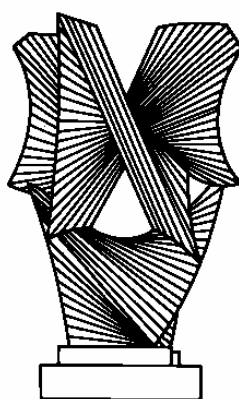


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## The Delegation Lottery

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## THE DELEGATION LOTTERY

*Adrian Vermeule*\*

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 article on legislative allocation of delegated power between agencies and courts is clear, rigorous, and brief, and makes a tangible contribution. The paper models "the decision calculus faced by a rational, risk-averse legislator who must choose between delegation to an agency and delegation to a court."<sup>1</sup> On the assumption that delegation to agencies tends to produce consistency across issues while delegation to courts tends to produce consistency over time, a risk-averse legislator interested in reducing variance along either dimension will face a tradeoff between intertemporal risk diversification and interissue risk diversification. From this basic tradeoff, Stephenson derives comparative statics about the rational, risk-averse legislator's choice of delegates under various conditions.

Stephenson himself describes the article's contribution as "incremental,"<sup>2</sup> and this seems appropriate. In general, there are two (compatible) ways of evaluating positive models: by reference to the realism of the model's assumptions and by reference to the model's ability to generate testable predictions that yield results with real-world significance.<sup>3</sup> I shall suggest that the limitations of Stephenson's legislative-delegation model stem from excessively artificial assumptions and from an inability to yield significant predictions — in either the political or statistical sense.

With respect to assumptions, the tradeoff between realism and mathematical tractability means that necessary simplifications are part and parcel of the enterprise; but a good model is one that carves the subject at its joints, capturing the central dynamic of the motivating examples. In the legislative-delegation model Stephenson offers, however, the crucial simplifications seem not only artificial, but arbitrary

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<sup>1</sup> Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 HARV. L. REV. 1035, 1035 (2006).

<sup>2</sup> *Id.* at 1042.

<sup>3</sup> Compare Milton Friedman, *The Methodology of Positive Economics*, in THE PHILOSOPHY OF ECONOMICS: AN ANTHOLOGY 180 (Daniel M. Hausman ed., 2d ed. 1994), with Daniel M. Hausman, *Why Look Under the Hood?*, in THE PHILOSOPHY OF ECONOMICS, *supra*, at 217.

— as though a political scientist decided to study only the behavior of left-handed senators, deferring right-handed ones to future research. In particular, it is unsatisfying to model legislators as entering a “policy lottery” by enacting ambiguous delegating statutes, but then also to picture them as clearly specifying the identity of the delegate. The same institutional and political factors that tend to produce a first-order policy lottery over statutory substance also tend to produce a second-order “delegation lottery” over the question whether agencies or courts have ultimate interpretive authority.

With respect to predictions, the model implies comparative statics that yield various hypotheses, but it seems unlikely that these hypotheses, even if testable, are significant in a political sense. The factors the model includes are, at best, second-decimal considerations relative to the factors it excludes. Indeed, if the included factors really are second-decimal considerations for rational legislators, the model may not be testable in any event: the included factors might not be sufficiently weighty to leave statistically significant traces that are discernable through the fog of political behavior.

#### I. THE DELEGATION LOTTERY

The most crucial of the model’s assumptions is a sharp distinction between the questions “delegation of what?” and “delegation to whom?” The rational legislator is pictured as voting on a statute with ambiguous first-order provisions and yet as also making a definite second-order choice about whether courts or agencies will have the authority to interpret those provisions.<sup>4</sup> The motivation for this partial simplification is clear. On the one hand, absent first-order ambiguity there would be no interpretive questions in the picture. On the other hand, introducing second-order ambiguity about the identity of the delegate would make the problem substantially less tractable. Yet the resulting simplification is excessively artificial. It does not resonate with the realities of the administrative state, at least in modern times; it carves the subject against the grain.

A danger signal here is the article’s relentless abstraction. Stephenson is interested in generating models rather than empirical testing, but the article contains no real set of examples to motivate the model’s assumptions. The debates over the Interstate Commerce Commission from the late nineteenth century are mentioned, as are a handful of statutes that explicitly assign interpretive responsibility to courts rather than agencies.<sup>5</sup> Yet in the modern administrative state, many statutes are silent or ambiguous not only about various first-order legal

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<sup>4</sup> See Stephenson, *supra* note 1, at 1049–51.

<sup>5</sup> See *id.* at 1039 & n.11.

and regulatory questions, but also about the identity of the delegate who is given interpretive authority. The model's partial simplification invokes the standard political science metaphor that legislators enacting statutes with ambiguous first-order provisions enter a policy lottery. Yet if there is a first-order policy lottery about how statutes will be interpreted, there is also a second-order "delegation lottery" about who will ultimately do the interpreting.

This second-order uncertainty<sup>6</sup> should not be surprising; all of the institutional causes of first-order ambiguity can also cause second-order ambiguity. Failures of legislative foresight or simply poor drafting may cause not only unintended first-order ambiguities, but also second-order ambiguities. The inability of political coalitions to agree may produce legislation that is vague or ambiguous about substance, yet it may also produce legislation that is vague about the identity of the delegate. Both sides of a contested policy question may prove willing to take their chances at the second level as well as the first.

Most fundamentally, the second-order delegation lottery arises from pervasive uncertainty in administrative law about the default rules for allocating interpretive authority. At least for statutes enacted after 1946, it might be tempting to say that the global second-order default rule is delegation to the judiciary, pointing to the Administrative Procedure Act's provision that courts shall decide all relevant questions of law.<sup>7</sup> Yet for decades after the Act's passage, courts issued conflicting decisions about deference to administrative agencies and discussed a variety of relevant factors without a clear theoretical framework, thus creating substantial uncertainty about who the ultimate recipient of interpretive authority would be when statutes were silent or ambiguous.<sup>8</sup> In the period after 1984, the *Chevron* decision<sup>9</sup> established something like a global default rule for second-order allocation of interpretive authority: if statutes were "clear," courts would announce their meaning; if not, interpretations by the administering agencies would prevail so long as they were "reasonable." Yet even this default rule contained a great deal of lurking legal uncertainty because what is "clear" and

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<sup>6</sup> Following Stephenson, I use "uncertainty" in its colloquial sense, not in its technical sense of uncertainty as opposed to risk. On this distinction, see DUNCAN LUCE & HOWARD RAIFFA, *GAMES AND DECISIONS* 277–78 (1957). Stephenson's title suggests a distinction between uncertainty and risk, but the body of the article does not pursue the issue.

<sup>7</sup> See Administrative Procedure Act, 5 U.S.C. §§§ 706 (2000).

<sup>8</sup> For a summary of the conflicting approaches and the uncertainty they created, see *Natural Resources Defense Council, Inc. v. EPA*, 725 F.2d 761, 767 (D.C. Cir. 1984). I bracket here the provocative claim that, for some time after 1946, there was a well-understood historical convention, since vanished from view, that a grant of rulemaking authority to an agency carried with it law-interpreting authority. See Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467 (2002).

<sup>9</sup> *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

what is “reasonable” is hardly self-evident, because *Chevron* deference only applied to agency interpretations that were sufficiently “authoritative,”<sup>10</sup> and because with respect to some ill-defined category of questions — for example, whether statutes create private causes of action — courts might say that the administering agency for *Chevron* purposes just is the judiciary itself.<sup>11</sup>

The uncertainties surrounding the delegation lottery have only increased in recent years, since the all-important *Mead* decision.<sup>12</sup> Since *Mead*, a large and growing body of law and theory — “*Chevron* Step Zero”<sup>13</sup> — addresses the question whether Congress will be taken to have delegated ultimate law-interpreting authority to agencies or courts. The law of *Chevron* Step Zero is notably uncertain, in part because the Court majority that produced *Mead* refuses to bind itself to anything like categorical rules or conventions; the resulting doctrinal mess has produced serious confusion in the lower courts.<sup>14</sup> Justice Breyer, who has some claim to being *Mead*’s intellectual mastermind (although not the decision’s actual author),<sup>15</sup> recently opined that even notice-and-comment rulemaking, the staple diet of the administrative state, is neither necessary nor sufficient for *Chevron* deference.<sup>16</sup> If this view prevails, it would produce a multifactor quicksand that courts and parties will have to traverse even to approach the *Chevron* inquiry — in turn creating pressure to avoid the whole Step Zero inquiry by claiming that statutes are “clear” in one direction or another, even if they really are not.

Perhaps the model might be modified and extended to account for the delegation lottery. Perhaps, without too great an increase in mathematical complexity, the model might incorporate the idea that the identity of the delegate is probabilistic, with legislators facing a cost to increase the probability of ending up with a delegate matching their preferences. Another tradeoff inherent in modeling would then have increased bite, however: the more dimensions in which relevant actors may maneuver and the more types of transaction cost that are relevant to their behavior, the less likely it is that the model will yield specific and testable predictions — especially if the behavioral factors

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<sup>10</sup> See *United States v. Mead Corp.*, 533 U.S. 218, 241 (2001) (Scalia, J., dissenting).

<sup>11</sup> See *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990).

<sup>12</sup> 533 U.S. 218 (2001).

<sup>13</sup> See Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833, 836 (2001); Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. (forthcoming Apr. 2006), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=739129](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=739129).

<sup>14</sup> See Adrian Vermeule, *Introduction: Mead in the Trenches*, 71 GEO. WASH. L. REV. 347 (2003).

<sup>15</sup> See Sunstein, *supra* note 13 (manuscript at 18).

<sup>16</sup> See *Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs.*, 125 S. Ct. 2688, 2712–13 (2005) (Breyer, J., concurring).

one is attempting to predict are of small importance relative to other determinants of behavior. I return to these points shortly. All I mean to indicate here is that there is a tradeoff across the problems of (1) omitted considerations, (2) mathematical tractability, and (3) predictive determinacy. The constraint on revising the model to sidestep problem (1) is that one or both of problems (2) and (3) is bound to become more serious.

Stephenson concludes that “[l]egislators who delegate interpretive power must pick the agent to whom they will delegate, thereby choosing which policy lottery they will enter.”<sup>17</sup> The “must” here seems ungrounded: legislators are never forced to specify a delegate, and much of the time they do not do so, at least not explicitly. To be sure, the delegation lottery is sometimes avoided; criminal statutes are generally interpreted by the courts,<sup>18</sup> and sometimes civil statutes are explicit about the choice of delegate, either by virtue of their text or by virtue of clear interpretive conventions in the background. The point is not that legislators always enter a delegation lottery, but that they often do. For a generation, at least, second-order uncertainty about statutes that do not speak explicitly to the identity of the delegate has been among the central issues of administrative law. A model that puts the issue aside, whether for future research or not, is bound to seem and be artificial, even accounting for the necessary simplifications of positive political theory.

## II. SECOND-DECIMAL CONSIDERATIONS AND TESTABLE PREDICTIONS

Stephenson says, quite rightly, that the literature on delegation emphasizes three types of explanation — expertise, principal-agent relations, and the manipulation of political credit or blame — and that his model will add or expand upon<sup>19</sup> a fourth factor: the relative variance associated with agency decisions and court decisions, both across issues and over time. In this picture, rational legislators have an interest in consistency — in the reduction of variance — for its own sake, over and above their interest in the substance of the relevant rules. Stephenson points out that consistency can be defined either across issues or over time and that there is a tradeoff between the two. Stephenson then suggests (and I will assume for discussion’s sake) that agencies are better at producing interissue consistency, while courts are better at producing intertemporal consistency. To the extent that the preference

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<sup>17</sup> Stephenson, *supra* note 1, at 1070.

<sup>18</sup> See *Crandon v. United States*, 494 U.S. 152, 158 (1990).

<sup>19</sup> Stephenson builds upon models pioneered by Morris Fiorina. See Stephenson, *supra* note 1, at 1045–47.

for interissue consistency predominates, legislators will favor delegation to agencies; to the extent that consistency over time is more important, they will favor delegation to courts. Putting aside additional complexities, this is the nub of the model.

So the interest in variance reduction has marginal importance only to the extent rational legislators care about more than the expected value of the choice of delegate. It exists, in other words, only once we have already bracketed and put aside the other considerations bearing upon the choice of delegate that Stephenson mentions — which delegate is more likely to get policies right (the expertise interest), which delegate is more likely to give legislators the policies they want regardless of what is right (the interest in minimizing agency slack), and which delegation is more likely to generate political credit for legislators. Let us stipulate that some variance-reduction interest exists, over and above these factors. The crucial issue — one that the model cannot tell us anything about — is the importance of this interest. The danger is that we are dealing here with a second-decimal consideration, one whose importance is swamped by the more familiar factors the model leaves aside.

The principal-agent model of the choice of delegate, for example, resonates with what we observe of the administrative state independently and pre-theoretically. It is obvious in many cases that legislators care very much about ensuring a delegate who will produce policies that suit their interests, in the expected-value sense, without particular regard to consistency either across issues or over time. Perhaps in other cases the variance-reduction model gains traction, but it seems plausible that the obvious considerations bracketed by the model are also the most important considerations. The factors emphasized in Stephenson's model are not obvious, but by the same token they are not obviously important. Counterintuitive models often lie about waiting to be discovered just because the most intuitive considerations are, quite often, also the dominant considerations.

Put another way, the model's engine is an explicit assumption that legislators are risk averse.<sup>20</sup> This is quite possible, and doubtless sometimes true; but how often is it true? Here again the lack of concrete motivating examples makes it hard to come to grips with the issue. At one point Stephenson suggests that legislative risk aversion is a product of tight principal-agent control of legislators by corporate or economic interest groups, who themselves desire to reduce variance.<sup>21</sup> Yet the standard assumption in economic modeling is that corporations are risk neutral, because shareholders can diversify risk at lower cost

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<sup>20</sup> *Id.* at 1052.

<sup>21</sup> Or so I read the discussion of "consistency interests." *See id.* at 1058–59.

than corporate managers. Moreover, it is puzzling that legislators who are assumed to be risk averse are also assumed, by another crucial premise of the model, to be willing to enter a policy lottery in the first place; those who enter lotteries are usually risk-preferring.

To be sure, the best way to determine whether variance reduction is a major or minor consideration is to test the model rather than reason a priori or discuss case studies. Yet the real possibility that variance reduction is a second-decimal consideration also undermines the model's ability to generate testable predictions. Here we must disentangle two points. Statistical significance is not the same as political or economic significance. So one point is that the variance-reduction interest might be detected by statistically significant tests, yet turn out not to matter very much. It is also possible, however, that the very lack of political significance will make it hard to detect any variance-reduction interest through the surrounding noise of legislative behavior, just as a very small organism is undetectable with a crude microscope. Stephenson is admirably candid about this. He calls his hypotheses testable "in principle,"<sup>22</sup> but of course nearly all nonanalytic propositions are testable in principle. The hard part is testing in practice, and it is not clear at all that this model yields practically testable predictions.

#### CONCLUSION

The variance-reduction model of legislative delegation is ingenious. It is not clear, however, what it is a model of. Not of the modern administrative state, in which the second-order delegation lottery over the identity of the interpreter is as important as the first-order policy lottery over the interpretation of ambiguous statutory provisions. Not, or probably not, of legislators who are portrayed as beholden to risk-neutral interest groups and who plausibly care most of all about the standard considerations of expertise, slack minimization, and political credit that Stephenson puts aside. Overall, one senses here that the model is dictating the choice of problems, rather than the problem suggesting the choice among models.

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<sup>22</sup> *Id.* at 1062.

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