
9 Statutory interpretation by agencies

*Matthew C. Stephenson*¹

We tend to think of legal interpretation as the business of courts, but much statutory interpretation in the United States is done, at least in the first instance, by administrative agencies. This is so in part because Congress and the courts permit, even encourage, an expansive role for agencies in determining statutory meaning. Congress does this by drafting vague statutory language and by authorizing (explicitly or implicitly) agencies to fill statutory gaps. The judiciary, meanwhile, has facilitated the expansion of agencies' interpretive authority by adopting doctrines that call on courts to defer to an agency's reasonable construction of the statutes it administers, even if the reviewing court would read the statute differently. Yet agencies are not fully autonomous when they make their interpretive decisions. Other political institutions – Congress, the President, and the courts – exert a powerful influence over how agencies interpret statutes. Agency statutory interpretation therefore involves complicated, and often subtle, interactions between and within the three branches of the federal government. Understanding these interactions is important both for making positive predictions regarding public policy outcomes and for normative assessment of legal doctrine and institutional arrangements. The analytical tools associated with positive political theory (PPT) (sometimes also referred to as 'public choice' or 'positive political economy') are designed for the analysis of complex strategic interactions in political settings. These tools therefore have the potential to deepen our understanding of important aspects of statutory interpretation by administrative agencies.

The chapter provides an overview of PPT research on agency statutory interpretation, and suggests some directions for future research. For expositional clarity, the chapter will consider separately how each of the three branches of the federal government – Congress, the Presidency, and the judiciary – influences the interpretive practices of administrative agencies.² Part I focuses on Congress, considering both Congress's initial decision to delegate interpretive authority to agencies and Congress's post-delegation influence over how the agencies exercise that authority. Part II examines the role of the President, focusing on the degree to which agency interpretive decisions can or should be insulated from presidential control. Part III turns to judicial review. Here, two issues are of particular interest. First, to what degree is judicial review of agency statutory interpretations influenced by judges' political ideology, and to what degree does legal doctrine constrain judicial behavior in this context? Second, how do agencies strategically respond to variation in judicial review practices?

I. Congressional influence on agency statutory interpretation

When considering issues of statutory interpretation, it is sensible to begin with Congress. After all, Congress is principally responsible for drafting and enacting legislation – although the President, the agencies, and outside interest groups also play a substantial role. We would like to understand why and under what conditions Congress grants

agencies broad power to make policy by interpreting imprecise statutory language. Furthermore, Congress's role in agency statutory interpretation does not end at the moment the relevant statutory language is enacted into law, as Congress has variety of tools to influence how agencies interpret their statutory mandates. How effective are these tools? Part I.A will discuss issues relating to congressional delegation of authority to agencies, while Part I.B will consider congressional efforts to control agency interpretation after Congress has delegated principal interpretive authority to an agency.

A. Congressional delegation through statutory imprecision

1. Why does Congress delegate policymaking authority? Congress delegates enormous policymaking responsibilities to administrative agencies, on topics as diverse as environmental protection, financial regulation, telecommunications, health care, consumer protection, tax administration, international trade, and so forth. Sometimes, this delegation is explicit, as when a congressional statute lays out a general objective and authorizes an agency to make rules and regulations to effectuate the statute's purposes. On other occasions, the delegation of policymaking authority is implicit, as when Congress enacts a statute that contains gaps or ambiguities that must be resolved in order for the statute to be administered effectively. For example, the Clean Water Act (CWA) makes it unlawful to discharge dredged materials into navigable waters without a federal permit from the Army Corps of Engineers. The CWA unhelpfully defines 'navigable waters' as 'the waters of the United States', which creates considerable uncertainty as to what activities are subject to the CWA permitting requirement. Does the term extend only to bodies of water that are navigable-in-fact, such as permanent lakes and rivers? Does it include smaller permanent bodies of water that are not literally navigable? What about wetlands and marshes? What about temporary bodies of water, like seasonal pools or intermittent streams?³ Furthermore, even if we could settle on a definition of 'waters', we would still need to know what counts as a 'discharge' of dredged material. Does moving material from one part of a lake to another part of that same lake count? Does dredging the bottom of a body of water *always* require a CWA permit, even if the dredged material is dumped on land, given that there is inevitably some 'fallback' of material from the dredging machine back into the water?⁴ If the statutory text has not specified clear answers to these questions, then some other institution must resolve these ambiguities. That interpretive authority is, in essence, the authority to make policy.

Statutory imprecision, then, can be considered simply as one form of congressional delegation of policymaking authority. Thus, the question, 'When and why does Congress empower agencies to interpret statutes?' is simply a special case of the more general question, 'When and why does Congress delegate policymaking authority to agencies?'⁵ To understand congressional authorization of agency statutory interpretation, one can therefore make use of the more general PPT literature on congressional delegation. This literature has emphasized three reasons why Congress would delegate, all three of which are consistent with themes in the more general administrative law literature. The first of these explanations concerns *legislative drafting costs*. The second focuses on *expertise*. The third emphasizes *political insulation*.

The cost of drafting statutory language that is both clear and complex is perhaps the most straightforward explanation for statutory imprecision (Baker and Krawiec 2004;

Hadfield 1994; Huber et al. 2001; Shepsle 1992). Just as it is prohibitively costly for private parties to write complete contracts that cover every possible contingency, it is prohibitively costly for legislatures to write complete statutes that anticipate and resolve all possible questions regarding a statute's proper scope and application. Of course, Congress can always legislate clearly and simply, just as private parties can write clear and simple contracts, but this approach often entails an unacceptable lack of nuance. Because the costs of drafting complex state-contingent statutes can be high relative to the benefits, and clear and simple statutes may be too crude, implicit delegation through statutory vagueness becomes appealing.

Moreover, legislators' incentives to draft more complete statutes may be even weaker than private parties' incentives to draft more complete contracts, in light of the fact that Congress is a collective body. Insofar as statutory clarity is valuable, it is a collective good. Individual legislators may have little incentive to invest substantial resources in identifying potential statutory ambiguities and drafting appropriate clarifications – especially if it is difficult for voters to discern which legislators are most responsible for which aspects of the final enactment (cf. Glazer and McMillan 1992). Interest groups and the executive branch may face less of a collective action problem in this regard, but they may also have independent interests in promoting delegation to agencies rather than statutory clarity (Aranson et al. 1982; Stephenson 2006b; Stephenson and Jackson 2010).

Furthermore, some scholars have suggested that legislators with disproportionate ex post influence over implementation, such as members of the relevant oversight committees, may actually benefit more from vague agency-administered statutes than from clear statutes (Fiorina 1982, 1989; Fiorina and Noll 1978; cf. Bawn 1997). According to this hypothesis, it is easier for an advantageously-positioned legislator to take personal credit for interceding with the responsible agency on behalf of particular constituents than it would be for the legislator to take equivalent credit for resolving the problem in the statute itself. Direct evidence for the strong claim that legislators deliberately delegate in order to create opportunities for constituency service is hard to come by; more plausible is a weaker version of the hypothesis, according to which legislators' inability to capture full credit for ex ante statutory improvements, coupled with awareness of opportunities for ex post interventions, diminishes legislators' incentives to draft more complex and precise statutory language.

The costs of drafting clear statutory language, however, cannot be a complete explanation for congressional delegation of broad interpretive authority. For one thing, while this explanation may account for why Congress does not (often) enact minutely detailed and precise statutory schemes, it does not fully explain why Congress prefers statutory imprecision to crude but clear across-the-board rules. Furthermore, drafting costs alone do not seem to account adequately for the broad scope of many delegations to agencies, especially those that empower agencies to make rules that are 'appropriate' or 'in the public interest'. What other factors might help explain the preference for delegation to agencies over statutory clarity?

A prominent hypothesis is that agencies may have greater expertise than do legislators. More precisely, agencies may have better access to information about the connection between policy choices and actual outcomes. One family of PPT delegation models takes this expertise difference as its central focus (Bawn 1995; Bendor and Meirowitz 2004; Epstein and O'Halloran 1994, 1999a; see also Gersen 2010). In these models, both

the legislature and the agency have preferences over outcomes, but the relationship between policy choices and outcomes depends on the state of the world. The agency has better information about the state than does the legislature, but the agency may also have different preferences. The question, then, concerns the degree of discretion that the legislature will confer on the agency. The legislature's decision is typically modeled as the selection of a 'discretionary window': a segment of the policy space from which the agency may select any policy, but outside of which the agency may never stray. In the statutory interpretation context, this discretionary window may be thought of as a statute's 'zone of ambiguity' – the range of interpretations that are plausible in light of the statute's language, read in light of legitimate interpretive principles (Elliott 2005; Stephenson and Vermeule 2009).

These models generally predict that the legislature will grant the agency some discretion, but that this discretion will not be absolute (that is, the discretionary window is finite). Furthermore, the legislature will grant the agency more discretion – perhaps by writing a less precise statute – when the preferences of the legislature and the agency are more closely aligned. This common-sense result is sometimes referred to as the 'ally principle'. Additionally, the better the agency's information about the true state of the world, relative to that of the legislature, the more discretion the legislature will allow. This intuitive result is sometimes dubbed the 'uncertainty principle' to capture the idea that legislatures delegate more when they are more uncertain about the true state of the world. A better label, however, might be the 'expertise principle', since what drives the result is not the absolute level of legislative uncertainty, but rather the degree to which the agency has *better* information (that is, more expertise) than the legislature. Taken together, these results are important but unsurprising: the legislature will delegate more authority to an agency when the legislature anticipates that the agency has similar preferences, and when the agency has greater expertise. When the legislature anticipates that the responsible agency has different preferences and limited expertise, the legislature is more likely simply to write a clear statute that leaves the agency little discretion.

Although most versions of this delegation model presume the legislature controls agency discretion by setting a discretionary window, recent work has suggested that the legislature could do even better by adopting a more refined incentive scheme in which the legislature makes variable transfer payments (which might be negative) to the agency, which depend on the policy the agency selected (Gailmard 2009; cf. Baron 2000, Stephenson 2006a, 2008c). That is, instead of the legislature telling the agency that it may stray this far, but no farther, from the legislature's ex ante most-preferred policy, the legislature might instead make deviations from the legislature's ex ante preferred policy progressively less attractive to the agency. This sort of graduated incentive scheme always weakly dominates the discretionary window approach.⁶ The problem, however, is that it may be difficult for the legislature to devise and credibly commit to such a scheme (Gailmard 2009). The crude discretionary window approach might be attractive precisely because it is relatively simple to specify and implement.

In addition to considerations related to drafting costs and agency expertise, Congress might sometimes prefer to delegate authority to administrative agencies precisely because agencies are somewhat insulated from political influence. It may at first seem odd to suppose that legislators could benefit from insulating policy decisions from congressional control. After all, we usually suppose that legislators benefit from the ability

to influence policy, as this enables them not only to advance their personal policy objectives but also to distribute favors to powerful constituency groups. While this is no doubt true in many cases, the PPT literature has suggested three reasons why legislators might sometimes prefer to delegate to politically insulated agencies. These can be dubbed the 'credible commitment' hypothesis, the 'policy insulation' hypothesis, and the 'blame shifting' hypothesis.

The credible commitment hypothesis holds that Congress may prefer to delegate authority to a partially insulated agency in order to address a time-consistency problem. That is, Congress may recognize that it will be tempted at a future date to renege on promises it makes today, but is better off overall if these promises are kept (Kyland and Prescott 1977).⁷ Delegation to an independent agency is one way to make legislative commitments credible.

The policy insulation hypothesis is similar to the credible commitment hypothesis, in that it suggests Congress may sometimes prefer delegation to a semi-autonomous agency in order to 'lock in' favorable policy positions over a longer period of time (De Figueiredo 2002; Moe 1989, 1990, 1991). The difference between the two hypotheses is that the credible commitment hypothesis emphasizes a time-consistency problem, while the policy insulation hypothesis suggests that the current legislature wants to lock in policies so they are not reversed or undone when political power changes hands.⁸

Both the credible commitment hypothesis and the policy insulation hypothesis are incomplete, however, because they do not explain why a future legislature could not simply retract the delegation or alter the agency's mandate. If a future legislature were able to do this, delegating to an agency would not really achieve credibility or insulation. Perhaps the answer has to do with the costs of passing new legislation. Yet that consideration is also incomplete, because if it is so the legislature should be able to achieve credible commitment or policy insulation without delegation, simply by enacting its initially-preferred policy in a more precise statute. In order for the credible commitment and policy insulation hypotheses for delegation to be coherent, it must be less likely that a future legislative majority will reverse a delegation of authority to an administrative agency than that it will reverse a substantive statutory provision.

Is this plausible? Perhaps it is, at least in some cases. For example, an agency that is delegated substantial discretion may itself become an influential player in the legislative process that will fight to protect its turf and authority (to say nothing of its very existence). Of course, statutory mandates can also empower other groups to wield more influence in the legislative process (cf. Noll and Owen 1983), but agencies might have unusual clout. Another reason why agency delegations could prove more resilient than statutory enactments derives from the standard PPT observation that political actors can avoid reversal if they select policies that are just moderate enough that their overseers do not find overturning the decision to be worth the cost. There may be considerable uncertainty concerning the range of policy choices that are safe from future legislative reversal. An administrative agency may be able to adapt as the preferences of legislative majorities change, advancing the agency's core mission as much as is politically feasible at any given moment. A statute that mandates a particular policy outcome, in contrast, will be vulnerable to override the instant that the preferences of the current legislative majority drift far enough away.

The 'blame shifting' hypothesis provides an alternative (though not inconsistent)

explanation for why an agency's insulation from the legislature may make delegation attractive. Some issues may present Congress with no-win situations, in which legislators are eager to appear to have 'done something', but are not at all eager to do anything in particular (Dwyer 1990; Fiorina 1982; Wilson 1980). Perhaps, for example, powerful constituency groups – or the general public – demand a legislative solution to some perceived problem (such as environmental pollution or a financial crisis), but any action that would actually achieve anything will antagonize other powerful constituencies. Moreover, sometimes the public demands that the legislature deal with some problem, but the legislature anticipates that any effective solution will turn out to be deeply unpopular once it is actually enacted. For example, residents of urban areas may demand more aggressive air pollution reduction, but the legislature might recognize that the only way to achieve this goal is to impose aggressive transportation control plans that restrict private automobile use – plans that would trigger a public outcry and backlash.

In these situations, according to the blame shifting hypothesis, legislators benefit from writing vague statutes that appear to address the problem but do not actually make the inevitable hard and unpopular choices. Legislators can claim credit for passing the statute, and when the agency does something unpopular, legislators can blame the agency – perhaps asserting in the process that the agency has misinterpreted the statute. A variant on the blame shifting hypothesis is that legislators might be unsure what policies will turn out to be politically popular and which will be politically unpopular. Delegating to the agency allows the legislators to wait and see, taking credit for the successes by pointing to their role in passing the statute, but blaming the agency for the failures by accusing the agency of misreading or misapplying the statute (Fiorina 1979).

The blame deflection hypothesis has the ring of plausibility, but turns out to require some additional theoretical moves in order to make it internally coherent. Most obviously, it is not clear why anyone is fooled by the legislature's gambit. Sophisticated interest groups should understand that the legislature chooses whether to delegate, delineates the scope of the delegation, and has the power to modify or retract the delegation. If delegation leads to unpopular results, then sophisticated interest groups should place a substantial chunk of the blame with the legislature. Of course, some groups, including the general public, may not be sophisticated enough to understand all this. But if a constituency group is unsophisticated about the legislative process, it is unclear why that group would be placated by a legislator's insistence that the agency, not the legislature, is to blame for an undesirable outcome. Unsophisticated groups and individuals are more likely to blame 'the government' generally. The blame deflection hypothesis therefore seems to assume that voters and interest groups are 'semi-sophisticated': they can observe whether the key public policy decisions were made by the legislature or the agency, but they are not savvy enough to understand that the degree of agency authority is derived endogenously from legislative choices (Stephenson 2004a).

A variant on the blame deflection hypothesis holds that legislators, or the relevant interest groups, actually prefer the 'policy lottery' associated with delegation over the (relatively) certain policy outcome associated with more specific legislation (Aranson et al. 1982; Fiorina 1982). Thus it is not the case that the legislature fools interest groups by delegating; instead, the legislators and the competing interest groups prefer the uncertainty of delegation to the certainty of a specific statutory solution. The problem, however, is that we need to explain why political actors would prefer the delegation

lottery to a moderate statutory solution that gives all interested parties their expected payoff from the lottery. Perhaps the interested parties are risk-loving rather than risk-neutral or risk-averse, but that is a nonstandard and substantively dubious assumption for most policy areas (Nichols 1982; cf. Stephenson 2008b). Another possibility is that in some policy domains outcomes are not divisible and side payments are infeasible. If so, then a lottery over outcomes might be the only way to achieve a 'compromise' allocation of policy benefits and burdens (cf. Seidenfeld 2004; Stephenson 2008c). Again, though, it is unclear how many actual policy domains fit this characterization.

Before proceeding, it is worth pausing to consider how these various theories as to why Congress delegates to agencies relate to the normative and doctrinal debates over the so-called 'non-delegation doctrine'. The non-delegation doctrine, derived from Article I of the Constitution, purports to limit the degree to which Congress can delegate lawmaking authority to the executive branch. The strong form of the non-delegation doctrine has little traction in current law; the Supreme Court last struck down a congressional statute on Article I non-delegation grounds in 1935, and in the seven-plus decades since, it has explicitly upheld a series of extraordinarily broad delegations.⁹ Yet non-delegation principles occasionally creep into judicial opinions, sometimes in the form of canons of statutory interpretation (Manning 2001; Stack 2007; Sunstein 2000), and there are both judges and commentators who advocate a revitalization of the non-delegation doctrine in its more robust, constitutional form.

One of the principal arguments raised in favor of a stronger non-delegation doctrine is that it would promote political accountability by forcing Congress to make more critical policy decisions itself, rather than shifting these decisions to agencies (Aranson et al. 1982; Baker and Krawiec 2004; Schoenbrod 1993). While this argument finds support in some strains of the PPT literature – particularly those that emphasize the blame shifting hypothesis as the principal explanation for delegation – other strains of that literature suggest reasons for skepticism. First, if one reason Congress delegates is to take advantage of superior agency expertise, and if voters likewise benefit from this expertise, then prohibiting delegation may make the voters worse off (Epstein and O'Halloran 1999b; Spence and Cross 2000). True, Congress might develop its own policy expertise if it were unable to delegate, but this might prove too difficult or costly. Similarly, voters might prefer delegation as a way to enhance the credibility of policy commitments.

Furthermore, voters can hold their representatives accountable not only for first-order policy decisions, but also for the second-order decision to delegate (Epstein and O'Halloran 1999b; Mashaw 1997; Posner and Vermeule 2002). This is a powerful generic objection to accountability-based arguments against delegation. The most compelling responses from non-delegation advocates assert that parochial interest groups are more sophisticated about both the legislative process and the agency process, but that first-order congressional decisions on policy substance are more transparent to voters. This might be true, but then again it might not be, and systematic evidence for this claim is hard to come by.

In addition to the argument that voters can and do hold legislators accountable for their decisions to delegate, there is a second powerful response to the claim that a revival of the non-delegation doctrine would benefit voters by improving congressional accountability. Eliminating the option of passing a vague or open-ended statute that delegates authority to an agency does not automatically mean that Congress will respond by passing a more

precise and detailed statute on the same subject. Congress may do so under some circumstances, but there are at least three other options. First, Congress might simply not legislate (Seidenfeld 2004). This may sometimes be a good thing – there are circumstances in which raising the costs to Congress of enacting legislation may enhance social welfare (Stephenson 2008c; cf. McGinnis and Rappaport 1999, 2007) – but in other cases it will harm voter interests. Second, as noted above, Congress might pass a clear but crude statute that is worse for voters than delegation (Seidenfeld 2004; Spence and Cross 2000). Third, Congress might continue to pass vague, open-ended statutes, but leave their interpretation to the courts rather than to administrative agencies (Schuck 1999; Spence and Cross 2000). It is possible that substituting judicial delegation for agency delegation will deepen, rather than ameliorate, concerns about political accountability. While it is conceivable that courts might expand the non-delegation doctrine to preclude this sort of implicit delegation to the judiciary, this type of delegation has heretofore been considered beyond the doctrine's scope (Lemos 2008). The fact that Congress might delegate to courts rather than to agencies raises the question of when and why Congress (or, for that matter, voters) might prefer agencies rather than courts to have primary interpretive authority, and vice versa. The next subsection takes up this issue.

2. *What determines whether Congress prefers to delegate interpretive authority to agencies or to courts?* The discussion to this point has suggested a variety of reasons why Congress might sometimes prefer to delegate policymaking authority by passing vague or incomplete statutes. This discussion has, however, begged a central question: even if Congress prefers delegation, why would Congress want an administrative agency, rather than a court, to interpret the vague statutory language?¹⁰ After all, delegation of interpretive authority to an executive branch agency is hardly inevitable. Indeed, the appropriate degree of interpretive authority to be exercised by agencies rather than courts has sometimes been the subject of explicit and vigorous legislative debate, as it was during legislative consideration of the Interstate Commerce Act (Fiorina 1986; Gilligan et al. 1989), the 1964 Civil Rights Act (Lemos 2010), the Administrative Procedure Act (APA) (McNollGast 1999; Shepherd 1996), and subsequent proposed amendments to the APA such as the Bumpers Amendment (Levin 1983). Moreover, although most federal regulatory schemes now have an administrative agency that acts as the first-instance interpreter of the relevant congressional statutes, this is not universally true. Bankruptcy law and patent law are prominent areas where courts still have the principal responsibility for statutory interpretation. Antitrust is another area where, despite the increasing prominence of the Federal Trade Commission (FTC) and the antitrust division of the Department of Justice (DOJ) in interpreting the relevant statutes, the federal courts still have a central role in elaborating the meaning of the Sherman Act and the Clayton Act, in more or less common law fashion (Baxter 1982; Easterbrook 1984, 2004). These examples, however, are the exceptions that prove the rule. The rule is that, for roughly the last quarter-century or more, Congress has either chosen or tolerated federal administrative agencies as the principal interpreters of the statutes in their jurisdiction, subject only to highly deferential judicial review. Why is this?

The various hypotheses as to why Congress would delegate interpretive authority at all may generate insights as to why Congress might prefer delegation to an agency rather than a court. Perhaps the most natural explanation follows from the expertise account

of legislative delegation (Rogers and Socker 2008; Stephenson 2006b). If Congress delegates principally because it is uncertain about the connection between interpretive choices and actual outcomes, it will prefer the delegate with better information about that connection. In most cases, this is likely to be an executive branch agency rather than a court. We can express this in terms of a variant on the 'expertise principle': the greater an agency's informational advantages vis-à-vis the courts, the more likely Congress will prefer the agency to have principal interpretive authority (and vice versa). The 'ally principle' may also play a role in Congress's choice of delegate: a legislator is more likely to prefer delegation to whichever agent has preferences most similar to the legislator's own, all else equal (Stephenson 2006b). Perhaps agencies' expected preferences will typically be closer to those of a decisive coalition of legislators, especially given the more extensive influence that Congress has over agencies' organizational structure, decision-making processes, and personnel.

Interestingly, of the broad explanations outlined in the preceding subsection for why Congress might prefer to delegate in the first place, only the expertise hypothesis seems to favor delegation to agencies rather than to courts. The drafting costs hypothesis would seem neutral as between courts and agencies, while all three variants of the political insulation hypothesis (credible commitment, policy insulation, blame shifting) would seem to push in the direction of delegation to courts rather than agencies, in that courts are probably more insulated from ongoing legislative control than are agencies. At least three qualifications to that last claim might be important, however. First, on the interest in policy insulation, agencies might be better than courts at locking in policy choices by strategically moderating their position so as to avoid legislative reversal. If so, there might actually be less policy insulation if Congress relies on courts as principal interpreters, because the courts will more frequently act in ways that trigger legislative intervention. Second, insofar as legislators delegate in order to shift blame, delegation to agencies under the President's control might be an attractive gambit when the President and the legislature are political adversaries (Levinson 2005). Third, while delegating to courts may sometimes be an effective credible commitment device, certain forms of credible commitment may favor agencies, as when the commitment is only effective if Congress can ensure that the decision-maker to whom Congress delegates has relatively extreme preferences. Congress, as suggested above, may have a greater ability to influence agency preferences than court preferences *ex ante*.

Another factor that might influence Congress's preference as between agencies and courts has to do with institutional differences in the interpretive practices of courts and agencies. Agency statutory interpretations, at least compared to courts, are more likely to exhibit ideological consistency across issues and across agencies: under Republican administrations, agencies are generally more likely to interpret statutes in a conservative direction, while under Democratic administrations we are likely to observe more liberal interpretations. This is because agencies are more subject to centralized control by the President than the courts of appeals are subject to centralized control by the Supreme Court. While one should be careful not to overstate the extent of presidential control or the degree of ideological homogeneity within or across agencies, the preceding assertion seems both plausible and consistent with casual observation. Also, while agency interpretive decisions are more likely than judicial decisions to be ideologically consistent *across* issues, any *particular* judicial interpretation of a statutory provision is more likely to be

stable over time than is a comparable interpretation by an administrative agency. The principal reasons for this stylized fact are that changes in presidential administration are likely to cause agencies to revise their interpretations to reflect the political preferences of the new administration, and that courts view their statutory interpretation precedents as even more binding than other precedents.¹¹

These differences are relevant to congressional preferences as to the allocation of interpretive authority because legislators may care both about interpretive consistency (across issues or across time) and about diversifying risk (again, both across issues and across time). The more a legislator cares about inter-issue consistency and inter-temporal risk diversification, the more she would prefer delegation to an agency rather than to the judiciary. On the other hand, the more a legislator cares about inter-issue risk diversification and inter-temporal consistency, the more she would prefer to grant primary interpretive authority to the courts (Stephenson 2006b). Even if these hypotheses are correct at the margin, however, it is not clear whether such considerations matter all that much in comparison to other salient factors, such as relative expertise and expected political alignment (Vermeule 2006).

B. Ex post Congressional influence over agency statutory interpretation

The preceding section focused primarily on when, why, and to what extent Congress delegates to agencies by passing vague statutes that the agencies have primary authority to interpret. Congress's role in agency statutory interpretation, however, is not limited to the initial decision to delegate. Congress has a range of tools at its disposal to undo agency interpretive decisions with which it disagrees or to induce agencies to adopt the interpretations that powerful members of Congress prefer (Beermann 2006). The fact that Congress may use such tools only rarely and sporadically does not mean that Congress's influence is rare and sporadic. Congress can exert a powerful influence over bureaucratic behavior without having to act, so long as agency officials can anticipate Congress's likely reactions and tailor their behavior accordingly (Weingast and Moran 1983), and as long as Congress is able to detect and discipline agencies that get out of line (McCubbins and Schwartz 1984). We can subdivide Congress's tools of ex post influence over agency statutory interpretation into four broad categories: 'statutory overrides', 'rewards and punishments', 'legislative history', and 'structure and process design'.¹²

Statutory override – or the threat of statutory override – is a powerful tool of ex post congressional control. Congress always has the power to reject an agency's interpretation of a congressional statute by enacting a new statute that expressly rejects the agency's interpretation. Such statutes may, but need not, explicitly mandate a specific alternative outcome. A strategic policy-motivated agency therefore has an incentive to modify its interpretive choice so as to get the best outcome for the agency that will not trigger a statutory override. One hypothesis that follows from this is that agencies have more interpretive freedom when a larger number of separate institutions (for example, chambers, committees and so on) must agree to any new statute, when these institutions have less similar preferences, and when the fixed costs to the relevant institutions of initiating or approving new legislation are higher (Tsebelis 2002). Changes in these factors may therefore induce changes in agency interpretive behavior, even if Congress only rarely actually enacts a statute to overturn an agency's interpretation. One can use this analytic framework to assess the likely impact of various specific institutional changes – such as

adding or eliminating a one-house legislative veto, or strengthening or weakening the gatekeeping power of legislative committees – on the degree to which agency interpretive choices correspond to the preferences of the chamber medians, or to some other normatively relevant position (Ferejohn and Shipan 1990).

In addition to the threat of statutory override, legislators have other means of influencing agency statutory interpretation. Perhaps the most important among these are the appropriations power and general oversight authority. With respect to appropriations, agencies typically care very much about their overall budgets. While the strong assumption that agencies are ‘budget maximizers’ has been discredited and abandoned (Blais and Dion 1991; Dolan 2002; McGuire 1981), the weaker assumption that agencies are partly motivated by a desire to preserve or increase their discretionary budgets remains compelling (Blais and Dion 1991; Kiewiet and McCubbins 1991; see also Gersen 2010). An agency that antagonizes powerful members of Congress risks having its budget cut in retaliation, while an agency that ingratiates itself with Congress may see its budget increase. Furthermore, since agencies typically have to submit a new budget request for every fiscal year, altering the agency’s budget may be less difficult for Congress than passing legislation to override a specific substantive interpretation.

Appropriations decisions may influence agency interpretive decisions in other ways as well. First, Congress may use appropriations riders to restrict an agency’s freedom to take certain actions or positions (Beermann 2006). Second, Congress can indirectly influence what agencies have the capacity to do by restricting agency resources. For example, if the Army Corps of Engineers interprets the CWA’s definition of ‘waters’ to include only navigable-in-fact lakes and rivers, the permitting program will be much smaller and cheaper to administer than would be the case if the Corps interprets ‘waters’ expansively to include wetlands, isolated ponds, and intermittent streams. So, Congress may render certain interpretations more or less meaningful in practice by altering the agency’s budget (Rose-Ackerman 1992; cf. Cohen et al. 2006). Using the power of the purse in this way, however, presents Congress with a difficult trade-off. Cutting the agency’s budget does reduce the agency’s ability to pursue activities that Congress does not want the agency to pursue – but it also reduces the agency’s ability to pursue activities that Congress *does* want it to pursue (Ting 2001). In that sense, this use of the appropriations power can be a blunt instrument.

With respect to general oversight authority, legislators – in particular, members of the relevant oversight committees – can make life unpleasant for agency officials by holding hearings, issuing press releases, sending threatening letters, and so forth (Aberbach 1990; Beermann 2006). These forms of oversight typically do not require the assent of a large number of players in the process, and so they can be exercised more frequently and at lower cost than other mechanisms of congressional control. On the other hand, these devices are also less powerful, and it is not entirely clear why, or to what degree, they actually influence agency behavior. There does appear to be evidence that congressional oversight activity of this sort has an impact on agency behavior (Aberbach 1990; Beermann 2006), as well as on the tenure of agency officials (O’Connell 2003), but it is hard to assess the degree to which this sort of oversight has a *causal* effect on agency interpretive behavior. It is possible that some deeper factor, such as public dissatisfaction with an agency, might trigger both congressional oversight activity and a change in agency policy, even though the former does not directly cause the latter.

Another way that members of Congress might try to influence agency choices regarding statutory interpretation is by creating 'legislative history' – actions and statements other than the statute itself. If reviewing courts pay attention to legislative statements regarding statutory meaning (other than the statute itself) when assessing the reasonableness of an agency's interpretation, then legislators may be able to influence agency statutory interpretation by making such statements (Beermann 2006; Rodriguez 1992). Similarly, if courts look to other legislative enactments when inquiring into the meaning of a given statute, then Congress can affect the court's interpretive views – and thereby affect the agency's interpretive choices – through these other enactments. Whether courts ought to adopt these sorts of interpretive approaches is a hotly contested question, and one of the points of contention focuses specifically on the fact that these approaches may give Congress – or individual legislators – greater ability to influence interpretive outcomes without modifying the text of the principal statute in question.

Finally, no discussion of congressional influence over how agencies interpret their statutory mandates would be complete without considering the hypothesis that Congress may design an agency's structure and decision-making processes such that the agency does what Congress wants it to do, without any need for Congress to intervene (or even to threaten to intervene) directly (McCubbins et al. 1987, 1989; see also Gersen 2010 in this volume for a more extended treatment). There seem to be two variants on this 'structure and process' hypothesis, which are somewhat in tension even though they are often conflated. On one account, Congress designs agency structure and process so as to make agencies more susceptible to ongoing congressional influence – for example, by designing procedures that alert Congress far enough in advance to an agency's intentions so that Congress can intervene effectively. On this version of the argument, Congress's structure-and-process choices *facilitate* ongoing legislative control of the agencies (Bressman 2007; Gersen and O'Connell 2008; McCubbins 1985; McCubbins and Schwartz 1984; McCubbins et al. 1987, 1989). Another version of the hypothesis, however, builds on the 'policy insulation' hypothesis sketched above by suggesting that the enacting Congress designs an agency's structure and process so as to prevent later legislative majorities from undoing or altering the original legislative bargain. On this version of the argument, Congress uses structure-and-process devices to *impede* interference by future Congresses – a process characterized by metaphors like 'hardwiring' and 'deck-stacking' (Bressman 2007; De Figueiredo 2002; De Figueiredo and Vanden Bergh 2004; McCubbins et al. 1987, 1989; Moe 1989, 1990, 1991; Wood and Bohte 2004). It is of course possible that Congress employs both control-facilitating and control-impeding structures and processes for different issues and agencies, but it is at least worth noting the tension between these common variants of the structure-and-process argument.

The structure-and-process hypothesis can take either a weak form or a strong form. The weak form posits simply that Congress recognizes that decisions regarding structure and process can influence agency behavior, and so Congress is attentive to these considerations when creating and empowering administrative agencies. Most straightforwardly, and most plausibly, Congress can make it harder or easier for agencies to achieve particular goals by ratcheting the attendant procedural and evidentiary requirements up or down, or by shifting the default rules. Congress can also influence the agency's policy goals by adjusting the scope of the agency's regulatory authority (Macey 1992a) and the professional background of agency personnel (O'Connell 2009). The strong version

of the hypothesis holds that Congress intentionally and effectively 'hardwires' agencies so that they consistently advantage particular (and narrowly defined) interest groups, allowing those groups to achieve their substantive goals on a range of issues, and that this objective is the most important explanation for Congress's structure-and-process decisions.

The weak version of the structure-and-process hypothesis seems well-grounded, and there are numerous concrete examples of Congress influencing agency behavior through procedural and structural choices (Gersen 2010). The strong version of the structure-and-process hypothesis, however, has much less empirical evidence to support it (Balla 1998; Clingermayer 1991; Hill and Brazier 1991; Oren 1989; Shapiro 2002; Spence 1999). Indeed, the strong version of the hypothesis has theoretical problems as well (Croley 2008; Hill and Brazier 1991; Spence 1997). Structure-and-process devices are crude instruments, and it is hard to anticipate which groups will benefit most from procedural devices in the future. Refining structure-and-process mechanisms may allow more precision, but this is likely to impose substantial costs. Indeed, if Congress's goal is to benefit particular interest groups over time, it is not at all evident why it is easier for Congress to anticipate which *procedures* will benefit these groups in the future than to anticipate which *substantive provisions* will do so.¹³ Furthermore, many of the most prominent examples of alleged structure-and-process control devices – such as the notice-and-comment provisions in the APA – were *not* created by Congress, at least not in a meaningful sense. Rather, those procedures were developed and elaborated by courts, engaging in what can only be characterized as creative and unanticipated interpretation of the APA's text. Although some have tried to salvage the structure-and-process hypothesis by arguing that courts developed these procedural rules in order to facilitate congressional control (Bressman 2007), it is hard to offer a convincing explanation as to why courts would do this, and the empirical evidence regarding this alleged judicial motive is thin.

This is not to marginalize the role of structural design and procedural controls in influencing agency choices. The weaker version of the structure-and-process hypothesis is compelling, as is the claim that administrative procedures may increase the amount of information available to legislative overseers about agency decisions, which can in turn facilitate legislative oversight (Balla and Wright 2001; Bawn 1997; De Figueiredo et al. 1999). A different chapter in this volume (Gersen 2010) treats issues of agency structure and organization in greater detail, so this chapter will not say more about the structure-and-process hypothesis, except to note that it is a bit surprising how influential the strong form of this hypothesis has been in light of this hypothesis's theoretical problems and the lack of convincing empirical support.

II. Presidential influence on agency statutory interpretation

The President has considerable influence over agency interpretive choices. Indeed, the President's influence almost certainly exceeds that of Congress, at least in most cases (Barron 2008; Kagan 2001; Moe 1987).¹⁴ For one thing, Congress needs the President's assent to enact a statute unless Congress can muster a two-thirds majority in both chambers. Thus the considerations that influence congressional decisions regarding the scope of delegation, the identity of the delegate, and the control of delegated power are applicable to the President as well. But the President's influence over agency statutory interpretation goes far beyond the President's role in the legislative process. The

President's position as head of the executive branch allows the President to initiate and direct agency action in ways that Congress and the courts find difficult to resist or counter (Moe and Howell 1999). Even so, the President's ability to control how agencies interpret their statutory mandates is not absolute; both practical and legal factors can give agencies a degree of autonomy from the President. Some of the most vital and contested legal questions related to agency statutory interpretation concern precisely the degree of influence the President ought to have over the agencies. Part II.A outlines some of the principal tools the President may deploy to influence agency interpretive decisions, as well as important constraints on the President's influence. Part II.B then considers both the arguments in favor of strong presidential control over agency statutory interpretation, and whether some degree of agency autonomy might benefit the President or the voters.

A. The extent of presidential influence over agency statutory interpretation

The President's influence over how agencies interpret their statutory mandates derives primarily from two sources: the President's predominant role in the appointment and removal of agency officials, and the President's authority to oversee and direct the conduct of the agencies.

With respect to personnel, the President has the explicit constitutional authority to appoint an agency's principal officers,¹⁵ and the President also has the implicit constitutional authority to remove agency officials, although this power is subject to important restrictions discussed below. Taken together, the President's appointment and removal authority gives the President tremendous power to influence agency policy preferences. Indeed, the President's ability to staff agencies with officials who share the President's policy agenda may be the single most important source of presidential influence over agency policy (Barron 2008; Lewis 2008).

There are, however, three important constraints on the President's power over agency personnel. First, the Senate also has a role in the appointment process, and the President cannot appoint a principal officer without the assent of a Senate majority. Second, although the President has plenary removal authority over some officials – in particular, senior officials in executive branch departments – Congress can limit the President's authority to remove the heads of certain regulatory commissions, so long as these removal restrictions do not substantially interfere with the President's constitutional duties.¹⁶ Thus the President has less control over these so-called 'independent agencies'. Third, many independent agencies are governed by a multi-member board rather than by a single head, and the statutes that create these independent regulatory commissions often include 'partisan balance' requirements. These provisions typically state that no more than a bare majority of the commission members (for example, three out of five) may be from the same political party.

Each of these three restrictions may have important consequences for the President's ability to determine the policy preferences of the agencies. Although the Senate rarely rejects a presidential nominee – only around 5 percent of nominees are not confirmed, and most of those are withdrawn without a floor vote (Krutz et al. 1998) – this does not mean the Senate confirmation process is insignificant. Actual rejections should be rare in equilibrium, even if the Senate imposes a powerful influence, so long as the President can anticipate which nominees are likely to be confirmable (Nixon 2004; cf. Moraski and

Shipan 1999). The President is likely to have especially good information in this regard given the intensive behind-the-scenes negotiations that usually precede any significant nomination. Furthermore, even a minority of Senators can substantially delay the confirmations of objectionable officials through procedural maneuvering, and this threat can influence the President's nomination decisions (McCarty and Razaghian 1999). Consistent with these considerations, empirical research suggests that the Senate does have a significant effect on appointee ideology, even though Senate rejections of nominees are rare (Nixon 2004; Snyder and Weingast 2000).

Congress's ability to limit the President's authority to remove the heads of the independent commissions also appears to be a meaningful constraint on the President, and there is some evidence that the independent agencies are, on average, less likely to reflect the administration's political ideology than are the executive branch agencies (Clinton and Lewis 2007; Lewis 2009). At the same time, though, the insulation of the independent commissions should not be overstated, as there is also strong evidence that even these agencies are responsive to presidential policy preferences, despite the limitations on the President's removal power (Devins and Lewis 2008; Lu 1998; Moe 1982, 1985, 1987). With respect to the partisan balance requirements, while there is not much empirical research on this topic, the available evidence some research does suggest that these requirements do have an effect on agency behavior (Ho 2007; Lewis 2003), but that the President is still able to exert considerable influence, not least because the President can usually select the commission chair (Bressman 2007; Strauss 1984).

In addition to the appointment and removal powers, the President also influences agency interpretive choices by exercising supervisory and directive authority over the administration. Under a set of executive orders promulgated by President Reagan, revised substantially by President Clinton, and revised again by President George W. Bush and President Barack Obama, agencies are required to submit economically significant rules to the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) for comment before the rules are promulgated. Although OIRA does not have the authority to veto regulatory proposals, it can send them back to the agency with comments and criticisms. The OIRA review process has the potential to delay an agency rule substantially, and agencies understand that they must take OIRA objections seriously – especially because it is often understood that OIRA and OMB are closer to the President and understand their mission as ensuring fidelity to the President's agenda (McGarity 1992; Morrison 1986; Stewart 2003).

That said, despite claims that OIRA is a regulatory 'black hole' (Tolchin and Tolchin 1983), the empirical evidence for the OIRA review process substantially impeding agency action is mixed. A number of studies have failed to find any significant effect of OIRA review (or analogous processes at the state level) on the speed or volume of agency rule-making activity (Coglianese 2008; Kerwin and Furlong 1992; Shapiro 2002; Yackee and Yackee 2010). But even if this is so, it does not refute the claim that the OIRA review process significantly enhances the President's influence over agency decision-making. After all, OIRA does not need to object frequently to agency proposals in order to be effective, so long as agencies can anticipate OIRA's likely reactions and tailor their proposals accordingly. In those cases where OIRA does object to the agency rule, federal agencies typically change their proposals in response to OIRA feedback (Croley 2003). Furthermore, the information that an agency may be required to produce as part of the

OIRA review process – such as detailed cost-benefit analyses – may reduce the information asymmetry between the agency and the President, thereby enabling the President to exercise a greater degree of control, even if these informational requirements do not impose substantial procedural burdens on agencies (Adler and Posner 2006; Posner 2001).

It is important to emphasize that, despite the attention paid to the OIRA review process, the President or his surrogates – including White House offices other than OIRA – may intervene in the agency rulemaking process in other ways that might be less transparent than OIRA review (Bressman and Vandenberg 2006). The President also sometimes seeks to influence agency statutory interpretation by issuing directives – often at public press conferences – to agencies, instructing them to pursue particular regulatory goals by interpreting their statutory mandates in a certain way (Kagan 2001). The legal enforceability of these directives is unclear (Stack 2006), but in practice, when coupled with the President's appointment and removal authority, as well as the office's other powers, these directives can have a powerful effect on agency behavior (Kagan 2001).

B. Optimal presidential influence over agency statutory interpretation

The appropriate scope of presidential authority over agency statutory interpretation, as well as other aspects of agency decision-making, is hotly contested. The major argument in favor of extensive presidential influence over statutory interpretation is an argument based on political accountability, coupled with the President's allegedly greater capacity for decisive action (Kagan 2001; Lessig and Sunstein 1994; Mashaw 1985). The essence of the argument is that when a vague statute effectively delegates a policy choice to an agency, it is usually better that the selection among reasonable interpretive alternatives be made by a more politically responsive elected official. But are there limits to this argument? We might ask both whether the President might sometimes prefer to limit his own influence over agency statutory interpretation, and also whether or under what conditions the voters would prefer such limitations on the President's influence over agency statutory interpretation.

1. How much control does the President prefer to have over agencies? In most cases, it is reasonable to assume that the President wants to exert as much control as possible over agency policy choices, for obvious reasons. But might there be cases in which the President would actually benefit from having *less* control over agency interpretive choices? One possibility is that the President, like Congress, might sometimes prefer a degree of agency autonomy in order to lock in particular policy choices – insulating them from reversal by future presidents – or to deflect blame for unpopular policy outcomes. An example of the former phenomenon might be the creation of various independent commissions during the New Deal – agencies like the Securities and Exchange Commission (SEC), Federal Communications Commission (FCC), and National Labor Relations Board (NLRB), which all contain both partisan balance requirements and limits on presidential removal authority. While one plausible explanation for these provisions is that Congress wanted to insulate the agencies from excessive manipulation by the Roosevelt Administration, it is also possible that President Roosevelt and his supporters found this structure attractive insofar as it helped insulate New Deal regulatory policies from interference by possible future conservative administrations. With respect

to blame deflection, we do occasionally see Presidents castigate the bureaucracy for some action or inaction. Perhaps this sort of political position-taking is easier when the President is less closely associated with the bureaucracy – though the problems with the blame deflection hypothesis discussed in Part I are even more pronounced with respect to the President.

Another reason why the President may sometimes prefer to limit his ability to influence agency policy choices relates to the credible commitment argument discussed earlier. Just as Congress might prefer to address a time-consistency problem by delegating to a semi-autonomous agency, so too might the President want to deal with a similar problem by limiting his ability to influence the agency on an ongoing basis (Spulber and Besanko 1992). For example, suppose that the President would prefer to establish a stringent environmental regulation if, but only if, the industry would comply with that standard. The industry, however, knows that if it does not comply – if, for example, it sinks substantial investments into facilities that cannot achieve compliance – the President would not find it rational to enforce the original standard. If the President has total control over the enforcement agency, then the President will not bother adopting the stringent standard in the first place, because he and the industry know that it will never be enforced. But if the President can appoint an aggressive environmentalist to head the relevant agency, and shield that agency from ongoing presidential control, then the industry will know the enforcement threat is credible and will conform to the new regulation.

There is a second reason why the President might benefit from credibly committing to an agency policy that differs from the President's own most-preferred policy: such a commitment might influence the amount of discretion that Congress confers on the agency (McCarty 2004). Suppose, for example, that the President's ideal point is far from that of the median legislator. If the agency's preferences mirror the President's preferences, the ally principle implies that Congress is unlikely to delegate much discretion to the agency. Congress is more likely to draft specific statutory language, even though Congress's uncertainty about the state of the world means that this will lead to policy choices that both Congress and the President would consider erroneous. If the President could shift the agency's ideal point closer to that of Congress, Congress would be willing to delegate more authority to the agency. Under some conditions, this may be a Pareto improvement, benefiting both Congress and the President. So, the President is sometimes better off if he can appoint an agency head with somewhat different preferences, and then empower that agency to interpret statutes with some degree of insulation from the President.

These observations partially undermine, or at least complicate, the assertion (often associated with proponents of the 'unitary executive' theory) that restrictions on the President's appointment, removal, or supervisory authority interfere with the President's constitutional prerogative and obligation to execute the laws. It is certainly true that restrictions on the President's ability to influence agency interpretive decisions *may* interfere with the President's ability to advance his policy agenda, but in some cases these restrictions may actually enhance the President's ability to achieve his policy objectives. Of course, if the President's constitutional responsibility to take care that the laws are faithfully executed is *defined* as maintaining ongoing control over agency decisions, then it is tautological that insulating agencies from presidential influence interferes with that constitutional duty. But if President's responsibility to take care that the laws are

faithfully executed is defined more capaciously as the ability to achieve a set of substantive outcomes, then some degree of agency insulation may actually enhance the President's ability to perform this constitutional duty.

2. *How much presidential control over agency statutory interpretation would the median voter prefer?* The preceding discussion connects to another important question regarding presidential influence over how agencies interpret statutes: What type and degree of presidential control over agency interpretive choices is most consistent with politically accountable, majoritarian decision-making? As noted at the outset, it is often argued that majoritarian values are best served by a strong President with the authority to direct and control the conduct of all the agencies within the executive branch – including how these agencies interpret their statutory responsibilities when the relevant statutes themselves are unclear (Calabresi 1995; Herz 1993; Kagan 2001; Lessig and Sunstein 1994; Mashaw 1985, 1997). According to this view, the responsiveness of agency policy decisions to the preferences of the median voter are undermined both by agency interpretive autonomy and by post-enactment attempts by Congress to influence how agencies interpret the statutes they administer.

This 'democratic accountability' argument for strong presidential authority to direct agency decisions rests on three central premises. The first premise is that policy decisions (including interpretive decisions) are more likely to reflect median voter preferences when those decisions are made by elected representatives than by unelected bureaucrats or judges. The second premise is that, of the elected politicians in the federal government, the President is more responsive to national political majorities than is Congress (or subgroups within Congress), because the President is elected by a national electorate whereas members of Congress are not. The third premise is that political accountability tends to be enhanced when a single institution, under the hierarchical control of a single elected official, is solely responsible for given policy decisions. That way, the voters know whom to blame or credit for policy choices and outcomes. Collective decision-making, by contrast, tends to dilute accountability by creating a 'clarity of responsibility' problem (Berry and Gersen 2008; Bueno de Mesquita and Landa 2008).

All three of these premises, however, are problematic. Consider first the claim that giving the most politically responsive institution maximum control over an agency's interpretive decisions would maximize the correspondence between the agency's choice and the median voter's ideal point. This claim, while intuitive, turns out to be incomplete or incorrect in a number of respects. First, one of the reasons political principals – including voters – might want to delegate to an agency is to take advantage of the agency's superior expertise. But that expertise is often located in the agency itself, not in the President. Furthermore, the development of specialized expertise and the acquisition of relevant information are costly for the responsible agency officials. If these officials know that their interpretive decisions can be revised or rejected at will by political overseers, agency officials may have too little incentive to invest in acquiring policy-relevant information (Bendor and Meirowitz 2004; Gailmard and Patty 2007; cf. Aghion and Tirole 1997; Gilligan and Krehbiel 1987, 1990). Thus, the median voter may be worse off with absolute political control over agency decisions than with some degree of bureaucratic autonomy, if the informational gains associated with autonomy outweigh the losses associated with increased policy bias. Put another way, the median voter may face

a trade-off or tension between the 'ally principle', which favors greater political control over agency interpretive decisions, and the 'expertise principle', which may militate in favor of greater agency autonomy.

A second reason why the median voter might sometimes prefer a bureaucracy that is insulated from direct political control concerns the time consistency problem described above. The median voter, like the President, may realize that she would benefit more from credibly committing to a particular policy decision by delegating to an agency, even if this means that the policy the bureaucracy pursues will differ somewhat from her ideal policy. Consider the classic monetary policy example: the median voter may benefit more in the long term from maintaining an independent central bank, over which the President has limited short-term control, even if this means that the bank will sometimes pursue policies that the voter dislikes.

Yet a third problem is that although elected politicians may be responsive *on average* to median voter preferences, elections are imperfect, and in practice an elected official's policy goals usually diverge, sometimes by a substantial amount, from median voter preferences. This is especially true in the case of an official, like the President, who has a broad mandate, because voters have to select among 'bundles' of policy preferences (each candidate offering a different 'bundle'), rather than selecting an ideal representative on each individual policy issue (Berry and Gersen 2008). The voter will choose whichever candidate offers the better bundle, but it is likely that even the best bundle will be highly imperfect, with substantial divergence from the voter's ideal policy on a large number of issues (Bafumi and Herron 2007; Erikson et al. 2002; Fiorina 2006). This variance in politician preferences is costly to the voter. After all, the voter presumably cares not about the distance between her ideal point and the *expected policy outcome*, but rather the *expected* distance between her ideal point and the *actual policy outcome*. Partially insulating an agency from political control may bias the agency's expected interpretive choice away from the median voter's ideal point, but doing so also reduces the variance in interpretive outcomes because elected officials shift bureaucratic policy less than they otherwise would. As a result, a moderate level of bureaucratic insulation from political control may increase the expected correspondence between policy outcomes and median voter preferences – even if the politician is more politically responsive than the bureaucracy, and even if expertise and credible commitment considerations are not at issue (Stephenson 2008b).

None of this is to say that the median voter will always prefer insulation of all agency interpretive choices from political control. Indeed, maximizing bureaucratic autonomy might prove even worse for voters than unfettered political control. The important point, rather, is that the optimal level of political control over agency interpretive decisions depends crucially on context, and in many cases some moderate degree of agency autonomy is likely to serve majoritarian interests better than either absolute autonomy or absolute political control.

What about the second premise of the unitary executive theory: that, insofar as some degree of political influence over agency interpretive decisions is valuable, the President rather than Congress ought to exercise such control because the President is more responsive than Congress to national, as opposed to local or regional, political majorities? The clearest flaw of this familiar argument is that it suffers from the 'fallacy of composition' – the assumption that because *individual* members of Congress are more responsive to

local rather than national majorities, therefore Congress *as a whole* is responsive to local rather than national majorities. But that is not necessarily true (Nzelibe 2006). Indeed, recent analyses that attempt to measure presidential and congressional ideology on a common scale suggest that the *median* member of the House and Senate is typically closer to the 'center' of the distribution of political preferences than are Presidents, whose ideal points tend to fall on either side (Bailey 2007; Bailey and Chang 2001). While it is hard to establish rigorously that this 'center' is closer than the President to the electorate's median voter, it seems unlikely that the differences in presidential ideal points reflect sudden, discontinuous jumps in median voter preferences.

The issue is complicated, however, by the fact that much congressional influence over agency statutory interpretation comes not from Congress as a whole, but rather from individual committees and subcommittees (Calabresi and Terrell 2009; DeShazo and Freeman 2003). The question then becomes the degree to which the preferences of the relevant committees track those of the whole chamber. There is a substantial empirical debate about this question (for example, Hall and Grofman 1990; Krehbiel 1990, 1994; Londregan and Snyder 1994; Snyder 1992; Weingast and Marshall 1987), which this chapter does not attempt to resolve. It is nonetheless worth noting that even if the relevant oversight committee is a 'preference outlier', it does not necessarily follow that the chamber as a whole, or the median voter in the electorate, would prefer to reduce the influence of that committee relative to the influence of the President or other actors. The 'expertise principle' applies in this context as well: the specialized committee may be a preference outlier, but it may also develop specialized expertise that allows it to oversee the agency more effectively, and the benefits of this specialization may be more valuable to the voters than the costs associated with giving a committee with somewhat divergent preferences more influence over agency decisions (Gilligan and Krehbiel 1987, 1989, 1990).

The premise that the President is generically more responsive to the national median voter may also understate the parochial factors that influence presidential behavior (Nzelibe 2006). As several of the last presidential elections have made clear, the oddities of the Electoral College mean that presidential candidates tend to focus on a handful of swing states, not the national electoral median. Furthermore, recent years have witnessed an increase in 'turn out the base' strategies rather than 'play to the middle' strategies (Fiorina 1999; Issacharoff 2004; Steinbuch 2007), though President Obama's campaign strategy in the 2008 election is perhaps a sign that this might be changing. These factors, coupled with the fact that second-term Presidents may be thinking more about some combination of historical legacy and personal policy objectives than the next election, mean that the President's responsiveness to the national median voter may be overstated. Again, none of this is to say that the President should not have considerable influence over agency decisions, nor that congressional influence is always desirable. The point is simply that the matter is complicated, and the claim that presidential influence over agency interpretive decisions more 'majoritarian' than congressional influence over such decisions may often be exaggerated.

Now, consider the third premise, which also concerns the appropriate degree of presidential and congressional influence over how agencies interpret ambiguous statutes: the notion that majoritarian values are best served when a single institution, headed by a single elected official, is responsible for directing agencies' interpretive activities. This

claim, if true, militates in favor of giving greater control to the President rather than Congress, for two reasons. First, because the President is a single elected officer with hierarchical control over the administration, voters can attribute all decisions taken by the office of the Presidency to the person of the President. Congress, on the other hand, is a collective decision-making body, and it is difficult for voters to attribute the decisions of Congress to any particular legislator. Second, because the President inevitably will have substantial influence over agency decisions, adding a significant congressional influence over agency interpretive choices would exacerbate the voters' clarity-of-responsibility problem. The voters, the argument goes, have trouble sorting out how much of any agency's choice was due to presidential influence, how much to congressional intercession, and how much to the agency's own policy views. The voters would find it easier to influence agency behavior if a single institution – the President – played the predominant role in shaping agency decisions, and could be held accountable for those decisions.

This clarity-of-responsibility problem is indeed significant. Yet a close analysis of the preceding claims suggests that both of them are subject to important qualifications. Consider first the argument that presidential influence over agency statutory interpretation is more 'democratic' (in a majoritarian sense) than congressional influence, because the President is a single elected official whereas Congress is a collective body comprised of several hundred elected officials. Framed in this strong form, the argument may prove too much: it suggests our system would better serve majoritarian values if we abolished the legislature altogether and authorized a single chief executive to enact and enforce all laws. Furthermore, as noted above, even if congressional influence over agency interpretation entails a greater clarity-of-responsibility problem than presidential influence, the preferences of the median member of Congress are likely to be (on average) more centrist and less variable than those of the President (Bailey 2007; Bailey and Chang 2003; Nzelibe 2006). And, precisely because congressional decision-making is collective rather than hierarchical, Congress may sometimes be better at both deliberation and information-aggregation than the President, and this may have accountability benefits that offset the losses associated with Congress's collective responsibility for policy outcomes.

What about the claim that allowing both the President and Congress to influence how agencies interpret statutes creates a different type of clarity-of-responsibility problem, because voters will find it difficult to apportion credit and blame as between these two institutions? That argument is right as far as it goes. Yet the argument turns crucially on the assumption that the decisive voter in the electorate is capable of observing only the agency's ultimate decision, not the positions taken by the President and various congressional actors on the interpretive controversy at issue. When voters can observe only the final decision or outcome, then joint or overlapping influence will indeed tend to erode accountability. But if voters can observe not only the final decision and outcome, but also the positions taken by the relevant institutional players, then the involvement of multiple, independently elected officials in shaping agency policy will tend to strengthen rather than undermine political accountability and responsiveness (Nzelibe and Stephenson 2010; Stephenson 2004a; Stephenson and Nzelibe 2010). The reason is that voters will be able to condition their political reward and punishment strategies not simply on the outcome, but also on the positions taken by the various institutional actors involved. Voters can allocate political credit and blame differently depending on, for instance, whether the agency's final interpretation had the support of both the President and

Congress, whether it was pushed through by the President over Congress's objections, whether it was pushed through by congressional pressure despite a reluctant or opposed President, and so forth. Increasing the number of elected officials involved in making a given interpretive decision may entail a loss of accountability if there is a serious clarity of responsibility problem, but if monitoring costs are sufficiently low then increasing the number of politically accountable entities involved in making an interpretive decision may *increase* responsiveness to voter preferences. Figuring out which condition is more likely to obtain in particular contexts is thus important for evaluating the optimal allocation of responsibility for influencing agency interpretive decisions.

III. Judicial influence on agency statutory interpretation

The preceding discussions of congressional and presidential influence over agency statutory interpretation have implicitly presumed a background of judicial enforcement of legal constraints on both the agencies and the political branches. After all, the notion that legislation creates a 'zone of discretion' within which the agency can act presupposes that any agency interpretive decision outside that zone would be legally impermissible and therefore impossible. That presumption, though, implies some kind of third-party enforcement of the boundaries set *ex ante* by Congress. The third-party enforcer is usually assumed to be the judiciary. Furthermore, the size of the zone of discretion is determined not only by the statutory language, but by how the courts interpret that language. Likewise, debates about the appropriate limits, if any, on congressional or presidential authority over agency statutory interpretation often presume that those limits are enforced by some other actor – again, usually assumed to be the judiciary.

For these reasons, courts play a critical role in how administrative agencies interpret their statutory mandates. Perhaps the most salient issue with respect to judicial influence over agency statutory interpretation concerns when, why, and to what extent a reviewing court will accept an agency interpretation of a statute that differs from how the court would have interpreted that statute. The remainder of this chapter will focus principally on that issue, leaving to one side other important topics, such as the role of the courts in adjudicating separation-of-powers disputes between Congress and the President. Part III.A considers the degree to which judges' political preferences influence the degree to which courts defer to agency statutory interpretations – both in the 'retail' context of deciding individual cases, and in the 'wholesale' context of developing and refining the relevant standard-of-review doctrines. Part III.B turns to the strategic interaction between agencies and courts, considering how judicial review influences agencies' interpretive practices, and how action by agencies and other interested litigants may affect the scope and intensity of judicial review.

A. Judicial policy preferences and deference to agency interpretations

It is common, and generally uncontroversial, to presume that the preferences of the President, agency officials, and members of Congress with respect to questions of statutory interpretation are shaped largely by preferences over policy. What about judges? To what extent does a court's decision as to whether an agency's interpretation of a statute is reasonable depends on the judges' ideology or views of sound policy? Is a judge more likely to uphold an agency's statutory interpretation when the judge agrees with the agency (either in the specific case, or perhaps in general) on the relevant policy issues?

If so, how strong is the effect, and how consistent across issue areas? To what extent are judges constrained by legal doctrine when reviewing agency interpretations? To what extent does the doctrine itself reflect the political preferences of the courts that shape it? This section will consider these questions, first in the context of judges passing on particular agency interpretations, and then in the context of Supreme Court formulation of deference doctrine more generally.

1. *How do considerations of law and policy influence judges' evaluation of agency statutory interpretations?* A substantial body of empirical research has analyzed voting patterns in agency review cases in the United States Supreme Court (Cohen and Spitzer 1994, 1996; Crowley 1987; Merrill 1992; Miles and Sunstein 2006; Richards et al. 2006; Sheehan 1990; Smith 2007) and the federal courts of appeals (Avila 2000; Cross and Tiller 1998; Czarnecki 2008; Humphries and Songer 1999; Kerr 1998; Miles and Sunstein 2006; Revesz 1997; Schuck and Elliott 1990; Smith 2007). This research indicates that a judge's political ideology, typically measured using the party of the appointing President as a proxy, affects how that judge votes in agency statutory interpretation cases.¹⁷ While the available data and methods are imperfect, the evidence seems strong enough to reject the claim (perhaps a straw-man anyway) that a judge's political preferences play *no* role in her decisions in these sorts of cases. Republican appointees are more likely, all else equal, to uphold conservative agency decisions and reject liberal agency decisions, while Democratic appointees are more likely to uphold liberal decisions and reject conservative decisions, and these effects are typically substantively as well as statistically significant. At the same time, the evidence does *not* support the strong claims (perhaps also straw-men) that political ideology perfectly explains voting patterns and that legal doctrine is irrelevant. It is not the case that Republican judges always vote to uphold conservative agency decisions and reject liberal agency decisions, while Democratic judges do the opposite.¹⁸

An important subtlety in the empirical findings on judicial voting at the court of appeals level concerns how the composition of the judicial panel (usually consisting of three judges) affects judicial voting. The literature has identified two distinct 'panel effects', which are sometimes conflated even though they are quite different. First, judges in the ideological minority on a three-judge panel tend to vote with their colleagues instead of dissenting (Revesz 1997; cf. Fischman 2008). That is, a liberal judge sitting with two conservative colleagues will often vote to uphold a conservative agency interpretation, or to strike down a liberal interpretation, even though this same judge would have voted differently (and more consistently with her true policy preferences) if at least one of her colleagues was also liberal. This 'majority effect' can mask the impact of political ideology on judicial voting. Even when there do not appear to be significant differences in the voting patterns of Democratic and Republican *judges*, there often turn out to be significant differences in the voting patterns of majority-Democratic and majority-Republican *panels*.

The second finding related to panel composition is that courts behave differently when there is at least one judge on the panel who has political views that differ from the panel majority. Mixed panels tend to be more moderate than homogenous panels, and they are also more likely to defer to agency interpretations (Cross and Tiller 1998; Miles and Sunstein 2006). That is, a court of appeals panel with three Republican appointees is more

likely to strike down a liberal agency interpretation than is a panel with two Republicans and one Democrat. This is sometimes referred to as the 'whistleblower effect', because of the hypothesis that judges in the majority worry that if they go too far in stretching the law to fit their policy preferences, the minority judge will expose their lack of fidelity to law via a dissenting opinion (Cross and Tiller 1998). This 'whistleblower' terminology, however, may be misleading insofar as it suggests a particular account of a behavioral pattern that might have alternative explanations (such as improved information acquisition and the reduction of 'groupthink'). The term 'diversity effect' may better capture the nature of the phenomenon without implicitly committing to a specific causal mechanism.

Both of these panel effects suggest that judges on court of appeals panels sometimes make concessions to their colleagues. The majority effect suggests that minority judges will sometimes go along with the majority; the diversity effect suggests that majority judges will sometimes make concessions to the minority judge on the panel. Together, these effects suggest convergence on mixed panels, with the majority judges generally moving toward the center just enough that the minority judge is willing to go along without dissent. The relative strength of these effects, however, is not altogether clear from extant empirical analyses. This question of relative strength is important for assessing reform proposals, such as the suggestion that ideologically mixed panels ought to be mandatory (at least where possible) (Sunstein and Miles 2009; Tiller and Cross 1999; cf. Schanzenbach and Tiller 2008). If the diversity effect predominates, then mixed panels will both induce moderation and generally improve the position of whichever party has fewer representatives on the court. If, however, the majority effect predominates, then although mandatory mixed panels will induce somewhat more moderation, this policy might also disadvantage the party with a minority of judges.¹⁹

What about legal doctrine? We know from the available empirical evidence that political ideology influences how judges vote when reviewing agency statutory interpretations, but do the formal legal principles and tests for reviewing agency statutory interpretations also affect judicial voting in this set of cases? The answer appears to be a qualified yes. Although the robust findings regarding the impact of political ideology on judicial voting are occasionally misconstrued as suggesting that legal doctrine does not affect judicial behavior, this strong interpretation of the empirical results is not justified. The data consistently show that courts of all ideological complexions usually uphold agency interpretations of statutes, even when the expected policy preferences of the reviewing court and the agency diverge. That evidence is inconsistent with the view that judges in these cases are crass ideologues, and it is broadly consistent with the notion of a background principle that judges are supposed to follow established doctrine by deferring to reasonable agency interpretations. In this regard, it is worth noting that the 'whistleblower' hypothesis for the diversity effect presumes that judges must care at least about the appearance of fidelity to legal principles. Otherwise, why would the judges in the majority care that a dissenter might 'expose' their lack of fidelity to the governing deference doctrine?

Of course, a general tendency to uphold agency interpretations does not necessarily indicate that judges are significantly constrained by doctrine. After all, even judges who care solely about outcomes rather than legal doctrine might often find it expedient to defer to agency interpretations, especially when the stakes are low and the legal questions are tedious and complex (Stephenson 2009). Additionally, if reviewing courts are risk-

averse and uncertain about the policy preferences of the legislature, then it is possible that courts might be willing to accept an agency interpretation that the court disfavors, because judicial invalidation of the agency action might trigger a legislative response that the court would dislike even more (Wright 2010). Furthermore, if agencies are strategic, then agencies should win most of the time even if courts are not significantly constrained by doctrine, because the agencies will anticipate how the courts are likely to behave and modify their interpretations accordingly. What looks like judicial deference to the agency's interpretive views might, on this account, actually reflect agency accommodation of the judiciary's interpretive views.

One way empirical researchers interested in the influence of judicial deference doctrine have tried to address these concerns is by looking at moments of substantial change in judicial deference doctrine – most prominently, the 1984 *Chevron* decision – and observing whether changes in lower court or agency behavior follow. The evidence here generally supports the claim that Supreme Court pronouncements on deference doctrine, and *Chevron* in particular, have had an effect on judicial behavior (Richards et al. 2006). In the years immediately following *Chevron*, agency win rates in the courts of appeals rose substantially. In later years, however, at least one influential study reported that agency win rates declined back toward their pre-*Chevron* levels, which might suggest that *Chevron*'s effect dissipated relatively quickly (Schuck and Elliott 1990). This empirical finding, however, does not necessarily support the conclusion that *Chevron* had only a temporary effect: a temporary spike in agency win rates followed by a decline is consistent with the hypothesis that agencies responded strategically to the unanticipated favorable change in doctrine by taking more aggressive interpretive positions, which are more likely to be invalidated even under a deferential standard of review – or with potential litigants deciding to forego challenges to agency action that they might have brought under a less deferential standard. Indeed, this sort of strategic behavior is what PPT would generally predict (Cohen and Sptizer 1994, Stephenson 2006c; cf. Priest and Klein 1984; but see Givati 2010), and it is consistent with insider accounts of how *Chevron* altered administrative agency behavior (Elliott 2005).

The above evidence, then, strongly supports the hypothesis that judicial doctrine, and *Chevron* in particular, influences judicial decision-making in agency statutory interpretation cases, making courts more deferential than they would be otherwise. There is, however, an additional complication in evaluating the impact of legal doctrine and political ideology on judicial decisions in agency statutory interpretation cases. The reviewing court sometimes (though not always) has the ability to choose the grounds on which it reverses an agency decision. Often, aggrieved parties *both* will assert that the agency's action is not authorized by statute *and* will advance other legal objections, such as the claim that the agency's action is arbitrary and capricious or that the agency failed to comply with applicable procedural requirements. A reviewing court that wants to strike down the agency action might therefore strategically select the grounds for reversal.

Some scholars have suggested that rejecting an agency action on the grounds that it is arbitrary and capricious requires more effort by the reviewing court than rejecting the agency action on statutory grounds, because the former requires review and analysis of technical evidence, whereas the latter involves only legal analysis. This means statutory interpretation decisions are less costly for the reviewing court to write, but statutory interpretation decisions are also more vulnerable to reversal on appeal (Smith and Tiller

2002, Tiller and Spiller 1999).²⁰ If we accept this assumption about relative drafting and reversal costs, we might hypothesize that a court that cares more about insulating its decision from reversal on appeal is more likely to rule an agency action arbitrary and capricious than to reject it on statutory grounds. In contrast, a court that is less worried about reversal is more likely to decide a case on statutory grounds, rather than invest the resources in writing an opinion that would invalidate the agency's reasoning process.

If this 'strategic instruments' hypothesis is correct, then the set of cases in which a circuit court strikes down an agency action on statutory grounds may be a non-random subset of the cases in which an agency's interpretation of a statute was subject to legal challenge. In particular, the set of statutory interpretation cases is likely to include a disproportionately large number of cases where the Supreme Court would be expected to disagree with the agency's policy choice (because the circuit court anticipates a low propensity of the Supreme Court to reverse), as well as a disproportionately small number of cases where the circuit panel strongly disagrees with the agency's policy choice (because these are the cases where the circuit court's incentive to insulate its decision are strongest). If so, then it may be problematic to attempt to estimate the relative influence of law and political ideology on judicial voting by looking only at cases that were *actually decided* on statutory interpretation grounds, as opposed to cases in which a statutory challenge was *raised*. That said, while there is some limited empirical evidence in support of this strategic instruments hypothesis (Smith and Tiller 2002), it remains unclear just how significant this phenomenon is.

2. *To what extent does politics explain the Supreme Court's deference doctrine?* Taken together, the evidence on judicial voting in agency statutory interpretation cases suggests that an individual judge's vote is influenced both by political ideology (her own and that of the other judges on the panel) and by legal doctrine. The fact that Supreme Court doctrine may have systematic effects on how lower courts decide these cases suggests the importance of attention to how the Supreme Court fashions its doctrine, and whether the Court does so strategically to further a political agenda. The idea that the Supreme Court may strategically manipulate legal doctrine flows from the observation that the Supreme Court's impact on policy outcomes derives less from its 'retail' resolution of legal issues in individual cases than its 'wholesale' formulation of doctrinal tests that lower courts are supposed to apply in the mine-run of cases that come before them (Cross and Tiller 2006; Jacobi 2010; Jacobi and Tiller 2007; Lax 2007, 2009; Landa and Lax 2009; McNollGast 1995; Strauss 1987; Tiller 1998; cf. Bueno de Mesquita and Stephenson 2003). It therefore makes sense to consider how a strategic, politically-oriented Supreme Court might formulate the doctrine relating to judicial review of agency statutory interpretations in order to further the Court's own political agenda.

One hypothesis is that the Supreme Court is more likely to promote doctrines that call for greater deference to agency interpretations during periods when the policy preferences of the Supreme Court's median justice are closer to those of the average executive branch agency than to those of the average court of appeals panel, while the Court is likely to signal the need for more aggressive scrutiny of agency interpretive decisions – that is, less deference – when the Court is more closely aligned with the courts of appeals than with the executive (Cohen and Spitzer 1994, 1996; cf. McNollGast 1995). It is at least intriguing, in light of this hypothesis, that the Supreme Court decided *Chevron* in

the latter half of President Reagan's first term, when the Supreme Court and the federal agencies had moved to the right, but the courts of appeals were still stocked with more left-leaning judges appointed by previous Democratic administrations. A more systematic study purported to find quantitative evidence consistent with this 'political alignment' hypothesis (Cohen and Spitzer 1996). This study reported that the Supreme Court signaled the need for greater deference in the mid-1980s, when the Supreme Court and the executive agencies were well to the right of the average court of appeals judge, but the Court adopted a less deferential posture in the late 1980s and early 1990s, as retirements and new Republican appointees gradually moved the courts of appeals to the right.

A closer look, however, reveals that the evidence is less supportive of this simple political alignment hypothesis than it might first appear. Even the anecdotal evidence is problematic: *Chevron*, after all, was a unanimous decision written by Justice Stevens, generally considered a liberal Justice unsympathetic to the Reagan Administration's political agenda. Furthermore, while *Chevron* is widely viewed as a declaration of expansive judicial deference on questions of statutory interpretation, *Motor Vehicle Manufacturers Association v. State Farm* – decided only a year earlier – adopts a decidedly less deferential posture in a different but closely related doctrinal context. This complicates a story that emphasizes a conservative Supreme Court eager to free Reagan-era agencies from intrusive oversight by liberal federal appeals courts.

More importantly, the quantitative evidence turns out to be less consistent with the political alignment hypothesis than the earlier study indicated. If deference doctrine were driven by the Supreme Court's relative alignment with the President and the courts of appeals, then one would predict that during the Clinton administration, the Supreme Court would have endorsed an increasingly aggressive, less deferential approach. After all, by the mid-1990s the Supreme Court and the federal courts of appeals were generally conservative, and appeared to be ideologically closer to each other than to Clinton's left-leaning agencies. Yet the data do not support this prediction: for the most part the Supreme Court called for broad (perhaps increased) deference to agency interpretations in the mid-1990s (Stephenson 2004b). In addition, the most prominent recent case revising administrative law doctrine in the direction of less deference – *United States v Mead Corporation*²¹ – came down in 2001, precisely at a moment where, if one looked only at relative political alignments, one would have thought the right-leaning Supreme Court was at least as congruent with the new Republican administration as with the courts of appeals, which had moved somewhat to the left during eight years of a Democratic administration.

What accounts for this non-finding? One possibility is that the Supreme Court is not driven principally by political ideology when considering the appropriate level of deference to agency interpretations. Although this hypothesis at first seems difficult to square with the evidence that ideology plays an important role in judicial review of agency interpretation, perhaps the Court considers tinkering with deference doctrine too crude and unreliable a device for influencing lower court behavior, so the Court simply decides the cases that come before it on a retail basis. That hypothesis finds support in the observation that while Supreme Court *decisions* in agency interpretation cases are relatively frequent, Supreme Court *pronouncements* on deference doctrine that revise rather than simply restate the doctrine are in fact quite rare. The hypothesis finds further support in more refined empirical analysis that shows justices' decisions are affected more by the

ideology of the President who was in office when a challenged regulation was enacted than by the ideology of the current President (Smith 2007).

Another possibility is that at the Supreme Court level the individual justice, rather than the Court, is the correct unit of analysis for detecting the impact of ideological alignment on preferences over doctrine. There does seem to be evidence that the political alignment hypothesis does a decent job explaining the voting patterns of individual justices known to be quite liberal or quite conservative (Stephenson 2004b).²² And, perhaps the median justices – Justices O'Connor and Kennedy throughout most of the relevant timeframe – did not respond strongly to shifts in political alignment because they were relatively centrist throughout the 1980s and 1990s. A closely related hypothesis is that the Court median was ideologically close to the President during both the mid-1980s and mid-1990s, and used deference doctrine to police extreme ideological outliers on the courts of appeals (on the left in the 1980s, on the right in the 1990s).

B. Strategic interaction between agencies and courts

The preceding section focused on how judges behave when deciding agency statutory interpretation cases. An equally important set of questions concerns how different doctrines or patterns of judicial review affect agency behavior. If agencies are rational and strategic, then in most cases they would prefer to avoid reversal by courts, for at least two reasons. First, a judicial finding that the agency's interpretation is unreasonable may (though need not always) prompt the court to issue a ruling that constrains the agency's interpretive freedom going forward, such that an interpretation that might have been upheld had the agency adopted it in the first instance is now off the table. Second, reversal may impose costs on the agency that are independent of the policy outcome. If the agency's first interpretation is reversed, the agency may incur additional costs promulgating a new interpretation that will be acceptable to the court. Reversal may also be embarrassing, or may signal to Congress or other overseers that more aggressive scrutiny of the agency is warranted.

If we presume that agencies tailor their interpretations to avoid judicial override, then the courts (like Congress and the President) may exert a powerful influence over agency statutory interpretation without actually striking down agency interpretations very frequently (Canes-Wrone 2003; Ferejohn and Shipan 1990; cf. Weingast and Moran 1983). But how, exactly, does expected judicial behavior affect agency behavior? There are an enormous number of more specific questions one could ask. This section focuses on a small selection of such questions that have attracted attention in both the PPT literature and the mainstream administrative law literature.

1. Does non-deferential judicial review increase the congruence between the agency's interpretation and Congress's preferred interpretation? On one influential account, judicial review of agency statutory interpretations is supposed to ensure that the agency's interpretation adheres faithfully to the meaning and purpose of the statute. The most obvious way that courts might do this is to act as faithful agents of Congress, permitting agency interpretations that are within the zone of discretion created by the statute but striking down those agency interpretations outside of that zone. On this account, the appropriate degree of judicial deference to agency interpretations depends on the amount of discretion that Congress meant to confer on the agency. If the court is too

deferential, the agency will be able sometimes to adopt interpretations that Congress meant to prohibit; if this happens frequently, Congress might simply delegate less, which could make both Congress and the agency worse off (Nelson 1992). On the other hand, if the court is not deferential enough, then it may strike down agency interpretations that Congress meant to permit.

If courts are faithful agents, the principal challenge for institutional designers is to ensure that judges are good at discerning the zone of discretion that Congress meant to establish for the agency. As long as courts are sufficiently competent in this respect, empowering courts to review agency decisions is desirable. But what if courts are not motivated solely by a desire to act as faithful agents of Congress? What if courts are at least partly policy-oriented actors with their own preferences, as much of the empirical research suggests? If so, the argument for aggressive judicial review of legislative enactments appears weaker. Such review might still serve the interests of the enacting Congress if Congress would prefer to delegate to a court rather than to an agency,²³ but otherwise it would seem that the enacting Congress would be better off with more deferential judicial review if courts are more interested in advancing their own policy objectives than in advancing the interests of the enacting Congress.

It is possible, however, to construct a PPT argument as to why non-deferential judicial review by policy-motivated courts can serve Congress's interests, even if the court itself has relatively extreme preferences (Esckridge and Ferejohn 1992b). To set up the argument, suppose that Congress passes a statute that appears to mandate the ideal point of its median member, but the agency's ideal point lies to the left of the congressional median. Suppose also that new legislation can be introduced only if it is approved by a gatekeeping congressional committee, and that the committee also lies to congressional median's left, though it is not as far to the left as the agency. In this situation, the agency will 'interpret' the statute such that the outcome is to the left of both the committee and the congressional median, but close enough to the committee's ideal point that the committee slightly prefers the agency's interpretation to the expected result of new legislation. Thus, the agency – in tacit collaboration with the committee – can undermine the purposes of the legislation and the interests of the congressional median.

Now suppose a court is empowered to reject an agency's interpretation and impose its own interpretation instead. If the court is to the right of the congressional median, the agency has no choice but to implement the congressional median's ideal point, because if the agency adopted anything to the left of this point, the court would reject it and impose the congressional median's ideal point.²⁴ If the court's ideal point is to the left of the congressional median's ideal point but to the right of the interpretation the agency would have selected without judicial review, the final outcome will be the judicial ideal point, since the court could reject anything further to the left without fear of reversal. This shifts policy toward the congressional median, though not all the way. Finally, if the court is even further to the left, judicial review has no impact because the court knows any attempt to shift policy further left would be overturned by Congress. The implications of this analysis are that non-deferential judicial review is good for Congress even if the court is purely ideological, and that this ameliorative effect is most pronounced when the court and the agency are on opposite sides of the congressional median.

This analysis is provocative and clever – but perhaps too clever. Even putting aside the question whether congruence with the preferences of the congressional median is the

appropriate normative benchmark, the preceding analysis turns crucially on premises that are problematic at best, and may suffer from internal inconsistencies. First, the idea that Congress, at the final stage of this policymaking game, can enact a statute to overturn an agency or judicial interpretation presumes that Congress can pass new legislation that 'sticks' – that is not subsequently ignored by the agency or by the court. But how, exactly, can Congress do that in the context of a model that assumes that courts and agencies care only about securing favorable policy outcomes? Furthermore, if Congress has the power to specify a particular legislative outcome at the *last* stage of the game, why could Congress not specify that same outcome at the *first* stage of the game, leaving no room for agency interpretation? Perhaps Congress did not anticipate the interpretive issue ahead of time – but that is only a partial answer. As Part I of this chapter discussed, there are other reasons Congress might want to delegate – such as agency expertise, interpretive consistency, and diversification of political risk – and it is far from clear whether non-deferential judicial review would further *those* interests.²⁵

Moreover, the location of the gatekeeping committee plays a critical role in the above analysis. If the gatekeeper is to the congressional median's right rather than to its left (that is, if the gatekeeper and the court are on the same side of the congressional median, with the agency on the other side), then aggressive judicial review will not necessarily benefit the congressional median, and may make things worse. To illustrate, suppose the agency is to the congressional median's left, the court is to the median's right, and the committee is also to the median's right, though not as far as the court. Without judicial review, the agency will select the chamber median's ideal point: the agency has no incentive to pick anything further to the right, and if the agency picked anything further to the left, the committee would introduce legislation to overturn it, resulting in an outcome at the chamber median's ideal point. Now add judicial review. The court knows it can adopt an interpretation even further to the right of the congressional median than the committee's ideal point without triggering legislation. The court might be able to adopt its own ideal point, and if not, the court can at least implement a policy that is twice as far to the right of the congressional median as is the committee. In this example, the introduction of non-deferential judicial review leads to outcomes that are *further* from the congressional median.

A variant on the analysis drops the committee, and suggests instead that the reason non-deferential, outcome-oriented judicial review may benefit Congress derives from the bicameralism and presidential veto provisions in Article I, Section 7 of the Constitution (Eskridge and Ferejohn 1992a). The initial assumption of this analysis is that the statute is supposed to implement an 'original bargain' located somewhere between the Senate and House medians. Suppose that the Senate median is to the left of the House median, and the President is to the left of the Senate median. The agency, which presumably has preferences close to the President, can implement a policy to the left of the original bargain, so long as the policy is not so far to the left that both the House and Senate could muster the two-thirds votes needed to override an expected presidential veto of any attempt to alter the agency's position via legislation. (Call the leftmost point the agency can adopt without provoking a veto-proof legislative override the 'veto point'.) Now add non-deferential judicial review. If the court's ideal point is to the right of the veto point and to the left of the House median, the outcome will be the court's ideal point, because this point is immune from legislative override. If the court's ideal point is closer to the

original bargain than is the veto point, then judicial review will move the outcome closer to the original bargain. If the court's ideal point is to the left of the veto point, then judicial review has no effect: the court cannot get anything closer to its ideal point than the veto point, which is what the agency would choose anyway. If the court's ideal point is to the right of the House median, the outcome will be the House median, because anything further right would trigger successful override legislation. So, as in the earlier model, the conclusion is that non-deferential, policy-oriented judicial review weakly improves the correspondence between the final interpretive outcome and the relevant normative benchmark (here, the 'original bargain' between the House and Senate).

This variant is vulnerable to many of the same criticisms as the first version of the argument – most importantly, the apparent tension between the assumption that Congress can enforce a specific interpretive outcome through legislation at the end of the policymaking game but cannot do so at the beginning, and the omission of several of the important factors – especially comparative expertise – that may lead Congress to prefer delegation to the agency in the first place (Strauss and Rutten 1992). While this version of the argument does not depend on questionable assumptions about the location of a gatekeeping committee, it depends on other problematic assumptions. First, consider how the results differ if the President's ideal point were between the original bargain and the veto point. That is, suppose the President does not support any policy that two-thirds of both chambers would oppose. If so, non-deferential judicial review moves the outcome further from the original bargain if the court's ideal point is further from the original bargain than is the President's ideal point. Second, even in the original analysis the court could pull the final outcome to the House median if the court's ideal point were even further to the right. While that point is on the contract curve between the House and Senate medians, it is entirely possible that it might be further away from the original bargain than is the veto point (or the agency's ideal point).

The examples, and the associated critiques, illustrate both the power and dangers of PPT-style analyses of the impact of judicial review on agency behavior, especially when accompanied by normative conclusions and proposals for institutional reform. These analyses are innovative and perceptive in their careful attention to how the strategic interaction between courts, agencies, and legislatures can produce surprising results. Yet these analyses demonstrate the need for caution before jumping from highly stylized models to strong conclusions about the likely effects of specific institutional or doctrinal reforms. Perhaps the most significant thing that this family of models demonstrates is the potential sensitivity of the results to seemingly minor changes in assumptions. That is not to say these models should not be used; rather, it is to say they should be used with caution.

2. *Does judicial deference lead agencies to interpret statutes more aggressively?* Much of the preceding discussion assumed that if the reviewing courts become more deferential to agency statutory interpretations, agencies will adopt more aggressive interpretations of their statutory mandates. That assumption seems sensible, and in most cases it probably is. Yet recent work has demonstrated that under certain conditions an increase in judicial deference may actually lead to *less* aggressive agency interpretations (Givati 2010). The key to this surprising finding is the idea that if an agency is sufficiently moderate in its interpretation, it can avoid litigation altogether – a possibility that is consonant with

the empirical finding that many significant agency decisions are never subject to judicial review (Coglianese 2002).

To illustrate the point, suppose an agency is deciding how to interpret a statute with respect to a particular regulatory target. All else equal, the agency would prefer a more aggressive interpretation than would the target. Litigation, however, is costly for both the agency and the target, and the outcome of litigation is uncertain: there is some chance the court will uphold the agency's interpretation, but there is some chance the court will interpret the statute in a way that favors the regulatory target (and that constrains the agency's subsequent interpretive freedom). The more aggressive the agency's interpretation, the more likely the court is to invalidate it, all else equal.

Under these conditions, the agency must choose between two interpretive approaches. One is to interpret the statute aggressively, knowing that this will provoke litigation initiated by the target. The advantage of this approach for the agency is that it can enact a more favorable interpretation, so long as the court upholds it. There are two disadvantages, however. First, the agency must bear the costs of litigation. Second, if the agency loses, it may get stuck with an undesirable interpretive outcome. Alternatively, the agency might adopt an interpretation that is just moderate enough that the regulatory target would not bother to litigate. For the agency, the advantage of this more moderate approach is that it avoids both the cost and the risk of litigation. The disadvantage, of course, is that the agency must forgo a more favorable interpretation. The agency's choice between the 'risky' (that is, litigation-provoking) interpretation and the 'safe' (that is, litigation-avoiding) interpretation depends on which has greater net benefits.

We can think about an increase in judicial deference as an increase in the probability that, for any given level of interpretive aggressiveness, the court will uphold the agency's choice. When judicial deference increases, the agency's optimal 'risky' interpretation becomes more aggressive, as does the agency's optimal 'safe' interpretation. If the agency prefers the risky approach both before and after the increase in deference, the agency's interpretation becomes more aggressive. Likewise, if the agency prefers the safe approach both before and after the increase in deference, or if the increase in deference causes the agency to switch from the safe approach to the risky approach, then the increase in deference will cause the agency to interpret the statute more aggressively. All this is consistent with the standard intuition that increasing judicial deference increases agency interpretive aggressiveness. Under some circumstances, however, an increase in judicial deference can cause an agency to switch from the risky approach to the safe approach, if this change increases the net benefits of the safe approach sufficiently more than it increases the net benefits of the risky approach. The result of the agency's switch from the risky approach under the less deferential regime to the safe approach under the more deferential regime may be a *less* aggressive interpretation overall.

The set of cases to which this intriguing and non-intuitive result applies may be limited, however. The result depends crucially on the agency being able to avoid litigation by adopting a moderate interpretation. When litigation is, for all practical purposes, inevitable – as when there are many opposed interest groups on all sides of the issue, or when the stakes are sufficiently large that litigation cost considerations are trivial by comparison – the agency has no incentive to moderate its interpretation to try to avoid litigation, so an increase in deference will always lead to greater agency aggressiveness (Stephenson 2006c). Nonetheless, a great deal of agency interpretive activity

likely takes place in domains where the stakes are relatively low, where there are only a small number of parties that care enough to consider challenging the agency's decision in court, or where for other reasons the agency may be able to avoid judicial review entirely (Coglianese 2002). Litigation-avoidance behavior by agencies may therefore have more significance than generally appreciated. If so, then quantitative studies of agency behavior and litigation outcomes must be sensitive to this theoretical possibility.

3. *How does agency procedural formality affect judicial deference?* The most important Supreme Court case on judicial deference to administrative agency interpretations of statutes in the last decade is probably *United States v Mead Corporation*, in which the Court held that *Chevron* deference does not apply unless Congress has empowered the agency to issue interpretations with the 'force of law', and the agency's interpretation was issued pursuant to such authority. Otherwise, while a reviewing court is still supposed to treat an agency interpretation with 'respect' pursuant to the standard articulated in *Skidmore v Swift and Co.*,²⁶ the agency's interpretation is not entitled to strong *Chevron* deference. Although *Mead* refused to specify precisely the conditions under which Congress has granted an agency the authority to issue legal interpretations with the force of law, the Court emphasized that one of the best indicators of the requisite congressional intent was the formality of the procedures authorized by Congress and employed by the agency when issuing the interpretation in question. In short, the Court suggested that use of more formal procedures – such as notice-and-comment rulemaking – is likely to result in greater judicial deference to agency statutory interpretations.

Why should this be the case? One explanation is that the courts, like Congress, tolerate agency interpretive discretion principally because of the agency's greater expertise, greater insulation from day-to-day partisan politics, or both. If so, then procedural formality may be a proxy for those expertise and insulation values – if one believes that interpretations reached through more formal procedures are more likely to reflect the input of disinterested experts and less likely to be distorted by political calculations (Sunstein 2006). Of course, procedural formality is likely to be an imperfect proxy for things like agency expertise, but procedural formality may be easier for courts to observe.²⁷

An alternative and perhaps complementary explanation for why procedural formality may influence judicial deference is that the use of costly formal procedures is a way for the agency to signal to the court something about the importance the agency attaches to the interpretive issue in question (Stephenson 2006c). To illustrate, suppose that the reviewing court cares both about the agency's ability to advance its policy agenda and about fidelity to the statutory text (as the court understands it). The court may be more inclined to allow the agency to interpret a statute aggressively, perhaps stretching the text a bit beyond what the court would otherwise think plausible, if this interpretive latitude is very important to the agency's ability to achieve its legitimate policy goals. The problem for the court is that expansive judicial deference will tempt the agency to adopt strained interpretations in more cases than the court would consider appropriate, but more rigorous judicial review will prevent the agency from engaging in aggressive interpretation in those cases where the court, if fully informed, would view the sacrifice of textual plausibility as acceptable. The court needs some mechanism to sort out those cases in which an aggressive interpretation is truly important to the agency's ability to accomplish its mission from those in which it is not.

Agency use of costly formal procedures may be an effective, albeit imperfect, sorting mechanism. If the court indicates that it will be more deferential to the agency's interpretation of the statute if, but only if, the agency promulgates that interpretation through formal procedures that are burdensome for the agency, then the agency will use the formal procedures to adopt the more aggressive interpretation only in cases where the benefits of greater deference outweigh the procedural costs. These will be the cases in which a more aggressive interpretation really is of great importance to the agency's policy agenda (Stephenson 2006c; cf. Stephenson 2006a). For less important issues, the agency would prefer to forgo formal procedures and promulgate a less aggressive, more textually plausible interpretation of the statute. The result is a separating equilibrium, in which agencies promulgate aggressive interpretations in formal proceedings, and more plausible interpretations in less formal contexts.

This 'strategic substitution effect' (where procedural formality and textual plausibility are substitute means for the agency to secure judicial approval) provides a partial account for why a court might defer more to agency interpretations issued in formal proceedings, even if one puts aside the possibility that formal procedures lead to 'better' agency decisions on some other dimension the court cares about. This substitution effect has additional ramifications for issues related to agency statutory interpretation. First, increasing the costs of formal procedures will decrease the average textual plausibility of both informal statutory interpretations and formal statutory interpretations, but may actually increase the average textual plausibility of agency interpretations overall. This is because the increase in procedural costs causes the agency to make relatively more of its interpretive decisions in informal proceedings. Additionally, when courts care more about allowing agencies to implement their policy views (or, equivalently, when courts attach less importance to strict fidelity to the statute), agencies will use formal procedures more frequently, and will use them for issues that are relatively less important to the agency. Conversely, when courts care relatively more about textual plausibility, agencies will use formal procedures less frequently. The reason is that, if procedural formality functions as a signal to the court of how important the aggressive interpretation is to the agency's policy agenda, this signal has a greater impact on the court's view of the appropriate level of deference when the court cares more about the agency's policy agenda. Because procedural formality 'buys' more judicial deference when the court cares more about allowing the agency to pursue its policy agenda, the agency will use formal procedures more frequently when this is the case.

4. *How does judicial (non-)deference to changed agency interpretations affect agency behavior?* Procedural formality is not the only consideration that the Supreme Court and other appellate courts have invoked as a partial determinant of judicial deference to agency statutory interpretations. Another possible consideration is the consistency of an agency's interpretation over time. Courts have wrestled with the normative question whether agency interpretations should be entitled to less deference if the agency has changed its position.²⁸ Implicit in these normative debates are a set of positive questions about the effect of different doctrinal rules on the behavior of agencies, political actors, and other interested parties. Surprisingly, although PPT would seem well-suited to address this latter set of positive questions, there is very little sustained analysis of this issue in the literature.

The judicial opinions and scholarly commentary defending the idea that interpretive

inconsistency should *not* reduce judicial deference to agency interpretations tends to emphasize two considerations. First, agencies ought to be able to respond to new information or new developments. This is essentially a variant on the 'expertise' rationale for delegation. Second, if responsiveness to the preferences of political majorities (typically represented by the median voter in the electorate) is an important value, then agencies ought to change their interpretations to reflect the political views of a new presidential administration. If the electorate shifts to the right, then interpretive choices – which, after all, are based in large part on policy judgments – should shift to the right as well. If electoral preferences then shift back to the left, interpretive choices should too.

The expertise argument for deferring to changed agency interpretations is straightforward, though subject to all the usual qualifications regarding the scope and limits of that sort of argument. The accountability argument is more problematic, and is subject to two important criticisms, both of which have been developed above. First, because electoral accountability is imperfect, the current administration's most-preferred interpretation will often not match the median voter's ideal point exactly, even if *in expectation* the President's most-preferred policy is equal to the median voter's ideal point. If so, then although allowing agencies to change their interpretations freely would increase the congruence between the expected interpretive decision and the median voter's ideal point, it might actually increase the expected distance between the agency's interpretation and the median voter's ideal point. This, in turn, implies that the median voter would prefer that it be somewhat difficult, but not impossible, for the President to shift the agency's position (Stephenson 2008b). It may be the case that the costs of interpretive revision are already sufficiently high that greater judicial scrutiny is undesirable from a majoritarian perspective, but that is not necessarily or obviously the case. Second, the less the courts defer to changed agency interpretations, the more agency interpretations start to have the kind of *stare decisis* effect associated with judicial interpretations. This is bad insofar as voters or legislators would prefer to diversify their political risk by allowing variation over time, but it might be good insofar as intertemporal interpretive consistency is normatively desirable – that is, if it is more important from a social perspective that an issue be settled than that it be settled right (Stephenson 2006b).

A closely related question concerns the effect of these different deference rules on the ideological extremism or moderation of agency interpretations. Perhaps when courts defer less to revised agency interpretations, the incumbent administration has a stronger incentive to issue a larger number of relatively extreme interpretations in order to 'lock in' more of its preferred interpretive choices over a longer period of time. On the other hand, perhaps as the costs to an agency of switching from one interpretation to another rise, the current administration may be more inclined to lock in more moderate (but still favorable) interpretations, while an administration that anticipates that much of what it does will be undone by the next administration (because of the low costs of changing interpretive positions) may have an incentive to take more extreme positions in the short term (Givati and Stephenson 2009). Thus, as was the case with judicial deference doctrine generally (cf. Givati 2010), an increase in deference to new and inconsistent interpretations can have two different effects. The incumbent administration might adopt a 'safe' approach of promulgating interpretations that, while slanted toward the incumbent administration's own interests, are sufficiently moderate that a subsequent administration of a different party would find it too costly to attempt to change them.

On the other hand, the incumbent administration might adopt the 'risky' approach of promulgating relatively extreme interpretations. In this case, the incumbent anticipates that if the other party takes power, it will try to revise these interpretations. If the court refuses to allow the change in position, then the current administration is better off, as it will have locked in a more extreme favorable interpretation. But, if the court defers to the interpretive change, then the current administration is worse off. As before, whether the incumbent administration opts for the moderate approach or the extreme approach depends on which one has greater net benefits.

For reasons similar to those discussed previously, the effect of switching from a regime in which changed interpretations get just as much deference to a regime in which changed interpretations get less deference is ambiguous. On one hand, reducing judicial deference to changed interpretations increases the value to the incumbent of taking the extreme approach, because the extreme interpretation is more likely to 'stick'. On the other hand, reducing judicial deference to changed interpretations also increases the value of the moderate approach, because the incumbent will be able to adopt an even more favorable interpretation without triggering any attempt by subsequent administrations to modify it. Reducing judicial deference to changed interpretations will indeed increase the aggressiveness of the initial interpreter if that interpreter sticks with either the moderate or extreme approach under both regimes, or if the reduction in deference causes a switch from the moderate to the extreme approach. But it is possible that reducing deference to inconsistent interpretations might cause an incumbent administration to switch from an extreme interpretive approach to a more moderate interpretive approach, and that switch could lead to *less* aggressive interpretations overall, as well as a reduction in the variance of interpretations over time (Givati and Stephenson 2009).

5. *How does judicial review of agency interpretations affect agency expertise?* To this point, most of the discussion of judicial review has either neglected the issue of agency policy expertise or, more frequently, has treated agency expertise as exogenous. But judicial doctrines and practices may affect agency incentives to acquire policy-relevant expertise, for several reasons. First, non-deferential judicial review may decrease agency incentives to invest in expertise for the same reasons that congressional or presidential authority to direct, revise, or reject agency interpretations may reduce agency expertise. From the perspective of the agency considered as a whole, and of individual agency officials, one of the benefits of investing in learning more about the connection between policy choices and outcomes is the ability to achieve more desirable outcomes. The less control agency officials feel that they have over policy decisions – the less they feel they can make use of the information they acquire to do what they think is best – the less incentive they have to invest substantial resources in research and analysis. Thus if courts are too willing to substitute their own interpretive and policy judgments for those of the agency, the less willing agencies will be to acquire costly expertise, all else equal.

Second, judicial review can affect agency acquisition of expertise if the courts explicitly or implicitly indicate that they will defer more to agency interpretations that appear to be the product of expertise than to interpretations that appear to reflect uninformed hunches or the partisan policy preferences of the current administration. The Supreme Court's decision in *Massachusetts v EPA*²⁹ may be the most recent and prominent decision to implicitly adopt this 'expertise-forcing' approach to judicial review of agency

statutory interpretations, but this has been a persistent undercurrent for a long time (Freeman and Vermeule 2008). But what, exactly, does it mean for a reviewing court to condition the level of interpretive deference on the agency's demonstrated level of expertise? Unpacking this question is a bit tricky, and different interpretations turn out to have different implications for agency incentives to acquire information.

One possible approach is for the court to defer to an agency interpretation that differs from the court's most-favored reading if, but only if, the agency provides sufficiently concrete and persuasive evidence of the beneficial impact the interpretation will have on legitimate policy goals that the court shares. That is, the court might require an agency to demonstrate its expertise by presenting the court with the hard evidence (Stephenson 2008a). One might question whether the non-expert court is even capable of evaluating the evidence proffered by the agency, but even putting that issue to one side, there are two difficulties inherent in a judicial approach that demands an agency justify its aggressive reading of the statutory text with hard evidence that doing so is necessary to further some legitimate goal.

First, even the most diligent agency efforts may not always generate concrete evidence of the sort the court demands. If the court adopted a rule that *required* a particular type or quantity of hard evidence to support a given interpretive decision, the court might find itself in the uncomfortable position of striking down as 'unreasonable' (because unsupported by sufficient evidence) agency interpretations that the court thinks are probably justified. It is not clear whether the court could credibly commit to such an approach, and if the court were able to do so, it would suffer the substantial error costs associated with striking down interpretations with positive expected net benefits (Stephenson 2008a).

Second, such an approach might have the perverse consequence of deterring the agency from bothering to acquire information in the first place. If the agency concludes that the likelihood of finding sufficiently clear evidence to satisfy the court is too low, it might simply abstain from acting in this area. The court might respond by modifying its rule so that the court will defer if the agency has no hard information one way or the other, and will strike down agency action only if the agency acquires hard evidence that the court views as adverse to the agency's preferred interpretive position. But this creates perverse incentives for the agencies to acquire less information than they otherwise would, since this information can be used against them to constrain their interpretive freedom (Jordan 2008; Stephenson 2008a).

Alternatively, the court might look not to the *product* of agency expertise – hard evidence that shows how the agency's interpretation will advance some legitimate goal – but rather to the *process* the agency followed in acquiring information and applying its expertise. One possibility, already noted, is that the court might use the formality of agency procedures as a proxy for the degree of expertise the agency brought to bear on the issue. While this may be helpful for the court, it also distorts agency behavior by causing agencies to invest excessively in determinants of expertise that courts can easily observe, such as formal procedures, at the expense of other, perhaps more meaningful information-gathering activities (Bueno de Mesquita and Stephenson 2007). Another possible adverse consequence of a judicial focus on whether the agency invested heavily in gathering expertise is that it may deter the agency from acting at all, if the procedural costs of doing what the court demands for deference exceed the expected benefits to the agency of adopting the interpretation in question (Bueno de Mesquita and Stephenson 2007; Stephenson 2008a).

The idea that courts might focus on process rather than substance suggests another way that judicial review might influence agency incentives to gather policy-relevant information before promulgating an interpretation of a statute. Judicial review may raise or lower the costs to an agency of adopting one or another interpretation. These judicially-created 'enactment costs' may affect agency incentives to gather information, completely independent of the content of judicial review. In particular, increasing the enactment cost of an interpretation that the agency is predisposed to favor will tend to increase an agency's investment in research and analysis, while increasing the enactment cost of an interpretation that the agency is predisposed to oppose will tend to decrease the agency's investment in research and analysis (Stephenson 2007). The reason is that an agency's incentives to do research are strongest when the agency is least sure about its preferred course of action. When the agency believes that the net benefits of interpretation *X* are much greater than those of interpretation *Y*, the agency has little incentive to incur substantial costs to get more precise estimates of the policy benefits of interpretations *X* and *Y*. But if the enactment costs of *X* go up (or, equivalently, the enactment costs of *Y* go down), the agency becomes less sure which interpretation it ought to adopt. As a result, the agency is willing to invest comparatively more in ascertaining the benefits and costs of *X* and *Y* more accurately, in order to make the right decision.

Yet another aspect of judicial review that might influence agency incentives to acquire information concerns the degree to which courts defer to an agency's interpretation of a statutory provision that is administered by multiple agencies. Though the doctrine on this issue is not entirely clear, the prevailing rule seems to be that in such 'overlapping jurisdiction' cases courts defer less to any one agency's interpretation than they do in cases where only a single agency has jurisdiction to implement a given statute (Gersen 2007, 2010; Merrill and Hickman 2001). Perhaps, however, courts might enhance agency incentives to invest in expertise by deferring to whichever agency is the first to issue an interpretation of the relevant statutory provision. According to that argument, because each agency knows it will be rewarded with judicial deference if it is the first to interpret the provision in question, the agencies will compete to acquire information relevant to the effects of different interpretations (Gersen 2007, 2010). That does not necessarily follow, however. Inducing this sort of competition may be counterproductive if it encourages agencies to issue an authoritative interpretation as quickly as possible, without doing substantial (and time-consuming) research and analysis. It is thus not at all clear whether altering the doctrine with respect to statutes administered by multiple agencies would have positive or negative effects on agency information acquisition.

Conclusion

PPT research has contributed to our understanding of agency statutory interpretation, particularly with respect to the strategic interactions between Congress, the President, courts, voters, and the agencies themselves. These complex strategic interactions sometimes turn out to have surprising implications for predicted behavior, which in turn have consequences for the design of legal rules and political institutions. Yet although the PPT research program on statutory interpretation by administrative agencies is already close to two decades old, this research program is still comparatively underdeveloped. There are serious questions about the robustness of many of the extant results, and much of the research to date has been preoccupied with a relatively small set of questions, most

particularly the determinants of congressional delegation, the extent of ex post congressional control over agencies, and the extent to which courts are 'political' when reviewing agency statutory interpretations. These are vital questions, but they are only a small subset of the extraordinary array of important issues related to statutory interpretation by administrative agencies. Broadening the PPT research agenda, particularly in the direction of greater attention to how variations in legal doctrine might affect agency behavior, may further enrich our understanding of agency statutory interpretation and contribute more directly to ongoing debates in public law.

Notes

1. Professor, Harvard Law School. Email: mstephen@law.harvard.edu. I am grateful to Rachel Barkow, Lisa Bressman, Steven Croley, Jody Freeman, Jake Gersen, Yehonatan Givati, Anne Joseph O'Connell, and Adrian Vermeule for helpful comments on drafts of this chapter, and to Dustin Cho, Leif Overvold, and Laurence Tai for able research assistance.
2. This expositional approach, however, should not obscure the fact that there are important strategic interactions *between* these three branches of government – indeed, there may be a 'tug of war' for influence over how agencies interpret statutes, as well as other aspects of agency decisionmaking (Macey 1992b; see also Ferejohn and Shipan 1990; Hammond and Knott 1996). This chapter will discuss inter-branch conflicts and strategic interaction where relevant, particularly with respect to the President and Congress.
3. Litigation on this point reached the Supreme Court in *United States v Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), *Solid Waste Agency of Northern Cook County (SWANCC) v Army Corps of Engineers*, 531 U.S. 159 (2001), and *Rapanos v United States*, 547 U.S. 715 (2006).
4. See, for example, the decisions in *S.D. Warren Co. v Maine Board of Environmental Protection*, 547 U.S. 370 (2006) and *National Mining Association v U.S. Army Corps of Engineers*, 145 F.3d 1399 (1998).
5. In fact, even those cases in which Congress has explicitly delegated regulatory authority to an agency – for example by instructing the agency to adopt 'necessary' rules, or to regulate 'in the public interest' – can be conceptualized as cases in which the agency must interpret vague and open-ended statutory terms like 'necessary' and 'public interest'. In that light, the question when Congress would draft imprecise statutory language and the question when Congress would delegate to agency are really different ways of asking the same question, at least if the background assumption is that the agencies have the power to choose among reasonable interpretive alternatives.
6. To see why, observe that the discretionary window approach can be considered simply as a special case of the graduated incentive scheme approach, where the transfer payment to the agency for any policy within the discretionary window is set at its maximum feasible value, and the transfer payment for any policy outside that window is set at its minimum feasible value.
7. The classic example is monetary policy: ex ante, Congress might prefer a tight monetary policy that keeps inflation low. If firms and workers make their plans and contracts under the assumption of low inflation, Congress can achieve a short term output boom by adopting a loose money policy. But if firms and workers anticipate this, they will write their contracts accordingly, no matter what Congress promises today. The result is undesirable inflation without any output or employment benefits. Congress (as well as firms and workers) would be better off if Congress could credibly commit to a low-inflation policy. One way to accomplish this is by delegating primary authority over monetary policy to an independent central bank (Kydlan and Prescott 1977). Another common example concerns investment in capital-intensive public utilities, such as telecommunications, where governments cannot promote adequate investment without committing themselves not to expropriate the investors' assets (either overtly or through aggressive rate regulation), but after the investments are made the government will face powerful political pressures to renege on any promises to the investors (Henisz and Zelner 2001; Levy and Spiller 1994). Another example may be criminal punishment, in that the long-term fiscal costs of 'tough on crime' policies may outweigh the benefits, but the short-term political advantages from cracking down are substantial. Given this, a legislature might rationally prefer delegation of criminal sentencing policy to independent commissions (Barkow and O'Neill 2006). Gersen (2010) further discusses this and other rationales for insulating agencies from political influence.
8. For example, there may be cases in which particular interest groups, particularly those that represent broad-based 'movements', recognize that they have considerable political leverage but only a very brief window of opportunity. If these groups cannot secure a total statutory victory, they may press Congress to delegate substantial policymaking authority to an agency, if they anticipate that the agency is likely to be friendlier to their interests over the long term than is Congress. Similarly, a legislative majority that anticipates losing its majority position in the near future may prefer to delegate to an agency that is

structured in such a way that the agency is likely to be sympathetic to the current legislative majority's interests even after political control of the legislature changes hands. Accounts of this sort have been invoked to explain the politics leading up to the enactment of the Administrative Procedure Act (APA) in 1946 (McNollGast 1999), as well as state-level administrative procedure acts (De Figueiredo and Vanden Bergh 2004), and it might also help explain the creation of environmental and consumer protection agencies, such as the Environmental Protection Agency (EPA), Consumer Product Safety Commission (CSPC), and National Highway Traffic Safety Administration (NHTSA), in the early 1970s.

9. In 1935, the Supreme Court struck down two pieces of New Deal legislation on Article I non-delegation grounds, in *Panama Refining Co. v Ryan*, 293 U.S. 388 (1935) and *A.L.A. Schechter Poultry Corp. v United States*, 295 U.S. 495 (1935). For a representative recent articulation of the Court's current tolerance for broad delegations of policymaking authority, see *Whitman v American Trucking Associations, Inc.*, 531 U.S. 457 (2001).
10. In addition to this question, one might also inquire when Congress would prefer to delegate to an executive branch agency (over which the President has plenary authority) or to an independent commission (over which the President's authority is more limited), and when Congress would prefer to delegate to multiple agencies rather than a single agency. Gersen (2010) in this volume contains a discussion of these issues.
11. The Supreme Court has held that agencies may change their interpretations of statutes over time, making this point most recently in *National Cable and Telecommunications Association v Brand X Internet Services*, 545 U.S. 967 (2005) (see also Bamberger 2002). The Court has not been altogether consistent on this doctrinal point (Givati and Stephenson 2009), though empirical evidence seems to support the proposition that courts usually uphold revised agency interpretations (Gossett 1997; Hickman and Krueger 2007). The Court has announced that a super-strong form of *stare decisis* applies to statutory interpretation precedents in cases such as *Flood v Kuhn*, 407 U.S. 258 (1972) (see also Eskridge 1988; Marshall 1989). Although the Court does overrule statutory precedents – perhaps more frequently than the formal doctrine might suggest – such decisions are still relatively rare, at least compared to the rate at which agencies appear to modify prior interpretations (Eskridge 1988; Stephenson 2006b).
12. Congress might also influence how agencies exercise their delegated authority by constraining the President's appointment and removal of agency officials. This issue will be taken up in Part II, below.
13. Another theoretical problem is that the canonical versions of the structure-and-process argument presume that the courts will enforce statutory structure-and-process restrictions, but that they cannot enforce statutory restrictions that substantively limit the scope of the agency's discretion in ways that advantage favored interest groups. Those assumptions are in some tension with one another. Perhaps Congress finds it easier to specify structure-and-process limitations than to specify substantive limitations, but the reasons for this are usually left obscure.
14. This may not be universally true, and some scholars have suggested that certain agencies – especially independent commissions – may be more sensitive to congressional oversight than to presidential direction (Strauss 1984). The weight of the evidence, however, indicates that the President has significant influence even over the independent commissions (Moe 1982, 1985, 1987).
15. The Constitution, however, allows Congress to vest the power to appoint so-called 'inferior officers' in the President alone, in the Department Heads, or in the courts. The distinction between 'principal officers' and 'inferior officers' is elusive and the subject of some controversy (see, for example, *Morrison v Olson*, 487 U.S. 654 (1988), *Edmond v. United States*, 520 U.S. 651 (1991), *Free Enterprise Fund v. PCAOB*, 537 F.3d 667 (D.C. Cir. 1998)), though the most important senior officials (including cabinet secretaries and agency heads) clearly fall on the 'principal officer' side of the line.
16. Some scholars have advanced plausible constitutional arguments to the effect that the independent commissions are per se unconstitutional insofar as they limit the President's plenary removal power (for example, Miller 1987; Calabresi and Yoo 2008). The Supreme Court, however, has held that Congress may limit the President's removal authority so long as doing so does not substantially interfere with the President's constitutional authority to execute the laws. The key Supreme Court decision for this principle is *Morrison v Olson*, 487 U.S. 654 (1988), and its antecedents are *Myers v United States*, 272 U.S. 52 (1926) and *Humphrey's Executor v United States*, 295 U.S. 602 (1935).
17. Some have criticized the use of the party of the appointing President as a proxy for judicial ideology (Epstein and King 2002). For a lucid discussion of both conceptual and measurement issues regarding empirical research on the impact of judicial ideology on case outcomes, see Fischman and Law (2009).
18. These findings in the administrative law context are consistent with empirical findings regarding judicial behavior more generally: judges are strategic actors who are influenced by their policy views and personal biases, but they are also substantially influenced by legal rules and doctrines (Jacobi 2010; Stephenson 2009).
19. To illustrate these contrasting effects, imagine a court of appeals with six conservative judges and three liberal judges, and assume that the court must decide three cases, in three panels of three judges each. If panels are randomly assigned, then most panels will have a conservative majority (either 2-1 or 3-0), but usually (87.5% of the time) one of the three panels will have a 2-1 or 3-0 liberal majority. If, however, the

- law mandates mixed panels, then all three panels will *always* have a 2-1 conservative majority. If the diversity effect predominates, then the liberal minority expects to gain more from changing some 3-0 conservative panels into 2-1 conservative panels than it expects to lose by sacrificing its one liberal-majority panel. But if the majority effect predominates, then the liberal minority is worse off under mandatory mixed panels, because whatever moderation is induced by ensuring a liberal voice on each panel is less significant to the liberals than the loss of the ability to ensure liberal outcomes just under 30 percent of the time.
20. The assumption that it is significantly more costly for a higher court to reverse a lower court opinion that strikes down an agency action on 'arbitrary and capricious' grounds is questionable, even if one accepts the first premise that drafting an initial opinion striking down agency action as arbitrary and capricious is more costly than striking down an agency action on statutory grounds. Even if an initial opinion striking down an 'arbitrary and capricious' agency action requires substantial research effort, *reversing* such an opinion may not, if all the appeals court has to do is assert that the lower court was not sufficiently deferential to the agency.
 21. 533 U.S. 218 (2001).
 22. However, even this may reflect not forward-looking preferences over doctrine, but rather case-by-case judgments of the reasonableness of the particular agency decision (Smith 2007).
 23. See above Part I.A.2.
 24. The court could also adopt something to the right of the congressional median's ideal point, but this would prompt the gatekeeper to introduce legislation, which in turn would lead to the congressional median's ideal point as the final outcome.
 25. It is also worth noting that the above analysis predicts that Congress always weakly benefits from eliminating judicial deference to agency decisions, yet in the real world Congress has tolerated substantial deference for decades with only occasional rumbles of discontent, which casts doubt on the idea that Congress would always do better with more aggressive judicial review.
 26. 323 U.S. 134 (1944).
 27. One implication of this is that judicial oversight may lead agencies to 'overinvest' in procedural formality, and to 'underinvest' in other activities that do more to enhance agency expertise but that are not as easily observable by the reviewing court (Bueno de Mesquita and Stephenson 2007). The court (and the public) may still be better off than it would be in a world without judicial review, but the court and the agency may both end up worse off than they could be if the court had some way of observing agency expertise more directly.
 28. For example, although *Chevron* itself involved a changed agency interpretation, and the Supreme Court has subsequently emphasized that *Chevron* deference still applies even when the agency has revised its own previous interpretation (in cases like *Rust v Sullivan*, 500 U.S. 173 (1991) and *National Cable & Telecommunications Association v Brand X Internet Services*, 545 U.S. 967 (2005)), the Court has stated on multiple occasions that an inconsistent agency interpretation may be entitled to less deference than a consistent interpretation (for example, in cases like *INS v Cardoza-Fonseca*, 480 U.S. 421 (1987) and *Good Samaritan Hospital v Shalala*, 508 U.S. 402 (1993)). Furthermore, after *Mead*, agency interpretations that do not qualify for *Chevron* deference are governed by the *Skidmore* standard, and *Skidmore* indicates that one factor a reviewing court should consider when deciding how much weight to give to an agency's view of an interpretive question is the consistency of the agency's position with its own earlier pronouncements. That said, the limited empirical evidence on actual practice indicates that reviewing courts do not usually treat agency inconsistency as a reason to reject the agency's interpretation, under either the *Chevron* standard or the *Skidmore* standard (Gossett 1997; Hickman and Krueger 2007).
 29. 549 U.S. 497 (2007).

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