

DELEGATION, RISK DIVERSIFICATION, AND THE
PROPERLY POLITICAL PROJECT
OF ADMINISTRATIVE LAW

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Replying to Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 HARV. L. REV. 1035 (2006).

Professor Matthew Stephenson's fascinating article provides (with apologies to Robert Bork) an intellectual feast for those scholars interested and invested in the emerging positive political theory (PPT) of legislative decisionmaking and bureaucratic performance. Perhaps less obviously, there is a feast here as well for anyone intrigued by the perennial puzzles of modern administrative law. My objective in this short response is two-fold: First, I describe, using the same basic analytical tools upon which Professor Stephenson relies for his argument, some of the important ways in which the agency-courts-legislature model is incomplete. Second, I use Professor Stephenson's illuminating model as a springboard to considering some of the potential implications of his analysis for modern administrative law.

I. THEORIES ABOUT INSTITUTIONS

Positive theories of delegation remain a lively topic of discussion for rational choice scholars who study legislatures and bureaucracies.¹ Rational choice theory seeks to explain a major puzzle: why would self-interested legislators cede regulatory power to nonlegislators, thereby making it more difficult to control the direction of regulatory policymaking?

Professor Stephenson's answer is novel and quite plausible: decisions to delegate regulatory authority to either agencies or courts will be influenced by whether legislators prefer consistency across time or

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¹ See, e.g., DAVID EPSTEIN & SHARYN O'HALLORAN, *DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS* (1999); Jonathan Bendor & Adam Meirowitz, *Spatial Models of Delegation*, 98 AM. POL. SCI. REV. 293 (2004).

ideological consistency across issues.² To the extent that they prefer the former, legislators will tend to delegate to courts because courts are more likely to value intertemporal consistency; to the extent that they prefer the latter, they will delegate to agencies because agencies place greater value in ideological consistency than in consistency over time.³ In addition to setting forth a concise and elegant model for explaining this delegation choice, Professor Stephenson explores how his basic insight might be affected by the nature of the policy problem at issue, the incentives of legislators and constituents, the characteristics of judicial and agency statutory interpretation, and the fact of judicial review of agency decisions.⁴

Professor Stephenson rests his analysis on positive assumptions and theories about agencies and courts. Agencies, he explains, are likely to be more ideologically consistent across a range of issues, and this consistency will be reflected in their interpretations of regulatory statutes.⁵ While he frames this assumption as one about agency characteristics, his underlying assumption concerns the relationship among agencies, legislatures, and the executive branch. Because “the President has at his disposal an array of mechanisms to assert centralized ideological control over the bureaucracy,”⁶ agencies are forced to behave in a more ideologically consistent fashion.

More consistent than what? More consistent than *courts*, says Professor Stephenson, for courts are “less subject to centralized control” and more independent from legislative and executive influence.⁷ Courts are thus (more) free (than are agencies) to be ideologically inconsistent. Courts do, however, tend to exhibit temporal consistency due to the norm of *stare decisis*.⁸ Furthermore, judges generally are less partisan and outcome-oriented than are agency officials,⁹ and therefore more likely to follow rules consistently despite their own ideological interests.¹⁰

² See Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 HARV. L. REV. 1035, 1050–53 (2006).

³ See *id.* at 1054.

⁴ See *id.* at 1057–70.

⁵ See *id.* at 1047.

⁶ *Id.* at 1048.

⁷ *Id.*

⁸ See *id.* at 1047.

⁹ *Id.* at 1048.

¹⁰ In an effort to proffer what he admits to be a “first-order generalization” about the institutional characteristics of, and differences between, agencies and courts, see *id.* at 1049, Professor Stephenson rightly elides difficult questions concerning the role of judges, the gravitational pull of doctrine and precedent, and the nature and persistence of judicial discretion. However, he might have enriched his analysis by including a few more sentences unpacking the distinction between judicial consistency due to *stare decisis* and consistency that results from a common judicial

Can these assumptions about the institutional characteristics of agencies and courts be supported by plausible positive political theories of these institutions? The answer is different with respect to agencies than it is with respect to courts.

Regarding courts, positive political theory lacks a compelling explanation of judicial behavior. It lacks as well a coherent spectrum along which competing theories of courts and judging can be aligned with clarity and precision.

Modern political science characterizes the judiciary as a policymaking institution.¹¹ Unfortunately, this characterization says very little of substance. While courts make and implement regulatory policy like other policymaking institutions, their institutional incentives and characteristics cause them to behave quite differently.¹² The challenge is to explain precisely how courts *qua* courts engage in policymaking. And the related normative question is how best to prescribe rules and doctrines to ensure that judicial policymaking is effective.¹³

Courts receive delegated power and engage in policymaking as they exercise this power. At the same time, they regulate agency choices through the doctrinal device of administrative law. The puzzle for legal scholars working in the positive political theory tradition, then, is how to reconcile these two very different functions. Although Professor Stephenson does not address this puzzle directly, his delegation analysis sheds light on the matter. The remainder of this Reply focuses on these normative issues.

II. ADMINISTRATIVE LAW AND THE ROLE OF COURTS

In the traditional model of administrative law, courts closely scrutinize agency decisionmaking to determine that agencies are (1) acting within the scope of the legislature's delegation of authority, and (2) interpreting that delegation reasonably. Courts engaging in so-called "hard look" review perform both of these functions.

Although these two sets of responsibilities supplement one another, there is a difference between them that bears upon the normative implications of Professor Stephenson's analysis. When a court determines whether an agency decision complies with a statute, the court

commitment to obeying clear legislative commands. These are two very different characteristics of judging and can pull in different directions.

¹¹ See, e.g., MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* 1-64 (1981); DONALD L. HOROWITZ, *THE COURTS AND SOCIAL POLICY* 4-9 (1977).

¹² For a valuable recent survey of the modern literature on judicial behavior, see Barry Friedman, *The Politics of Judicial Review*, 84 *TEX. L. REV.* 257, 270-329 (2005).

¹³ I use "effective" here as a rather loose term to encompass the vast range of criteria that scholars would use to measure the qualities of judicial policymaking. A very partial list would include fairness, efficiency, cost-effectiveness, and social acceptability.

acts as a watchdog for legislative will. In the PPT framework, courts can be viewed as agents — agents with a tremendous degree of independence, to be sure — of Congress and legislative will. By contrast, when a court takes a hard look at an agency's reasoning processes to ensure compliance with the standards of reasonableness required by the Administrative Procedure Act and the standards of administrative common law, the court seeks to regulate the behavior of agencies and of Congress. Indeed, the basic premise of hard look review is that the agency's organic statute does not exhaust the field of law in which the agency operates. Thus, we can say that administrative law review in this second sense is trans-statutory — it requires courts to use a set of legal rules and principles that are independent of what the agency's organic statute describes.

Why should courts play this trans-statutory role? The answer is that Congress cannot be trusted to articulate adequate decisionmaking rules for agencies. Furthermore, courts can invoke principles of sound administrative governance that apply in some measure to agency performance.

What reason is there to suppose that courts in fact play this role? Under what positive theory of judicial behavior could we expect courts actively to regulate agencies? This question is, of course, a matter of positive theory, and can be bracketed from the normative project of administrative law. But this attempt at evasion will not do the trick. After all, any prescription of one or another approach to regulating agency performance must take account of the incentives the approach creates for its audience. For example, the application by reviewing courts of the *Chevron-Mead* doctrine¹⁴ will turn on one's view about how successfully a court can separate itself from pressures brought to bear by the executive branch or, at a different stage of the game, by the Supreme Court.

What type of regulation can courts provide to limit agency misbehavior and to facilitate sound administrative governance? In one sense, this is just a reformulation of the key question: what should administrative law look like? However, the question put in this way is especially pertinent in light of the PPT project in that judicial methods of agency control can have dynamic consequences for politics and political strategy. So take the core question in Professor Stephenson's paper: to whom does the legislature wish to delegate? If courts want to retain the power and prerogative to superintend agencies, then they can shape this legislative choice through a variety of devices. Limiting

¹⁴ See *United States v. Mead Corp.*, 533 U.S. 218 (2001); *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

the scope of *Chevron* deference is one such mechanism;¹⁵ applying various canons of statutory construction — for example, the presumption of reviewability of agency decisions¹⁶ — in order to reframe regulatory choices in the first instance is another. The key point is that courts are in a rather good position, given their relative independence from direct political intervention, to construct doctrines that affect the delegation choice.

Legislators also have means of reconfiguring the equilibrium by their own machinations. They can legislate around *Chevron* and other key administrative law doctrines.¹⁷ They can restrict judicial control devices *ex ante* by limiting the availability¹⁸ or timing¹⁹ of judicial review. Congress also can affect significantly the scope of judicial review by specifically crafting agency responsibilities and regulatory missions.²⁰ Legislative power is not unlimited: judicial doctrines that rest on expressly constitutional foundations constrain legislative power.²¹ Moreover, Congress operates in a dynamic political environment that includes the President and the rest of the executive branch.²² The principal point, however, is that the complex conditions in which the courts operate will affect their choices about how best to structure administrative law.

These conditions and circumstances also may affect the choice of *whether* to create and implement a trans-statutory administrative law. Administrative law in the nonstatutory sense described above is not inevitable; courts could decline to impose a “reasonableness” requirement on agency decisionmaking, so long as the agency has obeyed the legislature’s will with regard to judicial regulation.

A final normative question raised by advocates of trans-statutory administrative law is whether the value of aggressive nonstatutory judicial review of agency decisionmaking is worth the costs. There are

¹⁵ See, e.g., Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989); Jonathan T. Molot, *The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference with the Judiciary’s Structural Role*, 53 STAN. L. REV. 1 (2000).

¹⁶ See *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967) (adopting a clear statement rule whereby “judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress”).

¹⁷ See, e.g., Elizabeth Garrett, *Legislating Chevron*, 101 MICH. L. REV. 2637 (2003).

¹⁸ See Administrative Procedure Act, 5 U.S.C. § 701(a)(1) (2000) (acknowledging statutory preclusion of judicial review).

¹⁹ See *id.* § 704.

²⁰ See, e.g., *Heckler v. Chaney*, 470 U.S. 821, 828–35 (1985) (grounding decision to decline review on the basis of congressional choices regarding budgetary and enforcement discretion).

²¹ See, e.g., *Webster v. Doe*, 486 U.S. 592, 603–05 (1988); *Johnson v. Robison*, 415 U.S. 361, 366–74 (1974).

²² See generally Daniel B. Rodriguez, *The Positive Political Dimensions of Regulatory Reform*, 72 WASH. U. L.Q. 1 (1994).

interesting lessons of this question to be drawn from Professor Stephenson's analysis. Consider, as a first example, the case for judicial control over interest group influence.²³ Professor Stephenson's crucial assumption is that agencies will show substantial policymaking diversity. So, Professor Stephenson argues, when influential interest groups have broad, encompassing interests, they will want to diversify their interissue risk and will favor delegations to courts.²⁴ However, courts, according to the traditional view, will want to limit the reach and influence of these interest groups and therefore may strike down agency decisions that bear the imprint of "excessive" interest group influence.²⁵ From the perspective of the interest group, this reintroduces a new form of risk: the risk that courts will hoist the interest group on its own petard. This chance presumably will factor into their diversification-of-risk calculus. Fearing the judicial activism newly enabled by the increased delegation to courts, interest groups may push legislators to shift delegations to agencies. This shift, of course, would merely reinforce the courts' incentives to check excessive interest group influence, this time with a focus on delegation to agencies.

Professor Stephenson takes the logic of his observation about interest group influence to its extreme, raising the clever hypothesis that "as interest groups proliferate . . . we might expect to see delegation to agencies increase, all else equal."²⁶ Yet it is precisely where interest group influence flourishes that administrative law scholars urge courts to give agency decisionmaking a harder look; this harder look may deter legislators from delegating to agencies and create incentives to delegate to courts instead.

Consider another example of Professor Stephenson's analysis: the comparison between independent commissions and executive branch agencies. A common focus in the traditional administrative law literature has been on the doctrinal lines between independent and executive branch agencies.²⁷ Professor Stephenson deploys his risk diversification analysis to hypothesize about the legislative choice between the two agency types. "It may . . . be the case," he says, "that independent commissions, by virtue of their insulation from the President, display less ideological consistency across issues. If this is so, delegation to commissions is appealing when the interest in interissue risk

²³ See generally CHRISTOPHER F. EDLEY, JR., *ADMINISTRATIVE LAW* 147-50 (1990).

²⁴ See Stephenson, *supra* note 2, at 1062.

²⁵ See, e.g., Richard Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1798-1800 (1975) (noting that "perceived inequities or inadequacies in [the administrative process] may generate additional pressures for judicial control, particularly if certain private interests are viewed as having seized the apparatus of government to direct it against others").

²⁶ See Stephenson, *supra* note 2, at 1062.

²⁷ See generally Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984).

diversification is strong and the interest in interissue consistency is weak."²⁸ Legislators, he explains, will calibrate their delegation according to (1) their interest in diversifying their interissue risk, and (2) their beliefs about the degree to which agencies are controlled by the President.²⁹ Yet this second factor is impacted by various doctrines in administrative law. For example, the willingness of courts to permit routine contact between high-level executive officials and agency heads in pending rulemaking matters involving executive agencies exemplifies the impact courts can have on presidential control strategies. At the same time, a president interested in consolidating control over policymaking through agency rulemaking can take steps — as President Nixon did with the creation of the Environmental Protection Agency during his first term — to implement his wishes.

Congress, of course, is even more powerful: legislators can shield certain regulatory initiatives from executive influence by creating a commission-form agency. What is more interesting is the degree to which courts can impact this strategic decisionmaking by crafting doctrines that apply to one type of agency but not another. As long as courts maintain the prerogative to police agencies and legislators, legislators will face a moving target in assessing their delegation options.

The critical issue with this moving target is that administrative law doctrine is purposefully designed to impose discernible costs on legislators and agencies within the regulatory process. PPT identifies the ways in which legislators and agencies strategize to implement their various agendas, and prescriptive administrative law stresses the ways in which courts ought to hamper these strategies to promote sound governance and other key public values. Political strategy will frequently be at war with these objectives; therefore, courts will craft administrative law within a legal and political environment that works to limit their capacity to improve governance.

The dynamics of political and legal strategies introduces another sort of risk into the regulatory environment: judicial interventions could generate political reactions from Congress and the President that would make the administrative process less efficient and fair than it would be in the absence of judicial intervention. Although Professor Stephenson does not address this possibility, it threatens to complicate significantly the delegation choice addressed by his model. This omission illustrates the perils of parsimonious explanations of a vastly complicated political situation.

²⁸ Stephenson, *supra* note 2, at 1067 (parentheticals omitted).

²⁹ *See id.* at 1068.

III. POSITIVE POLITICAL THEORY AND THE ADMINISTRATIVE LAW PROJECT

There is a marriage to be made between the PPT and modern administrative law projects. This marriage requires some adjustments in the expectations, and perhaps even the world view, of legal scholars working in the field of administrative law.

Administrative law scholars emphasize the normative values of judicial intervention to promote fairness and regulatory rationality.³⁰ By contrast, PPT scholars focus on the positive stories, emphasizing the ways in which legislators use process to affect policy choices.³¹ Both views are incomplete. To be sure, fairness and rationality are critical goals, and courts are assigned the function of ensuring at least the constitutional minima of fairness and rationality in governance. However, administrative processes (and I include here delegation as an element of process) are seldom decried by the Constitution. Rather, they are almost always political choices, and rational legislators, even those acting with incomplete information, design these processes with an eye toward policy outcomes.

This iron rule of politics must shape scholars' approach to administrative law doctrine. For some scholars, the connection between process and outcome is business as usual and need not be dismantled by courts using the blunderbluss of administrative law rules; for others, the politics of administrative process explains why government failure is ubiquitous and why delegations — and perhaps government regulation in general — should be rather disfavored; and for the rest, administrative law frequently will be useful as an antidote to strategic action by politicians, though the efficacy of the antidote must constantly be evaluated by weighing the costs and benefits of judicial intervention.

The marriage between the PPT and the administrative law projects, then, is a marriage of convenience borne of an appreciation of both the *realpolitik* of contemporary politics (the contribution of PPT) and the aspirations of scholars concerned with promoting sound governance (the contribution, in diverse forms, of administrative law scholars). While legal scholars and political scientists working within the PPT framework are working on different projects, Professor Stephenson's article illustrates how and why they are all working on essentially the same question: how do we evaluate the benefits and burdens of the modern administrative state in light of our general theory of politics and public choice?

³⁰ See Stewart, *supra* note 25, at 1760–90.

³¹ See, e.g., McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 J.L. ECON. & ORG. 180 (1999).