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# Designing Agencies

Jacob Gersen

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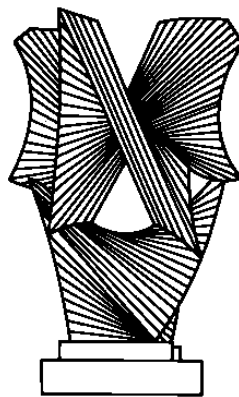
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DESIGNING AGENCIES

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# Research Handbook on Public Choice and Public Law

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## 10 Designing agencies

*Jacob E. Gersen*<sup>1</sup>

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### **Introduction**

The journal that today goes by the name ‘Public Choice’ originally had a less appealing but more accurate title: ‘Journal of Non-Market Decision Making’. The impetus for the new journal was apparently to make some headway on the thorny problem of decision-making by government actors by using the tools of modern economics. Although critics of the public choice movement are quick to point out that government organizations are different than firms because government entities lack the profit motive, that distinction was precisely the reason for the new journal. The cornerstone of public choice, at least as originally conceived, was a commitment to use tools of economic theory to analyze actors and entities that systematically differ from traditional actors in private markets. Although some in the field today prefer the moniker ‘political economy’ or ‘positive political theory’ (PPT), the central goal remains the same: a rigorous and realistic understanding of decision-making in government institutions.

This chapter sketches the public choice theory – or, more sensibly, public choice theories – of the federal bureaucracy. How are administrative agencies designed and what are the implications of these design principles for effective and efficient government? Administrative agencies have long been a staple of representative democracy, analyzed by Weber, Tocqueville, Montesquieu and dozens of other prominent political theorists.<sup>2</sup> In most of these studies, the existence of administrative agencies is the starting point for analysis. Yet, from the perspective of institutional design, there is no necessary reason to assume that a supreme legislature will choose to delegate policymaking authority to a bureaucracy. Even if delegation to some bureaucratic entity results, legislatures might sub-delegate to legislative bureaucracies rather than agencies located within the executive branch.

Once an executive bureaucracy exists, however, the menu of available bureaucratic structures will influence subsequent legislative decisions about whether to delegate authority in a specific instance. Nevertheless, because other chapters in this volume discuss the decision by the legislature to produce policy internally via casework or externally via delegation, this chapter largely sets these questions aside. It would be perfectly sensible to ask when and where legislators will delegate authority to agencies, conditional on agency structure and behavior. This chapter, however, asks how agencies are and should be structured, conditional on an affirmative decision to delegate authority. This is the problem of agency design.

A series of other useful surveys of positive political theory work on the bureaucracy also exist (for example, Wintrobe 1997; Moe 1997). Inevitably, this chapter covers some of the same ground and draws on these treatments throughout, but rather than simply replicating existing surveys, this chapter emphasizes the insights of these literatures through the lens of active debates in modern public law. Much of public choice abstracts away from the actual legal environment. And while a growing body of public choice

work has tackled concrete public law problems, particularly in administrative law, there remains a significant gap between modern theoretical work in public choice and the actual legal doctrines impacting agency design. Instead of attempting a comprehensive survey of all public choice work on agency design, the chapter discusses some of the more common and obvious areas of overlap, tacking back and forth between public choice theory and agency design problems in public law. Rather than insist on a particular application or interpretation, the chapter tries to illustrate the many ways in which these traditions fit together.

Part I discusses relevant theoretical priors about the creation of a bureaucratic structure, focusing on questions like what drives bureaucratic behavior, what is the political problem that agencies are supposed to help solve, and what new problems does reliance on agencies to develop public policy produce? Part II analyzes the conceptual relationship between the design of agency decision-making structures and the extent of control by other political institutions like the legislature. Part II then applies these theoretical insights to one administrative law doctrinal dispute (legislative rules) and one constitutional law doctrine (non-delegation). Part III turns to the problem of vertical bureaucratic structure by focusing on the twin problems of bureaucratic centralization and insulation, particularly in the context of the unitary executive debate. Part IV shifts from vertical bureaucratic structure to horizontal problems by emphasizing public choice and doctrinal disputes about the relationship among administrative agencies.

## **I. The problem of agency design**

From the perspective of institutional design, the optimal bureaucratic structure depends on the ends to be achieved. Unfortunately, as the other chapters in this volume usefully establish, there is no shortage of disagreement about what precisely those ends are. When designing agencies, legislators might seek to maximize political credit, minimize political blame, guard against the bureaucracy implementing policy that diverges from legislative views, reduce the risk that a future legislature will change policy, bring home the most benefits for constituents, serve the general public interest, advantage citizen contributors to campaigns, or protect their own tenure in office. Regardless of what ends legislators prefer, bureaucrats might maximize budgets for their agencies, the scope of their own power, leisure, the implementation of policy closest to their own preferences, stable policy likely to be upheld by courts, or policy advantaging influential private interests. Because these ends might be best facilitated by different design principles (means), at least some discussion of theoretical priors is in order.

### *A. Agency preferences*

The first generation of public choice work on agencies tended to be quite bureaucracy-centered. Niskanen's (1971) study of the bureaucracy argued that bureaucrats maximize some mix of salary, perks, reputation, power, and flexibility. Wilson (1989) echoed these sentiments almost two decades later. And if resources allow bureaucrats to pursue whatever ends they prefer, then bureaucrats might simply and safely be assumed to maximize budgets (Stearns and Zywicki 2009). Note that there is nothing nefarious about this assumption. Bureaucratic zealots endlessly seeking to do the public's bidding will still prefer to have the resources to pursue those ends. At the same time, those seeking to maximize power or control will tend to seek more resources as well. This idea of agency

empire building has received only mixed empirical support (Blais and Dion 1991) and agencies do not seem to seek systematic expansion of regulatory jurisdiction (Levinson 2005; Wilson 1989). A rational agency might prefer to maintain rigid control over existing jurisdiction or avoid entering into regulatory domains that will prove especially controversial or conflict with other agencies that are serving other interest groups or legislators. Moreover, although it is common to assume that once created agencies persist forever, this simply is not true. Agencies are often terminated or restructured (Berry et al. 2007; Lewis 2002); there is a risk to agency over-expansion or under-performance. Alternatively, in many models of bureaucracy, bureaucrats seek to maximize not budgets or power, but leisure. Agents, after all, often shirk (Brehm and Gates 1997, 1993; Miller 1992); perhaps agencies should be analyzed in the same way. Many of these assumptions about agency preferences are defensible, but there is a general consensus in the literature that we simply do not know what the typical bureaucratic objective function looks like (for a useful introductory treatment, see Shepsle and Bonchek 1997).

Although the conceptual and empirical evidence regarding the 'what do agencies maximize' question is mixed, the answer is directly relevant to ongoing disputes in the public law of agency design. To take one example, how should courts evaluate agency judgments about the scope of agencies own jurisdiction? When an agency asserts the legal authority to act in some new policy domain, should courts nod approvingly or look on with skepticism? These questions are encountered most frequently in the ongoing debate about whether *Chevron* deference should be given to agency determinations about the scope of the agency's own jurisdiction.

Notwithstanding several opportunities to do so, the Supreme Court has not offered a definitive answer about whether there is a 'scope of jurisdiction' exception to *Chevron* (Merrill and Hickman 2001; Sunstein 2006, 1990). Yet, the two main fixed points in the case law map neatly onto public choice work about agency ends. One view assumes that agencies are consistently interested in expanding their own authority, and therefore courts should aggressively review agency assertions of new authority.<sup>3</sup> This idea was articulated some years ago by Justice Brennan: one reason deference is owed to agency interpretations is that Congress has 'entrusted' the agency with administering the statute (*Mississippi Power & Light Co. v Mississippi*, 487 U.S. 354, 386 (1988) (Brennan, J., dissenting)). If *Chevron* rests on an implicit delegation of law-interpreting authority, perhaps it is awkward to infer that Congress intended agencies to define the scope of their own authority. A second view, forcefully articulated by Justice Scalia, is that interpretive questions about jurisdiction are no different from other interpretive questions. When an agency interprets a statutory provision it is almost always enhancing or restricting its ability to implement some policy; often it is impossible to distinguish jurisdictional questions from non-jurisdictional ones. (*Mississippi Power & Light Co.*, 487 U.S. at 381–82 (1988) (Scalia, J., concurring)).

Indeed, if there were no risk of political bias or self-interested agency behavior, Congress might prefer to entrust agencies with the task of determining the scope of their own jurisdiction. Even in the face of divergent preferences between agencies and the bureaucracy, there is a tradeoff between utilizing agency expertise and agency self-dealing. Self-interested agencies' interpretations of their own authority could be preferred by legislators, compared to de novo judicial pronouncements or the costs of legislative specification ex ante.

Against the inherited view of empire-building and never-ending agency efforts to expand authority, public choice provides several reasons to question this assumption (Levinson 2005). Indeed, the literature helps clarify that the ‘no deference to jurisdictional judgments’ view rests on unproven background assumptions about the behavior of administrative agencies. Self-interested agencies sometimes overreach, but in the past several years there have been many examples of what might be thought of as ‘agency under-reaching’. The Environmental Protection Agency (EPA) insisted that it did not have jurisdiction to regulate greenhouse gases in *Massachusetts v EPA*, 549 U.S. 497 (2007). And before the Food and Drug Administration (FDA) famously insisted it had jurisdiction to regulate tobacco as a drug, it had for many years asserted precisely the opposite: the relevant statute granted no authority to regulate (*FDA v Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000)). The apparent under-reaching might be explained by agency efforts to maximize autonomy instead of regulatory authority, as some models emphasize. The simple point is that public choice is filled with assumptions and predictions that are not clearly consistent with the dominant account in administrative law of agency expansion (Niskanen 1971; Wilson 1989; Downs 1989). Moreover, if agencies prefer more authority, then it is entirely rational for Congress to take account of this desire when designing statutory schemes. Rather than assuming legislative naiveté and refusing to grant agencies deference on scope of jurisdiction questions, courts could assume statutory schemes are chosen intentionally to take account of existing agency tendencies. Currently, this is clearly a minority view in the law; public choice suggests it should not necessarily be.

### *B. Legislative views*

The modern bureaucracy is mainly a congressional creation. Although many Presidents attempt to reorganize the executive branch so as to enhance political control or emphasize different policy domains (Howell and Lewis 2002), most administrative agencies are creatures of statute. Although it is hard to abstract too far from the existing bureaucratic structure, a fundamental lesson of public choice is that bureaucratic structure is endogenous. One cannot simply ask, conditional on the existing bureaucratic structure and agency performance, how should Congress delegate authority? The critical design question is how Congress should structure the bureaucracy to achieve the optimal mix of efficiency and effectiveness (Huber et al. 2001).

The second generation of public choice or PPT work on agencies turned from the bureaucracy as a starting place to the bureaucracy as a consequence of congressional choice. Rather than assuming Congress lacks effective tools controlling agencies, new work emphasized the range of ways in which Congress could and does control the bureaucracy (for example, Weingast and Moran 1983). Although Weingast and Moran’s account of Federal Trade Commission (FTC) policymaking has not gone unchallenged (Muris 1986), the work helped spawn a generation of scholarship known as the Congressional Dominance school.

Once the terrain shifted from bureaucratic maximization to congressional control, the modeling strategies shifted primarily to spatial models of policy implementation. These models assume members of political institutions have preferences that can be represented in spatial terms and that decision-makers prefer policy to be implemented as close as possible to their ideal point. Because using agencies to make policy requires a



delegation of decision-making authority from Congress to an agency, there is always a risk that the ultimate policy will diverge from congressional preference. When designing agencies, Congress and the President will therefore try to create an incentive scheme that helps ensure that agencies implement policy that converges to legislative and executive preferences.

As a result, principal agent models of various forms have come to dominate the field in recent years. There are two standard problems with giving authority to an agent: adverse selection and moral hazard (Huber and Shipan 2002). Picking the right type of agent and ensuring the agent exerts effort, utilizes expertise, and implements policy according to statutory requirements are the main challenge for agency design and administrative law. Because agencies generally have better information or expertise than legislators, some mechanism is necessary to ensure desirable agency behavior.

There are different ways to carve up this literature, but, as Huber and Shipan (2006) argue, there are two main premises of the modern literature: preference divergence and information asymmetry. That is, agencies (often) have different goals than politicians or different judgments about how best to achieve these goals. Although legislators presumably delegate authority to sympathetic agencies, both career civil servants and political appointees are likely to have views that differ somewhat from the enacting legislative coalition (Nixon 2004). Agencies also have systematically better information than legislators. This informational advantage might refer to better knowledge about the underlying state of the world (regulation needed or not needed), to the technology for implementing policy (price controls versus cap and trade), or to the level of effort required to implement policy.

These working assumptions are not always empirically accurate, but in the rare cases in which they are not, then the core problem of agency administration does not really exist. Agencies will simply do whatever legislators would want them to do. In the absence of any shirking, preference divergence, or information asymmetry, the only problem for agency design would be to manage the costs of producing regulatory policy. With these two working assumptions in the background, much of the literature has matured around four main themes: (1) policy uncertainty, (2) the ally principle, (3) substitution effects, and (4) political uncertainty (Huber and Shipan 2006).

Policy uncertainty refers to the idea that there is uncertainty about the outcome that will occur in the real world if a given policy is adopted. For example, will mandating passive restraint systems in automobiles significantly reduce the number of deaths from automobile accidents? One way of modeling this dynamic is to assume that after the agent takes some policy action, the outcome is a function of the action combined with another random variable. Requiring automobile manufacturers to install automatic seatbelts may result in more seatbelt wear, but if seatbelts can be easily disconnected, the relationship might be meager. If people feel safer when wearing seatbelts, they might drive more aggressively. Sometimes when an agency takes a desirable action, it will nevertheless result in an undesirable outcome, which means that a sanctioning scheme that rewards good outcomes and punishes bad outcomes will not perfectly discipline agency decisions. A common way to think about this question is to assume that both players in the game (the legislature and the agency) know something about the distribution of the random variable, but that the bureaucrat has better information. This setup often yields a result that as policy uncertainty increases for the politician relative to that of the

bureaucrat, the politician will want to delegate more discretion to the agency (Huber and Shipan 2006; Epstein and O'Halloran 1999; Bawn 1995; Calvert et al. 1989).

The ally principle, or policy conflict, refers to the level of preference divergence between the principal and an agent. As the level of policy conflict between the principal and agent increases, all else equal, the principal will want to grant less discretion to the agent. When bureaucrats have preferences that converge with those of legislators, legislators can give greater discretion to agencies in order to take advantage of the greater expertise (information asymmetry), without much risk that bureaucrats will deviate from legislative views. Although agents may still shirk if effort is costly, agents will not want to implement policies that systematically diverge from their own (and by assumption Congress's) policy preferences. Along these lines, Wood and Bohte (2004) show that agencies that are more structurally independent depend heavily on legislative turnover and the extent of conflict between the executive and the legislature.

Agency discretion might be restricted *ex ante* in a number of ways including detailed statutes, budgetary restrictions, procedural requirements, and so on (Epstein and O'Halloran 1999). Alternatively, legislators might rely on *ex post* mechanisms – actions taken after the agency selects a policy. The substitution effect relates to the trade-off between restricting bureaucratic discretion *ex ante* (Spence 1999) and controlling agencies *ex post*. Given powerful and cheap *ex post* mechanisms of control, *ex ante* restrictions will often be sub-optimal. The problem with *ex ante* restrictions on agency discretion is that they restrict bureaucratic choice. Because agencies are assumed to have better information than legislatures, *ex ante* restrictions cannot take advantage of this expertise. By the same token, when *ex post* controls are either ineffective or very costly, using *ex ante* restrictions will generally be preferred by legislators (Bendor and Meirowitz 2004; Huber and McCarty 2004; Huber and Shipan 2002). The substitution idea also has some empirical support. For example, members of Congress who sit on agency oversight committees are less likely to seek discretion-reducing mechanisms up front (Bawn 1997). And in state government, the presence of *ex post* mechanisms like the legislative veto seems to produce less detailed statutes (Huber and Shipan 2002).

Fourth, many early models emphasized preference divergence between politician and bureaucrats, but somewhat artificially held political preferences (Moe 1989). Yet, political preferences within Congress change over time. Politicians in one period face not only a risk of bureaucratic drift – a risk that implemented policy will differ from what the enacting legislative coalition would prefer – but also a risk of legislative drift – the risk that legislators in future periods with different preferences will undo the original agreement and alter policy away from the originally preferred outcome (de Figueiredo 2002; Horn 1995; Shepsle 1992; Moe 1989). All else equal, as the risk of legislative drift increases – that is, as the political uncertainty about the divergence between current period political preferences and future period political preferences increases – politicians may prefer to insulate policy from future political control (Volden 2002a). Indeed, Volden (2002b) finds that as state legislators face greater political uncertainty, the use of insulated boards as a design tool increases as well.

## **II. Agency structure and decisionmaking procedures**

This part discusses the specification of agency procedures and decision-making structures as a way of controlling agency behavior. Section A provides a critical discussion of the

dominant structure and process theory. Section B applies these insights in the context of the Legislative Rule doctrine of administrative law. Section C analyzes the constitutional non-delegation doctrine through the lens of structure and process insights.

### *A. Structure and process theory*

In the late 1970s and early 1980s, the ‘delegation as abdication’ thesis dominated academic debates about the bureaucracy. Critics of the New Deal argued that a headless fourth branch of government had come to run American politics (Lowi 1979). The bureaucracy – not the President, Congress, or the courts – was said to drive important public policy. Congress’s willingness to give authority to administrative agencies was criticized as an abdication of constitutional authority.

The last generation of administrative law scholars, however, was reared on the structure and process thesis articulated by McCubbins et al. (1987, 1989) and refined by subsequent scholars (for example, Macey 1992; Bawn 1995; Epstein and O’Halloran 1994; Balla 1998; Ferejohn 1987). Although the structure and process thesis now has many variants, its simplest form asserts that legislatures can control agency discretion (policy outcomes) by carefully delineating the process by which agency policy is formulated. Together with procedural restrictions, manipulating the structure of agencies serves similar ends. For example, creating a single agency to regulate a single industry might ensure that the views of that industry are especially well represented in agency policy (Macey 1992). The initial jurisdictional design determines which interest groups have access to the agency and thus the extent to which those interests will be able to participate and influence agency decisions. Variants on this idea have flourished. Restrictions on the appointment and removal of personnel (O’Connell 2009; Eisner and Meier 1990); ex ante review of proposed decisions by the Office of Management and Budget (OMB) (Kagan 2001); legislative vetoes, and alterations in funding (Wood 1988, 1990); and jurisdiction (Gersen 2007; Macey 1992) are all potential mechanisms for controlling agency behavior.

Most of these structure and process tools can be understood as responses to the alleged failure of ex post monitoring of agencies by Congress. As noted, a central premise of the administrative state is that agencies have better information and greater expertise than Congress; therefore, Congress ought to delegate to agencies (Aghion and Tirole 1997). Because narrow delegations with extensive substantive restrictions would eliminate agency discretion and expertise in policymaking, it is rare that Congress specifies the actual content or substance of agency decisions. Absent the ability to specify content directly, a natural inclination is to monitor agency decisions after the fact. Yet, if Congress lacks the expertise to formulate policy in some domain, it is not altogether unsurprising that Congress would lack the expertise to discipline the agency for failing to act well in that domain. Agency failure might be the result of good-intentioned mistakes (which Congress would prefer not to punish), or shirking (which Congress would prefer to punish) or the intentional implementation of policy different than the enacting legislature coalition (which Congress would prefer to punish so long as the enacting coalition continues to exist). Ex post monitoring is important, but can only accomplish so much (Aberbach 1990; Dodd and Schott 1979; Ogul 1976).

Given the challenges of ex post monitoring, the structure and process thesis emphasized ex ante restrictions that both mitigate the informational advantage enjoyed by agencies

and stack the deck in favor of certain interests to ensure the durability of the original bargain. Structure and process scholars have emphasized the importance of procedural requirements in organic statutes and the APA (McCubbins et al. 1987). Other alternatives exist as well, including administrative common law (Duffy 1998; Murphy 2006) and the Constitution (Sunstein 1990). To illustrate, the notice-and-comment procedure for generating new rules tends to be long, which allows observers in the legislature and the public to observe agency actions. Regulated parties have the incentive to monitor agency decisions and the legal ability to do so because of the APA. Because agency decisions depend, in part, on information generated by the record, ensuring that interest groups help generate the record constrains ultimate agency decisions (McCubbins et al. 1989). Similar effects might be produced by regulating the timing of agency decisions (Gersen and O'Connell 2008; Gersen and Posner 2007; Macey 1992).

So understood, the original McCubbins, Noll, and Weingast work on deck-stacking is thematically quite close to *ex post* monitoring, but in a somewhat puzzling way. Procedural restrictions affect policy by regulating the access of interest groups to the decision-making process. Procedures stack the deck by ensuring certain parties get a lot (or a little) access to the agency. Congress might simply carefully monitor and oversee agency decisions using regular review like police patrols or rely on interest groups to sound fire alarms when agencies go astray (McCubbins and Schwartz 1984). McCubbins and Schwartz argue that it will often be easier for Congress to ensure interest group access to agency procedures and then rely on those same groups to alert Congress, instead of carefully monitoring the beat on a day-to-day basis because ongoing oversight is costly.

Note that the access of interest groups to the agency is related to the ability of those interest groups to alert the legislature when the agency implements bad policy. On the one hand, routine access ensures that affected interests will know about agency decisions and therefore be able to sound alarms. On the other hand, a premise of the structure and process thesis is that this access will produce policy that reflects the preferences of those interest groups. If the agency proposes policy that converges with the views of affected interests, no fire alarms will be sounded. Such a strategy therefore assumes that private interest preferences converge with legislative preferences. Given preference divergence among legislators, agencies, and interest groups, agencies may collude with interests to implement policy that deviates from legislative preference.

Hill and Brazier (1991) and Arnold (1987) also argue that the thesis fails to identify the conditions under which it would work. They argue that *ex ante* controls operate effectively when the enacting legislative coalition gives clear guidance that favor particular choices, the coalition designs the structure and process requirements with the specific intention of durability, and courts reliably enforce these requirements. Macey (1992) argues that the original work was insufficiently attentive to the distinction between process and structural efforts like limiting the jurisdiction of agencies to one or several industries.

The structure and process tradition has always been accompanied by anecdotal evidence about this agency or that regulatory program, but in the past several years there has been more of a sustained effort to test the structure and process theories systematically (Balla 1998; Eisner and Meier 1990; Wood and Waterman 1993, 1991). Agencies appear to shift output in response to personnel changes (Wood 1990; Wood

and Waterman 1991) and organizational culture (Brehm and Gates 1996). As to the influence of procedural restrictions specifically, Balla (1998) studied the effect of notice-and-comment process on decision-making at the Health Care Financing Administration. The agency was more responsive to physicians expecting reductions in fees than to the intended beneficiaries of a proposed new payment system, which the paper interprets as evidence against the deck-stacking hypothesis.

The structure and process thesis is sometimes taken to mean that Congress, by specifying procedural requirements for agencies is actually limiting discretion and controlling policy choices in a substantive way. But it is one thing to say that structure and process matter for policy outcomes and quite another to say that they matter in a predictable way that ensures control by Congress or interest groups. Notice-and-comment requirements may open the agency decision-making process to the public or regulated interests thereby ensuring agency discussion and perhaps even transparency. However, it is hard to imagine that elaborately detailed procedures dictate anything like clear content, with the possible exception of clear deregulatory mandates. And when the agency mandate is clear, the agency lacks the very sort of discretion that is generally said to underlie the principal-agent problem.

Indeed, procedural restrictions on agencies have many alternative and less nefarious theoretical foundations. Mashaw (1990) argues that procedures facilitate fairness, efficiency, transparency, accountability, and legitimacy. Thus, the structure and process deck-stacking thesis should be understood as one of several possible rationalizations of the procedural restrictions imposed on agencies. To be sure, procedures matter, but it is not clear that procedures perform in the way that McCubbins, Noll, and Weingast originally posited (West 1995; Spence 1997).

Virtually all of the above models assume information asymmetry; that is, they assume that agencies have better information than politicians and analyze how rational politicians will structure the agency relationship as a result. More recent work has tried to model the information dynamic itself. Rather than assuming that agencies have better information, recent work has let the agency decide how much to invest in the development of expertise. Stephenson (2007) analyses how legislators might use decision costs to encourage agencies to invest in information acquisition. Because agencies are most likely to invest in information acquisition when the new information will matter, agencies will ordinarily invest when they are indifferent between two courses of action. Congress therefore might encourage expertise by manipulating the decision cost structure right near the indifference point. These ideas build on Bendor and Meirowitz (2004) who show that with endogenous bureaucratic expertise, politicians are more likely to delegate to a non-ally bureaucrat (given certain levels of policy uncertainty) because bureaucrats with divergent preferences are more likely to pay the costs of expertise. A nice counterpoint is Gailmard (2002), whose model allows legislators to invest in expertise too. Bureaucrats have incentives to invest in expertise as preference conflicts increase, but as a result, expertise is more valuable to legislators in precisely those same settings; therefore politicians may invest in information acquisition, producing less bureaucratic discretion because the information asymmetry is reduced. (See also Callander 2008.)

The structure and process ideas evolved predominantly in the context of the APA's procedural requirements. Yet, some recent work has also emphasized alternative

mechanisms that play on similar themes. Gersen and O’Connell (2008) analyze how the legislature might utilize deadlines or other timing rules to facilitate control over agencies. Many statutes contain deadlines that do not restrict how agencies must act or impose substantive guidelines, but nevertheless restrict agency behavior. Unreasonable deadlines may make it more likely that agencies reach bad decisions that will subsequently be overturned by courts or legislatures (Carpenter et al. 2008). In the credit-claiming game, deadlines might ensure bad agency outcomes that legislators or courts can subsequently fix. Alternatively, deadlines can prompt otherwise recalcitrant agencies to prompt action. If agencies, like many agents, have a preference for shirking, and if delay is an easier way to shirk than producing low-quality regulations, the administrative process will have too much delay. Timing rules are a potential remedy.

### *B. Legislative rules*

Turning to related controversies in public law, the Legislative Rule doctrine of administrative law illustrates some of the vulnerabilities in the structure and process orthodoxy. Recall that the legislature controls agencies in the structure and process framework by imposing procedural requirements that stack the deck in favor of certain interests. Deck-stacking generates information production and delay, both of which facilitate monitoring. In some circumstances, this is an accurate description of statutory requirements imposed on agencies, but not everything an agency does is subject to extensive procedural requirements like notice-and-comment rulemaking. And agencies are generally given discretion about how best to articulate policy (Magill 2004; Hamilton and Schroeder 1994). Agencies usually have discretion about whether to be bound by structure and process constraints.

Sometimes, however, agencies must use formal procedures like notice-and-comment rulemaking. One such setting is when an agency is issuing a legislative rule. If courts view a new policy as imposing substantive legal obligations, the rule is deemed legislative, which in turn implies that the agency must use (or must have used) notice-and-comment rulemaking (or formal rulemaking) to implement the policy. ‘The central inquiry in all nonlegislative rule cases is this: Is the agency document, properly conceived, a legislative rule that is invalid because it did not undergo notice-and-comment procedures, or a proper interpretive rule or general statement of policy exempt from such procedures?’ (Manning 2004, 917).

Unfortunately, [d]istinguishing between a “legislative” rule, to which the notice-and-comment provisions of the Act apply, and an interpretive rule, to which these provisions do not apply, is often very difficult – and often very important to regulated firms, the public, and the agency’. (*Hoctor v U.S. Department of Agriculture*, 82 F.3d 165, 167 (7th Cir. 1996)). As one scholar put it, ‘[t]he subject of nonlegislative rules breeds bewilderment and frustration’ (Anthony 1994, 6).

Some portion of the confusion stems from inconsistent usage and definitions of the relevant terms. Legislative rules are variously contrasted with interpretive rules, policy statements, nonlegislative rules, spurious rules, and procedurally deficient legislative rules. Legislative rules are generally (but not always) treated as equivalent to the term substantive rules, which itself is contrasted not only with the above terms, but also with procedural rules. The APA – the source of notice-and-comment requirements unless otherwise specified in an agency’s organic statute – nowhere speaks of legislative rules.

Rather, when describing the requirements of informal rulemaking in section 553, the APA exempts from those requirements 'interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice'. The APA contrasts 'substantive rules of general applicability adopted as authorized by law' with 'statements of general policy or interpretations of general applicability formulated and adopted by the agency'. Read together with § 553's exemption of interpretative rules and statements of policy from notice-and comment-requirements, the APA could be said to require notice-and-comment rulemaking for substantive rules and not otherwise. But the terms legislative rules and substantive rules tend to be used interchangeably.

If all legislative rules were deemed legally binding and all nonlegislative rules were not, then an agency would face a simple choice: use more formal procedures that will be given legal effect or use less formal procedures that may inform the public and low-level administrators of tentative interpretations, but that must be subsequently defended in enforcement actions. In practice, this view has not quite become the law, nor has it been universally embraced in the commentary. Indeed, courts and commentators have struggled to make sense of the legislative rule doctrine. Although different courts take different approaches, consider two ways that courts might distinguish legislative rules (requiring notice-and-comment rulemaking) from non-legislative rules (not requiring notice-and-comment). One is substantive, asking whether the agency intended to make the policy legally binding or whether the new policy would produce a legally binding effect independent of the agency's intentions. If so, the rule is legislative and is valid only if notice-and-comment proceedings were utilized. A second is procedural, asking simply whether notice-and-comment proceedings were utilized to issue the policy. If so, the rule is legislative and binding; if not, it is not.

For current purposes, the resolution of the doctrinal dispute is much less important than what the dispute signals for the structure and process thesis. First, agencies usually get to choose which procedures to utilize to issue policy (Magill 2004). Agencies themselves decide whether or not to use the relatively formal decision-making processes that constitute the very mechanisms that the structure and process thesis claims control agencies. This is a bit like an employer specifying an elaborate code of conduct to control workers and then giving workers the option of adhering to the code or not on any given day. Second, in instances where an agency does not get to choose, there is widespread confusion about how to define that set. Courts consistently struggle to make sense out of the legislative rule doctrine. Third, the legislative rule doctrine is a judicially created and judicially enforced restraint on agencies' decisions about which procedures to utilize. It is only after agencies have made an initial decision about how to proceed that courts ever ask whether the agency's decision was permissible. To the extent that courts are faithful agents of legislatures, pushing agencies towards the constraining structure and process, the system might work fine. If courts are imperfect agents of the legislature, however, there are good reasons to be skeptical. At a minimum, the legislative rule doctrine emphasizes that structure and process themes have teeth, only to the extent that courts effectively enforce them. Unfortunately, many of the same principal-agent problems that dominate the relationship between the legislature and agencies also dominate the relationship between agencies and courts.

Indeed, if procedures constrain agencies only to the extent that courts enforce those requirements, the judicial choice about whether to use a procedural test or a substantive

test to implement the legislative rule doctrine may matter a great deal. The procedural analysis requires that agencies utilize procedural formality if agencies want to impose binding legal obligations. And this procedural formality would help legislators exercise control over these legislative rules. The substantive legally binding effects test, on the other hand, requires judges to make an *ex post* judgment about whether a given agency policy statement is likely to produce a binding effect on regulated parties, an analysis that might undermine the structure and process dynamics.

If there is judicial error in this inquiry, then the structure and process mechanisms will constrain agencies less than their advocates might suppose. Agencies will sometimes opt out of formal procedural requirements and nevertheless produce significant private party behavioral changes. The deck will not be stacked in the way the structure and process theory emphasizes and therefore agency policy will not be effectively monitored or restricted. Additionally, the effectiveness of structure and process mechanisms depends partially on judicial formulation of an opaque doctrine that few understand and on the particular way in which that doctrine is implemented. The past 50 years have brought little clarity to the underlying doctrine and the courts have used different doctrinal markers to identify legislative rules.

Descriptively then, the effectiveness of the process mechanisms sketched by the structure and process thesis will depend on the degree of agency discretion regarding these procedures, which itself will depend on judicial enforcement that is likely to be uneven because of persistent doctrinal uncertainty. One might view all this as a reason to question the viability of the structure and process thesis. Alternatively, if one wanted to facilitate the use of structure and process tools to control agencies, one might simply favor the procedural implementation of the legislative rule doctrine. If procedures are the main mechanism for controlling agencies, there should be some clarity about precisely when and how often agencies will actually be required to comply.

### *C. Non-delegation*

The non-delegation doctrine is a constitutional law doctrine requiring that when Congress delegates lawmaking authority to an agency, it must be accompanied by an 'intelligible principle' to guide the agency's discretion. If not, advocates assert, Congress has delegated 'legislative power' and the Constitution vests 'all legislative power' in the legislative branch. Although the doctrine's constitutional pedigree is contested (Posner and Vermeule 2002), and the doctrine used extremely rarely to strike down statutes, the doctrine continues to occupy a central place in most standard treatments of administrative law. This section sketches a reading of the non-delegation doctrine against the backdrop of the structure and process thesis.

The non-delegation doctrine has been criticized on two fronts in recent years. One set of scholars bemoans the judiciary's general failure to enforce the constitutional requirement and trumpets the doctrine's importance for ensuring effective government. Because the legislature is the most accountable branch, the non-delegation doctrine is said to ensure accountable policy judgments. When Congress makes the hard policy choice and provides an intelligible principle to guide the exercise of agency discretion, administrative agencies are said to exercise executive authority. They have discretion to choose among policy alternatives, but their discretion is bounded by the principle laid down by Congress in advance. The doctrine, therefore, should ensure that the legislature makes



hard choices and that agency decision-making discretion is not unbounded. The judiciary's failure to enforce the doctrine is lamentable on this view.

The other main line of attack questions the constitutional and pragmatic pedigree of the doctrine itself. The non-delegation principle was not actively discussed by the founders, nor did it appear in Supreme Court cases until the late 1800s (Posner and Vermeule 2002). Public choice work on delegation presents a host of factors that should enter into a normative evaluation of delegated authority. Some models of delegation illustrate the dark underbelly of delegation; others the warm and sunny potential. Delegation can create iron triangles of policymakers insulated from public control, but it can also produce policy based on technocratic expertise and a deliberative process to which affected parties have easy access. This chapter does not aspire to resolve this dispute other than to urge that the best public choice scholarship shows that global claims about the normative status of delegation are nonsensical. Evaluation must be localized and sensitive to the institutional variation discussed above. Nevertheless, some of this literature might be used to craft a weak defense of the norm's under-enforcement.

Although under-enforcement of constitutional norms is sometimes attacked as judicial abdication of constitutional responsibility, in the non-delegation context it might be justified by an assumption that Congress generally has the right incentives to formulate restrictions on agency behavior. When Congress provides few substantive limits on agency discretion, that will generally be the right way to produce the mix of expertise, responsiveness, insulation, congressional control and so on. Otherwise, the legislature would specify a more serious substantive limit.

More importantly, substantive restrictions on agency discretion and procedural restrictions are partial substitutes for one another (compare Stephenson 2006). To control an agency, one might specify elaborate decision-making procedures with deadlines, publicity requirements, and voting rules. Alternatively, one might specify a rigid substantive standard against which any policy choice can be evaluated *ex post*. The substitution effect suggests that as the legislature increases the stringency of one type of restriction, the need to use the other is lessened.

To illustrate, when Congress gives authority to an agency to regulate 'in the public interest', there is not much in the way of a substantive restriction, but the extensive requirements of the organic statute or the APA, regarding how agency decisions must be made and justified, will apply (subject to the above caveats). If structure and process are weakly constraining, the additional requirement of an 'intelligible principle' or substantive restriction on an agency's discretion may be unnecessary. In a world without either the APA or procedural restrictions in organic statutes, the non-delegation doctrine might be both important and actively enforced, but in a world with extensive procedural requirements, perhaps the court's under-enforcement of the norm is sensible, on the public choice view.

For most of the doctrine's history, the courts were strangely blind to this insight. Instead, the courts tended to insist that seemingly vacuous substantive guides in statutes provide sufficient restrictions to constitute intelligible principles. The Supreme Court's most recent pronouncement on the matter suggests things may be changing. In *Whitman v American Trucking Association*, 531 U.S. 457 (2001), the Supreme Court considered a non-delegation challenge to a provision of the Clean Air Act. The Court upheld the challenged provision, holding that the act provided a sufficient 'intelligible principle' to

guide the EPA's exercise of discretion. However, in its exposition of the non-delegation doctrine, the Court wrote:

It is true enough that the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred. While Congress need not provide any direction to the EPA regarding the manner in which it is to define 'country elevators,' which are to be exempt from new-stationary-source regulations governing grain elevators, it must provide substantial guidance on setting air standards that affect the entire national economy. (ibid at 475 (internal citations omitted)).

The doctrinal innovation is an explicit statement that the degree of restraint (control) required by the Constitution varies with the scope of authority exercised by the agency.

One common justification for the non-delegation principle is that it controls the exercise of discretion by administrative agencies. This idea is precisely the tradeoff emphasized in public choice scholarship. Agency control can be accomplished either with substantive standards or with procedural restrictions, but the greater the use of one the lesser the use of the other. Such restraints trade off against one another as ways of controlling agencies. Structure and process, if real constraints on agencies, ought to be taken as partial substitutes for substantive restrictions. And therefore, even in the absence of substantive limitations on agency discretion like intelligible principles, there is some reason to think that agency decisions are meaningfully constrained by other procedural restrictions. This, in turn, suggests the court's under-enforcement of the non-delegation principle is a perfectly sensible approach to regulating agency design, not a constitutional abdication.

### **III. Insulation and centralization**

This Part emphasizes the problem of vertical control and insulation in the bureaucracy. These issues have captured the imagination of public choice scholars for many years (for example, Lewis 2002; Moe 1982; Wood and Waterman 1994) and relate to the unitary executive debate that has dominated constitutional law circles recently (see Calabresi and Yoo 2008). Can and should Congress insulate agencies from presidential control? May Congress delegate authority directly to agency heads or other officials in such a way as to differentiate direct presidential choice of policy? Strong unitarians argue that the Constitution does not or ought not to tolerate insulated independent agencies. Doctrinally, the Supreme Court has approved various degrees of political insulation, and the number of agencies created with characteristics that limit presidential control have increased substantially over time (Lewis 2004).

#### *A. Public choice, insulation, and independence*

In the last half of the twentieth century, Congress created 182 new agencies (Lewis 2003). Forty-six percent were located within the existing cabinet, 13 percent were independent agencies; and 19 percent independent commissions (Lewis 2002). Forty-four percent of these agencies were created with board structures like the EEOC (Lewis 2003, 47). Thirty-one percent of newly-created agencies are staffed by political appointees with fixed terms, including the Atomic Energy Commission and the Federal Election Commission (ibid). And 41 percent of new agencies have qualifications that limit who may head agencies; approximately one-third of these require some partisan balancing (Lewis 2003, 48).

Institutionally, less insulation is associated with strong majorities during unified government and more insulation is associated with strong majorities in Congress in divided government (Lewis 2003, 60).

There is an unfortunate ambiguity in the usage of terms like insulation and independence. Independence is a legal term of art in public law, referring to agencies headed by officials that the President may not remove without cause. Such agencies are, by definition, independent agencies; all other agencies are not. In the economics and political science literature, however, the idea of independence has a more functional meaning, referring to the degree of actual or effective control exerted over the agency by other political institutions or the agency's location inside or outside the cabinet hierarchy.<sup>4</sup> Unlike the dichotomous legal idea of agency independence, the functional public choice notion is more or less continuous and is marked by a range of institutional features. More functional independence is thought to result when an agency is created outside the existing bureaucratic structure rather than within an existing cabinet department, as was the norm in the early years of the bureaucracy (Lewis 2003); location within the bureaucratic structure seems to matter (Wood and Waterman 1994). On this view, the EPA, located outside of other agencies on the existing organizational chart of the bureaucracy is more independent than a sub-agency of the Department of Interior.

Greater functional independence also results when Congress places limitations on the President's ability to appoint or remove agency heads, as the legal definition emphasizes. If the President can remove the head of an agency for the failure to do as the President directs, the agency is not insulated in any serious way. More insulation is also associated with a commission or board structure, especially when combined with partisanship requirements and staggered terms (O'Connell 2009; Ho 2007; Strauss 1984). Statutory requirements for commissions may specify the length of term for members of a commission, require representation of both parties on the board, or limit the President's ability to remove commissioners; in comparison, the administrator of the EPA may be freely removed by the President (O'Connell 2009). The empirical evidence about the impact of these mechanisms, however, is mixed (O'Connell 2009). Hedge and Johnson (2002) find the EEOC and NRC – allegedly more insulated agencies – reduced regulation immediately after the Republicans took control of Congress in 1995. Weingast and Moran (1983) found that the FTC was surprisingly sensitive to changes in the composition of its congressional oversight committee.

The President's historical efforts to use appointments to control the bureaucracy should not be surprising (see Weko 1995; Hammond and Hill 1993; Moe 1985; Nathan 1983). Indeed, many Presidents have sought to reorganize the bureaucracy in the hopes of gaining greater control (Arnold 1998; Graves 1949). Presidents tend to prefer that agencies be located within the cabinet hierarchy and headed by appointees of their choosing (Lewis 2003; Moe 1989). Yet, it is ultimately the President who must sign legislation creating agencies and therefore presumably the signing Presidents approved of at least some agency insulation.

Principal responsibility for agency design generally starts with Congress (Lewis 2003). Why would Congress prefer to insulate the bureaucracy from Presidential control? The conventional public choice wisdom is that Congress manipulates the structure of agencies so as to guard against opportunism by political actors later (Lewis 2004). Insulating characteristics guard against the hijacking of policy by the President or a future-period

legislature (Moe 1989). The risk of legislative drift on the one hand and bureaucratic or presidential drift on the other means that insulation from future period political control may best ensure the durability of current period policy preferences (Epstein and O'Halloran 1999, 1994). Of course, the desire to insulate will depend on many factors, including the degree of preference divergence between Congress and the President, the median legislator of the floor and committees, and the rapidity of turnover within the legislature (Epstein and O'Halloran 1999).

A second justification for insulation has to do with the trade off of technocratic expertise against democratic accountability. Because insulated agencies are less accountable and harder to control – not just for the President but also for Congress – insulation is also a strategy for allowing agencies to utilize expertise without short-term political pressure. This is a standard account of central bank independence both in the United States and abroad. Insulation lessens political pressure on agencies, which may in the long term result in more effective public policy. This same logic motivated much of the early debate about a professional civil service versus a system of patronage in the bureaucracy.

One of the major contributions of public choice in recent years has been to reassert and rigorously analyze the role of the President (for example, Canes-Wrone 2009; 2006). In public law, the dominant trend in executive design scholarship has been a push towards greater centralized control, either as a constitutional matter as in the unitary executive debate or as a regulatory matter as in the Presidential Administration school of agency action (Kagan 2001). In this world of partial control exercised both by the President and the legislature, inherent agency problems may mean less accountability of the bureaucracy overall (Moe and Caldwell 1994; Hammond and Knott 1996). Because agencies must answer to both Congress and the President, the underlying model is really one of multiple principals (Biber 2009). Agencies are assigned tasks for which the President may favor one outcome while Congress may favor another. Seemingly inconsistent policy pronouncements by an agency, may in fact be a rational response to conflicting pressure from other political institutions.

Related, the Constitution's hybrid appointments scheme – the President proposing someone for office and the Senate giving consent – provides for a natural conflict or at least negotiation point between the two branches (McCarty and Razaghian 1999). When the legislature has proposal power over resources given to bureaucrats but has limited control over personnel, except through confirmation of the President's choices (Noken and Sala 2000), outcomes can be inefficient (McCarty 2004). If the President selects an official whose preferences diverge too much from those of the legislature, the legislature responds by reducing resources available to the agency (*ibid*). This appointments dilemma can be solved by centralizing appointment and budgetary authority in the same institution, or minimized by restricting the President's removal power. By restricting the President's ability to control officials after they are put in office, the President can commit to a more moderate agency, which would in turn induce greater resources from Congress. The basic intuition is that if the President exerts a lot of ex post control of policy (and has preferences different than Congress), then the legislature will be hesitant to give the bureaucracy a lot of resources or discretion. The appointments dilemma thus puts another possible positive gloss on insulation of agencies from presidential control.

### B. *The unitary executive*

One of the more active public law disputes about agency design as of late has grown out of the unitary executive debates. Many pages in the law reviews and Supreme Court reporters have been filled with fights about whether the President must be given strong, weak, or complete hierarchical control over all administrative officials. May Congress restrict the President's ability to remove an officer appointed by the President? Does the President have the authority to negate the judgments of any and all administrative officials? On one view, independent agencies – those headed by officials who cannot be removed by the President without good cause – are legally uncontroversial. On the other, they are inconsistent with explicit and implicit design principles of Article II.

Properly understood, the unitary executive debate is about the extent of hierarchical control over executive or administrative officers that the Constitution establishes. The contours of the doctrinal debate have remained largely unchanged for many years, with *Humphrey's Executor v United States*, 295 U.S. 602, 629 (1935), and *Myers v United States*, 272 U.S. 52, 176 (1926), providing the key building blocks for modern doctrine. In *Myers*, the Supreme Court held that the President's right to remove officers whom he appointed with the advice and consent of the Senate cannot be restricted by Congress (272 U.S. at 176). However, in *Humphrey's Executor*, the Court concluded that the President does not have unlimited removal power over individuals who serve in a quasi-legislative or quasi-judicial position (295 U.S. at 629). The doctrinal idea here is that the President must be given almost unilateral control over officers exercising pure or core executive authority, but that Congress may restrict either appointment or removal powers for officers exercising more peripheral authority. More recently, *Morrison v. Olsen*, 487 U.S. 654 (1988), upheld the Independent Counsel Act, concluding that an Independent Prosecutor that could not be removed by the President at will is consistent with any constitutional limits.

Part of the constitutional debate about the unitary executive is historical, asking whether executive authority would have been understood by the founding generation to require strong vertical control over all executive officials (Calabresi and Yoo 2008). Yet, increasingly, the debate has turned from historical analysis to pragmatic questions about how enhancing executive control over administrative agencies would affect executive efficiency and efficacy. That is, does strong vertical control by an executive over the entire bureaucracy support or undermine government performance? What the US Constitution actually requires on this front is an issue for another day, but there is an inevitable class of pragmatic questions about the design and performance of agencies that are a growing part of the unitary executive debate.

The main pragmatic justification for strong vertical control of agencies in the bureaucracy is that unitary structure enhances accountability and responsiveness – that is, reduces slack in government. If the President cannot control the decisions that agencies make, then the public will not be able to reward or sanction the President effectively for agency behavior. Nor will agencies be effectively controlled by the President, and therefore agencies might implement their own preferences or shirk too much, or so the argument goes.

Although this view is superficially appealing, it has recently been questioned by two separate public choice attacks. First, Stephenson (2008) shows that a single unitary executive does not always represent voter preferences better than an independent agency.

Voters (should) care not just about the average policy position of a given President, but also the variance of those policy positions. Insulation of agencies can sometimes reduce the variance of policy decisions – avoiding large shifts from an extreme on the Left to an extreme on the Right. By reducing short-term political control of agencies, independent agencies might produce policy that is more consistently close to median public preferences, notwithstanding the lack of presidential democratic control. On this view, insulation produces biased agency decisions, but a little bit of bias may be preferable to the high variance of strong presidential control.

Second, Berry and Gersen (2008) propose that an executive regime in which agency heads are directly elected by the public rather than indirectly chosen by the President would provide greater government responsiveness than imposing strong vertical control over the bureaucracy. They propose that directly electing the head of the Department of Education would enhance both the selection effects and the incentive effects of elections. If the goal of the unitary executive is accountability to the public, then directly electing agency heads might better facilitate those goals than granting strong vertical control.

Even if true, the direct election of agency heads might generate other design problems, for example sacrificing policy uniformity or coordination. The legal value of uniformity concerns the similar application of one legal principle in many different settings. That is, uniformity is about consistent application of law within a policy dimension. Serving the interests of uniformity is sometimes said to require strong vertical control over agencies because an executive without that authority might not be able to ensure that different subordinates always apply the law in identical or at least similar ways. Yet, in the unitary executive structure, there is ultimately one person who must ensure the uniform implementation of federal law across dozens or even hundreds of different policy domains. If each agency head were directly elected, there would be a single official to ensure the uniform implementation and application of federal law in a single policy domain, like the environment. This is difficult too, but it seems an order of magnitude less difficult than in unitary executive cases.

The unitary executive advocates also emphasize that a single strong executive is better able to coordinate related policies and make sensible trade offs across policies. Public choice, however, counsels that it is a mistake to equate centralization (strong vertical hierarchical control) with coordination. Centralization is neither a necessary nor a sufficient condition for coordination. Strong vertical control over subordinates may facilitate coordination, but there is no shortage of lackadaisical supervisors in bureaucracies, be they public or private. Moreover, the key to effective coordination is accurate information. The centralized official – the chief executive – must depend on information provided by the decentralized agencies whose policy decisions are to be coordinated. If the preferences of agency heads happen to coincide with the ‘coordinated outcome’, then centralization or vertical control is unnecessary. In the more likely scenario that agency preferences diverge from the coordinated outcome, there is a risk that agency heads will reveal biased information to the presidential supervisor to push outcomes toward their own preferences. Therefore, the selected coordinated policy will not tend towards the first-best coordinated outcome that would be based on accurate information from agency heads. Instead, it will be a second-best coordinated outcome based on biased information. This second-best coordinated policy could be better or worse than

the uncoordinated decisions of agencies without vertical control because agencies would then have better incentives to reveal accurate information about the right policy in their respective domains (Alonso et al. 2008).

#### **IV. Redundancy and overlapping authority**

This part shifts from mechanisms of vertical control to horizontal relations among agencies. To reiterate a now familiar theme, a main task for agency design is to take advantage of agency expertise, while ensuring that the agency exerts high levels of effort and implements policy consistent with the views of enacting coalition. As agencies are given greater discretion, there is also an enhanced risk that the agency will act poorly. As discretion is restricted, the risk of agency drift decreases, but so too does the benefit that accrues from agency expertise. Closely related to this problem is the following decision: conditional on an affirmative decision to delegate to some bureaucratic entity, should authority be delegated to a single agency or several different agencies (Chisholm 1989)?

##### *A. Theorizing jurisdiction*

There are two dominant ways of thinking about this question. The first abstracts away from the principal-agent problems that motivate most of the modern field and imagines bureaucratic structure to be a problem of engineering. When the same task is given to two different agencies, there is duplication of administrative efforts, which entails some redundant costs and therefore potential waste or inefficiency. It is rare to hire two companies to collect the same garbage on the same day. On the other hand, redundancy is a standard design principle in both engineering and organizations (O'Connell 2006; Lerner 1986). Modern cars have both seat belts and airbags notwithstanding the fact that neither airbags nor seat belts would be sufficient to protect against injury in many accidents. Likewise modern jumbo jets are designed with multiple engines; in the case of a single engine failure, the other engine is typically sufficient to land safely. There is a cost to the partially duplicative safety measures, but it is not hard to imagine a scenario where the additional cost is worth the reduction in potential accident costs (Heimann 1993; Landau 1991, 1969; Wilson 1989).

Early work on duplication and overlap in the bureaucracy arose primarily in the field of public administration. Bureaucratic redundancy was sometimes criticized as government waste and public administration scholars sought to understand precisely when and where duplication is desirable (Wilson 1989). More duplication will generally be more costly, but also will reduce the probability of organizational failure, particularly if effort and errors are not correlated across agencies or divisions (Bendor 1985).

This approach has much to recommend it, but the tradition of public choice recognized that it is not quite right to model administrative agencies as components of an engine. Because policy decisions are made by individuals or collections of individuals in organizations, individuals react strategically to the extent of redundancy or jurisdictional overlap (Bolton and Dewatripont 2005). Political principals often observe only a single policy output – either success or failure – that is itself jointly produced by the effort of overlapping organizations (Holmstrom 1982). So long as agents in organizations prefer shirking to working, redundancy not only produces efficiency losses from duplication, but it can also result in less effort by the multiple agents (Brehm and Gates 1997), or

organizational failures that result from complex interactions of different decentralized decision-makers (Perrow 1984).

To make headway on the strategic design problem, Ting (2003, 2002) uses a model in which the choice by principals about the extent of redundancy and the effort levels of selected agents are endogenously derived. He concludes, first, that policy choices by agents in a redundant organizational scheme impose both positive and negative externalities on other organizational actors when the policy technology is statistically independent (generally producing less effort by each individual in the redundancy scheme). Second, the extent of negative externality varies as a function of the divergence between the preferences of the principal and the agents. Redundancy produces policies closer to the preferences of the principal when the preferences of agencies are far from the principal's. However, when the agent's preferences are close, free-riding produces worse outcomes in the redundant scheme. Finally, Ting suggests that, in repeated settings, even unfriendly agents can be induced to choose policy close to the principal's with the threat of termination. Such a regime induces the redundant agents to compete against each other, potentially producing policy more consistent with congressional preferences (Niskanen 1971; Miller and Moe 1983; Landau 1991). Although theoretical formulations of this idea vary, the basic intuition is to create a regime in which agencies compete to obtain or to avoid losing resources – usually funding or staff but sometimes even the extent of jurisdiction itself – and in the process compete away the rents that would otherwise accrue. Even more simply, redundancy or overlap can prevent capture of agencies because an interest group must bear greater costs to capture several agencies instead of just one (O'Connell 2006; Berkowitz and Goodman 2000; Laffont and Martimort 1999).

A final view is that jurisdictional overlap or equivalently, redundancy results from political compromise in the legislature (for example, Moe 1989). Interest groups may express preferences not only about the substance of policy, but also the agency to which policy discretion is delegated. As policy is formulated over time, groups in one time period may advocate delegation to one agency while groups in a different time may prefer delegation to another. Over time, one would expect to see precisely the sort of partial jurisdictional overlap that is on display in so many actual policy areas. Before the reorganization of disaster planning and response, literally dozens of agencies administered various parts of the federal disaster response regime.

Redundancy within the bureaucracy creates the opportunity not just for agency shirking, but also for agency conflicts (Gersen 2007; Weaver 1991; Johnson 1987). Particularly when multiple agencies administer different parts of the same statutory scheme, agencies may give conflicting interpretations to statutory terms or meanings, leaving litigants and courts to resolve the conflict. Administrative law doctrine has evolved to help resolve these disputes, but typically requires courts to pick one agency as the primary one in charge. This doctrine may resolve the immediate controversy, but it also undermines Congress's ability to use overlapping schemes to enhance bureaucratic reliability, control adverse selection, and minimize moral hazard (Gersen 2007).

Because the field largely evolved as a way to understand redundancy and duplication, the question of underlapping as opposed to overlapping jurisdictional assignment has received relatively little attention. Frequently, however, it is not clear whether an agency has authority to act in some domain, or alternatively whether one, two, or no



agencies have authority. Ambiguity about whether two agencies have statutory authority is closely related to ambiguity about whether neither does. Many of the same insights about redundancy and team production can be applied to this problem as well.

The implicit logic of the agency-competition model is that Congress can reward or sanction agencies for their failure to perform (compare Macey 1992). Typically, the dimensions to adjust to generate these incentives involve budgets or staff; however, as noted, there is also a tradition in public choice that views agents as seekers of empires or growing jurisdictional authority (Levinson 2005). If jurisdiction can be shrunken or expanded to generate agency incentives, it is also possible that Congress would deliberately create ambiguity about which of several agencies has authority in some area. Agencies might then develop expertise and assert authority in order to expand their own jurisdiction (Gersen 2007). As Stephenson points out in his chapter of this volume, this might create an undesirable race-to-be-first. Nevertheless, the basic point that jurisdictional underlap or ambiguity about jurisdictional boundaries may be used strategically by Congress in order to generate incentives for agency behavior.

### *B. Administrative law of overlap*

As one court recently noted, ‘we live in an age of overlapping and concurring regulatory jurisdiction’. (*FTC v Ken Roberts Co*, 276 F.3d 583, 593 (D.C. Cir. 2001)), quoting *Thompson Medical Co. v FTC*, 791 F.2d 189, 192 (D.C. Cir. 1986). Unfortunately, these statutes have led to persistent confusion in public law circles, confusion that might be clarified using some basic insights from public choice.

Suppose Congress is considering enacting a new statute to address some policy domain. Conceptually, Congress might allocate authority in any number of ways, but consider two dimensions of variation: exclusivity and completeness. With respect to exclusivity, Congress might grant authority to one agency alone or several. With respect to completeness, Congress might delegate authority to act over the entire policy space or only a subset of the space. If two agencies receive concurrent authority to regulate in a field, there is jurisdictional overlap. When neither gets authority, there is jurisdictional underlap. In the administrative law context, these jurisdictional disputes are most likely to rear their heads in the *Chevron* doctrine. When both agencies offer conflicting interpretations of a statute, which agency, if any, should receive deference from the courts?

The conventional wisdom had it that such agencies have neither a greater claim to democratic accountability nor special expertise and therefore deference to interpretation of shared jurisdiction statutes – statutes administered by multiple agencies – was inappropriate. One reason for courts to defer to agencies is that agencies have greater expertise than courts. If redundancy and team production creates shirking and shirking undermines expertise or judgment, perhaps courts should be rightly hesitant to defer agencies in concurrent jurisdiction schemes. This view would be something akin to a public choice justification for the court’s lack of deference to agencies in these settings. By the same token, when several agencies share responsibility for administering a statute, any or all of them might have more expertise than the courts. To say that multiple agencies administer a statute is to say that several agencies regularly utilize the statute and apply it in the context of their specific policy domain. So long as statutory interpretation is partially policy-making, agencies possessing greater familiarity with underlying policy issues should do better than generalist courts.

Setting aside agency expertise, a second reason courts might defer is the better democratic pedigree of agencies relative to courts. Similar public choice ideas apply here as well. To say that agencies are accountable is to say that the slack created by delegation is not too severe. But, the severity of the agency problem will, as the literature suggests, be a function of incentive schemes created by the overlapping jurisdiction statutes. If statutory schemes are carefully crafted, redundancy may generate competition among agencies, causing them to compete away rents they would otherwise enjoy, generating policy closer to congressional preferences (O'Connell, 2006; Macey 1992). On this view, two agencies with concurrent jurisdiction will generally be more democratically responsive than one agency administering a statute alone. By the same token, sometimes shared policy authority makes it more difficult to craft an effective incentive mechanism because responsibility for policy success or failure cannot be easily assigned to the right agency.

Consider agency interpretations of general statutes – statutes that bear on the business of multiple agencies like the Freedom of Information Act (FOIA) or National Environmental Policy Act (NEPA). 'It is universally agreed that no single agency with enforcement power has been charged with administration of these statutes, and hence that *Chevron* does not apply' (Merrill and Hickman 2001, 893). Similarly, no deference is given to agency interpretations of the APA because '[t]he APA is not a statute that the Director is charged with administering' (*Metropolitan Stevedore Co. v Rambo*, 521 U.S. 121, 137 (1997) (internal citations omitted)). Congress should not be taken to have implicitly delegated law-interpreting authority to any agency because no agency administers the statute. Indeed, lower courts generally do not defer to agency views in these settings, largely on expertise grounds.<sup>5</sup> In *Professional Reactor Operator Society v NRC*, 939 F.2d 1047 (D.C. Cir. 1991). The D.C. Circuit refused to give *Chevron* deference to the Nuclear Regulatory Commission's interpretation of the APA because the 'Supreme Court has indicated . . . that reviewing courts do not owe the same deference to an agency's interpretation of statutes that, like the APA, are outside the agency's particular expertise and special charge to administer' (ibid, 1051).

Not giving deference to an agency's view of a statute that it does not administer implies little about whether deference is warranted for agency views of a statute that multiple agencies do administer. Unfortunately, the same basic analysis is often applied. In *Sutton v United Air Lines, Inc.*, 527 U.S. 471 (1999), the Court emphasized that no agency was given authority to issue regulations for the applicable provisions of the Americans with Disabilities Act (ADA), even though multiple agencies clearly had authority to administer other portions of the ADA. The Court chose to treat one portion of the statute as 'administered by no agency' notwithstanding that the statute itself was administered by multiple agencies. Even Justice Breyer, in dissent, would have given deference to the agency only because the term at issue – 'disability' – was used both in the portion of the statute the Equal Employment Opportunity Commission (EEOC) administers and in the more general portion of the statute not solely administered by the EEOC.

In many cases of concurrent jurisdiction, courts go to great length either to conclude that no agency was given law-interpreting authority or to conclude that only one agency was given law-interpreting authority (*California v Kleppe*, 604 F.2d 1187 (9th Cir. 1979)), involved the question of whether the EPA and the Secretary of Interior had concurrent jurisdiction over air quality on off-shore oil rigs. The Ninth Circuit concluded that there was no overlapping jurisdiction because such authority would 'impair or frus-

trate the authority which [the statute] grants to the secretary' (ibid, 1193–4). Similarly, in *Martin v Occupational Safety & Health Review Commission*, 499 U.S. 144 (1991), the Supreme Court was faced with a conflict between the Secretary of Labor and the Health Review Commission, both of whom have responsibility for implementing the Occupational Safety and Health Act (Weaver 1991; Johnson 1987). The Court rejected the Commission's interpretation, holding that the Secretary was the agency entitled to deference, not the Commission. The Supreme Court appeared to rely on a presumption that Congress delegates law-interpreting authority (today the marker of when *Chevron* deference should apply) to a single agency:

Because historical familiarity and policymaking expertise account in the first instance for the presumption that Congress delegates interpretive lawmaking power to the agency rather than to the reviewing court, we presume here that Congress intended to invest interpretive power in the administrative actor in the best position to develop these attributes. (*Martin*, 499 U.S. at 153.)

This language seems to amount to a presumption of exclusive jurisdiction: when Congress delegates power to the executive, it presumably gives law-interpreting authority only to a single agency (Gersen 2007). Because this inquiry is now part of the qualification for *Chevron* deference (Sunstein 2006), the presumption makes truly concurrent law-interpreting authority unlikely on the ground. It also reduces the effectiveness and increases the costs of using redundancy to control agency behavior. Such a presumption might not be tragic on its own, but in effect it imposes an additional cost on Congress for using overlapping jurisdiction schemes and the public choice literature shows that such schemes can sometimes be an effective way to discipline agencies.

Alternatively, the presumption might be grounded in a democracy-forcing idea that is also consistent with some public choice work. Presuming that Congress does not give concurrent jurisdiction might facilitate greater democratic accountability because there is always one and only one agency that has the authority to act with the force of law in a given policy domain. Citizens would know to whom to direct complaints and about whom to complain to Congress. Some models emphasize that principals can more easily hold agents accountable when there is clarity about which agent is responsible for which actions (and outcomes). Perhaps the exclusive jurisdiction presumption tries to support clarity in government structure. If the presumption merely requires that Congress speak clearly when delegating law-interpreting authority to multiple agencies, perhaps enhanced institutional clarity allows citizens to monitor Congress and reward or punish accordingly.

How do such schemes affect the ability and cost of interest groups monitoring agencies? If overlapping jurisdiction statutes produce confusion rather than clarity about which agency is responsible for which action, interest groups will be forced to monitor multiple agencies, which will increase the costs of monitoring and influencing the bureaucracy. Whether this is good or bad normatively, it would seem to be an effect Congress would care about if genuine. Monitoring is not costless and overlapping schemes affect the magnitude and distribution of these costs. The exclusive jurisdiction presumption might also be understood as a way to economize on these costs.

The cases themselves seem to ground the presumption in the idea of agency expertise. As between two agencies, courts should presume that Congress delegated law-interpreting authority to the more expert agency rather than the less expert agency. In

*Gonzales v Oregon*, 546 U.S. 243 (2006), one reason the majority did not defer to the Attorney General's interpretation was that the Attorney General was said to lack the relevant expertise. The majority concluded the Secretary of Health and Human Services was given exclusive interpretive authority regarding health and medical practices. When one agency has greater expertise than another agency, it is not ludicrous to suggest courts should defer to the more expert one. Yet, this is a static and exogenous understanding of expertise that public choice suggests is also wrong. If concurrent jurisdictional schemes facilitate the development of agency expertise by rewarding agencies who develop expertise with increases in authority, then the exclusive jurisdiction presumption undermines the precise goal the presumption is supposed to serve.

A statute that allocates authority to multiple government entities relies on competing agents as a mechanism for managing agency problems. If Congress wants to take advantage of agency knowledge, but is concerned that agencies will shirk and fail to invest heavily enough in the development of expertise, manipulating jurisdiction can help manage that possibility. If one agency invests in developing expertise and the other does not, Congress can give the agency that invested in expertise exclusive authority. With two agents exercising concurrent authority, the idea would be to design an incentive scheme that gets them to compete away the rents from their informational advantage (Bolton and Dewatripont 2005). The presumption of exclusive jurisdiction undermines a potentially important set of mechanisms with which Congress creates desirable incentives for agencies. If Congress utilizes concurrent agency jurisdiction to constrain the behavior of those agencies so as to align outcomes more closely with the preferences of Congress, then the presumption of exclusive jurisdiction is democracy-undermining rather than democracy-reinforcing. The presumption produces an artificial increase in the cost of utilizing certain statutory structures to control agencies. The point is not that Congress would always prefer this regime, but only that Congress would not always prefer the alternative.

Overlapping jurisdiction is not necessarily an ideal structure for delegation. As noted, redundancy in the assignment of bureaucratic tasks can also create duplicative monitoring and enforcement costs (Whitford 2003; McGuire et al. 1979; Miller and Moe 1983). And as Stephenson emphasizes in his chapter of this volume, this proposed alternative might generate at least two problems: the possibility of inconsistent interpretations of a statute and a race to the courthouse steps. Said one court, '[giving deference] would lay the groundwork for a regulatory regime in which either the same statute is interpreted differently by the several agencies or the one agency that happens to reach the courthouse first is allowed to fix the meaning of the text for all' (*Rapaport v U.S. Department of Treasury*, 59 F.3d 212, 216 (D.C. Cir. 1995)).

Even if superficially unseemly, there is nothing inherently troubling about a statutory term having different meanings in different policy spheres. *Chevron* is supposed to open up policy discretion for agencies that have significant expertise in the fields they regulate. When a single agency administers a statute that uses the same term in different parts of the statute, the term may be defined differently so long as there is a sufficient justification for doing so. Similarly, a single agency is free to offer two different interpretations of a statutory term in two different time periods so long as adequate justification is given for the difference, as in the original *Chevron* case. It is no more objectionable when two agencies do so, than when one does so.

The race to the courthouse steps may have been a genuine problem at one point. But the ideas embraced by *National Cable & Telecommunications Association v Brand X Internet Service*, 545 U.S. 967 (2005), suggest otherwise today. In *Brand X*, the Court clarified the relationship between a prior judicial interpretation of a statute and an agency's subsequent and different interpretation of the same term (Bamberger 2002). The *Brand X* majority held that a 'court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion' (545 U.S. at 982). Put differently, when a court rejects an agency position because the statute unambiguously requires the interpretation the court adopted (*Chevron* Step 1), the agency may not later adopt a different position. When a court acknowledges statutory ambiguity but acknowledges the agency's interpretation is reasonable (*Chevron* Step 2), the agency maintains the flexibility to pick new interpretations in the future. In effect, the agency may subsequently pick an interpretation different from the one the prior court thought best. When a court finds that a statute requires a given interpretation, the agency is bound; when a court finds merely that an agency position is permitted, the agency is not.

The question is obviously different when two different agencies offer two different statutory interpretations at different points in time. But *Brand X* clarifies that first in time need not imply first in right with respect to agency statutory interpretation. One agency's interpretation upheld by the courts in one time period need only bind another agency interpretation if it is required by the statute rather than merely permitted. But if the interpretation is required by the statute (Step One), the same result would be required no matter which agency litigated the issue and with or without a deference regime. Congress spoke clearly and mandated the specific interpretation. If Congress did not clearly resolve the interpretive question, both agencies would remain free to adopt alternative interpretations in the future, irrespective of which agency first breached the courthouse door. Like *Chevron* itself, *Brand X* is flexibility-preserving, and deference to agency interpretations of overlapping jurisdiction statutes is perfectly in keeping with that impulse. Although it remains to be seen whether the courts will take account of PPT and public choice work in this context, there seems to be an emergent view in the legal academy that they should (Bressman 2008).

## Conclusion

This chapter sought to discuss some of the vast public choice literature on administrative agencies and apply relevant insights to active doctrinal disputes in the public law of agency design. Given that the public choice of agency design could easily constitute an entire volume by itself, this chapter is inevitably incomplete on many dimensions. Rather than an attempt at comprehensiveness that would be destined for failure, therefore, the chapter sought to at least gesture at the major themes and much of the prominent work. While the chapter sought mainly to take insights from public choice and apply them to the public law of agency design, it is also true that greater attention to real disputes in public law could make for more accurate and rigorous theoretical models. Just as the public law of agency design has much to learn from public choice, public choice theories of agency design might learn a good bit from public law as well.

## Notes

1. Assistant Professor of Law, University of Chicago Law School. This chapter benefited from very useful comments from Dan Farber, Anne Joseph O'Connell, and Matthew Stephenson. Excellent research assistance was provided by Monica Groat.
2. Carpenter (2001) and Skowronek (1982) provide very useful historical treatments.
3. See, for example, *Dole v United Steelworkers*, 494 U.S. 26, 43 (1990) (White, J., dissenting); *Social Security Board v Nieretko*, 327 U.S. 358, 369 (1946) ('An agency may not finally decide the limits of its statutory power.').
4. Lewis, for example, treats the EPA as an independent agency because it is not located within the cabinet hierarchy. It is a stand-alone agency in this sense, even though the head of the EPA is selected by the President without partisan requirements or limitations on the removal power.
5. See, for example, *DuBois v United States Department of Agriculture*, 102 F.3d 1273, 1285 n. 15 (1st Cir. 1996) (declining to apply *Chevron* to NEPA 'because we [the court] are not reviewing an agency's interpretation of the statute that it was directed to enforce'). However, even here it is not clear shared jurisdiction is the appropriate framework for analysis. At least on the court's own terms, the correct parallel is whether the agency is one of several that enforces the statute. A somewhat stronger case is *Reporters Comm'n for Freedom of the Press v United States Dept. of Justice*, 816 F.2d 730, 734 (D.C. Cir. 1987) ('[N]o one executive branch entity is entrusted with [FOIA's] primary interpretation'), rev'd on other grounds, 489 U.S. 749 (1989).

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