

# The Consequences of Congress’s Choice of Delegate: Judicial and Agency Interpretations of Title VII

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| INTRODUCTION .....   | 364 |
| I. DELEGATIONS FROM CONGRESS .....   | 368 |
| A. <i>Why Congress Delegates</i> .....   | 368 |
| B. <i>Delegations to Courts</i> .....  | 370 |
| II. CURRENT PERSPECTIVES ON THE CHOICE OF<br>DELEGATE .....  | 372 |
| A. <i>The Ally Principle</i> .....   | 373 |
| B. <i>Blame Shifting</i> .....   | 376 |
| C. <i>Expertise</i> .....  | 377 |
| D. <i>Stability</i> .....  | 378 |
| III. DELEGATION IN ACTION: TITLE VII .....   | 380 |
| A. <i>Title VII in Congress</i> .....  | 382 |
| B. <i>Title VII in the Supreme Court and the<br/>        EEOC—Overall Trends</i> .....                     | 387 |
| IV. WHAT TITLE VII TELLS US ABOUT THE CHOICE OF<br>DELEGATE .....  | 392 |
| A. <i>Role Orientation and Interpretive Methodology</i> .....  | 393 |
| B. <i>External Influences</i> .....  | 404 |
| 1. The President .....   | 404 |
| 2. The Current Congress .....  | 418 |
| 3. Interest Groups .....   | 423 |
| C. <i>The Quality of Administrative and Judicial<br/>        Decisions: Uniformity and Stability</i> ..... | 427 |
| CONCLUSION .....   | 433 |

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## INTRODUCTION

Congress often delegates aspects of its lawmaking authority to other institutions, particularly administrative agencies.<sup>1</sup> Such delegations have been criticized as inconsistent with the constitutional separation of powers, an abdication of Congress's responsibility to make the policy choices that shape citizens' lives.<sup>2</sup> In response to these and other critiques, a rich literature has grown up to defend Congress's practice of delegating to agencies.<sup>3</sup> Much of the literature is grounded in a recognition that delegations are inevitable. Congress lacks the time, resources, foresight, and flexibility to attend to every conceivable detail of regulatory policy.<sup>4</sup> Building from that premise,

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1. See Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 3 (1998) ("In many profound ways, the innumerable activities of everyday life—working, traveling, transacting, recreating, indeed eating, drinking, and breathing—are affected by the work of federal administrative agencies . . .").

2. See, e.g., DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* 3–21 (1993) ("When the lawmakers we elect have others make the law, the people lose."); Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 7, 63–67 (1982) (proposing to "deprive the legislature of its ability to shift responsibility and to create lotteries in private benefits through regulation" by renewing the nondelegation doctrine); Ernest Gellhorn, *Returning to First Principles*, 36 AM. U. L. REV. 345, 352 (1987) (calling for a revival of the nondelegation doctrine and a narrower reading of the statutory authority of agencies and the President); Marci A. Hamilton, *Representation and Delegation: Back to Basics*, 20 CARDOZO L. REV. 807, 819–20 (1999) ("[T]he nondelegation doctrine serves crucial constitutional ends when applied against delegations to the President and against delegations to administrative agencies."); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 333 (2002) (asserting that the Constitution contains a "discernable, textually grounded" nondelegation principle that is "far removed from modern doctrine"); David Schoenbrod, *Delegation and Democracy: A Reply to My Critics*, 20 CARDOZO L. REV. 731, 732 (1999) (responding to critics of his proposition that democracy suffers when Congress evades responsibility by delegating legislative powers to the executive branch).

3. See, e.g., JERRY MASHAW, *GREED, CHAOS, AND GOVERNANCE* 152–56 (1997) (asserting that the delegation of political authority to administrators is "a device for improving the responsiveness of government to the desires of the general electorate"); David Epstein & Sharyn O'Halloran, *The Nondelegation Doctrine and the Separation of Powers: A Political Science Approach*, 20 CARDOZO L. REV. 947, 950–51 (1999) (describing delegation as a self-regulating "balancing of competing inefficiencies," and arguing that "legislators may well delegate authority to executive actors, but they will rarely, if ever, do so without constraints"); Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 100 (1985) ("[D]elegation to experts [is] a form of consensus building that, far from taking decisions out of politics, seeks to give political choice a form in which potential collective agreement can be discovered and its benefits realized."); David B. Spence, *A Public Choice Progressivism, Continued*, 87 CORNELL L. REV. 397, 398 (2002) [hereinafter *Progressivism*] (examining the roots of legal scholars' dissatisfaction with economic models of delegation and detailing the public choice case for delegation); David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97, 101–02 (2000) (using public choice theory to argue that "agency policymaking autonomy is desirable, constitutionally valid, and practically workable").

4. See Spence & Cross, *supra* note 3, at 135–36 (explaining why it is difficult for Congress to legislate with specificity).

commentators have identified various characteristics of agency decisionmaking and institutional structure—agencies' expertise, their ability to revise rules as times change or new information comes to light, and their responsiveness to the political branches—that make agencies tolerable (and perhaps even superior) substitutes for congressional lawmaking.<sup>5</sup>

The literature on delegation tends to view Congress's choice as binary: Congress can either resolve policy issues itself or leave the relevant decisions to an agency. There is a third option, however. Congress can and does delegate policymaking discretion to the federal courts.<sup>6</sup> Yet, despite the attention that has been heaped on delegations generally, we lack an account of the value—if any—of delegations to courts.

What factors might lead Congress to choose courts as its delegates? Put somewhat differently, what are the likely consequences of a congressional decision to vest courts with primary authority to interpret and enforce a statute rather than relying on an agency to perform those tasks? Existing scholarship, focused as it is on the tradeoff between congressional and agency decisionmaking, sheds little light on the choice among potential delegates. The few scholars who have grappled directly with the choice-of-delegate question have constructed formal models that purport to explain certain aspects of the choice from the perspective of the enacting Congress.<sup>7</sup> Those commentators have not sought to understand how the relevant

5. See *infra* notes 11–15 and accompanying text.

6. This Article treats statutes that contain substantial gaps or ambiguities, and give courts primary *interpretive* authority to resolve those uncertainties, as delegations to courts. Some statutes in that category also give courts primary *enforcement* authority, in the sense that litigation in court is the only route to government-imposed sanctions for statutory violations. Judicial enforcement also involves the efforts of private parties, of course. See Margaret H. Lemos, *Special Incentives to Sue* 6 (Cardozo Legal Studies Research Paper No. 271, 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1474923](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1474923) (discussing congressional efforts to encourage private litigation to enforce statutes). It may also involve the efforts of one or more agencies, for example if agencies have been given authority to initiate and conduct litigation to force compliance with statutory requirements or to sanction violators. Such statutes still are properly understood as judicially enforced, as any relief must come from the courts.

7. See Morris P. Fiorina, *Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?*, 39 PUB. CHOICE 33 (1982) [hereinafter Fiorina, *Choice of Regulatory Forms*] (focusing on slack-minimization); Morris P. Fiorina, *Legislator Uncertainty, Legislative Control, and the Delegation of Legislative Power*, 2 J.L. ECON. & ORG. 33 (1986) [hereinafter Fiorina, *Delegation*] (same); Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 HARV. L. REV. 1036 (2006) (focusing on stability). For a rare example of commentary on delegations to courts that does not rely on formal modeling, see Eli Salzberger, *A Positive Analysis of the Doctrine of Separation of Powers, or: Why Do We Have an Independent Judiciary?*, 13 INT'L REV. L. & ECON. 349 (1993).

considerations are reflected in the real actions of courts and agencies. Instead, their theories are based quite explicitly on assumptions about the behavior of judges and administrators. The results are neat, but necessarily limited. At best, they gloss over important nuances in institutional behavior. At worst, they rest on premises that bear little resemblance to reality.

This Article takes a new approach to understanding delegations, exchanging the abstract models of previous work for an investigation into the actual conduct of courts and agencies. Using a real-world example of a delegation to courts—Title VII of the Civil Rights Act of 1964<sup>8</sup>—I show how the court-versus-agency choice has operated in one domain of federal law. My goal is to illuminate what is at stake in the choice between judicial and administrative process. To that end, I studied every Title VII case decided by the Supreme Court through its 2007 Term, and compared the Court’s interpretations with those of the Equal Employment Opportunity Commission (“EEOC”). The analysis confirms the significance of the choice of delegate, revealing substantial divergence between judicial and agency interpretations of the statute from its enactment in 1964 to the present. Indeed, although it has received far less attention, the choice of delegate may be every bit as important as the choice to delegate.<sup>9</sup>

To be very sure, the Title VII example does not hold all the answers to the complex choice-of-delegate question. Nevertheless, examination of the statute and its implementation by the Court and the EEOC brings to light key differences—and also some surprising similarities—between judicial and administrative process. By exposing the consequences of Congress’s decision to delegate primary interpretive and enforcement authority to the courts, the analysis helps clarify the factors that might inform Congress’s choice of delegate in other areas.<sup>10</sup> The aim is not to devise a tidy formula that explains every statute, but to provide a deeper and more nuanced

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8. Civil Rights Act of 1964 §§ 702–718, 42 U.S.C. §§ 2000e-1–2000e-17 (2006).

9. See Fiorina, *Delegation*, *supra* note 7, at 34–35 (describing how, in the debates over early railroad legislation, the choice between delegating enforcement authority to the federal courts or to the Interstate Commerce Commission “was viewed by many as the key to [the] substance” of any regulation); Stephenson, *supra* note 7, at 1036 (“Understanding the conditions under which a rational legislator would prefer delegation to agencies rather than courts, and vice versa, has important implications for both the positive study of legislative behavior and the normative evaluation of legal doctrine . . .”).

10. It bears emphasis that nothing here turns on the view that Congress always makes a purposeful choice of delegate. Through examination of the consequences of a delegation to courts, this Article illuminates some of the factors that might guide Congress’s choice. If Congress does not currently consider such factors, perhaps it should—but that is a question for another day.

understanding of a largely overlooked, yet critically important, question of institutional choice.

The Article proceeds in four parts. Part I explains the prevalence of congressional delegations to both courts and agencies. Part II provides a brief overview of the extant literature on the choice of delegate, revealing its limitations. The problem is largely one of perspective. The prevailing efforts to understand Congress's choice focus on Congress but pay little attention to the delegates themselves. We are told how legislators would choose between stylized and oversimplified models of courts and agencies, but not how real courts and agencies perform in the role of delegate. As a result, we know next to nothing about what actually happens when Congress chooses to delegate to the courts instead of to an agency, or vice versa. Without such knowledge, we have no way of testing the existing theories, and precious little on which to base new ideas about what ought to be driving the legislative choice.

Part III moves beyond the existing literature in search of more promising indications of what is at stake in the choice of delegate. Consistent with the shift in emphasis from modeling to empirical analysis of institutional behavior, the discussion in Part III is largely descriptive. It recounts the arguments that were made in Congress in favor of judicial rather than administrative enforcement of Title VII, and provides a snapshot view of how the Supreme Court and the EEOC have interpreted Title VII over the years.

Part IV then teases out the theoretical implications of the Title VII experience. I argue that several factors contributed to the divergence between judicial and administrative interpretations of Title VII, including differences between judicial and agency interpretive methodology and role orientation. On the other hand—and contrary to conventional assumptions about political influence on the bureaucracy—the Court and the EEOC displayed remarkably similar decisionmaking in one respect: neither seems to have been influenced much by political actors such as the President and the sitting Congress. Finally, although commentators have assumed that judicial decisions are more stable over time than agency rules, in the Title VII context both judicial and agency interpretations have been resistant to change once adopted. Moreover, while judicial interpretations of Title VII have been stable once the Supreme Court speaks, the law has been marked by considerable change, disuniformity, and uncertainty during the (sometimes lengthy) periods before the Court intervenes. Commentators interested in the choice of delegate have assumed away this problem, but it calls into question

their core claim that legislators seeking interpretive consistency over time should prefer delegations to courts.

## I. DELEGATIONS FROM CONGRESS

### A. *Why Congress Delegates*

Scholars have identified several reasons why Congress might opt to delegate its lawmaking authority to an agency rather than hoarding it to itself. First, it would be impossible for Congress to anticipate and resolve every detail of every legislative scheme.<sup>11</sup> Nor, for that matter, would perfectly specified legislation be normatively desirable. Each minute spent on statutory details is a minute not spent on other, potentially more important, matters.<sup>12</sup> And there is little reason to believe that Congress is institutionally well suited to decide many of the questions that arise in statutory application. Whereas agencies have (or can accumulate) special expertise in their areas of authority, legislators tend not to be experts, and the costs of educating Congress would be prohibitive.<sup>13</sup> Agency decisionmaking also is generally more flexible than legislation under the constraints of bicameralism and presentment,<sup>14</sup> enabling agencies to respond more nimbly than Congress could to new information or changed circumstances.<sup>15</sup>

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11. See Thomas W. Merrill, *Rethinking Article I, Section I: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2153–54 (2004) (discussing the common argument that the scale of modern government makes delegations necessary); Richard J. Pierce, Jr., *Political Accountability and Delegated Power: A Response to Professor Lowi*, 36 AM. U. L. REV. 391, 404 (1987) (“Given the nature and level of governmental intervention that Congress now authorizes, it could not possibly make the hundreds, or perhaps thousands, of important policy decisions that agencies make annually.”).

12. See Lisa Schultz Bressman, *Chevron’s Mistake*, 58 DUKE L.J. 549, 568 (2009) (“The costs of writing specific legislation are high, indeed wastefully so.”); Fiorina, *Choice of Regulatory Forms*, *supra* note 7, at 45–46 (“In every session there are hundreds of decisions to be made; time spent on any one competes with opportunities presented by others. Moreover, time spent on decision-making may actually be politically counter-productive as editorialists and interest group spokesmen begin to complain about legislative delays, stalemate, incapacity to govern, and so forth.”).

13. See Spence & Cross, *supra* note 3, at 135–36 (“It would place an enormous burden on Congress to evaluate all the data supplied in a typical notice-and-comment rulemaking process before an agency. The frequency of legislative hearings and the size of legislative staff would have to multiply many times over. Additionally, there is little that could be done to provide Congress with the engineering expertise of OSHA or EPA.”).

14. See GRANT GILMORE, *THE AGES OF AMERICAN LAW* 95 (1977) (“One of the facts of legislative life . . . is that getting a statute enacted in the first place is much easier than getting the statute revised so that it will make sense in light of changed conditions.”).

15. See Epstein & O’Halloran, *supra* note 3, at 954 (noting that “one of the primary reasons for delegating” is “the ability of agencies to respond flexibly to changed conditions”).

Even on issues that Congress is competent to resolve, a variety of factors may make decisions difficult or politically unfeasible.<sup>16</sup> For example, a majority of legislators may agree on a general policy direction but not on the details.<sup>17</sup> By leaving implementation to an agency, the enacting coalition is able to achieve its larger policy goals without fighting—and perhaps splintering—over the issues that divide it.

Indeed, as public choice theorists have argued, delegations can be particularly useful to Congress with respect to divisive issues. Congress often legislates to please certain constituencies. But different groups tend to want different solutions to problems; legislation that responds to the wishes of one group may draw the ire of another.<sup>18</sup> The problem is particularly acute when interest group differences cut across party lines. Legislation in such circumstances threatens high political costs and minimal gains, as any conclusive solution will divide supporters of both parties.<sup>19</sup> One option is to do nothing, but inaction is a risky strategy when constituents are clamoring for a legislative response to some pressing problem.<sup>20</sup> Instead, Congress often opts for legislation that addresses the problem generally but leaves the most contentious details unresolved.<sup>21</sup> By

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16. Cf. Fiorina, *Delegation*, *supra* note 7, at 35 (“[C]omplexity of governmental tasks is not a sufficient explanation for observed patterns of delegation, because legislatures sometimes choose to retain close control over complex policy realms such as taxation . . . while relinquishing close control over many simpler realms.”).

17. See Spence, *Progressivism*, *supra* note 3, at 432 (“Slender majorities of both houses of Congress may favor legislation aimed at a new policy goal, but different subsets of those slender majorities may oppose some of the particulars in each potential approach to achieving that goal.”).

18. See Salzberger, *supra* note 7, at 361 (“The cases in which all potential voters of a legislator unanimously support a certain arrangement are extremely rare. Usually one will find within a potential voters’ group . . . a subgroup that will benefit from a certain legislation and thus supports it, and another subgroup that will lose from this arrangement and will naturally oppose it.”).

19. See Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 *STUD. AM. POL. DEV.* 3, 39 (Spring 1993) (“[M]ainstream politicians do their best to avoid taking firm public stands on those matters that internally divide their coalition.”).

20. See Salzberger, *supra* note 7, at 365 (“One can argue that . . . it is best for the legislator not to regulate at all. But of course this option can impose costs in the same manner that regulating can . . . Thus, not doing anything is not a solution.”).

21. See Neal Devins & Michael Herz, *The Battle That Never Was: Congress, the White House, and Agency Litigation Authority*, 61 *LAW & CONTEMP. PROBS.* 205, 215–16 (1998) (“As public choice theory suggests, lawmakers often devise legislation at the behest of powerful interest groups. . . . [S]ince interest groups often compete with each other (including industry and environmentalists, unions and business), legislation is often ambiguous.”); Joseph A. Grundfest & A.C. Pritchard, *Statutes With Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Administration*, 54 *STAN. L. REV.* 627, 628 (2002) (“Ambiguity serves a legislative purpose. When legislators perceive a need to compromise they can, among

delegating the ultimate decision to an agency, Congress can take credit for doing something while dodging the blame from disappointed constituents.<sup>22</sup>

### *B. Delegations to Courts*

Although delegations to agencies have received the lion's share of attention, Congress also delegates policymaking authority to the federal courts.<sup>23</sup> The most prominent example is the Sherman Act, which broadly prohibits "[e]very contract, combination, or conspiracy in restraint of trade."<sup>24</sup> Recognizing that *all* contracts restrain trade—"[t]o bind, to restrain, is of their very essence"<sup>25</sup>—the Supreme Court was quick to disclaim a "literal approach to [the Act's] language."<sup>26</sup> The Court has explained that the operative question is not whether the conduct at issue restrains trade, but whether it does so unreasonably.<sup>27</sup> Neither the Sherman Act nor its legislative history provides any guidance to courts on that question.<sup>28</sup> Rather than resolving the many difficult puzzles of antitrust itself, Congress opted

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other strategies, 'obscur[e] the particular meaning of a statute, allowing different legislators to read the obscured provisions the way they wish.' " (quoting ABNER J. MIKVA & ERIC LANE, *LEGISLATIVE PROCESS* 779–80 (1997)); Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 595 (2002) (describing the prevalence of "deliberate [statutory] ambiguity," and reporting that congressional staffers "viewed deliberate ambiguity . . . as justified by the felt need for action or the perceived threat that inflexible political positions would thwart passage of any bill at all").

22. See Bressman, *supra* note 12, at 568 ("Congress might aim to write just enough policy to receive a positive response for its action, while deflecting any negative attention for the burdensome details to the agency."); Jonathan R. Macey & Geoffrey P. Miller, *The Canons of Statutory Construction and Judicial Preferences*, 45 VAND. L. REV. 647, 666 (1992) ("As interest groups have become more specialized and as more interest groups have succeeded in gaining voice in the policymaking process, consensus has become more difficult to achieve. Congress has adopted, therefore, the strategy of passing increasingly broad and amorphous enabling legislation that delegates controversial matters to administrative agencies.").

23. See generally Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 428–34 (2008) (describing delegations to courts); cf. Salzberger, *supra* note 7, at 359 (noting that, while "[a]lmost all of [the] literature" on delegations focuses on agencies, delegations also may run to the courts).

24. 15 U.S.C. § 1 (2004).

25. *Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918).

26. *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006) (citing *State Oil Co. v. Kahn*, 522 U.S. 2, 10 (1997)).

27. *Id.*

28. See HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION* 39 (2005) (describing "much of the legislative history" as "useless"); Daniel A. Crane, *Antitrust Antifederalism*, 96 CAL. L. REV. 1, 5 (2008) (describing legislative history as "notoriously tortured and unhelpful").



for “regulation by lawsuit,”<sup>29</sup> relying on the courts to strike the appropriate balance between competition and collusion.<sup>30</sup>

Although the Sherman Act may represent the most open-ended delegation to the courts, it is hardly the only one. Title VII prohibits “discriminat[ion] against any individual with respect to his compensation, terms, conditions, or privilege of employment” because of race, gender, religion, or national origin.<sup>31</sup> Other examples include the Securities Act of 1934, which prohibits the use of “any manipulative or deceptive device or contrivance” in connection with the purchase or sale of securities;<sup>32</sup> the Copyright Act, which exempts “the fair use of a copyrighted work” from the prohibition on copyright infringement;<sup>33</sup> the Individuals with Disabilities Education Act, which calls upon courts to enforce handicapped children’s right to “free appropriate public education”;<sup>34</sup> and Section 301 of the Labor Management Relations Act, which grants federal courts jurisdiction over contract disputes between employers and unions without specifying any substantive law to govern such disputes.<sup>35</sup> Although agencies often play some role in administering such statutes,<sup>36</sup> the ultimate authority for interpreting and enforcing their terms is vested in the federal courts.

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29. IX ALEXANDER BICKEL, *THE JUDICIARY AND RESPONSIBLE GOVERNMENT 1910–21*, at 130 (1984) (describing the method of regulation reflected in the Sherman Act).

30. See *Nat’l Soc’y of Profl Eng’rs v. United States*, 435 U.S. 679, 688 (1978) (“Congress . . . did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations. The legislative history makes it perfectly clear that [Congress] expected the courts to give shape to the statute’s broad mandate by drawing on common-law tradition.”); 1 PHILIP AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* ¶ 103d2 (3d ed. 2006) (stating that the Sherman Act “invest[ed] the federal courts with a jurisdiction to create and develop an ‘antitrust law’ in the manner of the common law courts”); Graber, *supra* note 19, at 50–51 (arguing that the Sherman Act was designed to push off to the courts the difficult questions of antitrust policy).

31. Civil Rights Act of 1964 § 703, 42 U.S.C. § 2000e-2 (2006). Notably, courts also have primary interpretive authority over all federal criminal law, even though the Department of Justice could, theoretically, perform that role. See Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469 (1996) (arguing for delegation of criminal law interpretation to the executive branch).

32. 15 U.S.C. § 78j(b) (2006).

33. 17 U.S.C. § 107 (2006).

34. 20 U.S.C. § 1412 (2006).

35. 29 U.S.C. § 185(a) (2006); see *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 450–51 (1957) (interpreting Section 301 as authorizing courts to develop a substantive law regarding enforcement of collective bargaining agreements).

36. For example, the Sherman Act is subject to public enforcement by the Antitrust Division of the Department of Justice and the Federal Trade Commission. See Lemos, *supra* note 23, at 462. Similarly, as described in detail below, the EEOC has authority to process, investigate, and conciliate claims of discrimination, and can initiate litigation in federal court on behalf of victims. See *infra* notes 89, 94, 106 and accompanying text.

It is not difficult to understand why these and other judicially administered statutes contain vague or ambiguous language, leaving substantial discretion in the hands of federal courts. To the extent that delegations to agencies can be explained by institutional limitations that make fully specified legislation unfeasible, the same is true of judicially administered statutes. There is no reason to believe that Congress magically develops specialized expertise or perfect foresight when crafting legislation that will be interpreted by courts rather than an agency, or that decision costs evaporate outside of the administrative context. And, to the extent that ambiguity stems from Congress's desire to avoid making politically damaging decisions, delegations to courts offer the same advantages as delegations to agencies, allowing Congress to take credit for addressing general problems without confronting the details that divide legislators and their supporters.<sup>37</sup>

The more difficult question is why Congress sometimes chooses to delegate to courts instead of agencies. Despite the voluminous literature on delegations, we know strikingly little about the considerations that guide (or ought to guide) Congress's choice of delegate, and even less about the likely consequences of that decision.<sup>38</sup> Given the significant institutional differences between courts and agencies, however, the choice has important ramifications for the substance and effect of the law.

## II. CURRENT PERSPECTIVES ON THE CHOICE OF DELEGATE

What considerations might lead Congress to choose the federal judiciary as its delegate rather than leaving statutory implementation in the hands of an administrative agency? The few scholars who have

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37. See Paul Frymer, *Distinguishing Formal from Institutional Democracy*, 65 MD. L. REV. 125, 128 (2006) (“[E]lected officials rely on courts in a myriad of ways to conduct public policy and they frequently authorize legal activism to handle matters precisely because they are incapable of doing it themselves.”); Graber, *supra* note 19, at 44 (“Having a judiciary available to make policy decisions is a particular boon to elected officials whenever they are faced with a strong public demand that the government do something about a pressing problem, but there is no public consensus on a solution.”); cf. Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1871–1891*, 96 AM. POL. SCI. REV. 511, 511 (2002) (critiquing the scholarly tendency to “attribute judicial empowerment to factors other than the short-term self-interest of elected power-holders acting on the basis of conventional political agendas”).

38. See Stephenson, *supra* note 7, at 1042 (“Despite the extensive positive literature on legislative delegation and the voluminous normative literature on how courts should allocate interpretive authority between themselves and administrative agencies, there has been relatively little positive analysis of the factors that would influence legislative preferences between delegating to agencies and delegating to courts.”).

addressed the question have identified four factors that, they claim, inform Congress's choice: (1) predictions about which institution is most likely to interpret the statute in accord with the policy preferences of the enacting coalition, (2) a desire to avoid blame for unpopular decisions, (3) the relative expertise of possible delegates, and (4) the relative flexibility of delegated decisionmaking. This Part provides an overview of those four factors and exposes a common shortcoming. The existing literature seeks to explain the choice of delegate in the abstract. Given that approach, commentators have not paid adequate attention to the actual behavior of courts and agencies. As a result, although we have the benefit of the theories described here, we have only the foggiest sense of how they play out in practice.

### A. *The Ally Principle*

Imagine a legislator who must choose between delegating interpretive authority to the courts or to an agency. What sorts of considerations will drive her decision? The most obvious factor is known as “slack minimization,” or the “ally principle”: a legislator will prefer to delegate to the institution that is most likely to interpret the statute in accord with her own policy preferences.<sup>39</sup> Scholars have modeled legislative behavior to demonstrate the theoretical importance of the ally principle to Congress's decision to delegate.<sup>40</sup> They have tended to view Congress's choice as binary—a choice between resolving the issue itself or delegating to an agency. Little effort has been made to explain how legislators interested in slack minimization would choose between different possible delegates. And, while the choice between judicial or agency administration may well be influenced by legislators' beliefs about likely outcomes, it is far from clear how those beliefs are, or ought to be, formed.

One possibility, suggested by Morris Fiorina, is that legislators see courts as “‘faithful’ if uncertain enforcers”—not entirely predictable, but likely to follow the intent of the median enacting legislator.<sup>41</sup> Building from that premise, Fiorina concludes that a

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39. Stephenson, *supra* note 7, at 1043 (describing the “slack-minimization” theory of delegations as follows: “[L]egislators prefer delegation to an agency rather than a court when the ideological distance between legislator and agency is smaller than that between legislator and court.”).

40. See Jonathan Bendor & Adam Meirowitz, *Spatial Models of Delegation*, 98 AM. POL. SCI. REV. 293 (2004) (proposing a delegation model based on risk-aversion); Jonathan Bendor et al., *Theories of Delegation*, 4 ANN. REV. POL. SCI. 235 (2001) (emphasizing the ally principle within current delegation rationales).

41. Fiorina, *Delegation*, *supra* note 7, at 39.

legislator will opt for judicial enforcement when she supports the general gist of proposed legislation, but will prefer agency administration when she believes the legislation does “too much” or “too little,” in the hopes that the agency will adopt policies closer to her own.<sup>42</sup>

Unfortunately, Fiorina does not explain *why* courts should be expected to enforce the preferences of the median legislator. That assumption is open to question. For example, prominent students of statutory interpretation have argued that the courts (especially the Supreme Court) necessarily take into account the political line-up in Congress and the executive branch when deciding statutory cases.<sup>43</sup> The Court’s focus, on that account, is not on the preferences of the median legislator but on those of members of powerful committees, the President, or the legislators whose votes would be needed to override a presidential veto.<sup>44</sup> Moreover, courts are responsive to the views of *current* legislators, not the median enacting legislator. Perhaps most importantly, Fiorina’s theory assumes that the intent of the median legislator is discernible by courts.<sup>45</sup> But the class of cases in which we

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42. Fiorina, *Choice of Regulatory Forms*, *supra* note 7, at 57. William Landes and Richard Posner have advanced a similar theory, albeit not directed at Congress’s choice of delegate. See William Landes & Richard Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875 (1975). Landes and Posner argue that an independent judiciary is valuable to Congress because courts will give effect to the “deal” struck by the enacting Congress, even if later Congresses adopt different policies. *Id.* at 885. Like Fiorina, Landes and Posner assume without explanation that courts will follow the intent of the enacting legislature. As others have pointed out, “[t]his pivotal underlying assumption is supported neither by Landes’ and Posner’s own empirical findings, or by others’, nor by theoretical proof.” Salzberger, *supra* note 7, at 359.

43. See Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027, 2084 (2002) (arguing for a default rule that “dynamically tracks the enactable preferences of the current government”); William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613, 643–44 (1991) (arguing that courts consider the potential reactions and beliefs of Congress and the President before interpreting a statute); William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 549–52 (1992) (discussing the court’s decision-making process in terms of anticipating subsequent congressional action); see also Mario Bergara, Barak Richman & Pablo T. Spiller, *Modeling Supreme Court Strategic Decision Making: The Congressional Constraint*, 28 LEGIS. STUD. Q. 247, 248 (2003) (concluding that “justices do adjust their decisions to presidential and congressional preferences”).

44. See Eskridge, *supra* note 43, at 644–48 (illustrating the influence that congressional committees and presidential preferences can have on the court’s decision-making process).

45. Although Fiorina’s work is not entirely clear on this point, it appears that he is contrasting broadly worded statutes that delegate significant discretion to agencies with more specific statutes administered by courts. See Fiorina, *Choice of Regulatory Forms*, *supra* note 7, at 45 (critiquing one theory of delegations on the ground that “it does not explain why Congress ever passes a specific law rather than hand off the specifics to an agency”); *id.* at 53 (arguing that different consequences follow “[i]f the legislature writes a clear law containing the regulatory decision and charges the courts with enforcement” as opposed to “if the legislature writes a vague law and empowers an agency to interpret and enforce it”). He is not, in other words, comparing

are interested consists of those where legislators are unlikely to have had any intent on the issue in question, or where different legislators in the enacting coalition held conflicting views on the issue.

A more promising approach to the ally principle is to focus on how the decisionmaking of agencies and courts can be influenced or controlled. That factor would seem to weigh strongly in favor of delegating to agencies, as Congress itself can steer agency policymaking through procedural requirements,<sup>46</sup> budget control,<sup>47</sup> oversight hearings,<sup>48</sup> and informal interactions with agency decisionmakers.<sup>49</sup> Matters are complicated, however, by the fact that agencies also are subject to influence by various other actors and institutions—the President,<sup>50</sup> congressional committees, future

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delegations to agencies to delegations to courts, but instead is comparing delegations to agencies to decisionmaking by Congress itself (with later enforcement by the courts). That frame of reference may explain why Fiorina assumes that courts will enforce—or at least try to enforce—the intentions of the median legislator.

46. On the relationship between agency procedures and congressional control, see generally Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1751–52 (2007) (analyzing the “notion that agencies are answerable to Congress” through congressional use of agency procedure); Mathew D. McCubbins et al., *Administrative Procedures As Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 244 (1987) [hereinafter McCubbins et al., *Administrative Procedures*] (discussing the use of agency procedure to mitigate information disadvantages of politicians and to enfranchise important constituents in agency decision-making processes); Mathew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 432–33 (1989) [hereinafter McCubbins et al., *Structure and Process*] (discussing the use of agency procedure as an ex-ante agreement between Congress and the President to limit their ability to influence agencies).

47. See Peter H. Schuck, *Delegation and Democracy: Comments on David Schoenbrod*, 20 CARDOZO L. REV. 775, 785 (1999) (“The appropriations process sharply constrains the authority and discretion of agencies.”).

48. See *id.* (“While the nature, quality, and intensity of legislative oversight vary from committee to committee, it is often used to signal congressional preferences on agency policy issues and to extract policy commitments from agency officials.”).

49. See Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 509–10 (1989) (“Agency action can be publicly castigated on the House or Senate floor, and members of Congress or their staffs can importune agency decision makers.”).

50. The President appoints agency heads (subject to the advice and consent of the Senate), and—with the exception of so-called independent agencies—can remove them from their offices. Modern presidents also have exercised control through executive orders requiring review of proposed agency actions and regulatory plans by the executive Office of Management and Budget and the Office of Information and Regulatory Affairs. See Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1263–67 (2006) (arguing that the requirements of centralized review provide the President with a “powerful tool” to shape agency policy); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2281–82 (2001) (describing how President Clinton used administrative oversight to promote desired policy ends). For a discussion of President Reagan’s Executive Order 12,498, which was adopted until recently by subsequent Presidents, see Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 3 (1995) (describing the order’s “annual regulatory plan”

Congresses, interest groups, and so on—that might hold divergent views. Scholars working in political science and administrative law have paid careful attention to how Congress might seek to harness or neutralize such influences in order to ensure favorable agency decisionmaking.<sup>51</sup> But they have not looked beyond the possibility of different types of delegations to agencies and, therefore, have not seriously considered the alternative of delegations to courts. As a result, the ally principle is of limited utility in explaining Congress's choice of delegate.

### *B. Blame Shifting*

As the previous Part explained, congressional delegations may be motivated by a desire to shift the blame for unpopular initiatives to another institution.<sup>52</sup> Such delegations are less successful, and therefore less attractive, if Congress can be blamed for the choices of its delegates. Recognizing as much, some scholars have suggested that delegations to courts are more valuable than delegations to agencies precisely because agencies are subject to ongoing congressional control and courts are not. Courts' insulation from politics, the argument goes, permits Congress to claim that unpopular judicial decisions were outside its control.<sup>53</sup>

That view is plausible and may help explain Congress's seemingly counterintuitive choice to delegate to the institution over which it exercises less control. The blame-avoidance theory is subject to at least three caveats, however. First, to the extent voters believe that agencies are controlled by the President, delegations to agencies provide Congress with the same opportunity for blame-shifting as do

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requirement). For a discussion of President George W. Bush's Executive Order 13,422, see Peter L. Strauss, *Overseer, or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 701–02 (2007) (describing the order's amendments to the provisions respecting the Regulatory Policy Officers).

51. See sources cited *supra* note 46; see also Kathleen Bawn, *Political Control Versus Expertise: Congressional Choices About Administrative Procedures*, 89 AM. POL. SCI. REV. 62, 62 (1995) (arguing that agency procedures may be used to maximize competence, increase political control, or achieve a combination of the two); David Epstein & Sharyn O'Halloran, *Administrative Procedures, Information and Agency Discretion*, 38 AM. J. POL. SCI. 697, 715 (1994) (investigating the ability of Congress to limit agency discretion "when legislators have both ex post agenda control and access to information").

52. See *supra* notes 18–22 and accompanying text.

53. See Salzberger, *supra* note 7, at 365 (arguing that courts provide the best opportunity for shifting risk, or responsibility, away from Congress); Stephenson, *supra* note 7, at 1044 ("One might imagine, given the greater political insulation of the judiciary, that legislators interested in blame avoidance would prefer delegation to courts because legislators may appear to have even less responsibility for judicial decisions than for agency decisions.").

delegations to courts.<sup>54</sup> Second, even if voters understand that Congress cannot control the decisions of the federal courts, they still may hold Congress accountable for leaving matters in judicial hands.<sup>55</sup> Finally, the blame-avoidance hypothesis, if correct, will always be available—Congress always will be able to distance itself from judicial decisions more easily than from agency decisions. The hypothesis therefore provides little help in explaining why Congress sometimes delegates to agencies and sometimes to courts.

### C. Expertise

Although considerations of expertise tend to weigh in favor of delegations to agencies,<sup>56</sup> some commentators have suggested that judges possess a distinctive form of expertise as a result of their experience with resolving legal disputes. That experience arguably gives judges an advantage when it comes to “issues that recur in a number of subject areas or that involve the relationship of one area to a broader range of law.”<sup>57</sup> More concretely, commentators have suggested that procedural questions lend themselves more readily to judicial than agency expertise.<sup>58</sup> Yet it is hard to see why judges would be more expert than agencies on questions of procedure *generally*. Judges are likely to be trained in a particular type of procedure—

54. Stephenson, *supra* note 7, at 1044. It is worth noting that the President can use the veto power to prevent Congress from tossing a political hot-potato into the executive’s lap.

55. Cf. Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1748 (2002) (critiquing blame-shifting arguments regarding delegations to agencies on the ground that “Congress *is* accountable when it delegates power—it is accountable for its decision to delegate power to the agency”). Of course, legislators should be concerned about this possibility only to the extent that they anticipate that they will still be in office when any unpopular judicial decisions are handed down.

56. See Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833, 861 (2001) (“[F]ederal statutory programs have become so complex that it is beyond the capacity of most federal judges to understand the full ramifications of the narrowly framed interpretational questions that come before them”); Spence & Cross, *supra* note 3, at 140 (“Judges do not possess the technical expertise that justify agency delegations, and courts are the poorest of all government institutions when it comes to independent information-gathering capabilities.”); Stephenson, *supra* note 7, at 1042 (“Perhaps the most common explanation for why a legislator would prefer delegation to an agency rather than a court is that agencies have specialized expertise and better access to relevant information, and they are therefore more likely to ‘get it right’ than courts.”); Cass R. Sunstein, *Beyond Marbury: The Executive’s Power to Say What the Law Is*, 115 YALE L.J. 2580, 2583 (2006) (“For the resolution of ambiguities in statutory law, technical expertise . . . [is] highly relevant, and . . . the executive has significant advantages over courts.”).

57. Bernard W. Bell, *Using Statutory Interpretation to Improve the Legislative Process: Can It Be Done in the Post-Chevron Era?*, 13 J.L. & POL. 105, 144 (1997).

58. *Id.*; Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 377 (1986); Stephenson, *supra* note 7, at 1042–43.

litigation under the adversary system. Such expertise does little to explain delegations to courts, since adversarial litigation is hardly the only way to deal with social problems. Thus, a focus on courts' specialized expertise in matters of procedure simply begs the question why Congress would opt for "regulation by lawsuit"<sup>59</sup> rather than, say, agency rulemaking.

A similar argument about judicial expertise is that judges are more expert than agencies at "matters of law."<sup>60</sup> While that claim has never been fully fleshed out, the notion seems to be that judges develop expertise in understanding and interpreting legal sources. Perhaps, but such skills are of limited utility when Congress has ceded decisionmaking authority to another institution rather than resolving the relevant issues itself. Whether the recipient is a court or an agency, the questions that Congress chooses to delegate away are precisely the sort of questions on which Congress is least likely to have formed an "intent."<sup>61</sup> Interpretive tools designed to ferret out congressional intent are of little help in such circumstances.

What is required instead is policy judgment. Indeed, that insight lies behind the strong preference for agency decisionmaking expressed in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, which requires courts to defer to agencies' reasonable interpretations of the statutes they administer.<sup>62</sup> As *Chevron* recognizes, filling in statutory gaps or construing vague statutory language is not the sort of work that benefits from the "traditional tools of statutory construction."<sup>63</sup> It involves policy creation, not excavation.

#### D. Stability

A common argument in favor of agency decisionmaking is that it is flexible: agency regulations can evolve in response to new

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59. BICKEL, *supra* note 29, at 130.

60. Breyer, *supra* note 58, at 397; Stephenson, *supra* note 7, at 1042-43.

61. See Graber, *supra* note 19, at 39 (noting that, when courts are called upon to make policy decisions, "[j]udicial efforts to identify the policies favored by the dominant national coalition are . . . likely to prove unavailing because mainstream politicians do their best to avoid taking firm public stands on those matters that internally divide their coalition").

62. 467 U.S. 837 (1984). Under *Chevron's* famous two-step rule, the reviewing court first must ask whether Congress clearly expressed an intent on the "precise question at issue." *Id.* at 842. However, if "the statute is silent or ambiguous with respect to the issue," the court must defer to the agency's answer to the question so long as it is reasonable. *Id.* at 843.

63. *Id.* at 843 n.9; see also *id.* at 843 (explaining that an agency's resolution of statutory ambiguity "necessarily requires the formulation of policy and the making of rules to fill any gap left . . . by Congress").



information or changed circumstances in a way that statutes cannot.<sup>64</sup> Judicial decisionmaking tends to be more rigid than agency decisionmaking because of the judicial doctrine of *stare decisis*—which operates with special force in the statutory field<sup>65</sup>—and because courts' political insulation means that their decisions tend to persist across different administrations and congressional configurations rather than shifting with the prevailing political winds.<sup>66</sup>

Although the relative rigidity of judicial decisionmaking typically is viewed as a demerit, Matthew Stephenson has argued persuasively that it may prove to be an advantage in some circumstances. According to Stephenson, one reason why Congress may opt to delegate to courts rather than agencies is that courts' decisions, while ideologically heterogeneous across issues, tend to be stable over time.<sup>67</sup> Therefore, courts may be particularly attractive delegates in areas marked by strong reliance interests, where stability is especially important.<sup>68</sup>

Stephenson acknowledges that his theory is based on “assumptions” about judicial behavior.<sup>69</sup> But there is reason to doubt whether judicial decisionmaking is reliably stable with respect to statutes that delegate broad policymaking discretion to the courts. For example, the Supreme Court has indicated that the traditionally “super strong” *stare decisis* applied to statutory decisions will be relaxed—and perhaps even abandoned—with respect to “common law”

64. See *supra* notes 14–15 and accompanying text.

65. See Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317, 327–28 (2004) (“A majority of the circuits has explicitly adopted the super-strong presumption against overruling statutory precedents, and in those circuits that have never explicitly applied the rule, separate opinions assume that it applies.”); William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1362 (1988) (discussing “super strong” statutory *stare decisis* in the Supreme Court).

66. See Jonathan T. Molot, *Reexamining Marbury in the Administrative State: A Structural and Institutional Defense of Judicial Power Over Statutory Interpretation*, 96 NW. U. L. REV. 1239, 1247 (2001) (“[J]udges . . . are subject to strong institutional norms that render judicial interpretation more stable and consistent over time than interpretation by successive political administrations . . .”).

67. Stephenson, *supra* note 7, at 1047.

68. See *id.* at 1058 (explaining that “[a] legislator’s interest in intertemporal consistency is likely to be stronger”—and hence delegations to courts more attractive—“when compliance with a statute requires large, irreversible investments—for example, when the interpretive question involves the permissible forms of business organization or the selection of an industry-wide technological standard”). The flip side of this view is that agencies will be the more attractive option when ideological consistency across issues is more important than stability over time. *Id.* at 1054. Thus, Congress will opt for judicial process when it wishes to diversify the risk of unfavorable decisions across different issues, and will opt for administrative process when it wishes to diversify the risk of unfavorable decisions over time.

69. *Id.* at 1049.

statutes like the Sherman Act.<sup>70</sup> Agency rulemaking also might be more stable than Stephenson assumes, because agencies hold onto the “mission” specified by the enacting Congress,<sup>71</sup> because certain types of agencies might be resistant to short-term political changes,<sup>72</sup> or because of ossification of the rulemaking process.<sup>73</sup> Thus, while Stephenson may be correct that judicial decisionmaking *overall* is more stable than agency decisionmaking, significant variation likely exists within both categories. Absent some understanding of the factors that contribute to the consistency of judicial and agency decisionmaking, our understanding of the role that stability might play in congressional delegations is necessarily incomplete.

In sum, while existing theories on the choice of delegate offer some insight into why Congress sometimes opts for judicial rather than administrative process, they do not point the way to any clear answers. In some respects that finding is neither surprising nor disappointing. The choice between courts and agencies plainly cannot be reduced to a simple algorithm. Context matters, and considerations that are critical in one instance may recede in the next. But the problem runs deeper than a failure to provide a crystal ball. We are told what to look for—ideological accord with the enacting Congress, for example—but not how to find it. And, to the extent clues can be pulled from the extant literature, the results are question-begging at best.

### III. DELEGATION IN ACTION: TITLE VII

This Article takes a new approach to the choice-of-delegate analysis. Rather than hypothesizing how rational legislators might negotiate the choice, I examine a real-world delegation—Title VII—in an effort to show what courts actually have done in the role of

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70. See, e.g., *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (“[T]he general presumption that legislative changes should be left to Congress has less force with respect to the Sherman Act . . . .”); Eskridge, *supra* note 65, at 1376–81.

71. See Spence & Cross, *supra* note 3, at 115 (noting that “the statutory mission locks in agency values over time,” even as the values of the public or other political actors evolve).

72. For example, so-called independent agencies, over which the President enjoys only limited removal power, may be less likely than executive agencies to adapt their policies as presidential administrations change. See Stephenson, *supra* note 7, at 1067 (acknowledging that the assumptions of his model might be less persuasive as applied to independent agencies).

73. See Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Analysis of Chevron*, 73 U. CHI. L. REV. 823, 868–69 (2006) (“[A]dministrative law already ensures a high degree, and perhaps an excessively high degree, of stability. It is both time consuming and difficult to make a regulation; often the process takes two years or more. To say the least, new presidents cannot immediately change agency policy as they see fit.”).

delegate, and how their decisions compare to those of the relevant agency. The analysis in this and the following Part picks up where the existing literature ends, exposing the consequences of the choice between judicial and administrative process in one area of federal law.

Of course, one must hesitate before drawing general conclusions based on a single statute, and I do not suggest that my findings on Title VII necessarily will hold true for other areas of federal law. The issues presented by Title VII are politically contentious and not terribly technical, two factors that may affect the behavior of the relevant institutions. Moreover, there may be systematic differences between the types of agencies that Congress vests with primary interpretive and enforcement authority, and those like the EEOC, which are relegated to a secondary role. And courts and agencies might act differently depending on whether they have the lead role in implementing a given statute. For example, an agency that lacks direct enforcement authority might adopt a capacious interpretation of a statute for expressive or strategic reasons, but would hesitate to go so far if its interpretations had immediate legal force.

These problems are significant, but they are largely unavoidable. At least where interpretive authority is concerned, Congress must choose between giving the courts or an agency the last word on statutory meaning; it cannot give the same job to both candidates.<sup>74</sup> Accordingly, a study like this cannot escape the fact that one of the institutions in question is the recipient of a congressional delegation and the other is not. Similarly, constraints of time and space make it difficult to examine several different statutory contexts at once. Thus, while this Article may be the first word on the consequences of a choice of delegate, it should not be the last. There is much more work to be done before we can fully understand what is at stake in the choice between judicial and administrative process.<sup>75</sup>

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74. That is not to suggest that the choice between delegations to courts and delegations to agencies must be all-or-nothing; Congress can and sometimes does divide power between courts and agencies, for example by giving an agency primary interpretive authority but providing for enforcement through the courts. Congress also can provide for shared enforcement authority, by providing for both judicial and administrative enforcement. But interpretive authority is harder to share, as one institution or the other must have the last word in the case of disagreements as to statutory meaning.

75. As noted, agencies may differ based on the subject matter of their organic statutes and their status as primary or secondary delegates. There also may be important differences among agencies based on their preferred policymaking form—rulemaking or adjudication. Others have suggested that agencies' approaches to statutory interpretation properly may vary depending on policymaking form. See Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501, 525 (2005)

This Part provides some necessary background on Title VII. Congress was well aware that Title VII could be enforced and interpreted by the federal courts or by the EEOC, and legislators wrestled self-consciously with the choice between judicial and administrative process. This Part outlines the relevant debates and then provides a brief overview of the statute's history in the hands of the Supreme Court and the EEOC. I discuss the theoretical implications of the Title VII experience in Part IV.

### *A. Title VII in Congress*

Title VII was enacted as part of the Civil Rights Act of 1964.<sup>76</sup> Congress faced powerful pressure to combat racial discrimination, but cross-cutting divisions in both parties made action difficult. Democrats were split between northern legislators who favored new legislation and southern legislators who opposed it. A similar dynamic divided the Republicans, who were trying to court both the southern Democrats and the minority vote.<sup>77</sup> As the analysis in Part I suggests, perfectly specified legislation is unlikely in such circumstances. Congress is far more likely to paint with a broad brush, leaving significant questions to be worked out by a delegate—which is just what Congress did with Title VII.

Substantively, Congress had to choose between two distinct models of antidiscrimination legislation: a distributive-justice model aligned with affirmative measures to achieve racial equality, or a corrective-justice model focused on color-blind, individualized redress

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(noting that “[i]t would be surprising for agency interpretive methodology to be invariant across [the] different contexts [of rulemaking and adjudication] (although it may be)”; Kevin M. Stack, *Agency Statutory Interpretation and Policymaking Form*, 2009 MICH. ST. L. REV. 225, 226 (arguing that “an agency’s approach to statutory interpretation is in part a function of the policymaking form through which it acts”). It follows that the relationship between judicial and administrative process likewise may depend on whether the agency or agencies under consideration typically rely on adjudication or rulemaking to flesh out the meaning of the relevant statute(s).

76. For discussions of the legislative history, see HUGH DAVIS GRAHAM, *THE CIVIL RIGHTS ERA* 125–52 (1990); CHARLES WHALEN & BARBARA WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT* 115–19 (1985). For a detailed account of the legislative choice between public and private enforcement of Title VII, see generally Sean Farhang, *The Political Development of Job Discrimination Litigation, 1963-1976*, 23 *STUD. AM. POL. DEV.* 23, 58–60 (2009).

77. See Robert C. Lieberman, *Ideas, Institutions, and Political Order: Explaining Political Change*, 96 *AM. POL. SCI. REV.* 697, 706 (2002) (“Both Kennedy and then Lyndon Johnson needed to balance the electoral demands of Southern whites and Northern blacks, each of whom was an essential piece of the Democratic coalition. . . . Civil rights posed similar challenges and opportunities for Richard Nixon in his own presidential bids, as he sought to pry the South loose from the Democrats’ grip while also competing for minority votes.”).

for identifiable wrongs.<sup>78</sup> As enacted, Title VII fell “squarely in the color blind camp, defining discrimination as a deliberate individual act and apparently explicitly ruling out collective, race conscious remedies.”<sup>79</sup> Section 703(a) of the statute broadly prohibited discrimination by employers or unions on the basis of race, sex, religion, or national origin.<sup>80</sup> Yet other provisions contained important limitations designed to restrict its reach to intentional wrongs.<sup>81</sup>

The substantive choices reflected in Title VII were linked to a series of decisions about enforcement. Most civil rights advocates favored a distributive-justice model that combined race-conscious measures with vigorous enforcement by the EEOC, which they thought could “uncover and prohibit broad patterns of discrimination by employers.”<sup>82</sup> Republicans and southern Democrats opposed giving the EEOC direct enforcement—or cease-and-desist—authority. One objection was that the agency inevitably would be biased in favor of potential claimants. That intuition seems to have been based at least in part on evidence of pro-labor bias by the National Labor Relations Board, which served as the template for the EEOC.<sup>83</sup> A second

78. *See id.* at 705–06 (“Ideologically, the debates over civil rights represented the culmination of a long-standing debate in American political and intellectual life between color-blind and race-conscious visions of American society.”).

79. *Id.* at 706–07.

80. Section 703 reads in full:

It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Civil Rights Act of 1964 § 703, 42 U.S.C. § 2000e-2(a) (2006).

81. Section 703(j), for example, made clear that Title VII does not require employers to adopt racial quotas; Section 703(h) carved out an exception for differential treatment based on “bona fide seniority system[s]” and authorized employers to rely on “professionally developed ability test[s]” so long as the tests were not “designed, intended, or used to discriminate”; and Section 706(g) stated that judicial relief was available only upon a finding that the employer “has intentionally engaged in or is intentionally engaging in” a prohibited practice, and warned that courts may not require employers to hire, reinstate, or promote employees who were fired or refused employment or promotion “for any reason other than discrimination on account of race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(j), e-2(h), e-5(g)(2)(A).

82. Lieberman, *supra* note 77, at 706–07 (citation omitted). For a discussion of why civil rights groups favored EEOC enforcement over a private right of action in the courts, see Farhang, *supra* note 76, at 17–19, 22 (noting that private civil suits were too infrequent, slow, and expensive to serve as an effective enforcement mechanism).

83. *See* GRAHAM, *supra* note 76, at 130 (describing the “pro-labor prejudice” of the early NLRB); *see also* Farhang, *supra* note 76, at 24 (“[T]he analogy of the proposed EEOC to the

objection to direct enforcement by the EEOC was that Washington bureaucrats should not be empowered to prescribe employment policies for businesses nationwide.<sup>84</sup> Although tightly connected to southern opposition against *any* intervention in the name of civil rights, the second objection also captured broader concerns about regionalism and federalism that appealed to many legislators outside of the South.<sup>85</sup> Finally, some legislators objected to giving the EEOC cease-and-desist authority on essentially due process grounds: they thought it inappropriate for one body to be charged with investigating, prosecuting, and adjudicating claims of discrimination.<sup>86</sup>

Ultimately, Title VII “substantially hollowed out the enforcement authority of the new EEOC.”<sup>87</sup> Enforcement authority was divvied up among the EEOC, the federal courts, and the Department of Justice.<sup>88</sup> The EEOC was given authority to process and investigate claims and to seek “informal” conciliation with employers when it found reasonable cause to believe that discrimination had occurred.<sup>89</sup> Primary enforcement would be in the federal courts. When the EEOC found evidence of a “pattern or practice” of discrimination, it could refer the matter to the Attorney

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NLRB, on which it was so clearly modeled, was repeatedly invoked by Republicans as emblematic of the political mischief that could emanate from strong bureaucratic powers placed in the hands of overzealous administrators appointed by liberal interventionist presidents.”).

84. See HANES WALTON, JR., *WHEN THE MARCHING STOPPED: THE POLITICS OF CIVIL RIGHTS REGULATORY AGENCIES* 17 (1988) (“[T]he southern congressmen who opposed the creation of the new regulatory agencies felt that such action would lead to (1) bureaucratic tyranny by bigoted bureaucrats who would impose foreign social customs in the South; (2) a more powerful federal government—one that could involve itself in nearly every facet of the individual’s life; and (3) a more massive and expensive federal bureaucracy.”).

85. See GRAHAM, *supra* note 76, at 148 (describing “the Republican (and conservative Democratic) principle that in government-business relations, local primacy must prevail over Washington-knows-best”). Objections to a strong enforcement role for the EEOC also might have been linked to a Republican aversion to “big government” and higher taxes. See ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 50–51 (2001) (“Republicans helped craft regulatory schemes that called for private litigation, rather than public expenditure, to accomplish collective goals.”).

86. H.R. REP. NO. 88-914 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2515–16 (reasoning that employers and labor unions needed “a fairer forum to establish innocence since a trial *de novo* is required in district court proceedings together with the necessity of the Commission proving discrimination by a preponderance of the evidence”); see GRAHAM, *supra* note 76, at 129–30 (noting that some members of Congress argued that “long-standing principles of American jurisprudence required that final determinations be made by the judiciary rather than by an investigative, prosecuting agency”).

87. Lieberman, *supra* note 77, at 707.

88. To many, this represented a serious setback for the civil rights movement. See Robert Belton, *A Comparative Review of Public and Private Enforcement of Title VII of the Civil Rights Act of 1964*, 31 VAND. L. REV. 905, 907 (1978) (“The prevailing attitude towards Title VII . . . was that the civil rights movement had suffered a defeat . . .”).

89. Civil Rights Act of 1964 § 706(a), 42 U.S.C. § 2000e-5(b) (2006).

General for litigation.<sup>90</sup> But the bulk of the work would be done by individuals acting as “private attorneys general.”<sup>91</sup> To that end, Title VII created a private cause of action for any individual harmed by prohibited employment practices,<sup>92</sup> and provided for attorneys’ fees for prevailing plaintiffs.<sup>93</sup> As for interpretive authority, Congress delegated to the EEOC the power to create procedural rules.<sup>94</sup> Substantive issues—such as the critical details of what constitutes prohibited “discrimination”—were left to the courts.<sup>95</sup>

The choice-of-delegate question surfaced again in the late 1960s and early 1970s as Congress considered amendments to Title VII.<sup>96</sup> Proponents of strong enforcement argued for increasing the role of the EEOC. They maintained that “the entire area of employment discrimination [was] one whose resolution require[d] . . . expert assistance . . . [and] technical perception,” which in turn required a specialized agency with adjudicatory powers.<sup>97</sup> Women’s groups, which had not fared well in the federal courts, also favored granting more enforcement authority to the EEOC.<sup>98</sup> Interestingly, they were joined by labor unions, which had been the objects of Title VII enforcement rather than its beneficiaries, and which sought to escape the risk of crushing damages liability that could result from private litigation.<sup>99</sup>

90. § 707(a).

91. See *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 415 (1975) (noting that the attorneys fees provision of Title VII, § 706(k) or 42 U.S.C. § 2000e-5(k), serves the “strong public interest in having injunctive actions brought under Title VII” by plaintiffs acting as “private attorneys general”).

92. § 706(e), 42 U.S.C. § 2000e-5(f).

93. § 706(k), 42 U.S.C. § 2000e-5(k).

94. § 713(a), 42 U.S.C. § 2000e-12(a).

95. See Rebecca Hanner White, *The EEOC, the Courts, and Employment Discrimination Policy: Recognizing the Agency’s Leading Role in Statutory Interpretation*, 1995 UTAH L. REV. 51, 56 (“Title VII . . . expressly delegated to the agency only the power to issue *procedural* rules. The Supreme Court consequently has interpreted Title VII as denying the EEOC the power to engage in *substantive* legislative rulemaking . . .”).

96. For discussion of early proposals to enhance the EEOC’s enforcement powers, see GRAHAM, *supra* note 76, at 253–54; Farhang, *supra* note 76, at 50–67.

97. See H.R. REP. NO. 92-238 (1972), reprinted in 1972 U.S.C.C.A.N. 2137, 2144.

98. See GRAHAM, *supra* note 76, at 436 (“If there is any group that should not be willing to trust their rights to the federal courts . . . it is the women. They have never won.”).

99. See Paul Frymer, *Acting When Elected Officials Won’t: Federal Courts and Civil Rights Enforcement in U.S. Labor Unions*, 97 AM. POL. SCI. REV. 483, 493 (2003) (“[B]y the late 1960s, . . . the AFL-CIO was lobbying Congress to shield it from Title VII lawsuits and was willing to increase the power of the EEOC as a compromise.”). Unlike most civil rights groups lobbying to increase the EEOC’s enforcement authority, labor unions wanted cease-and-desist authority for the EEOC instead of, rather than in addition to, the private right of action that Title VII had created. See Farhang, *supra* note 76, at 54–55 (“[T]he AFL-CIO . . . conditioned its support for cease-and-desist authority on eliminating the private right of action.”).

On the other side of the debates, the Nixon administration and southern and conservative members of Congress preferred to leave enforcement of Title VII to the federal courts. They believed that courts, particularly in the South, would interpret the law more narrowly than the EEOC, which continued to be viewed as biased in favor of employees.<sup>100</sup> Concerns about EEOC bias led some civil rights groups to oppose cease-and-desist authority as well, though the bias they feared cut in the opposite direction.<sup>101</sup> Those views were reflected in the work of Alfred Blumrosen, a Rutgers law professor who had served at the EEOC during its first year. Blumrosen concluded

that it would not help—but would positively harm—the drive to end employment discrimination if the [EEOC] were given that additional statutory power which the liberals believed so important . . . [A] *more powerful* Commission would become a captive of those interests which were to be regulated, while the existing weak institution enabled civil rights groups to use the federal courts which are favorable to their demands.<sup>102</sup>

The cross-cutting interests on both sides of the debate were made more complicated still by the fact that none of the participants could agree which model—EEOC or court enforcement—would maximize the goal of eradicating discrimination. Proponents argued that cease-and-desist authority was necessary if the “poor, enfeebled” EEOC were to give effect to the promise of the 1964 Act.<sup>103</sup> But the Nixon administration had a reasonable argument that its proposal for judicial enforcement would be even more effective. Pointing to the EEOC’s substantial backlog in complaints, Republicans argued that judicial enforcement would be faster than agency resolution, and they maintained that the provisions for extensive discovery in federal court were preferable to the “more limited and cumbersome use of subpoena authority by regulatory boards with cease-and-desist power.”<sup>104</sup> Finally, the chairman of the EEOC argued (perhaps disingenuously) that cease-and-desist authority would deprive employees of a powerful

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100. Frymer, *supra* note 99, at 490; *see also* H.R. REP. NO. 92-238, at 59 (1972), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2168 (noting that the EEOC had “attained an image as an advocate for civil rights” and as a “mission” agency); GRAHAM, *supra* note 76, at 425 (describing Justice Rehnquist’s opinion that “[a]dministrative agencies . . . lack objectivity and tend to favor one or another of the groups whose interests are protected by their statute”).

101. *See* Neal Devins, *Political Will and the Unitary Executive: What Makes an Independent Agency Independent?*, 15 CARDOZO L. REV. 273, 294 (1993) (noting that some civil rights interests feared that regulatory capture would reduce the efficacy of the EEOC).

102. ALFRED W. BLUMROSEN, *BLACK EMPLOYMENT AND THE LAW* 59 (1971).

103. GRAHAM, *supra* note 76, at 421.

104. *Id.* at 435.



ally by forcing the EEOC to shift from the role of advocate and prosecutor to that of a neutral quasi-judicial body.<sup>105</sup>

In the end, Congress rebuffed efforts to give the EEOC cease-and-desist authority, but it did authorize the agency to initiate suit in federal court and to control its own litigation at the district and circuit court levels.<sup>106</sup> The Attorney General maintained control of EEOC litigation in the Supreme Court—a fact that proved significant in subsequent years. The 1972 amendments also extended Title VII coverage to employees of state and local governments, but provided that the Attorney General, not the EEOC, would control any suits against governmental units.<sup>107</sup> Again, that limitation on the EEOC's enforcement authority was driven by concerns that a centralized bureaucracy would be insufficiently sensitive to regional differences and to the prerogatives of state and local governments.<sup>108</sup>

The persistent debates about enforcement authority highlight the perceived importance of the choice of delegate. Perhaps even more significantly, the legislative histories of Title VII and the 1972 amendments illustrate the difficulties that legislators face in trying to predict how different institutions will flesh out a broadly worded statute. Legislators recognized that their decisions about delegation would impact the effective content of Title VII's nondiscrimination guarantee. As the ally principle predicts, members of Congress sought to delegate authority to the institution most likely to move the statute in their preferred direction. But they did not have much to go on, other than their experience with the NLRB and their (conflicting) assumptions about interest group pressures. Ultimately, legislators had to choose between judicial and administrative process based on little more than hunches about how the candidate institutions would act.

### *B. Title VII in the Supreme Court and the EEOC—Overall Trends*

More than four decades have passed since Congress wrestled with the choice of delegate for Title VII, and we are now in a position

105. *Id.* at 429.

106. Civil Rights Act of 1964, § 706(f)(1), 42 U.S.C. § 2000e-5(f)(1) (2006). The EEOC was empowered to bring suit in federal court on behalf of individual claimants, and it also took over the Attorney General's role in bringing "pattern or practice" suits against employers. § 707(c), 42 U.S.C. § 2000e-6(c).

107. § 706(f)(1), 42 U.S.C. § 2000e-5(f)(1).

108. See GRAHAM, *supra* note 76, at 425 ("[G]iving the . . . [EEOC] authority to sue state and local governments over their employment practices would unacceptably interfere with established patterns of federalism that the Republican party had historically defended.").

to assess what the EEOC and the courts have done. To that end, I analyzed every case decided by the Supreme Court after oral argument that involved a question of interpretation or application of Title VII.<sup>109</sup> The resulting list consists of 102 cases, containing a total of 120 Title VII-related issues.

For its part, the EEOC has taken pains over the years to develop its own answers to the questions left open by Title VII. Although the EEOC's interpretations lack legal force, they provide guidance to employers, potential claimants, and EEOC employees. The agency's interpretations can be found in formal guidelines (usually issued after notice and comment),<sup>110</sup> a compliance manual for employers, enforcement guidelines for EEOC employees, EEOC decisions, and various less-formal sources.<sup>111</sup> The EEOC's position also can be gleaned from briefs filed in the Supreme Court by the Solicitor General.<sup>112</sup> However, the EEOC occasionally signs onto briefs filed by the Solicitor General that advance arguments at odds with the agency's previously stated position. For purposes of this study, I attribute to the EEOC the position stated in the brief, but note the cases in which the briefing does not seem to reflect the EEOC's sincere view of the issue.<sup>113</sup> In some cases, the EEOC vacillates between

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109. With the help of research assistants, I identified the relevant cases by running a search in Westlaw's "SCT" database for cases involving the terms "Title VII" and/or "employment discrimination." The results of that search were, by design, overinclusive. I read all the cases and omitted those that were not decided after full briefing and oral argument, did not involve Title VII of the Civil Rights Act of 1964, or involved Title VII only tangentially. *See, e.g.*, *Hetzel v. Prince William County, Va.*, 523 U.S. 208 (1998) (holding, in a case that happened to involve a Title VII claim, that the court of appeals violated the plaintiff's Seventh Amendment right to a jury trial by requiring the district court to enter judgment for a lesser amount than that determined by the jury).

110. *See* 29 C.F.R. §§ 1601-14 (2009) (detailing the agency's procedures and guidelines for issuing rules).

111. Those sources are available on the section of the EEOC's website entitled "Laws & Guidance," located at [www.eeoc.gov/laws/index.cfm](http://www.eeoc.gov/laws/index.cfm) (last visited January 31, 2010).

112. Recall that the 1972 amendments that enabled the EEOC to seek judicial relief on behalf of the victims of discrimination limited the agency's litigation authority to the district and circuit courts. *See supra* note 106 and accompanying text. Like most other agencies, the EEOC cannot litigate in the Supreme Court itself but must go through the Solicitor General, who is appointed by the President and serves at his pleasure. *See generally* Neal Devins, *Unitariness and Independence: Solicitor General Control over Independent Agency Litigation*, 82 CAL. L. REV. 255 (1994). Not surprisingly, the Solicitor General typically advances the administration's views, sometimes at the expense of the relevant agency. *See generally* Margaret H. Lemos, *The Solicitor General as Mediator Between Court and Agency*, 2009 MICH. ST. L. REV. 185, 187 (arguing that the Solicitor General's "role in filtering the arguments presented to the Court may leave insufficient room for a distinctive agency voice").

113. *See, e.g., infra* note 210 and accompanying text (discussing a case where the Solicitor General essentially "overruled" the EEOC, forcing the agency to abandon its position in the briefs).

different approaches to the issue in question and does not express any view to the Supreme Court.<sup>114</sup> I treat such cases as “no position” for the agency. All told, I could identify the EEOC’s position with respect to 98 of the 120 Title VII-related issues the Supreme Court resolved.

In many respects, the EEOC’s and the Supreme Court’s interpretations of Title VII have been quite similar. Title VII as enacted reflected several critical compromises, all of which worked to narrow the reach of the statute.<sup>115</sup> As noted above, the enacting coalition rejected a broad, distributive-justice mandate in favor of a more limited prohibition of intentional discrimination. Nevertheless, both the EEOC and the Supreme Court have interpreted Title VII expansively. For example, both institutions have concluded that Title VII reaches beyond intentional discrimination to capture employment practices that have a discriminatory effect—or “disparate impact”—on protected groups.<sup>116</sup> And both have interpreted the statute to permit voluntary affirmative action.<sup>117</sup> Indeed, most observers agree that neither the Court nor the EEOC has adhered to the intent of the 88th Congress.<sup>118</sup>

Although the cases reflect substantial agreement between the Court and the EEOC, the two institutions reached different conclusions with respect to roughly one-third of the issues they both considered. As some legislators predicted, the EEOC’s interpretations of Title VII have, on the whole, been more “liberal” than the Court’s. Consistent with the conventions of existing literature, I coded

114. An example is *Yellow Freight System, Inc. v. Donnelly*, 494 U.S. 820 (1990), which involved the question whether federal courts have exclusive jurisdiction over Title VII claims. The EEOC did not participate in the case, and had advocated different answers to the question in previous filings. See Brief of Respondent, *Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820 (1990) (No. 89-431), 1990 WL 10013147 (citing shifts in EEOC’s position).

115. See *supra* note 81 and accompanying text (citing provisions that restrict the reach of Title VII to intentional wrongdoing by employers).

116. See *infra* notes 151–155 and accompanying text (discussing the Supreme Court’s reliance on the EEOC’s disparate impact statistics in *Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971)).

117. See *infra* notes 204–212 and accompanying text (explaining the Supreme Court’s holding in *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), which was consistent with the EEOC’s guidelines on affirmative action).

118. See Frymer, *supra* note 99, at 491–92 (“[C]ourts significantly rewrote the law on Title VII, getting rid of carefully placed loopholes that unions and other civil rights opponents demanded in order to pass the Act . . . .”); Lieberman, *supra* note 77, at 705 (“[T]he act appeared explicitly to rule out an alternative race- and group-conscious approach to recognizing and remedying discrimination in the workplace. . . . And yet within 10 years of the act’s passage, the United States had adopted just this approach . . . .”); Julie Chi-Hye Suk, *Antidiscrimination Law in the Administrative State*, 2006 U. ILL. L. REV. 405, 440 (“In practice, the EEOC’s exercise of its own power suggests that it understood its role to be more proactive in the pursuit of equality than Congress . . . envisioned.”).

decisions as “liberal” if they were in favor of the Title VII claimant, except in cases of reverse discrimination against white men. Decisions were coded as “conservative” if they cut against the Title VII claimant or in favor of a claim of reverse discrimination.<sup>119</sup> The EEOC’s position was liberal on eighty-nine, or 91 percent, of the ninety-eight Title VII-related issues that both the Court and the EEOC addressed. The Court, by contrast, took a liberal position on only seventy-three, or 61 percent, of the 120 Title VII-related issues it resolved after oral argument.<sup>120</sup>

The true rate of disagreement between the EEOC and the Court is likely higher than the numbers suggest. First, the numbers above overstate the percentage of “conservative” EEOC positions, because they include five cases in which the EEOC signed onto a brief filed by the Solicitor General advocating a conservative position at odds with the EEOC’s previously stated views.<sup>121</sup> If the Solicitor

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119. William N. Eskridge & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1205 (2008); Jeffrey A. Segal, *Separation-of-Powers Games in the Positive Theory of Congress and Courts*, 91 AM. POL. SCI. REV. 28, 36 n.27 (1997).

120. I focus here on the Supreme Court’s decisions on all 120 Title-VII related issues that the Court resolved after oral argument, rather than the ninety-eight issues on which both the Court and the EEOC took a position, in order to provide the fullest possible view of the Justices’ votes on Title VII. Omitting the twenty-two issues that the Court resolved without the benefit of the agency’s input would not meaningfully change the results reported in the text. The Court took a liberal position on sixty-three, or 64 percent, of the ninety-eight issues that both the Court and the EEOC decided.

121. See *infra* note 209 and accompanying text (discussing *Sheet Metal Workers v. EEOC*, 478 U.S. 421 (1986)). Compare Brief of the United States as Amicus Curiae, *Penn. State Police v. Suders*, 542 U.S. 129 (2004) (No. 03-95), 2004 WL 121589 (arguing that constructive discharge is not a “tangible employment action” for which an employer is automatically liable even though it results from the acts of supervisory employees), with 2 EQUAL EMPLOYMENT OPPORTUNITY COMM’N, EEOC COMPLIANCE MANUAL § 612.9(a) (2002) (“Respondent is responsible for constructive discharge in the same manner as it is responsible for the outright discriminatory discharge of a charging party.”); compare Brief for the United States as Amicus Curiae Supporting Respondent at 45–46, *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988) (No. 86-6139), 1987 U.S. S. Ct. Briefs LEXIS 955 (arguing that disparate-impact analysis should not be applied to subjective hiring systems because subjective practices would be so impossibly difficult to validate as job-related that employers would effectively be forced to adopt quotas in order to avoid liability), with 29 C.F.R. §§ 1607.4–1607.6 (1987–2009) (indicating that hiring or promotion systems that could not be formally validated could be challenged successfully under disparate impact analysis—not, as the Solicitor General contended, exempted from disparate-impact analysis for that reason); compare Brief for the United States & the Equal Employment Opportunity Commission as Amici Curiae Supporting Affirmance, *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60 (1986) (No. 85-495), 1985 WL 670268 (arguing that employer need only provide a reasonable accommodation; it need not consider alternatives proposed by the employee), with 29 C.F.R. § 1605.2(c)(2)(ii) (1986) (“[W]hen there is more than one means of accommodation which would not cause undue hardship, the employer . . . must offer the alternative which least disadvantages the individual with respect to his or her employment opportunities.”). See also Brief for the United States & the Equal Employment Opportunity

General-induced switches are omitted from the count, the percentage of liberal EEOC positions is 96 percent.

Second, although the Court has declined to apply strong *Chevron* deference to the EEOC's interpretations of Title VII's substantive provisions, in many cases it purported to defer to the EEOC's judgment to some extent.<sup>122</sup> While it is difficult to gauge how much work such deference is doing, it is possible that the Court's interpretations would have diverged more frequently from the EEOC's had the Court not felt some obligation to follow the agency's lead.

Finally, the imperatives of data collection and management inevitably result in the loss of some nuance. Although I coded decisions as either liberal or conservative, interpretations can of course be *more or less* liberal or conservative. For example, in *Price Waterhouse v. Hopkins*, a majority of the Court and the EEOC agreed that when a plaintiff proves that her gender played a role in an employment decision, the burden of persuasion should shift to the defendant employer to prove that it would have made the same decision regardless of sex.<sup>123</sup> However, while the EEOC appeared to

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Commission as Amicus Curiae at \*15 n.14, *Nw. Airlines, Inc. v. Transport Workers Union of Am.*, 451 U.S. 77 (1981) (No. 79-1086), 1980 WL 339323 (“In the court of appeals, the EEOC as an *amicus curiae* took the position that contribution [against a union that participated in discrimination] is available under Title VII . . . . As a result of this Court's invitation to participate on writ of certiorari, the Commission has reconsidered its position and, by formal vote, concluded that an implied right of contribution should *not* be available under . . . Title VII . . . .”). The EEOC also acceded to a somewhat more conservative (but still pro-claimant) position in *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986). Compare Brief for the United States & the Equal Employment Opportunity Commission as Amici Curiae, *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986) (No. 84-1979), 1985 WL 670162 (arguing that employers should be liable for hostile work environments created by supervisory employees only if they knew or should have known about the sexually offensive atmosphere), with 29 C.F.R. § 1604.11(c) (1986) (“[A]n employer . . . is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence.”).

122. See, e.g., *EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 115–16 (1988) (explaining that “the EEOC's interpretation of ambiguous language need only be reasonable to be entitled to deference”); *Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501 (1986) (reasoning that the EEOC's guidelines can be relied upon because they are a manifestation of experience and informed judgment); *Meritor*, 477 U.S. at 65 (declaring that the agency guidelines, “while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance . . .” (quoting *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 141–42 (1976))); *EEOC v. Shell Oil Co.*, 466 U.S. 54, 74 (1984) (explaining that “the EEOC's interpretation of its own rules is entitled to deference”); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 279 (1976) (noting that the EEOC's interpretations of Title VII are “entitled to great deference”); *Griggs v. Duke Power Co.*, 401 U.S. 424, 433–34 (1971) (“The administrative interpretation of [Title VII] by the enforcing agency is entitled to great deference.”).

123. 490 U.S. 228, 250 (1989).

favor a clear-and-convincing standard of proof for the defendant, the Court required only that the defendant prove by a preponderance that its decision was not driven by the prohibited consideration. Thus, while both the Court and the EEOC adopted a pro-claimant interpretation, the EEOC's reading was *more* pro-claimant than the Court's.<sup>124</sup> Because I did not attempt to distinguish between different gradations of liberal (or conservative) decisionmaking for purposes of the quantitative aspects of this study, the one-third figure almost certainly understates the real rate of disagreement between the two institutions.

What accounts for the differences and similarities between the decisions of the Court and the EEOC? Should disagreements between court and agency be chalked up to happenstance, or do they reveal something about the nature of courts and agencies? I take up those questions in the following Part, using the Title VII experience to help illuminate some of the consequences of a congressional decision to delegate primary interpretive and enforcement authority to the courts.

#### IV. WHAT TITLE VII TELLS US ABOUT THE CHOICE OF DELEGATE

This Part uses the insights provided by Title VII to inform our understanding of the consequences of Congress's choice between judicial and administrative process. The discussion focuses on three constellations of issues. The first concerns how the Supreme Court and the EEOC approached the interpretive task. The Court typically has emphasized evidence of congressional intent, whereas the EEOC has focused on statutory purpose writ large. That difference in methodology has led the Court to relatively more narrow interpretations of Title VII than those adopted by the EEOC. The two institutions also differed in their perceived roles. The Court's status as adjudicator appears to have reinforced a judicial emphasis on righting wrongs, whereas—somewhat ironically—the EEOC's lack of enforcement authority transformed it into an advocate for the victims of discrimination, which in turn encouraged a broad and claimant-friendly reading of the statute.

Second, this Part examines the relative influence of political actors—the President, Congress, and interest groups—on judicial and administrative decisionmaking. Conventional wisdom suggests that the EEOC's interpretations (but not the Court's) should vary over time depending on the direction of the prevailing political winds. In fact,

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124. See also *infra* text accompanying notes 163–166 (discussing subtle differences between the EEOC's and the Court's approach to claims of sexual harassment by supervisors).

both the Court and the EEOC displayed relatively stable decisionmaking in the face of political upheavals in Congress and the White House. The EEOC's approach to enforcement changed temporarily as a result of political pressure, but its statutory interpretations did not.

The final set of issues concerns the quality of judicial and administrative decisions, particularly their uniformity and stability. In the Title VII context, judicial decisionmaking has resulted in substantial disuniformity across different jurisdictions, but not across different statutory issues. As for stability, the interpretations adopted by the EEOC and the Supreme Court have both been quite stable over time. Yet, because many years can pass before the Court resolves a statutory issue, judicial interpretations on the whole have changed more than those of the EEOC. Both findings call into question the common assumption that judicial process is more stable than administrative process.

#### *A. Role Orientation and Interpretive Methodology*

Why did the Supreme Court and the EEOC reach different conclusions with respect to roughly one-third of the Title VII-related issues they both addressed? One possibility is that the Court and the agency approached the interpretive task in different ways. Overall, the Court's interpretations of Title VII have tended to be more cautious than those of the EEOC. Although there certainly are counterexamples,<sup>125</sup> the Court has tended to hesitate before expanding the scope of the antidiscrimination principle. It consistently has sought indications of congressional intent, and its typical approach to questions on which congressional intent is unclear or indeterminate is to limit the reach of the statute.<sup>126</sup>

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125. The most important counterexample is *Griggs*, in which the Court endorsed the disparate-impact theory of liability. 401 U.S. at 422. It bears emphasis that the Court there quite self-consciously followed the path marked out by the EEOC. See *infra* notes 154-155 and accompanying text.

126. See, e.g., *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 642 (2007) (refusing to entertain policy arguments against a strict reading of Title VII's statute of limitations, explaining that "it is not our prerogative to change the way in which Title VII balances the interests of aggrieved employees against the interest in encouraging the 'prompt processing of all charges of employment discrimination'"); *Faragher v. City of Boca Raton*, 524 U.S. 775, 798 (1998) (refusing to adopt a blanket rule of vicarious employer liability for supervisor harassment in part because of an absence of evidence that "Congress wished courts to ignore the traditional distinction between acts falling within the scope and acts amounting to what the older law called frolics or detours from the course of employment"); *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 476 (1982) (refusing to depart from traditional rules of preclusion without explicit direction from Congress); *Nw. Airlines, Inc. v. Transport Workers Union of Am.*, 451 U.S. 77, 95-98 & n.41

While the Supreme Court took pains to enforce the various compromises embedded in Title VII, the EEOC built off what it saw as the overriding purpose of the statute.<sup>127</sup> When that purpose conflicted with statutory text, purpose won out.<sup>128</sup> The EEOC's behavior is consistent with Jerry Mashaw's suggestion that "agencies have a responsibility to interpret in order to give energy and effectiveness to the legislative programs for which they are responsible."<sup>129</sup> Most important for present purposes, the EEOC's behavior is markedly different from that of the Supreme Court.

The issue of seniority systems provides a useful example. In many industries, competitive seniority historically was tied to job categories, so a transfer from one job to another would result in a loss of competitive seniority; the employee would have to start at the bottom of the list for the new job. Many of those same industries were marked by racial job segregation. Title VII took care of the latter problem, but the result was that black employees were faced with an unpalatable choice between remaining in their existing job or transferring to a more desirable job and thereby losing the seniority

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(1981) (refusing to recognize a right of contribution against unions absent evidence of congressional intent, and emphasizing that "[t]he equitable considerations advanced by petitioner are properly addressed to Congress, not to the federal courts"); *Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702, 721 (1978) (refusing to award class-based retroactive relief against discriminatory pension plans on the ground that "the rules that apply to these funds should not be applied retroactively unless the legislature has plainly commanded that result"); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 79 (1977) ("Without a clear and express indication from Congress, we cannot agree with . . . the EEOC that an agreed-upon seniority system must give way when necessary to accommodate religious observances."); *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 134 (1976) (refusing to extend Title VII's prohibition on "sex" discrimination to differential treatment of pregnant employees, given Congress's failure to specify "pregnancy" as one of the protected characteristics); *see also* Steven R. Greenberger, *Civil Rights and the Politics of Statutory Interpretation*, 62 U. COLO. L. REV. 37, 60 (1991) (arguing that, in civil rights cases, where the text is unclear and "where the background norm necessary to decide a case is controversial, the Court will not extend a statute beyond its uncontroversial meaning unless Congress has made that determination in the statute"); *cf.* William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 279 (1988) ("A court is often tempted to finesse a hard interpretational choice by 'leaving it to the legislature.'").

127. *See* GRAHAM, *supra* note 76, at 249 ("[A] broad global purpose was imputed to Congress in 1964 [by the EEOC] and was then invoked to override the limitations [of the Act] . . .").

128. For an argument that "purposive" statutory interpretation may be appropriate for agencies even if it is inappropriate for judges, *see* Michael Herz, *Purposivism and Institutional Competence in Statutory Interpretation*, 2009 MICH. ST. L. REV. 89, 92.

129. Jerry L. Mashaw, *Agency-Centered or Court-Centered Administrative Law? A Dialogue with Richard Pierce on Agency Statutory Interpretation*, 59 ADMIN. L. REV. 889, 891 (2007). Mashaw finishes the thought by noting that "courts have no parallel responsibility for implementation." *Id.* I am not so sure, at least when one focuses on statutes over which Congress has vested the courts with primary interpretive authority. A normative analysis of how courts *should* act as delegates is outside the scope of this project, however.



they had accumulated over their years of employment.<sup>130</sup> The EEOC was quick to recognize the unfairness of such a system—indeed, it identified seniority systems as one of the major causes of systemic racial disparities in many sectors of the workforce.<sup>131</sup> The agency initially pushed for “bumping” rights, which would give black employees who transferred out of low-paying jobs the right to displace, or “bump,” whites with less plant-wide seniority.<sup>132</sup> But the EEOC faced an obstacle in the text of Title VII, which specifies in § 703(h):

it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin . . .<sup>133</sup>

The agency’s solution in cases involving seniority systems was to focus its arguments on the broad purpose of Title VII—correcting the “economic plight of the minority worker”—and to emphasize that purpose over the rather more narrow language of the statute.<sup>134</sup>

The issue of seniority came to a head in the Supreme Court in three 1977 cases, each of which saw a divided Court reject the views of the EEOC. Most notable was *International Brotherhood of Teamsters v. United States*, in which the Court held that § 703(h) immunizes seniority systems that perpetuate pre-Title VII discrimination by locking minority employees into less attractive job categories.<sup>135</sup> In order to prevail, claimants must show that the seniority system was adopted or maintained with discriminatory intent; the fact that the system has a discriminatory effect is irrelevant.<sup>136</sup> The Court extended *Teamsters* in *American Tobacco Co. v. Patterson*, holding that § 703(h) also immunizes a seniority system with discriminatory effect that was adopted after the enactment of Title VII.<sup>137</sup> It rejected the contrary view, reflected in the EEOC’s guidelines, which would have

130. See Alfred W. Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59, 64 & n.19 (1972) (noting the existence of various seniority systems designed by employers of previously white-only workers to keep minorities from rising above certain advancement levels).

131. See GRAHAM, *supra* note 76, at 248 (“High on such a list [of targets for the EEOC] were two formidable barriers to black advancement: employment tests and seniority systems.”); Frymer, *supra* note 99, at 489 (“By 1967, the seniority loophole in Title VII became a central concern among EEOC officials . . .”).

132. GRAHAM, *supra* note 76, at 252–53.

133. Civil Rights Act of 1964 § 703(h), 42 U.S.C. § 2000e-2(h) (2006).

134. GRAHAM, *supra* note 76, at 249–51.

135. 431 U.S. 324, 352 (1977).

136. See *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 75–76 (1982) (describing the holding in *Teamsters*).

137. *Id.* at 76.

distinguished between an application of a preexisting seniority system (protected) and the adoption of a new system (not protected).<sup>138</sup> For the Court, the text of Title VII was clear and drew no distinction between pre-Act or post-Act discrimination.<sup>139</sup>

To the extent that Title VII is representative of judicial decisionmaking in other fields,<sup>140</sup> it suggests that judicial administration ought to be attractive not only to legislators who believe that the balance struck by Congress was roughly correct, but also to those who believe that the legislation does “too much.” On the other hand, legislators who fear that the legislation does “too little” should tend to favor administrative regulation, which—all else being equal—tends to be more energetic. The point is not that courts will enforce the intentions of the median member of the enacting Congress and agencies will not,<sup>141</sup> but rather that courts may tend to be more dependent on indications of congressional intent than agencies. Where such indications are absent—as often will be the case in statutes that delegate—the Title VII experience suggests that courts are less likely than agencies to strike out on their own.

Of course, the degree to which an agency is likely to “give energy” to the programs it enforces<sup>142</sup> may depend on the details of its institutional design. As others have shown, Congress can nudge agencies to more or less action through the procedures it chooses to guide agency decisionmaking.<sup>143</sup> For example, Congress can “stack the deck” in favor of non-regulation by requiring agencies to jump through various hurdles before they can alter the status quo with new

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138. See Brief for the Equal Employment Opportunity Commission at 25, *Am. Tobacco Co. v. Patterson*, 456 U.S. 63 (1982) (No. 80-1199), 1981 U.S. S. Ct. Briefs LEXIS 1791 (“Section 703(h) should not apply to a timely challenge to the post-Act adoption of an aspect of a seniority system.”).

139. See *Patterson*, 456 U.S. at 69 (“On its face § 703(h) makes no distinction between pre- and post-Act seniority systems, just as it does not distinguish between pre- and post-Act merit systems or pre- and post-Act ability tests.”).

140. My observations on this point are consistent with William Eskridge’s finding that “the Court will sometimes refuse to interpret a statute broadly, especially when such an interpretation would represent a major policy decision that the Court would be more comfortable allowing Congress to make,” William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 389 (1991), and with Einer Elhauge’s claim that courts in statutory interpretation cases tend to “favor[] middle ground options,” Elhauge, *supra* note 43, at 2081.

141. See *supra* note 42 and accompanying text (discussing this suggestion by Morris Fiorina).

142. Mashaw, *supra* note 129, at 891.

143. See generally McCubbins et al., *Administrative Procedures*, *supra* note 46 (discussing the relationship between agency procedures and congressional control).

regulation.<sup>144</sup> Similarly, Congress can place the burden of proof on the agency to justify regulation rather than on regulated groups to oppose it.<sup>145</sup>

Congress's ability to specify agencies' duties and procedures can be understood as an important part of the choice of delegate. It suggests that legislators need not take agencies as they find them, but can take steps to ensure—or at least encourage—decisions of a particular type or direction. The Title VII experience highlights, however, how unpredictable the effects of institutional design can be. As explained in Part III, Title VII as enacted came down strongly in the corrective-justice camp, prohibiting intentional and wrongful acts of discrimination. Yet the EEOC quickly moved to interpret the statute more broadly, focusing on “systems and effects” rather than tort-like individual wrongs. And, as noted, the EEOC's interpretations consistently favored a broad, claimant-friendly reading of the statute.

One way of understanding *what* the agency did is to look at *how* the EEOC was empowered to act. Although “[t]he model of enforcement implied by [Title VII's] color-blind ideological approach was one of retrospective judgment, in which deliberate individual acts of discrimination could be adjudicated and punished after the fact,” the EEOC was not given authority to judge or punish wrongdoers.<sup>146</sup> Instead, it was authorized to investigate charges of discrimination, issue right-to-sue letters, and attempt conciliation with employers. Those tasks created two critical roles for the agency: advocate/investigator for victims of discrimination and conciliator. While the role of advocate naturally pushed the EEOC toward a plaintiff orientation, the role of conciliator distanced it from a focus on attaching blame.

Similarly, the agency's focus on discriminatory effects rather than intent stemmed largely from institutional constraints. Limited resources and staff made processing the ever-growing piles of individual complaints nearly impossible from the start. The fledgling

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144. *See id.* at 268 (explaining how legislation enacted in 1981 requires the Consumer Product Safety Commission [CPSC] to invite proposals for voluntary standards from the industry to be regulated before it may issue new rules: “If a feasible voluntary standard is proposed, the CPSC must adopt it and end its own process. CPSC can produce mandatory industry standards only if it finds that voluntary standards are unlikely to reduce risk or would not result in compliance,” and must “produce ‘substantial evidence’ to support this conclusion.”).

145. *See id.* at 268–69 (contrasting the Federal Food, Drug, and Cosmetic Act, which places the burden of proof on pharmaceutical manufacturers to obtain Food and Drug Administration approval of new drugs, with the Toxic Substances Control Act, which places the burden of proof on the Environmental Protection Agency to prove that a new chemical is a risk to human health or the environment).

146. Lieberman, *supra* note 77, at 707.

agency therefore trained its scarce resources on a different goal—imposing recordkeeping and reporting requirements on all employers covered by Title VII.<sup>147</sup> The data allowed the EEOC to observe racial hiring and employment trends nationwide, and to pinpoint problem areas by geographic region and industry.<sup>148</sup> The results were striking, revealing “employment patterns that were so massively skewed, especially by race, that they intuitively demanded an inference of systematic job discrimination.”<sup>149</sup> Such disparities, the EEOC concluded, were caused in large part by newly minted testing requirements, which (along with seniority systems) operated to exclude huge numbers of minority applicants from desired jobs.<sup>150</sup>

Although recordkeeping allowed the EEOC to perceive the pernicious effects of job-testing and similar employee selection procedures, it did little to suggest a legal solution. The difficulty was Title VII itself, which, as the EEOC was well aware, targeted only intentional discrimination and explicitly protected “professionally developed ability test[s].”<sup>151</sup> Again, the EEOC turned to the broad remedial purpose of the statute. Emphasizing Congress’s desire to remedy the “economic plight of the minority worker,” the EEOC interpreted Title VII to bar not only intentional discrimination, but also employer practices “which prove to have a demonstrable racial effect.”<sup>152</sup> The EEOC memorialized that interpretation in its guidelines on Employee Selection Procedures, disapproving the use of tests that adversely affect members of the protected classes unless

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147. For a description of how the EEOC was able to impose such requirements in the face of a statutory provision exempting organizations which already were reporting to state or local fair employment practices commissions, see GRAHAM, *supra* note 76, at 193–97.

148. See THE STORY OF THE UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION: ENSURING THE PROMISE OF OPPORTUNITY FOR 35 YEARS 9–10 (2000) [hereinafter STORY OF THE EEOC] (describing early record-keeping requirements and providing examples of some of the resulting data).

149. GRAHAM, *supra* note 76, at 244.

150. See Blumrosen, *supra* note 130, at 64 (observing that “[t]ests and educational requirements were adopted extensively in the early 1960’s” in order to perpetuate the subordination of black workers through “seemingly neutral personnel policies”); cf. Gene Grove, *When a “No. 2” Applies for a Job*, N.Y. TIMES, Sept. 18, 1965, at SM32 (describing a job test that asked applicants for an executive job to complete the following sentence: “Crepe suzette is to pancake as Beaujolais is to blank.”).

151. 42 U.S.C. § 2000e-2(h) (2006).

152. GRAHAM, *supra* note 76, at 249 (quoting EEOC commissioner Samuel C. Jackson, *EEOC vs. Discrimination, Inc.*, CRISIS, Jan. 1968, at 17). The view is reflected as well in the writing of Professor Alfred Blumrosen, who served as the Chief of the EEOC’s Office of Conciliation from 1965 to 1967. See Blumrosen, *supra* note 130, at 73 (“Title VII was intended as a serious response to a major social problem, and, for this reason, the [EEOC] since 1965 has attempted to make the statute effective in dealing with the social problem by giving it the broadest possible construction.”).

such tests are empirically “validated” as job-related.<sup>153</sup> The Supreme Court drew heavily from those guidelines in *Griggs v. Duke Power Co.*,<sup>154</sup> where it endorsed the EEOC’s “disparate impact” theory and held that Title VII prohibits practices that work to the disadvantage of black employees without serving a genuine business need.<sup>155</sup>

Thus, by the end of the 1960s, the EEOC already had adopted an effects-based theory of discrimination and had reached a consensus that it “was properly an advocate of the victims of discrimination, not a neutral judge of their claims.”<sup>156</sup> Called to testify before Congress in 1969, the chairman of the EEOC argued against proposed amendments that would give EEOC cease-and-desist authority, on the ground that such a move would require a convulsive shift in role-orientation. “The cease and desist approach would inhibit [the EEOC’s traditional] attitude,” he explained, “for it carries with it a presumption of quasi-judicial neutrality toward the problem title VII seeks to correct.”<sup>157</sup>

Courts, by contrast, followed an enforcement model that fit neatly with the corrective-justice approach Title VII envisioned. Adversarial litigation is well suited to reveal and redress wrongdoing. Rather than engaging in a dialogue with each other, litigants try to persuade a third-party decisionmaker that their side is right and the other wrong.<sup>158</sup> The decisionmaker—judge or jury—then hands down a verdict of guilty or not. The system is good at creating winners and losers; it is less adept at finding nuanced solutions to complicated social realities.<sup>159</sup>

153. 29 C.F.R. § 1607.3 (1970); see Blumrosen, *supra* note 130, at 60 & n.5 (describing the impetus for and the original form of the EEOC guidelines, which the author helped formulate).

154. 401 U.S. 424, 436 (1971).

155. Fans and opponents of *Griggs* tend to agree that the decision is difficult to square with the available indications of congressional intent. See, e.g., GRAHAM, *supra* note 76, at 387 (“Burger’s interpretation in 1971 of the legislative intent of Congress in the Civil Rights Act would have been greeted with disbelief in 1964.”); Frymer, *supra* note 99, at 491–92 (arguing that courts interpreted Title VII broadly, and contrary to legislative will). Despite the evident tension with the intentions of the enacting coalition in 1964, committee reports in both the House and Senate endorsed *Griggs* when Congress amended Title VII in 1972. H.R. REP. NO. 92-238, 1st Sess., at 21–22 (1971), reprinted in 1972 U.S.C.C.A.N. 2137, 2156–57; S. REP. NO. 92-415, 1st Sess., at 14 (1971).

156. GRAHAM, *supra* note 76, at 430.

157. *Id.* at 429 (footnote omitted).

158. See Croley, *supra* note 1, at 162 (“[A]djudication is simply antithetical to dialogue; it provides adversaries with a chance to persuade a neutral decisionmakers [sic] to side with them.”).

159. Cf. Frymer, *supra* note 99, at 496 (arguing that “[t]he single-mindedness with which many judges and lawyers focused on integrating unions led them to ignore less adversarial ways in which the process might have been resolved”).

Just as the EEOC's focus on information gathering and conciliation may have influenced its decisionmaking, the judicial system's focus on righting wrongs can help explain some of the trends in the Supreme Court's Title VII jurisprudence. Consider the Court's treatment of sexual harassment claims. The Court first recognized that sexual harassment can constitute a form of sex discrimination in 1986.<sup>160</sup> As in *Griggs v. Duke Power Co.*, the Court relied heavily on the EEOC's guidelines and well-established precedents in the lower courts.<sup>161</sup>

However, the Court did not resolve a question that would prove thorny in later years: if an employee suffers harassment by a supervisor, may she hold the *employer* liable? The EEOC had the simple answer that the employer is strictly liable for the acts of its agents and supervisory employees.<sup>162</sup> But the Court was unwilling to go that far. Instead, it took pains to link employer liability for sexual harassment to some form of wrongdoing. After twelve more years of litigation, the Court finally settled on the rule that an employer is liable for sexual harassment by its supervisors where the employer knew or should have known of the harassment,<sup>163</sup> or where the supervisor used his agency relationship with the employer to take "tangible employment actions" against the employee.<sup>164</sup> In other circumstances, employers can take refuge in an affirmative defense to liability if they can show that they exercised reasonable care to prevent and address harassment and the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities.<sup>165</sup> The "tangible employment action" requirement has added significant

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160. *Meritor Sav. Bank FSB v. Vinson*, 477 U.S. 57, 66 (1986).

161. *See id.* at 65 ("In concluding that so-called 'hostile environment' (*i.e.*, *non quid pro quo*) harassment violates Title VII, the EEOC drew upon a substantial body of judicial decisions and EEOC precedent holding that Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult.").

162. 29 C.F.R. § 1604.11(c) (1986) ("[A]n employer . . . is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence."); *Discrimination Because of Sex Under Title VII of the Civil Rights Act of 1964*, 45 Fed. Reg. 74,676 (Nov. 10, 1980) ("[T]he strict liability imposed in § 1604.11(c) is in keeping with the general standard of employer liability with respect to agents and supervisory employees.").

163. *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 759 (1998) ("[A]lthough a supervisor's sexual harassment is outside the scope of employment because the conduct was for personal motives, an employer can be liable, nonetheless, where its own negligence is a cause of the harassment. An employer is negligent with respect to sexual harassment if it knew or should have known about the conduct and failed to stop it.").

164. *See id.* at 760 (finding "vicarious liability when a discriminatory act results in a tangible employment action").

165. *Id.* at 765; *Faragher v. City of Boca Raton*, 524 U.S. 775, 807-08 (1998).

complexity to litigation over sexual and other forms of harassment.<sup>166</sup> For the Court, however, it was necessary in order to avoid imposing liability on employers who were, in the Court's eyes, blameless.

The Court's focus on blameworthiness also is evident in several other aspects of its Title VII jurisprudence, including its treatment of disparate-impact liability,<sup>167</sup> voluntary affirmative action,<sup>168</sup> and seniority systems.<sup>169</sup> Indeed, many of the issues on which the Court and the EEOC disagreed can be understood in terms of the competing

166. See, e.g., *Pa. State Police v. Suders*, 542 U.S. 129, 140–41 (2004) (grappling with the question whether a constructive discharge constitutes a “tangible employment action” and concluding that it does not).

167. Disparate-impact liability can be understood in either distributive- or corrective-justice terms. See Suk, *supra* note 118, at 424–26 (discussing antidiscrimination disparate-impact prohibitions in terms of corrective justice and distributive justice). The distributive-justice understanding would treat disparate-impact litigation as a means of achieving equality in the workplace whenever feasible. On that view, policies that have an adverse effect on protected groups would run afoul of Title VII unless they could be shown to be truly necessary to the functioning of the workplace. On the corrective-justice view, by contrast, disparate-impact litigation would serve to smoke out wrongdoing by identifying employment practices that appear to be neutral but really are not, because they exert costs on protected groups without any offsetting benefits. That approach would impose liability on employers only if they adopted policies that were in some respect irrational, bearing no reasonable relationship to the demands of the business. Such policies could be understood as a form of negligence. Although *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), could be read to adopt the broader view of disparate impact (no surprise, given the Court's heavy reliance on the EEOC's guidelines in that case), later cases tended strongly toward the corrective-justice model. For example, under the Supreme Court's 1989 decision in *Wards Cove Packing Co. v. Atonio*, a disparate-impact plaintiff could prevail only if she could prove that the challenged policy was essentially a pretext for discrimination—in other words, if she could prove *wrongdoing* on the part of the employer. 490 U.S. 642, 660. Congress overturned aspects of *Wards Cove* in the Civil Rights Act of 1991, see *infra* notes 200–203 and accompanying text, but most lower courts have continued to key disparate impact liability to some evidence of irrationality or other blameworthy behavior by defendant employers. See Suk, *supra* note 118, at 458–59 (noting that “even recent successful claims are often accompanied by some evidence in the record of intentional discrimination”).

168. Both the Supreme Court and the lower courts have tended to follow a remedial approach to voluntary affirmative action. Affirmative action creates victims, who come to court alleging wrongdoing on the part of employers and unions. Those claims have a certain force: Title VII prohibits discrimination treatment based on race, and the Court long has held that the prohibition extends to discrimination against whites. See *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 278–79 (1976) (holding that Title VII is “not limited to discrimination against members of any particular race”). The Court has avoided that problem by focusing on a different set of wrongs—the wrongs that would be righted by affirmative action. See *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 208 (1979) (emphasizing that the affirmative action plan at issue was designed to “eliminate a manifest racial imbalance” and “[d]id not unnecessarily trammel the interests of the white employees”); Richard N. Appel et al., *Affirmative Action in the Workplace Forty Years Later*, 22 HOFSTRA LAB. & EMP. L.J. 549, 564–65 (2005) (reporting that lower courts overwhelmingly have hewed to the remedial approach suggested in *Weber*).

169. The Court has refused to invalidate seniority systems on the basis of discriminatory effects and absent proof of intentional wrongdoing. See *supra* notes 136–139 and accompanying text; Belton, *supra* note 88, at 955 (emphasizing the Court's focus on purposeful discrimination in seniority-systems cases).

models of corrective versus distributive justice.<sup>170</sup> And the aspects of the Supreme Court's jurisprudence that tend most strongly toward the distributive-justice model, such as *Griggs*, developed from the efforts of the EEOC.<sup>171</sup>

What lessons does this hold for delegations more generally? Probably the most important is that courts are best suited for enforcing statutes that fit the model of righting wrongs. The adversarial system has a tendency to force questions into a tort-like mold, and judges have a tendency to view disputes in that light. Thus, judicial administration may be a poor choice for situations where regulation is not tied to wrongdoing.<sup>172</sup> That point should be obvious in some respects. For example, courts could not perform the role of the Food and Drug Administration in testing and permitting drugs. Their procedures do not allow for that sort of decisionmaking or for distributing benefits rather than imposing penalties. There also is a more subtle lesson, however. Given the strong tendency of judicial decisionmaking to convert issues into a tort- or crime-like model, legislators should hesitate before giving courts authority to implement measures that might not fit those models. Delegations to courts in such circumstances likely will result in a body of law focused on moral blameworthiness, regardless of whether such a focus is appropriate.<sup>173</sup>

More generally, the connections between the institutional setting within which decisionmaking occurs and the substance of the resulting decisions call attention to how complicated the choice of delegate can be. Congress creates agencies in various different models, and scholars have argued persuasively that legislators can calibrate

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170. *See, e.g.*, *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252–53 (1989) (holding, in conflict with EEOC, that an employer is not liable for sex discrimination if it can show by a preponderance of the evidence that it would have made the same decision regardless of sex), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified in scattered sections of 29 U.S.C. and 42 U.S.C.); *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 70–71 (1986) (holding, in conflict with EEOC's guidelines, that an employer's duty to religious employees extends only to providing a reasonable accommodation; employers need not offer the alternative that least disadvantages the employee); *Ford Motor Co. v. EEOC*, 458 U.S. 219, 240–41 (1982) (holding, in conflict with EEOC, that an employer can toll the accrual of backpay liability by offering the plaintiff the job she was initially denied, even though the offer does not provide for retroactive seniority); *Trans World Airlines v. Hardison*, 432 U.S. 63, 84–85 (1977) (holding, in conflict with EEOC, that an employer did not violate its duty to provide reasonable accommodations for religious employees by refusing to go against the terms of a valid seniority system).

171. *See* Suk, *supra* note 118, at 438 (“[T]he elements of antidiscrimination law that best fit the distribute justice paradigm have emerged largely from administrative agency action . . .”).

172. *See id.* at 466 (arguing that agency regulation is more appropriate than litigation in court for addressing practices, like pollution, that have harmful effects but are not blameworthy).

173. *Cf.* Crane, *supra* note 28 (explaining that antitrust enforcement has followed a crime-tort model rather than a corporate-regulatory model).



agency procedures in an effort to ensure that the agency's decisions track the preferences of the legislators and their constituencies.<sup>174</sup> In some respects, the same is true of courts. Although certain institutional characteristics of courts cannot be changed (e.g., Congress could not specify that a given statute would be interpreted by popularly elected judges or by means of advisory opinions), Congress plays an important role in determining the types of cases that courts will hear. Congress must decide, for example, whether and to what extent to permit private parties to sue to enforce the statute, whether and to what extent attorneys' fees should be available to prevailing parties, what remedies are available for statutory violations, and which party bears the burden of proof.<sup>175</sup> Those choices can significantly shape the contexts in which courts confront interpretive questions. Thus, the choice of delegate is nowhere as simple as "court or agency": judicial and administrative process can take many forms.

Not only is the choice of delegate more complicated than commonly acknowledged, it also is less predictable. As the history of Title VII demonstrates, the effects of administrative procedures and other aspects of institutional design may be surprising. Legislators did not likely anticipate that limiting the EEOC's enforcement power, funding, and staff would set in motion a series of events that would push the agency to a broad interpretation of the statute focused on systemic—rather than intentional and individual—discrimination. Again, the same is largely true of courts. While Republicans resisted giving the EEOC cease-and-desist authority because of concerns that the agency would do "too much," the resulting system of private enforcement through the courts proved to be significantly more robust than they anticipated. As political scientist Sean Farhang has shown, "[t]he volume and efficacy of Title VII litigation far exceeded anyone's expectations,"<sup>176</sup> representing "a potent *strengthening* of Title VII's enforcement framework, though clearly this was not [the

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174. See McCubbins et al., *Administrative Procedures*, *supra* note 46, at 244 ("[E]lected officials can design procedures to . . . enfranchise important constituents in agency decisionmaking processes, thereby assuring that agencies are responsive to their interests.").

175. See Sean Farhang, *Private Litigation, Separation of Powers, and the Struggle Over Job Discrimination Enforcement, 1981-1991*, at 3 (Jan. 17, 2008) (UC Berkeley, JSP/Center for the Study of Law and Society Faculty Working Papers, available at <http://repositories.cdlib.org/cslls/fwp/60>) ("[W]hen drafting a regulatory statute Congress, if it is going to allow private enforcement litigation at all, has wide latitude in selecting rules that substantially determine" the expected benefits and costs of litigation, as well as the plaintiff's likelihood of success); Lemos, *supra* note 6 (explaining how statutory mechanisms like attorney's fee shifts can affect the content of courts' dockets).

176. Farhang, *supra* note 76, at 28.

Republicans'] intention."<sup>177</sup> Both sides of the Title VII story, then, call into question the notion that legislators can and will simply delegate to their "allies."

### *B. External Influences*

The discussion thus far has focused on how characteristics internal to courts and agencies can shape their decisionmaking. But various external factors also might exert influence. Indeed, a familiar theme in the literature on the administrative state is that administrative decisionmaking promotes democratic accountability because agencies are subject to significant control by Congress and the President.<sup>178</sup> If that is correct, we might expect the EEOC's interpretive and enforcement decisions to shift with the current political majority. On the other hand, courts' presumed insulation from politics should in theory generate a more stable decisionmaking record.

Title VII provides a useful window into the question of political influence because it spans several changes in party control of Congress and the White House, including the Reagan administration with its strong anti-affirmative action agenda. In this Section, I examine whether changes in the political climate influenced the EEOC's and the Supreme Court's decisionmaking. I then address the issue of interest group influence on delegated decisionmaking. I take up the more general question of the stability of judicial and agency decisionmaking in Part IV.C.

#### 1. The President

The Reagan administration provides a promising case study of presidential influence on the judiciary and the bureaucracy. Reagan was elected on a strongly deregulatory platform, which included a commitment to limit civil rights enforcement to righting individual wrongs.<sup>179</sup> A key component of Reagan's civil rights agenda was to cut

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177. *Id.* at 91.

178. See, e.g., Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 978-79 (1992) ("[A]gency decisionmaking is always more democratic than judicial decisionmaking because all agencies are accountable (to some degree) to the President, and the President is elected by the people.").

179. See Hugh Davis Graham, *The Politics of Clientele Capture: Civil Rights Policy and the Reagan Administration*, in REDEFINING EQUALITY 103, 106 (Neal Devins & Davison M. Douglas eds., 1998) ("Although environmental and consumer deregulation claimed priority under Reagan, the deregulatory campaign included civil rights components."); see also Drew S. Days, III, *The Courts' Response to the Reagan Civil Rights Agenda*, 42 VAND. L. REV. 1003, 1008 (1989)

back on all forms of affirmative action that benefited minorities at the expense of so-called “innocent nonblack employees” or applicants.<sup>180</sup> Reagan also was opposed to *Griggs* and the disparate-impact doctrine that grew out of it.<sup>181</sup> Disparate-impact analysis inevitably involved some consideration of statistical disparities between the number of minorities or women in the relevant job and the number of minorities or women in the workforce generally. Employers intent on avoiding the threat of disparate impact liability might feel compelled to achieve statistical parity—which for Reagan and his allies raised the specter of racial quotas.<sup>182</sup>

Reagan pursued his agenda in several different ways. First, he appointed a conservative Republican, Clarence Thomas, to head the EEOC. By 1982, Reagan had attained a Republican majority on the five-member commission.<sup>183</sup> Second, Reagan pressed the EEOC to

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(“Harking back to earlier theories of discrimination, the [Reagan] Administration sought to refocus civil rights enforcement on blatant, intentional violations of federal civil rights laws or the Constitution. . . . [T]his shift in policy had a corollary: Enforcement of civil rights laws utilizing concepts of ‘discriminatory effect’ or ‘disparate impact’ should be de-emphasized.”).

180. *Justice Department Seeks to Overturn Promotion Plan for New Orleans Police*, Daily Lab. Rep. (BNA) No. 6, at A-8 (Jan. 10, 1983) (quoting Brief of the Department of Justice Civil Rights Division, *Williams v. New Orleans*, 729 F.2d 1554 (5th Cir. 1984) (No. 82-3435)).

181. Indeed, Reagan was generally opposed to the use of statistics as an indicator of discrimination. During his first term, Reagan’s administration pressed the OMB to stop collecting statistical data regarding racial and ethnic groups, and pressed the EEOC to stop using statistical data to determine discrimination. Consistent with that view, Chairman Clarence Thomas “told a House Subcommittee on Employment Opportunities that ‘statistics have been misused to charge discrimination against employers.’ Thomas testified that ‘differences between the proportion of blacks, Hispanics or women at a work site and their proportion in the total work force are not proof of discrimination,’ and he urged the government to stop using statistics as an indicator of possible discrimination.” WALTON, *supra* note 84, at 133 (quoting Juan Williams, *Chairman of EEOC Tells Panel Statistics Misused to Prove Bias*, WASH. POST, Dec. 15, 1984, at A4); see also Juan Williams, *EEOC Chief Cites Abuse of Racial Bias Criteria*, WASH. POST, Dec. 4, 1984, at A13 (quoting Thomas as saying that *Griggs* had been “overextended and over-applied”).

182. See Andrew M. Dansicker, *A Sheep in Wolf’s Clothing: Affirmative Action, Disparate Impact, Quotas and the Civil Rights Act*, 25 COLUM. J.L. & SOC. PROBS. 1, 37 (1991) (explaining that, under *Griggs*, “the employer is being given a ‘request’ to hire more minorities, but it is so difficult for the employer to prove that she tried to hire those minorities . . . that the ‘request’ effectively becomes a ‘demand,’ and the end results are predetermined”); Brief for the United States as Amicus Curiae Supporting Petitioners at 25, *Wards Cove Packing Co. v. Atonio*, 493 U.S. 802 (1989) (No. 87-1387), 1988 WL 1026056 (arguing that a demanding business necessity test “would threaten to put pressure on employers to avoid disparate impact liability by adopting quotas or otherwise turning their attention away from job qualifications and toward numerical balance”).

183. As Neal Devins and David Lewis have explained, Reagan aggressively utilized the appointments process to place ideological allies in positions of agency leadership, “vett[ing] nominees for ideological consistency and intensity” and “emphasiz[ing] the need for appointees to see themselves as part of a unitary administration.” Neal Devins & David E. Lewis, *Not-So*

shift its enforcement focus away from class-based relief and toward seeking “full relief” for individual claimants.<sup>184</sup> Third, he attempted unsuccessfully to induce the EEOC to change its guidelines on employee selection procedures—the guidelines that the Supreme Court and lower courts had used to shape the contours of disparate impact analysis.<sup>185</sup> Finally, Reagan urged the courts themselves to adopt a narrow reading of Title VII.<sup>186</sup>

Reagan enjoyed mixed success in the courts. As Table 1 shows, no obvious pattern emerges when the Title VII cases are broken down by the presidential administration in office at the time of the decision—including Reagan’s.<sup>187</sup> The percentage of liberal decisions by the Court is not consistently lower during conservative administrations (Nixon, Ford, Reagan, Bush I and Bush II) than during liberal administrations (Carter and Clinton). More formally, there proves to be no statistically significant association between the

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*Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 459, 481 (2008).

184. See *infra* notes 217–218 and accompanying text.

185. See WALTON, *supra* note 84, at 157 (quoting the acting Chair of the EEOC from 1981–82 as stating that, “OMB, Justice and certain recent staff appointees at EEOC have been quietly working to undermine the Employment Selection Guidelines and erode—by oratory—the *Griggs Doctrine*”); Eleanor Holmes Norton, *Equal Employment Law: Crisis in Interpretation—Survival Against the Odds*, 62 TUL. L. REV. 681, 707 (1988) (noting “frequent, if aborted” threats to revise the guidelines).

186. Notably, the final strategy did not require the EEOC’s participation or assent. See *supra* note 112 (discussing Solicitor General control of litigation in the Supreme Court). Indeed, the 1980s saw a clash between the traditionally pro-claimant EEOC and the Reagan administration. In the years between 1964 and 1981, the EEOC had taken a position on thirty-six issues that reached the Court. On only two of those issues did the Solicitor General adopt a different position. During the Reagan years, the EEOC had an identifiable position on thirty-four issues that reached the Court. The Solicitor General filed a brief without the EEOC’s participation that adopted a contrary position with respect to seven of those issues, and persuaded the EEOC to sign briefs representing a change of position with respect to an additional five issues.

187. These findings are consistent with those in Segal, *supra* note 119, at 34 (empirically testing, and rejecting, the notion that the Supreme Court shifted to the right on civil rights following the election of Ronald Reagan in 1980). William Eskridge, on the other hand, has argued that the Court shifted to the right on civil rights issues after Reagan’s election, and has attributed that shift to the fact that “the Court would be protected from congressional overrides by a presidential veto, unless the Court took a position that not even a third of either chamber would accept.” Eskridge, *supra* note 140, at 395. I did not attempt to replicate Eskridge’s study, which included Title VII as well as other civil rights statutes. In the Title VII context, however, the Court’s decisionmaking was if anything more liberal following Reagan’s election than before. The Court rendered a liberal decision on six out of the thirteen issues it considered in the 1977–79 Terms (46 percent), and on twelve of the twenty-three issues it considered in the 1980–83 Terms (52 percent). *But cf.* Eskridge, *supra* note 140, at 396 n.205 (reporting that the Court rendered a liberal decision in ten of the seventeen statutory civil rights cases decided during the 1977–79 Terms, and in eleven of the thirty-four such cases decided during 1980–83).

percentage of liberal decisions and the identity or party of the administration in office.

**TABLE 1: SUPREME COURT DECISIONMAKING AND THE POLITICS OF CURRENT PRESIDENTS**

**Panel A: Liberal Supreme Court Decisions on Title VII-Related Issues, by Presidential Administration in Office**

| <b>President in Office</b> | <b>Number of Liberal Title VII Decisions</b> | <b>Total Number of Title VII Decisions</b> | <b>Percentage of Liberal Title VII Decisions</b> |
|----------------------------|--|--|--|
| Nixon                      | 6  | 7  | 86%  |
| Ford                       | 5  | 11   | 45%  |
| Carter                     | 11   | 25   | 44%  |
| Reagan                     | 30   | 43   | 70%  |
| Bush I                     | 6  | 13   | 46%  |
| Clinton                    | 8  | 11   | 73%  |
| Bush II                    | 7  | 10   | 70%  |

**Panel B: Political Direction of Supreme Court Decisions on Title VII-Related Issues under Democratic and Republican Presidents<sup>188</sup>**

| <b>Party of Sitting President</b> | <b>Supreme Court Decisions</b> |                     |              |
|-----------------------------------|--------------------------------|---------------------|--------------|
|                                   | <i>Liberal</i>                 | <i>Conservative</i> | <b>Total</b> |
| <i>Democratic</i>                 | 19 (53%)                       | 17 (47%)            | 36           |
| <i>Republican</i>                 | 54 (64%)                       | 30 (36%)            | 84           |
| <b>Total</b>                      | 73 (61%)                       | 47 (39%)            | 120          |

The Court's decisionmaking may reflect presidential politics in a more subtle way—and with a substantial time lag—through the mechanism of judicial appointments. The percentage of liberal

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188. Row percentages are shown in parentheses. Using a significance level of 0.05, no significant relationship exists between the direction (liberal or conservative) of the Supreme Court's decisions on Title VII-related issues and the party of the President in office at the time the decisions were made. In the absence of such a relationship, one would expect to see approximately twenty-two liberal decisions under Democratic administrations, and fifty-one liberal decisions under Republican administrations. A chi-square test with one degree of freedom indicates that there is a 0.2366 probability that random chance alone would have yielded a difference of the type witnessed between actual and expected values.

opinions issued during the Reagan administration was a relatively high 70 percent. That figure dipped to 46 percent during the first Bush administration. Perhaps that conservative turn can be explained by the fact that the cumulative effect of Reagan's three appointees did not begin to be felt until the latter part of the Reagan administration and through the Bush administration.

A strong correlation exists between the Justices' votes on Title VII issues and their presumed political preferences. As Table 2 shows, Justices who are generally viewed as "liberal" have cast a high proportion of "liberal" votes in the Title VII context, while the opposite is true for Justices typically deemed "conservative."<sup>189</sup> Statistical analysis confirms that the party of the appointing President and the direction of a Supreme Court Justice's votes (i.e., liberal or conservative) on Title VII issues are highly correlated: Justices appointed by Democratic presidents tend to render significantly more liberal decisions than Justices appointed by Republican presidents.

Nevertheless, the appointment process is hardly a sure-fire mechanism for ideological consistency.<sup>190</sup> Some of the most liberal Justices to cast votes during the Title VII era were appointed by Republican Presidents (Brennan, Souter, Stevens, and Blackmun), and Justice White (President Kennedy's sole appointee) cast more conservative votes than several Republican appointees. Moreover, Reagan's three appointees—O'Connor (1982), Scalia (1984), and Kennedy (1988)—all proved to be farther to the left on Title VII issues than the Justices they replaced.<sup>191</sup>

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189. Interestingly, Justice Thomas's votes in Title VII cases seem notably different from his votes in other areas. Justice Thomas consistently is ranked as one of the most conservative Justices on the modern Court, yet he falls close to the middle of the range on Title VII. One possible explanation for that discrepancy is that Justice Thomas's experience at the EEOC heightened his sensitivity to, and understanding of, the many facets of employment discrimination.

190. See generally Lee Epstein et al., *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 NW. U. L. REV. 1483, 1540–41 (2007) ("The ideological boxes into which Presidents, senators, and the public place Justices at the time of their nominations are not so tightly sealed.").

191. Justice O'Connor replaced Justice Stewart, who had a more conservative voting record on Title VII cases (51 percent liberal) than she would have (57 percent liberal). Justice Scalia was appointed to the Court to fill the vacancy left when Justice Rehnquist was elevated to Chief Justice to replace Chief Justice Burger. Again, Burger's voting record (38 percent liberal) was more conservative than Scalia's proved to be (43 percent liberal). The same pattern holds for Justice Kennedy (49 percent liberal) who replaced Justice Powell (45 percent liberal). The most convulsive shift was Justice Thomas's replacement of Justice Marshall. Justice Thomas has a fairly moderate voting record in Title VII cases (52 percent liberal), but Justice Marshall's voting record was one of the more lopsided (88 percent liberal). Accord Matthew C. Stephenson, *Mixed Signals: Reconsidering the Political Economy of Judicial Deference to Administrative Agencies*, 56 ADMIN. L. REV. 657, 675 (2004) (charting the ideology of the median Justice following various

**TABLE 2: SUPREME COURT DECISIONMAKING AND THE POLITICS OF APPOINTING PRESIDENTS****Panel A: Percentage of Liberal Votes by Justice**

| <b>Justice (appointing President)</b> | <b>Number of Liberal Title VII Votes</b> | <b>Total Number of Title VII Votes</b> | <b>Percentage of Liberal Title VII Votes</b> |
|---------------------------------------|--|--|--|
| Douglas (Roosevelt)                   | 10                                       | 10                                     | 100%   |
| Brennan (Eisenhower)                  | 79                                       | 91                                     | 87%  |
| Stewart (Eisenhower)                  | 24                                       | 47                                     | 51%  |
| White (Kennedy)                       | 53                                       | 100                                    | 53%  |
| Marshall (Johnson)                    | 84                                       | 96                                     | 88%  |
| Burger (Nixon)                        | 29                                       | 76                                     | 38%  |
| Blackmun (Nixon)                      | 71                                       | 100                                    | 71%  |
| Powell (Nixon)                        | 33                                       | 74                                     | 45%  |
| Rehnquist (Nixon)                     | 44                                       | 115                                    | 38%  |
| Stevens (Ford)                        | 75                                       | 105                                    | 75%  |
| O'Connor (Reagan)                     | 38                                       | 67                                     | 57%  |
| Scalia (Reagan)                       | 19                                       | 44                                     | 43%  |
| Kennedy (Reagan)                      | 17                                       | 35                                     | 49%  |
| Souter (Bush I)                       | 19                                       | 23                                     | 83%  |
| Thomas (Bush I)                       | 11                                       | 21                                     | 52%  |
| Ginsburg (Clinton)                    | 16                                       | 19                                     | 84%  |
| Breyer (Clinton)                      | 15                                       | 17                                     | 88%  |
| Roberts (Bush II)                     | 2  | 3                                      | 67%  |
| Alito (Bush II)                       | 0  | 2                                      | 0%   |

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membership changes on the Court, and finding a significant shift after Thomas replaced Marshall, but scant movement after the additions of O'Connor, Scalia, Kennedy, and Souter).

**Panel B: Party of Appointing President and the Political  
Direction of Justices' Title VII Votes<sup>192</sup>**

| <b>Party of<br/>Appointing<br/>President</b> | <b>Title VII Votes</b> |                     |              |
|--|------------------------|---------------------|--------------|
|  | <i>Liberal</i>         | <i>Conservative</i> | <b>Total</b> |
| <i>Democratic</i>                            | 178 (74%)              | 64 (26%)            | 242          |
| <i>Republican</i>                            | 461 (57%)              | 342 (43%)           | 803          |
| <b>Total</b>                                 | 639                    | 406                 | 1045         |

A more detailed look at the Supreme Court's decisions confirms what the raw numbers suggest: Reagan failed to induce major shifts in Title VII doctrine. On the issues most important to Reagan's agenda—affirmative action, seniority systems, and group- or statistic-based claims—the administration came out roughly even. The most successful issue for Reagan was seniority systems, on which the Court took a consistently employer-protective approach.<sup>193</sup> But Reagan faced an uphill battle on disparate-impact liability and affirmative action, as the Court already had spoken approvingly to those issues.<sup>194</sup>

Consider, first, the question of disparate-impact liability. As noted above, the Court's 1971 decision in *Griggs* had endorsed the EEOC's disparate-impact theory of Title VII liability. By the time President Reagan took office ten years later, disparate-impact analysis was cemented in Title VII doctrine, though important questions remained regarding its precise scope. Those questions came to the fore in 1989 when the Court decided *Wards Cove Packing Co.*,

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192. Row percentages are shown in parentheses. Using a significance level of 0.05, a statistically significant relationship exists between the party of the appointing President and the direction of a Justice's Title VII votes (liberal or conservative): Justices appointed by Democratic Presidents are significantly more likely to cast liberal votes on Title VII-related issues than Justices appointed by Republican Presidents. In the absence of a relationship, one would expect to see approximately 148 liberal votes by Justices appointed by Democratic Presidents and 491 liberal votes by Justices appointed by Republican Presidents. A chi-square test with one degree of freedom indicates that there is less than a 0.0001 probability that random chance alone would have yielded a difference as large as the one witnessed between actual and expected values.

193. See *supra* notes 135–139 and accompanying text.

194. See *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 214 (1979) (finding that an employer could grant preferential treatment to racial minorities under a private, voluntary affirmative action program); *Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971) (holding that under Title VII, if a hiring procedure disparately impacts ethnic minority groups, businesses must demonstrate that such tests are “reasonably related” to the job for which the test is required).



*Inc. v. Atonio*.<sup>195</sup> At the time, the prevailing rule in disparate-impact cases was that once a plaintiff established a disparate impact, the burdens of production and persuasion shifted to the defendant to justify the challenged practice. Courts were split on whether the defendant had to show that the practice was necessary or merely related to success on the job.<sup>196</sup> *Wards Cove* appeared to adopt a standard more lenient than either of the two prevailing contenders: the defendant need only show that the practice “serves, in a significant way, the legitimate employment goals of the employer.”<sup>197</sup> The Court also shifted the burden of persuasion on the justification point.<sup>198</sup> Both aspects of the Court’s holding were consistent with positions taken by the Reagan administration in its amicus brief, which the EEOC did not join.<sup>199</sup>

Although *Wards Cove* was a victory for the Reagan administration, it was short lived. A Democrat-controlled Congress quickly introduced legislation to overrule *Wards Cove* in relevant part. The proposed override provision would have obligated employers to demonstrate that the challenged practice was “required by business necessity,” and defined that term to mean “essential to effective job performance.”<sup>200</sup> The new Bush administration, fearing a push toward

195. 490 U.S. 642 (1989).

196. The Court stated in *Griggs* that “[t]he touchstone is business necessity,” 401 U.S. at 431, but it went on to explain that practices with a disparate impact on minority applications are permissible only if they “can[] be shown to be related to job performance,” *id.*, “are demonstrably a reasonable measure of job performance,” *id.* at 436, or have “a manifest relationship to the employment in question,” *id.* at 432. Clearly, “necess[ary]” and “related” are—or at least could be—significantly different standards. *Griggs* therefore spawned substantial uncertainty in the lower courts as to what “business necessity” entailed, and how it could be proved. See Dansicker, *supra* note 182, at 16 & nn.15–16. Subsequent decisions by the Court provided little guidance, as they appeared to waver between a strict and more lenient approach. See *id.* at 19–20 (“[T]he Supreme Court vacillated between the manifest relationship and business necessity standards.”). Compare *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975) (holding that an employment practice with a disparate impact on minority applicants must be “‘predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job’” (quoting 29 C.F.R. § 1607.4(c))), and *N.Y. Transit Auth. v. Beezer*, 440 U.S. 568, 587 n.31 (1979) (concluding that because the defendant employer’s goals were “significantly served by—even if they do not require—[the challenged] rule,” the record “demonstrat[ed] that [the] rule bears a manifest relationship to the employment in question” (internal quotation marks omitted)), with *Dothard v. Rawlinson*, 433 U.S. 321, 331 & n.14 (1977) (finding that the defendant prison failed to establish that the physical size of a prison guard is “necessary” or “essential” to success in the job).

197. 490 U.S. at 659 (disclaiming any requirement “that the challenged practice be ‘essential’ or ‘indispensable’ to the employer’s business”).

198. *Id.* at 659–60.

199. Brief for the United States as Amicus Curiae Supporting Petitioners, *Wards Cove*, 490 U.S. 642 (No. 87-1387), 1988 U.S. S. Ct. Briefs LEXIS 263, at \*29.

200. S. 2104, 101st Cong. §§ 3–4 (as introduced to Senate, Feb. 7, 1990).

racial quotas, opposed that language on a ground that such a requirement would “all but compel employers to adopt quotas by making Title VII liability hinge on bad numbers.”<sup>201</sup> After narrowly losing a veto battle over the issue,<sup>202</sup> Congress opted to omit any definition of the key term “business necessity,” and President Bush signed the bill, known as the Civil Rights Act of 1991.<sup>203</sup>

Reagan faced similar challenges with respect to affirmative action. In 1979, a divided Court held in *United Steelworkers of America v. Weber* that Title VII does not prohibit all private, voluntary, race-conscious affirmative action plans.<sup>204</sup> Although the Justices made no mention of them, the Court’s decision was consistent with the EEOC’s guidelines on affirmative action, which received heavy billing in the amicus brief filed by the EEOC and the Carter administration.<sup>205</sup>

Reagan took office intent on chipping away at *Weber*, and at first it appeared that he might prevail. In *Firefighters Local Union No. 1784 v. Stotts*,<sup>206</sup> the Court struck down a district court decree requiring the defendant fire department to lay off senior white employees before junior black employees in contravention of an existing seniority system. The Court reasoned that the district court’s order violated a provision of Title VII that limits judicial remedies to the victims of discrimination.<sup>207</sup> Reading the majority opinion to

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201. Eskridge, *supra* note 43, at 639.

202. The final version of the legislation passed both houses of Congress in 1990 and defined “business necessity” to mean that the challenged practice “must bear a significant relationship to successful performance of the job.” S. 2104, § 3 (as passed by Senate, July 18, 1990). Although that language was similar in many respects to the Bush definition, the difference between the two proposals was enough to persuade President Bush to veto the version of the bill that Congress passed in 1990. The Senate fell one vote short of overriding the veto. See Neil A. Lewis, *President’s Veto of Rights Measure Survives by 1 Vote*, N.Y. TIMES, Oct. 25, 1990, at A1.

203. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified in scattered sections of 42 U.S.C.). As enacted, the 1991 Act shifted the burden to the defendant to “demonstrate that the challenged practice is job related for the position in question and consistent with business necessity,” § 105, but did not define the key term.

204. 443 U.S. 193, 201-02 (1979).

205. Adoption of Interpretive Guidelines, 44 Fed. Reg. 4422, 4427 (Jan. 19, 1979) (codified at 29 C.F.R. § 1608.4). The Guidelines endorsed voluntary efforts at eradicating discrimination, and concluded that affirmative action is appropriate where an employer, after analyzing its employment practices, finds a reasonable basis for believing that race conscious action is required to bring it into compliance with Title VII or to remedy prior discrimination by the employer or by others.

206. 467 U.S. 561 (1984).

207. *Id.* at 579-80. Section 706(g) of Title VII provides that “no order of the court shall require the . . . hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused . . . employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-5(g)(2)(A). As the Solicitor General’s

prohibit quota relief of any sort, the Reagan administration touted *Stotts* as an important move away from *Weber*.<sup>208</sup> Again, however, the triumph was fleeting. In *Local 28, Sheet Metal Workers' International Association v. EEOC*,<sup>209</sup> five Justices agreed that in appropriate circumstances a court may order preferential treatment for non-victims in order to remedy Title VII violations.<sup>210</sup> And in *Johnson v. Transportation Agency, Santa Clara County, Cal.*, the Court approved an affirmative action plan by a public employer, ruling that because the plan was moderate, flexible, and took a case-by-case approach, it was justified under Title VII to rectify a “manifest imbalance” in traditionally job-segregated categories.<sup>211</sup> The majority rejected the Solicitor General’s argument that affirmative action is permissible only to the extent that it rectifies actual discrimination by the employer.<sup>212</sup>

Although cases like *Stotts* provided some glimmer of hope, the Court’s decision in *Johnson* was, by the Reagan administration’s own reckoning, a major defeat.<sup>213</sup> In the end, although Reagan was able to populate the lower courts with sympathetic judges,<sup>214</sup> his losses in the

brief noted, the EEOC rejected the interpretation of § 706(g) pressed by the Reagan administration and adopted by the Court, reasoning that it would “call into question numerous extant consent decrees and conciliation agreements to which the EEOC is a party.” Brief for the United States as Amicus Curiae Supporting Petitioners, *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984) (No. 82-206), 1983 U.S. S. Ct. Briefs LEXIS 427, at \*36 n.23.

208. See Joel L. Selig, *The Reagan Justice Department and Civil Rights: What Went Wrong*, 1985 U. ILL. L. REV. 785, 824–26 (arguing that the Reagan Administration had misinterpreted *Stotts*); William Bradford Reynolds, *The Reagan Administration and Civil Rights: Winning the War Against Discrimination*, 1986 U. ILL. L. REV. 1001, 1015 (writing in reply to Selig, “*Stotts* appeared to us to hold that quotas or other preferential techniques, which by design benefited non-victims because of race or sex, cannot be a part of relief under Title VII.”). Reynolds was the Assistant Attorney General for Civil Rights under President Reagan.

209. 478 U.S. 421 (1986).

210. Interestingly, the EEOC—which was a respondent in the case and had joined the plaintiffs throughout the litigation in arguing that numeric goals were necessary—joined the Solicitor General’s brief advocating a strongly anti-affirmative action position. It appears that the Solicitor General effectively overruled the EEOC when the case made it to the Supreme Court and, thus, passed out of the hands of the EEOC and into the hands of the Attorney General. See Devins, *supra* note 112, at 299–300 (“[W]hen the EEOC explained its position to Solicitor General attorneys, it was flatly told that it . . . would have to swallow DOJ opposition to affirmative action.”).

211. 480 U.S. 616, 641–42 (1987).

212. See Brief for the United States as Amicus Curiae Supporting Petitioner, *Johnson v. Transp. Agency*, 480 U.S. 616 (1987) (No. 85-1129), 1986 WL 728148, at \*13–16.

213. See Reynolds, *supra* note 208, at 1019 (describing *Johnson* as “a significant setback”).

214. See Graham, *supra* note 179, at 108 (noting that “appointing youthful conservatives to the federal courts[] was a priority of the Reagan revolution” and that, “[b]y the end of his eight years in the White House, Reagan had filled 338 judgeships on the district and appeals courts—about half the total.”); Stephenson, *supra* note 191, at 669 (reporting that “the federal circuit

Supreme Court meant that voluntary affirmative action and disparate impact analysis would endure.

Reagan's agenda also was at odds with the EEOC's practices in 1981. The EEOC had issued guidelines strongly supportive of voluntary affirmative action and had sought relief in the form of "goals and timetables" both in its efforts at conciliation and in litigation.<sup>215</sup> The EEOC likewise had emphasized the class-based nature of discrimination and had led the charge to push courts to recognize theories, such as disparate impact, that targeted the more subtle forms of discrimination.<sup>216</sup>

As noted, Reagan used the appointment power to install a Republican majority in the EEOC. Changing EEOC leadership made it possible for Reagan to influence the agency's enforcement priorities. In due course, the EEOC shifted its focus from "broad, systematic employment practices that operated to discriminate against large classes of individuals" to efforts to obtain "full remedies for every individual complainant."<sup>217</sup> In practice, that shift resulted in less enforcement by the EEOC since the new policies compelled the agency to spend more resources on individual charges of discrimination at a time when claims were multiplying and its budget was shrinking.<sup>218</sup>

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courts were liberal from 1977 until about 1985, conservative from 1990 to 1996, and relatively moderate in the 1986–89 and the 1997–2002 periods”).

215. See Norton, *supra* note 185, at 702–03; Selig, *supra* note 208, at 821–23; see also STORY OF THE EEOC, *supra* note 148, at 16 (describing successful EEOC effort to obtain a consent decree against the Illinois Central Gulf Railroad (among other employers) that mandated “hiring at a rate 25 percent above the representation of each minority group in the labor force until goals were reached in specific job categories”).

216. See *supra* notes 151–155 and accompanying text; STORY OF THE EEOC, *supra* note 148, at 31 (“EEOC began the 1980s by continuing to focus on broad, systemic employment practices that operated to discriminate against large classes of individuals. However, the Republican appointees to the Commission wanted to reassess its methods.”).

217. STORY OF THE EEOC, *supra* note 148, at 31–32; see Graham, *supra* note 179, at 106 (noting that the EEOC “shifted enforcement emphasis from class-action proceedings to conciliation and lawsuits seeking make-whole relief for identified victims of discrimination,” and that “the shift in regulatory strategy was accomplished not through formal, notice-and-comment procedures but through internal policy directives”).

218. See MICHAEL E. MILAKOVICH & GEORGE J. GORDON, PUBLIC ADMINISTRATION IN AMERICA 373 (10th ed. 2009) (“Ronald Reagan, from the very start of his presidency, used a comprehensive assault on the national government budget as the key to his attempt to reshape the national bureaucracy. Reagan demonstrated convincingly that the most direct way (if not always the easiest politically) to control an agency is to cut—or increase—its budget.”); STORY OF THE EEOC, *supra* note 148, at 45 (explaining that budget cuts forced the agency “to undergo severe staff reductions, leading to an ever larger charge backlog”); Graham, *supra* note 179, at 106 (noting that the Reagan administration “slowed regulatory activity by cutting the agency budgets”); see also Norton, *supra* note 185, at 706 (noting a 70 percent drop in cases filed by the EEOC in court during the 1980s); B. Dan Wood, *Does Politics Make a Difference at the EEOC?*, 34 AM. J. POL. SCI. 503, 522–23 (1990) (finding a sharp drop in EEOC enforcement under Reagan).

The relevant changes lasted only as long as the Republican majority, however. By 1995, the EEOC had abandoned the “full investigation” directive of the 1980s and returned to a more “strategic and systematic approach.”<sup>219</sup>

Moreover, Reagan was quite *unsuccessful* in influencing the EEOC’s fundamental approach to Title VII. Although Reagan and others in his administration pushed the agency to change its guidelines on affirmative action and employee selection procedures, their efforts were in vain. The primary obstacle to change, it turned out, was the Supreme Court. The disparate-impact theory of liability that underlay the employee selection guidelines had become Title VII gospel after the Court’s decision in *Griggs*, and the Supreme Court’s 1979 decision in *Weber* had endorsed at least some forms of voluntary affirmative action. Given those precedents, any significant changes to the EEOC’s related guidelines were both unlikely and futile.<sup>220</sup>

In sum, Reagan’s effect on the EEOC was mixed at best, and not much different from how he fared in the Supreme Court. Although Reagan was able to change the EEOC’s short-term practices (such as its enforcement priorities), he failed to shift either the agency’s or the Court’s understanding of Title VII’s meaning. On its face, that finding might seem to call into question the general assumption that agencies are more susceptible to presidential influence than are courts. It bears emphasis, however, that the EEOC is an independent agency. Independent agencies tend to be governed by a bipartisan commission over which the President has only limited removal authority—and, hence, limited means of control.<sup>221</sup> Such agencies also are exempt from

219. STORY OF THE EEOC, *supra* note 148, at 58; *see also* Press Release, E.E.O.C., EEOC Chairman and Commissioners Expected to Take Decisive Actions to Reinvigorate Charge Processing (Apr. 18, 1995), *available at* <http://www.eeoc.gov/eeoc/newsroom/release/archive/4-18-95.html> (announcing changes for processing increased charge filings).

220. *See* Norton, *supra* note 185, at 706–07. Concededly, the fact that the Court has the last word as to the meaning of Title VII may mean that the history recounted here understates the degree of presidential influence over agencies’ interpretive decisions. Had the EEOC’s guidelines on employee selection and affirmative action operated with the force of law, Reagan may well have pressed harder for revisions, and those efforts may have met with more success than was possible under Title VII.

221. *See* Angel Manuel Moreno, *Presidential Coordination of the Independent Regulatory Process*, 8 ADMIN. L.J. AM. U. 461, 469 (1994) (explaining that, while “no uniform definition of independent agency appears to exist in American scholarship,” most definitions “emphasiz[e] that the president cannot remove . . . commissioners”); Alan B. Morrison, *How Independent are Independent Regulatory Agencies?*, 1988 DUKE L.J. 252, 252 (“[A]n independent agency is one whose members may not be removed by the President except for cause, rather than simply because the President no longer wishes them to serve.”); *see also* Strauss, *supra* note 50, at 717 n.99 (arguing that the President’s power to remove independent agency heads for “cause” would not permit removal on the ground that the agency did not interpret the statute as the President wished).

executive orders requiring OMB review and the like, while they remain subject to the typical means of control by Congress.<sup>222</sup> Although independent agencies are by no means fully independent from the President,<sup>223</sup> it should not be terribly surprising that an independent agency like the EEOC would exhibit less-than-perfect accord with presidential policies.

Moreover, despite the similarities, the judicial and administrative experiences under Title VII suggest several ways in which courts and independent agencies might differ in terms of presidential influence. The first concerns the procedures for enforcement. The institution charged with enforcing a right or entitlement exercises a great deal of power over access to that right. Under Reagan, the EEOC made fundamental changes to its enforcement priorities, transferring resources from investigating and prosecuting subtle, group-based forms of discrimination to seeking redress for intentional, individual wrongs. If EEOC enforcement were the only mechanism for Title VII relief, the Reagan-era shift would have worked a significant (if temporary) change in the practical effect of the statute. But with judicial enforcement, the doors are always open. Thus, the Title VII experience reveals a potentially important distinction between delegations of *interpretive* authority and delegations of *enforcement* authority. Presidents may find it easier to shift an agency's approach to enforcement than to work fundamental changes in statutory interpretation. It follows that legislators

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222. See Linda R. Cohen & Matthew L. Spitzer, *Judicial Deference to Agency Action: A Rational Choice Theory and an Empirical Test*, 69 S. CAL. L. REV. 431, 448 (1995) (noting that, due to their exemption from the requirement of OMB review, "independent agencies d[o] not need to be as immediately attentive to changes in the executive branch as [are] executive agencies"). Predictably, congressional delegations to independent agencies tend to increase during periods of divided government. See DAVID EPSTEIN & SHARYN O'HALLORAN, *DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS* 146-47, 158 (1999) (arguing that Congress is less likely to delegate at all during periods of divided government, and, when it does delegate, more likely to choose independent agencies than executive agencies subject to greater presidential control); see also Devins & Lewis, *supra* note 183, at 464 (explaining that Congress is more likely to delegate authority to independent commissions when they "fear the administrative influence of the current President on policies post-enactment"). Congress also may be more likely to delegate enforcement authority to the courts during times of divided government.

223. In particular, although the President's removal power is constrained with respect to independent agencies, he retains a great deal of leverage through the appointment power. See B. Dan Wood & Richard W. Waterman, *The Dynamics of Political Control of the Bureaucracy*, 85 AM. POL. SCI. REV. 801, 822 (1991) (finding that "agency outputs shifted immediately after a change in agency leadership" in the EEOC and four other agencies, and concluding that "political appointment . . . is very important"). See generally Devins & Lewis, *supra* note 183 (discussing the Presidential appointment process). The same is true of federal courts, but the number of judges is much larger and the rate of turnover much slower, making it more difficult for a President quickly to change the makeup of the federal judiciary.

concerned about the possibility of presidential influence should prefer judicial enforcement coupled with a private right of action over enforcement by an agency. As long as private litigants control the decision to initiate “lawmaking,” statutory enforcement is unlikely to vary significantly by presidential administration.<sup>224</sup>

Finally, while both judicial and administrative interpretations of Title VII have been resistant to short-term shifts in administration policy, judicial interpretations may be more susceptible to presidential influence over the long term due to the relative stability of the Supreme Court’s decisions. The issue of stability is discussed in more detail below, but the point here is straightforward. Barring a congressional override, which is rare,<sup>225</sup> or judicial overruling, which is even more rare,<sup>226</sup> Supreme Court interpretations do not change much over time. Thus, if the President is able to win a favorable interpretation from the Court—whether through strategic use of the appointments power or the force of advocacy by the Solicitor General—that victory may have more lasting effect than a successful effort to shift an agency’s interpretation. The flip side also is true: a President who encounters unfavorable Supreme Court precedents (as happened with President Reagan in *Griggs* and *Weber*) will face a steeply uphill battle.

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224. See Sean Farhang, Public Regulation and Private Lawsuits in the American Separation of Powers System 8 (Sept. 14, 2007) (Berkeley JSP/Ctr. for Study of Law & Soc’y Faculty Working Papers, available at <http://escholarship.org/uc/item/8m59b989>) (“The operation of economic incentives on private litigants and lawyers in statutorily constructed enforcement markets creates an enforcement apparatus with an autopilot character, substantially beyond the reach of presidential influence . . .”). In this empirical study of legislation designed to facilitate private lawsuits to enforce statutory provisions—i.e., legislation that creates a private right of action and provides for attorney’s fees for prevailing plaintiffs and/or enhanced damages—Farhang found that “conflict between the executive and legislative branches causes Congress to rely more heavily upon the mobilization of private litigants for regulatory enforcement.” *Id.* at 33. Although Farhang focuses on congressional empowerment of potential litigants rather than empowerment of courts, it is hard to have the former without the latter. The key point for our purposes is that legislators concerned about the possibility of presidential influence on regulatory policy may prefer “private enforcement” through the courts over an enforcement scheme that leaves all enforcement power in the hands of an agency.

225. In an empirical study of congressional overrides of Supreme Court statutory decisions, William Eskridge found an average of ten overrides per Congress, or five per year. Eskridge, *supra* note 140, at 338.

226. In an empirical study of the Supreme Court’s application of stare decisis to statutory precedents, William Eskridge identified fifty cases decided between 1961 and 1987 in which the Court explicitly or implicitly overruled prior statutory interpretations, for an average of approximately two per year. Eskridge, *supra* note 65, at 1427–34.

## 2. The Current Congress

As discussed in the previous Section, the enacting Congress has various means of controlling or channeling delegated lawmaking. The most obvious is the text of the statute itself, which can be broad or narrow, can specify certain guiding principles or policies,<sup>227</sup> and can prioritize or rule out certain considerations for decisionmaking.<sup>228</sup> Congress also can exert *ex ante* control by specifying agency procedures or other forms of institutional design. But such mechanisms are necessarily imperfect; the whole point of a delegation is to leave some decisions to another institution, and as a result, delegates will always enjoy some degree of discretion. They will have choices to make, and those choices may be made after many members of the enacting Congress have left office. Congress is not a static body: it changes with each election cycle. Future Congresses may hold views that diverge from those of the enacting Congress. Fearing such change, enacting legislators may seek to delegate to the courts, believing them to be less likely to bend to the wishes of the current political majority.

The Title VII experience provides an opportunity to gauge the effect of changing political majorities on the decisionmaking of the Court and the EEOC. I argued above that neither institution's decisions reveal any notable shifts that correlate with changes in Presidential politics. Does the picture change when we add Congress?

Congress was controlled by the Democrats during most of Title VII's history. Republicans controlled the Senate (and thus all of the Senate oversight committees) from 1981 through 1986; and Republicans controlled both the House and the Senate for most of the period from 1995 through 2006.<sup>229</sup> Both periods overlapped with a Republican presidency—the entire period in the 1980s, and the period after George W. Bush took office in 2001. Neither period reveals any

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227. See Robert Pear, *Congress Passes Bill With Protections for Disabled*, N.Y. TIMES, Sept. 18, 2008, at A21 (describing a recent amendment to the Americans with Disabilities Act that overturns several Supreme Court decisions and specifies that “[t]he definition of disability in this act shall be construed in favor of broad coverage”).

228. For example, the Civil Rights Act of 1991 contained a provision limiting the legislative history that courts could use to supply meaning to the term “business necessity.” Pub L. No. 102-166, § 105(b), 105 Stat. 1071, 1075 (1991) (codified as amended at 42 U.S.C. 1981 (2006)). The only authorized source of legislative history is an interpretive memorandum stating that “[t]he terms ‘business necessity’ and ‘job related’ are intended to reflect the concepts enunciated by the Supreme Court” in *Griggs* and other cases “prior to” *Wards Cove*. 137 CONG. REC. 28,680 (daily ed. Oct. 25, 1991) (statement of Sen. Danforth).

229. The Democrats took control of the Senate on May 24, 2001, when Senator Jeffords switched parties, but lost it again in the 2002 elections.



significant shift in the EEOC's interpretation of Title VII, though again, statutory enforcement seems more susceptible to political influence than interpretation.<sup>230</sup>

As for the Court, the lineup of Justices is widely regarded as having fallen right-of-center during both periods of Republican dominance in Congress.<sup>231</sup> Therefore, we might expect the Court to take advantage of the congenial political atmosphere during those periods and render more conservative decisions. Yet no evidence of such strategic behavior exists in the Title VII context. As Table 3 demonstrates, the politics of the party in control of the Congress and the direction of Supreme Court decisionmaking in the Title VII arena are not correlated. That is, the Court does not appear to render more "liberal" decisions during periods of Democratic control of Congress or more "conservative" decisions under Republican control. In fact, the converse appears to be true: the association between Democratic control of Congress and liberal Supreme Court decisionmaking is negative and statistically significant. The Court's behavior suggests that the Justices are not paying particularly close attention to the political winds blowing their way from the Capitol.

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230. One study has found that the number of lawsuits filed by the EEOC dropped dramatically in the mid-1990s, apparently as a result of the "Republican revolution" of 1994. David Hedge & Renee J. Johnson, *The Plot That Failed: The Republican Revolution and Congressional Control of the Bureaucracy*, 12 J. PUB. ADMIN. RES. & THEORY 333, 344-46 (2002). The cause of the dip in enforcement is uncertain, however, because the numbers rebounded in 1996 and 1997, without a shift in party control of Congress. As the authors acknowledge, "[i]t is difficult to know whether [President Clinton's appointment of a new Chairman] or the waning influence of the Republican Revolution had a stronger influence in reinvigorating the activities of the EEOC, but the change in the EEOC's agenda is clear." *Id.* at 344.

231. See, e.g., Cohen & Spitzer, *supra* note 222, at 445 (describing the median Justice at the time of Reagan's inauguration as "a moderate/conservative"); Stephenson, *supra* note 191, at 676 ("The 1977-1981 period was the most liberal [Supreme] Court in the sample. The Court became somewhat more conservative in the 1982-1990 period, and it became sharply more conservative from 1991 to 1993—the most conservative Court in the sample. The Court became somewhat more liberal in the 1994-2002 period, but was not as liberal as it had been in 1991 or before.").

**TABLE 3: CONGRESSIONAL POLITICS AND  
SUPREME COURT DECISIONMAKING**

**Panel A: Political Direction of Supreme Court Decisions on  
Title VII-Related Issues under Democratic and Republican  
Control of the House of Representatives<sup>232</sup>**

| <b>Party Controlling<br/>House</b> | <b>Supreme Court Decisions</b> |                     |              |
|------------------------------------|--------------------------------|---------------------|--------------|
|                                    | <i>Liberal</i>                 | <i>Conservative</i> | <b>Total</b> |
| <i>Democratic</i>                  | 59 (57%)                       | 44 (43%)            | 103          |
| <i>Republican</i>                  | 14 (82%)                       | 3 (18%)             | 17           |
| <b>Total</b>                       | 73 (61%)                       | 47 (39%)            | 120          |

**Panel B: Political Direction of Supreme Court Decisions on  
Title VII-Related Issues under Democratic and Republican  
Control of the Senate<sup>233</sup>**

| <b>Party Controlling<br/>Senate</b> | <b>Supreme Court Decisions</b> |                     |              |
|-------------------------------------|--------------------------------|---------------------|--------------|
|                                     | <i>Liberal</i>                 | <i>Conservative</i> | <b>Total</b> |
| <i>Democratic</i>                   | 36 (53%)                       | 32 (47%)            | 68           |
| <i>Republican</i>                   | 37 (71%)                       | 15 (29%)            | 52           |
| <b>Total</b>                        | 73 (61%)                       | 47 (39%)            | 120          |

Perhaps predictably, given the disconnect between congressional politics and the ideological direction of the Supreme Court's decisions, Congress has been unusually active in the Title VII

232. Row percentages are shown in parentheses. Using a significance level of 0.05, a statistically significant negative relationship exists between Democratic control of the House of Representatives and liberal decisionmaking by the Supreme Court. In the absence of a relationship, one would expect to see approximately sixty-three liberal decisions under Democratic control and ten liberal decisions under Republican control. A chi-square test with one degree of freedom indicates that there is a 0.0498 probability that random chance alone would have yielded a difference as large as the one witnessed between actual and expected values.

233. Row percentages are shown in parentheses. Using a significance level of 0.05, a statistically significant negative relationship exists between Democratic control of the Senate and liberal decisionmaking by the Supreme Court. In the absence of a relationship, one would expect to see approximately forty-one liberal decisions under Democratic control and thirty-two liberal decisions under Republican control. A chi-square test with one degree of freedom indicates that there is a 0.0428 probability that random chance alone would have yielded a difference as large as the one witnessed between actual and expected values. Because Democrats controlled the House at every time they controlled the Senate, the results for Democratic control of House and Senate are the same as the results for Democratic control of the House.

arena, stepping in to override six Supreme Court decisions.<sup>234</sup> The relative frequency of congressional responses to the Court's interpretations of Title VII suggests a potentially important difference between delegations to courts and delegations to agencies. Congressional control of delegated lawmaking can take one of two forms: efforts to *influence* decisionmaking before it occurs, or efforts to *correct* "bad" decisions already made.<sup>235</sup> Both approaches are available to Congress when the relevant decisionmaker is an agency. By specifying agency procedures, as discussed above, Congress can force agencies to divulge proposed decisions and the reasons for them, and can head off particularly problematic agency decisions before they become final.<sup>236</sup> Such *ex ante* control mechanisms may be far more valuable to Congress than the alternative—trying to override or otherwise change a decision that already has taken effect. It often will be impossible for Congress to enact override legislation, even if a majority of members and their constituents support it.<sup>237</sup> And when override legislation is possible, "it can reopen long settled, but still contentious, aspects of a policy that are unrelated to the [precise issue in question]. To impose legislative sanctions, therefore, requires running the risk of other undesirable legislative outcomes from the perspective of any given elected official."<sup>238</sup>

Although Congress can address agency decisions through *ex ante* influence as well as *ex post* corrections, legislative sanctions are

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234. See Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified in scattered sections of 29 U.S.C. and 42 U.S.C.) (overriding *Lorance v. AT&T Tech., Inc.*, 490 U.S. 900 (1989); *Martin v. Wilks*, 490 U.S. 755 (1989); *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); and *Library of Cong. v. Shaw*, 478 U.S. 310 (1986)); Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k)) (overriding *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976)). The EEOC had taken a position contrary to the Court's in all the relevant cases except *Shaw*, in which the Court held that Title VII does not waive the federal government's immunity to paying interest. 478 U.S. at 322. The EEOC had not taken any position on that issue. Congress, especially the Democrat-controlled House, also made active use of oversight hearings during the Reagan and first Bush administration in an effort to correct what legislators saw as a troubling shift in enforcement by the EEOC. See Farhang, *supra* note 175, at 24–25 (reporting that between 1983 and 1991, "Democratic chaired congressional committees conducted no less than 15 oversight hearings examining various aspects of EEOC enforcement efforts").

235. See generally McCubbins et al., *Administrative Procedures*, *supra* note 46, at 246–53 (describing means of congressional control of agency policymaking).

236. See *id.* at 253–64 (describing *ex ante* means of control).

237. On the many forces that can conspire to block override legislation, see, for example, McNollgast, *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, LAW & CONTEMP. PROBS., Winter 1994, at 3, 11; Mark Seidenfeld, *Bending the Rules: Flexible Regulation and Constraints on Agency Discretion*, 51 ADMIN. L. REV. 429, 482 (1999); Kenneth A. Shepsle & Barry R. Weingast, *Structure-Induced Equilibrium and Legislative Choice*, 37 PUB. CHOICE 503, 513–14 (1981).

238. McCubbins et al., *Administrative Procedures*, *supra* note 46, at 252.

the primary mechanism Congress has to control judicial decisionmaking.<sup>239</sup> The upshot is that legislators can assure disappointed constituents that unpopular judicial decisions were outside their control. For this reason, some commentators have suggested that delegations to courts should be particularly attractive to legislators intent on avoiding blame for controversial policies.<sup>240</sup> But Congress's inability to intervene to prevent unpopular judicial decisions also increases the likelihood that legislators will be pushed toward the politically dangerous shoals of override legislation. So, too, does the fact that judicial interpretation tends to generate substantial disuniformity in the law, as different courts reach different conclusions as to statutory meaning. A single agency, on the other hand, can adopt a single, uniform interpretation of the statute(s) it administers. I discuss questions of uniformity in more detail in Part IV.C; the point here is that judicial dissensus may be an additional trigger for legislative overrides, as override legislation tends to focus on areas marked by circuit splits or significant intra-circuit disagreement.<sup>241</sup> It should come as no surprise, then, that overrides are most frequent in areas where courts (rather than agencies) enjoy primary interpretive authority: criminal law, civil rights, and antitrust.<sup>242</sup> If commentators are correct about the political perils associated with reopening prior legislative compromises—and studies of the politics surrounding Congress's efforts to override *Ward Cove* suggest that they are<sup>243</sup>—it follows that the advantages of judicial

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239. Cf. McCubbins et al., *Structure and Process*, *supra* note 46, at 444–45 (recognizing that the procedural mechanisms Congress can use to control agency decisionmaking before it happens are not available where courts are concerned). Courts might also be more likely to reach seriously unpopular decisions than agencies. As discussed in the previous Section, the adversarial system tends to create well-defined winners and losers rather than forging compromise among competing groups. Agencies, by contrast, may be designed by Congress so as to reflect “a propensity to find compromise, so that in the end the participants will have a blunted incentive to take further political action to alter the policy outcome.” McCubbins et al., *Administrative Procedures*, *supra* note 46, at 256.

240. See *supra* note 53 and accompanying text.

241. See JEB BARNES, OVERRULED? LEGISLATIVE OVERRIDES, PLURALISM, AND CONTEMPORARY COURT-CONGRESS RELATIONS 90 (2004) (finding that eighty-nine of 100 randomly sampled overrides followed judicial dissensus).

242. Eskridge, *supra* note 140, at 344 tbl.4.

243. See Dansicker, *supra* note 182, at 3 (describing the issue of racial quotas, brought to the fore in the debates leading up to the 1991 overrides of *Wards Cove* and other unpopular judicial decisions, as a “political minefield”). Recent controversy over the Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 632 (2007), including the override legislation, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (codified as amended at 29 U.S.C.A. §§ 626, 633a, 794a, and 42 U.S.C.A. §§ 2000a, 2000e-5, 2000e-16 (West 2009)), provides an additional example.

process for blame-shifting might be balanced out by the new risks created by unpopular and highly visible Supreme Court decisions.

### 3. Interest Groups

A common, though contested, complaint about administrative agencies is that they are subject to undue influence by concentrated interest groups.<sup>244</sup> Yet the relationship between agencies and interest groups has gone largely unnoticed in the literature on Congress's choice of delegate.<sup>245</sup> That oversight is unfortunate because interest group dynamics seem to play out differently in the administrative and judicial arenas. Indeed, some commentators have seized on the insights from public choice theory to argue for a more aggressive form of judicial review. At the heart of their arguments is the assumption that courts are immune from the sort of interest group distortions that plague Congress and agencies.

According to public choice theory, legislation is likely to be skewed in favor of small, concentrated interest groups at the expense of larger, more diffuse interests.<sup>246</sup> Thus, automobile manufacturers

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244. Some scholars have used that insight as a way of explaining delegations to agencies. The key premise is that Congress will tend to delegate to agencies the details of statutes that generate diffuse benefits and concentrated costs—e.g. environmental legislation. Such statutes make Congress appear to be addressing the problem, but the agency is left in charge of (potentially critical) details, and can respond to the narrow interests of the regulated community in a way that is less visible to the public. See NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* 95–96 (1994) (arguing that politicians can declare support for a policy but quietly undermine it by pressuring the implementing agency). The same logic works to explain delegations to agencies with respect to statutes that benefit powerful, concentrated interests: the agency can hand out the benefits and Congress can avoid the blame. See Aranson et al., *supra* note 2, at 37–62 (arguing that delegations to agencies facilitates the collective provision of private goods); Eskridge, *supra* note 126, at 289 (“In conflictual demand situations (concentrated cost measures), legislators will often seek to delegate regulation of the group to an agency. If the legislation distributes benefits at the expense of a concentrated group, the cost payers will tend, over time, to organize themselves effectively to influence the agency.”). Cf. McCubbins et al., *Structure and Process*, *supra* note 46, at 443–44 (explaining how Congress can design agency procedures to ensure that administrators are responsive to the same groups that the legislation was designed to benefit).

245. *But see* Salzberger, *supra* note 7, at 368 (noting in passing that agencies are “more influenced by interest groups” than courts).

246. The foundational work on the subject is MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965). For a sampling of the literature that has built on Olson's insights as applied to agencies, see Croley, *supra* note 1, at 12–25, 34–56, and the sources cited therein. *But see* Croley, *supra* note 1, at 55 (“Numerous scholars have concluded that the empirical evidence often offered in support of the public choice theory is at best inconclusive and at worst inconsistent with the theory.”); Jerry L. Mashaw, *Explaining Administrative Process: Normative, Positive, and Critical Stories of Legal Development*, 6 J.L. ECON. & ORG. (SPECIAL ISSUE) 267, 280 (1990) (“[T]he empirical record of [public choice theory] is one that should induce the utmost caution in its practitioners.”).

can band together to persuade Congress not to adopt higher emission standards, while the groups that will bear the costs of non-regulation—consumers of gas, for example—face serious obstacles to collective action and, therefore, will not be heard. The same dynamics apply at the agency level, fueling concerns that agencies will be “captured” by the very industries they are supposed to regulate.<sup>247</sup> If anything, administrators may be more susceptible to interest group pressure than legislators because their specialized focus brings them into repeated contact with the relevant groups.<sup>248</sup>

For those who accept that dark vision of interest group politics, judicial review provides a possible escape route. Here, judges’ insulation from politics is transformed from a blemish to a blessing. Because judges can’t be fired, hit with a pay cut, or lured by the promise of a new job, they will be immune to the interest group pressures that cloud the decisionmaking of more “political” decisionmakers.<sup>249</sup> Moreover, even if individual judges are subject to influence, it would be extraordinarily difficult for a single interest or collection of interests to win over the entire judiciary.<sup>250</sup> Building from these premises, some commentators have argued for an enhanced judicial role in statutory and constitutional law.<sup>251</sup>

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247. For an overview of the “capture” literature, see Bagley & Revesz, *supra* note 50, at 1284–92.

248. Others have sought to show that agencies do not, in fact, appear to be captured by interest groups in any consistent or predictable way. *See generally, e.g.*, PAUL J. QUIRK, *INDUSTRY INFLUENCE IN FEDERAL REGULATORY AGENCIES* 175–77 (1981) (finding no empirical support for the notion that agencies are systematically biased in favor of business interests); Mark Kelman, *On Democracy-Bashing: A Skeptical Look at the Theoretical and “Empirical” Practice of the Public Choice Movement*, 74 VA. L. REV. 199, 236–68 (1988) (exposing tensions between public choice theory and the actual performance of administrative agencies). *Cf.* Croley, *supra* note 1, at 142 (“[T]he regulatory regime’s legal process rules do not seem very well designed to facilitate regulatory rent-seeking by special interest groups.”).

249. *See* Richard A. Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335, 351 (1974) (arguing that judges are more insulated from interest groups than agencies).

250. *See* Eskridge, *supra* note 126, at 305 (arguing that life tenure frees judges from the influence of interest groups).

251. *See, e.g., id.* at 315 (advocating “a more aggressive approach to statutory interpretation” to ameliorate public choice dysfunctions); Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 227 (1986) (arguing that courts should interpret statutes to enforce their public-regarding purposes, thereby “transforming statutes designed to benefit narrow interest groups into statutes that in fact further the public’s interests”). Others have argued that the characteristics that give certain groups a leg up in the political arena also will aid them in court. *See generally* KOMESAR, *supra* note 244, at 123–50 (examining the advantages and disadvantages of the adjudicative process); Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 66–87 (1991) (arguing that the litigation process is subject to interest group pressure); Paul H. Rubin, *Common Law and Statute Law*, 11 J. LEGAL STUD. 205,

Interest group dynamics have played out in an interesting way in the Title VII context.<sup>252</sup> First, the dominant interest groups—such as the NAACP and National Organization for Women—do not clearly fit the public choice mold.<sup>253</sup> They are large, and while their members share a common interest, it is unlikely that the immediate benefits of Title VII are high per capita. Although the *total* benefits of reducing racial and gender discrimination may be substantial, they are spread over many individuals. Furthermore, the number of women or African Americans who will benefit directly from a prohibition on outright discrimination likely represents only a fraction of the total. Nevertheless, these groups organized to push for legislation and corrective amendments from Congress, to push the EEOC to adopt favorable guidelines, and (to a lesser extent) to push the courts to interpret Title VII in a sympathetic fashion.

Public choice scholars have offered various explanations for the existence and power of such “public interest” groups. Most obviously, individuals might contribute to a collective good for moral or ideological reasons.<sup>254</sup> Individuals also might derive solidaristic and expressive value from the mere “act of associating.”<sup>255</sup> The Title VII experience suggests a somewhat different explanation. Recall that,

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206–07, 217 (1982) (likening spending on lobbying to spending on litigation, especially for cases that have precedential value).

252. See Graham, *supra* note 179, at 113 (“In the new civil rights regulation of the 1960s, . . . capture took a different twist. Routinely, newly created regulatory offices, such as the EEOC, . . . were dominated not by the employers and organizations being regulated but by representatives of the constituencies being served.”).

253. See Eskridge, *supra* note 126, at 320 (acknowledging that public choice theory does not satisfactorily explain the enactment of the Civil Rights Act of 1964); Jonathan Turley, *Transnational Discrimination and the Economics of Extraterritorial Regulation*, 70 B.U. L. REV. 339, 376–77 (1990) (“Although the Civil Rights Act took many years to enact, few organizations actually lobbied in support of the legislation. Of the major groups lobbying Congress on behalf of the legislation, most were ideological groups organized with civil rights, labor, religious, legal, or political interests. Arguably, the civil rights groups and unions had an economic interest in the legislation, but all of these groups were large national organizations with overtly ideological agendas.”).

254. See, e.g., RUSSELL HARDIN, *COLLECTIVE ACTION* 103–12 (1982) (discussing moral motivations for contributing to a collective good); Elhauge, *supra* note 251, at 43 (“Others have . . . demonstrate[d] that noneconomic factors such as altruism and ideology play at least some role in political participation and decisionmaking, and that the preferences of regulators and the general public sometimes prevail over the preferences of interest groups.” (citing sources)).

255. JAMES Q. WILSON, *POLITICAL ORGANIZATIONS* 34 (1973) (arguing that individuals derive solidarity benefits—“rewards created by the act of associating”—and expressive benefits—“rewards that derive from a sense of satisfaction at having contributed to the attainment of a worthy cause”—from group membership); see also Croley, *supra* note 1, at 20–21 (discussing “benefits of participation itself”); John Mark Hansen, *The Political Economy of Group Membership*, 79 AM. POL. SCI. REV. 79, 79–82 (1985) (stressing the variety of benefits, both selective and collective, tangible and intangible, that individuals receive from group membership).

from the first days of its existence, the EEOC struggled under severe resource constraints. I argued above that those constraints served to inspire some of the agency's more aggressive readings of the statute, but they also contributed to the EEOC's relationship with civil rights groups, particularly the NAACP's Legal Defense Fund ("LDF"). Simply put, the EEOC needed help, and civil rights groups were quick to provide it.<sup>256</sup> The LDF and other organizations worked to get the word out about Title VII, helped potential plaintiffs file claims with the EEOC, consulted with the EEOC about its guidelines, and led the charge in litigating Title VII cases in the federal courts.<sup>257</sup> The result was a collaborative association between the agency and the interests it served—an association that likely shaped the EEOC's understanding of Title VII's antidiscrimination command.

Whatever the precise reasons, it appears that civil rights groups *were* successful in influencing the EEOC's decisionmaking under Title VII. If interest group influence can be measured in results,<sup>258</sup> the EEOC's strongly pro-claimant record indicates a high success rate for "client" groups like the NAACP. The Supreme Court also has adopted a relatively claimant-friendly reading of Title VII. But the more balanced nature of the Court's decisionmaking supports the hypothesis that it is more difficult, as a practical matter, for interest groups to win the favor of a consistent majority of Justices than to sway a regulatory agency.<sup>259</sup>

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256. See Robert C. Lieberman, *Private Power and American Bureaucracy: The EEOC and Civil Rights Enforcement 21* (unpublished manuscript, on file with author) ("Within days after the EEOC began its operations, NAACP General Counsel Robert L. Carter wrote to EEOC Chairman Franklin D. Roosevelt Jr. expressing the desire to cooperate with the commission in the enforcement of Title VII and requesting a meeting to discuss 'ways and means that we in the Association may best work with you in the ordinary processing of complaints and in their submission and disposition by the Commission.'").

257. See *id.* at 21–33.

258. It is not clear that the EEOC's pro-claimant leanings are caused by interest group influence as opposed to merely correlated with it. Indeed, I argued above that the EEOC's procedures may have been a critical factor in cementing the agency as an advocate for the victims of discrimination. See *supra* Part IV.A. It also bears emphasis that the individuals who would be likely to seek out employment at an agency like the EEOC can be expected to agree with and desire to further the agency's mission. See ANTHONY DOWNS, *INSIDE BUREAUCRACY* 107 (1967) (arguing that bureaucrats' views are "based upon a 'biased' or exaggerated view of the importance of their own positions 'in the cosmic scheme of things'"); Spence & Cross, *supra* note 3, at 115 ("We can expect agency bureaucrats to have values that are consistent with the agency's mission; otherwise, the bureaucrats initially would not be attracted to work in the agency.").

259. Concededly, the interest group dynamics apparent in Title VII may be a function of the enforcement scheme that Congress created. If the EEOC had been vested with direct enforcement authority, we might expect to see more lobbying of the agency by business groups and the like. See Farhang, *supra* note 76, at 59 (quoting Jack Greenberg, Director-Counsel of the NAACP: "I have no doubt that if there had been only administrative enforcement, employers and



*C. The Quality of Administrative and Judicial Decisions: Uniformity and Stability*

As explained in Part II, Matthew Stephenson has sought to understand Congress's choice to delegate to courts rather than to agencies by reference to the relative stability of judicial decisions. He assumes that courts are more likely to interpret statutes consistently over time, whereas agencies are more likely to "treat different interpretive questions in an ideologically consistent manner within a given time period."<sup>260</sup> Building from those assumptions, Stephenson argues that legislators will favor delegations to courts when they value decisions that remain constant over time but wish to diversify the risk of "bad" decisions across different issues. On the other hand, legislators will favor delegations to agencies when they wish to diversify the risk of "bad" decisions over time, and/or when consistency across different issues is most important.

Title VII provides an opportunity to test the assumptions that drive Stephenson's model. When viewed at a relatively high level of generality, the Supreme Court's decisionmaking patterns support Stephenson's claims. If judged by the rate of outright reversals, the Court's decisions in the Title VII arena have been exceptionally stable: not once in the history of Title VII has the Court overruled a prior opinion. Moreover, the Court relied heavily on *stare decisis* to inform the course of its Title VII jurisprudence, claiming to find meaningful guidance in precedent on 69 of the 120 Title VII-related issues it resolved.<sup>261</sup>

Notably, the EEOC's decisionmaking has been quite stable as well. The EEOC rarely amended its guidelines without an external impetus, such as intervening legislation or decisions by the Supreme Court or courts of appeals. As explained in the previous Section, the EEOC resisted significant pressure from the Reagan administration to amend its guidelines on employee selection practices.<sup>262</sup> And when the

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unions would have been all over the EEOC trying to shape what would happen."). According to Greenberg, the private right of action "kept the EEOC honest because it didn't want to be shown up by private enforcers." *Id.*

260. Stephenson, *supra* note 7, at 1047.

261. The Court purported to rely on *stare decisis* more than any other source of statutory meaning, including the text of the statute (which played a substantial role in the Court's reasoning on 53 of the 120 Title VII issues the Court resolved). *See, e.g.*, *Faragher v. City of Boca Raton*, 524 U.S. 774 (1998); *Johnson v. Transp. Agency, Santa Clara County, Cal.*, 480 U.S. 616 (1987).

262. The EEOC's Guideline on Employment Selection Procedures did undergo changes prior to Reagan's administration, but the amendments do not appear to have been politically motivated. First issued in 1966, the guideline set forth the EEOC's view (later endorsed by the

agency did make changes, the changes were consistently in a pro-claimant direction.<sup>263</sup> In short, the EEOC's Guidelines do not reflect "flexible" decisionmaking in the sense of switching from one interpretation to another as times—or administrations—change. For a Congress intent on stability in its delegate's decisionmaking, the choice between the EEOC and the federal courts seems to be a wash.<sup>264</sup>

The Title VII experience suggests an additional point about stability that has been ignored in the literature thus far. While it may be true that each court's decisionmaking is stabilized by political insulation and the doctrine of stare decisis, the decisions of the federal judiciary *as a whole* seem far less stable because of the potential for a substantial time lag between the first judicial decision on an issue and

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Supreme Court) that an employer violates Title VII if it uses a test or other screening system for selecting employees that excludes disproportionate numbers of minority applicants, unless the employer can demonstrate that the test is job-related. 29 C.F.R. § 1607 (1970). The guideline prescribed a slew of requirements employers must satisfy in order to "validate" tests as job-related. See Ronald B. Rubin, Note, *The Uniform Guidelines on Employee Selection Procedures: Compromises and Controversies*, 28 CATH. U. L. REV. 605, 610-14 (1978) (describing EEOC's guidelines and the validity requirement). Several other federal agencies adopted similar—but not identical—requirements for employers in other contexts. See, e.g., 41 C.F.R. §§ 60-3.1 to 60-3.18 (1976) (Department of Labor guidelines); 5 C.F.R. §§ 300.101 to 300.104 (1976) (Civil Service Commission guidelines). After several failed attempts to settle on a uniform set of guidelines, the agencies in 1978 adopted the Uniform Guidelines on Employee Selection Procedures, which replaced all pre-existing federal employment selection requirements. The Uniform Guidelines cut back on the EEOC's own guidelines in several respects, primarily by liberalizing the means by which employers could validate challenged tests as job related. See Rubin, *supra*, at 620-30 (describing the differences between the Uniform Guidelines and the prior EEOC's guidelines).

263. For example, the EEOC originally interpreted Title VII's prohibition on sex discrimination to permit claims of wage discrimination only to the extent that such claims would be available under the Equal Pay Act. 29 C.F.R. § 1604.7 (1966) (explaining that "the standards of 'equal pay for equal work' set forth in the Equal Pay Act for determining what is unlawful discrimination in compensation are applicable to Title VII"). In 1972, and without explanation, the agency deleted that limitation from its guidelines. See 37 Fed. Reg. 6837 (1972). When the Supreme Court confronted the issue in 1981, the EEOC took the position that Title VII wage discrimination claims are not limited to those permitted by the Equal Pay Act. *Washington v. Gunther*, 452 U.S. 161, 162 (1981); Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae, *Washington*, 452 U.S. 161 (No. 80-429), 1981 U.S. S. Ct. Briefs LEXIS 1052. The EEOC's approach to pregnancy discrimination followed a similar pattern. Shortly after Title VII was enacted, the EEOC took the position that it did not require employers to provide benefits for pregnancy under the same terms provided for other disabilities. See *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 142-43 (1976) (discussing the EEOC's early and subsequently conflicting interpretations). Again, the EEOC backed away from that opinion in subsequent years, and its 1972 guidelines flatly prohibited discrimination against pregnant employees. 29 C.F.R. § 1604.10 (1973).

264. Stephenson recognizes that the assumptions of his model—particularly the assumption that agency decisionmaking will be more variable over time than judicial decisionmaking—are less realistic as applied to independent agencies. Stephenson, *supra* note 7, at 1067.

the Supreme Court's eventual decision.<sup>265</sup> Until the Court resolves the issue, different circuits may well adopt different rules, leading to substantial geographical disuniformity.<sup>266</sup> For example, more than two decades elapsed between the first circuit court decisions addressing the question of employer liability for supervisor harassment and the Supreme Court's ultimate resolution of that issue.<sup>267</sup> And the lower courts still are divided on how to interpret the term "business necessity" from the Court's 1971 decision in *Griggs*.<sup>268</sup>

The Court's eventual decision, moreover, may well be inconsistent with decisions reached earlier by some or all of the lower courts. Approximately half (47 out of 102) of the Supreme Court's Title VII cases resolved issues on which at least two appellate courts already had ruled, and in only 30 of those cases was the Supreme Court's ruling consistent with the majority view in the courts of appeal. Thus, the individuals and entities who are regulated by the relevant statute may be forced to make investments before the Supreme Court steps in (perhaps to comply with a lower court's decision) and then pay significant "switching costs"<sup>269</sup> if the Supreme

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265. Stephenson's model does not address this issue because it assumes that a decision by either court or agency will be rendered within the first time period. *Id.* at 1053 & n.67 (acknowledging that the assumption detracts from the realism of the model).

266. See Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1121 (1987).

267. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 807–10 (1998) (setting out rules to govern employer liability for supervisor harassment); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764–66 (1998) (same); *Tomkins v. Pub. Serv. Elec. & Gas Co.*, 568 F.2d 1044, 1048–49 (3d Cir. 1977) (holding that employers are liable for supervisor harassment when they have "actual or constructive knowledge" of the problem and do not "take prompt and appropriate remedial action"); *Barnes v. Costle*, 561 F.2d 983, 993 (D.C. Cir. 1977) (holding that employers are liable for supervisor harassment except when "a supervisor contravene[s] employer policy without the employer's knowledge and the consequences are rectified when discovered"). The level of confusion in the lower courts is evidenced by the Court's observation in *Ellerth* that the lower court, which had considered the issue en banc, "produced eight separate opinions and no consensus for a controlling rationale." 524 U.S. at 749.

268. As explained in the previous Section, Congress adjusted the contours of disparate-impact liability in the 1991 Act. But Congress left the key term "business necessity" undefined. See *supra* note 205 and accompanying text. The Supreme Court has never clarified matters, so the uncertainty remains. Although the EEOC's guidelines long have provided detailed requirements for test validation—which is to say, justification under the business necessity test, see 29 C.F.R. § 1607,—the lower courts continue to disagree on the appropriate contours of the test. See Christine Nardi, Comment, *When Health Insurers Deny Coverage for Breast Reconstructive Surgery: Gender Meets Disability*, 1997 WIS. L. REV. 777, 802 n.153 (noting that "courts are split as to whether an employer must provide a legitimate business reason or a compelling justification" (citations omitted)).

269. Stephenson, *supra* note 7, at 1056.

Court's decision cuts in a different direction.<sup>270</sup> It follows that judicial administration may be less attractive than Stephenson presumes—and less attractive than administration by an independent agency—to legislators intent on harnessing intertemporal consistency.

Attention to the hierarchical nature of the federal judiciary also may have implications for inter-issue consistency. Here it helps to distinguish between two different types of issue consistency that Stephenson treats as interchangeable: consistency on the same issue across different jurisdictions, and consistency across different issues within the same statute.<sup>271</sup> Stephenson certainly is correct that an agency, by virtue of its centralized decisionmaking system, has an institutional advantage over courts when it comes to inter-jurisdictional consistency. Agencies' ability to render a clear, uniform national rule on any given statutory question is frequently touted as an important benefit of the administrative process.<sup>272</sup>

It is less clear, however, that agencies have a similar advantage with respect to consistency across different statutory issues. Again, it matters whether one focuses on individual courts or on the judiciary as a whole. Several factors combine to push the decisionmaking of individual courts in a fairly consistent direction across different statutory issues. The first is a judicial tendency to seek coherence and consistency across issues—to interpret similar language and statutory provisions *in pari materia*. Judges, as lawyers, may have different intellectual priorities than agency policymakers. As William Eskridge has explained, “[t]he Supreme Court sees itself as preserving, to the extent possible, law’s coherence. A reading of the text that is coherent with other legal authorities is better than an equally plausible textual reading that is incoherent.”<sup>273</sup> Consistent

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270. For example, prior to the Supreme Court's decision in *General Electric Co. v. Gilbert*, the lower courts uniformly had held that employers would violate Title VII if they offered benefits for some disabilities but not for pregnancy. 429 U.S. 125, 147 (1976) (Brennan, J., dissenting). In order to comply with that rule, employers would have to reduce benefits for all employees or expand existing benefits to cover pregnancy. After *Gilbert*, employers were free to discriminate against pregnant employees, but the freedom lasted only until the enactment of the Pregnancy Discrimination Act, which returned the law to the pre-*Gilbert* status quo. Congress recognized the potential costs to employers and provided a 180-day window during which employers could adjust their benefit systems without running afoul of the newly amended law. Pub. L. No. 95-555, § 2(b), 92 Stat. 2076 (1978) (“The provisions of the amendment . . . shall not apply to any fringe benefit program or fund, or insurance program which is in effect on the date of enactment of this Act until 180 days after enactment of this Act.”).

271. See Stephenson, *supra* note 7, at 1059 (discussing both inter-issue and inter-jurisdictional inconsistency).

272. See Strauss, *supra* note 266, at 1095, 1105–06.

273. Eskridge, *supra* note 140, at 373–74; see also Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN.

with that principle, the Court's Title VII decisions contain frequent references to other statutes, particularly the National Labor Relations Act, which served as the model for Title VII in several respects.<sup>274</sup> The Court also borrowed heavily from the reasoning in other cases outside of the Title VII context, including constitutional decisions.<sup>275</sup> That

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L. REV. 501, 509 (2005) ("Courts repeatedly suggest that interpretation designed to lend coherence to the general legal order is one of their most important responsibilities as custodians of the rule of law."); Molot, *supra* note 66, at 1298–99 (describing a "hermeneutic tradition . . . which distinguishes legal reasoning from political choice [and] which values the consistent application of interpretive strategies across cases").

274. *See, e.g.*, Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 66 (2006) (relying on NLRA analogy to support the conclusion that Title VII prohibits a wide body of retaliatory behavior); EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 251–52 (1991) (relying on NLRA analogy to support the conclusion that Title VII does not apply extraterritorially); Lorance v. AT&T Tech., Inc., 490 U.S. 900, 909 (1989) (relying on case construing NLRA as authority for the proposition that Title VII's statute of limitations runs from the date a discriminatory seniority system is adopted, not when the employee feels the negative effects); Price Waterhouse v. Hopkins, 490 U.S. 228, 249–50 (1989) (relying on NLRA cases to support the conclusion that employers can escape liability under Title VII by showing that they "would have made the same decision in the absence of the unlawful motive"); Hishon v. King & Spalding, 467 U.S. 69, 76 n.8 (1984) ("The meaning of this analogous language [in the NLRA] sheds light on the Title VII provision at issue here."); Ariz. Governing Comm. for Tax Deferred Annuity and Deferred Comp. Plans v. Norris, 463 U.S. 1073, 1091 n.21 (1983) (using analogy to NLRA to support the conclusion that employers are responsible for retirement benefits even if they are provided by third parties); Ford Motor Co. v. EEOC, 458 U.S. 219, 226 n.8 (1982) ("The principles developed under the NLRA generally guide . . . courts in tailoring remedies under Title VII. Therefore, throughout this opinion we refer to cases decided under the NLRA as well as under Title VII." (citation omitted)); Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 395 n.11 (1982) ("Because the time requirement for filing an unfair labor practice charge under the [NLRA] operates as a statute of limitations subject to recognized equitable doctrines . . . , the time limitations under Title VII should be treated likewise."); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 803–04 (1973) (relying on NLRA analogy to conclude that Title VII does not compel an employer to rehire an employee who engaged in deliberate and unlawful conduct against it).

275. *See, e.g.*, Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 537 (1999) (relying on ADEA analogy to support the conclusion that intentional discrimination may not give rise to punitive damages liability if the employer mistakenly relies on a statutory exception or defense); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 754–57 (1998) (reasoning from general agency principles as applied in state tort cases and by federal courts under the Federal Tort Claims Act to conclude that sexual harassment by a supervisor is not conduct within the scope of employment); Int'l Union v. Johnson Controls, Inc., 499 U.S. 187, 201–03 (1991) (observing that the Court has read the bona fide-occupational-qualifications exception to the ADEA "just as narrowly" as the equivalent exception to Title VII and reasoning by analogy from a case applying the ADEA); EEOC v. Commercial Office Prods. Co., 486 U.S. 107, 123–24 (1988) (relying on an ADEA case as support for the proposition that a claimant's failure to file a claim within the state limitations period does not render his claim untimely); Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 339 (1977) (borrowing from the reasoning in jury-selection cases to support conclusion that statistical proof can be used to establish a prima facie case of discrimination); Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 145 (1976) (relying on reasoning in a constitutional case to conclude that differential treatment of pregnant employees does not constitute discrimination because of sex). *Cf.* Belton, *supra* note 88, at 955 (arguing that the Court's focus on purposeful discrimination in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, is analogous to its approach to discrimination under the Equal Protection Clause).

behavior is consistent with empirical research suggesting that “judicial decisions are the dominant source of authority” on which courts rely when interpreting statutes.<sup>276</sup>

Similarly, the Court has sought interpretive consistency and coherence within Title VII itself. A well-known canon of statutory construction is that a word used in several different sections of a statute should mean the same thing. The Court followed that approach in *Mohasco Corp. v. Silver*, for example, where it considered the various filing requirements prescribed by Title VII.<sup>277</sup> Specifically, in states that have their own fair employment practices agency, claimants first must file their complaints with the state agency, must give the state agency sixty days to conclude its proceedings before filing a complaint with the EEOC, and must file with the EEOC within 300 days of the occurrence of the challenged employment practice.<sup>278</sup> The question in *Mohasco* was whether the statute effectively created a 240-day statute of limitations in states with slow claim-processing systems, since a complainant who filed with the state agency after more than 240 days could not satisfy both the 60-day waiting period and the 300-day deadline for filing with the EEOC unless the state agency happened to conclude its proceedings in less than sixty days. The EEOC had sought to avoid that problem by treating a complaint as “filed” if the EEOC had received a letter from the complainant within the 300-day period and had not received any indication from the state agency that its proceedings had been terminated.<sup>279</sup> The Supreme Court rejected that approach on the ground that it treated the word “filed” as meaning two different things in the same section of the statute.<sup>280</sup> “It is our task,” the Court explained, “to give effect to the statute as enacted.”<sup>281</sup>

The canon that the same word or phrase must mean the same thing when used in different parts of a statute is based on the assumption that Congress must have intended such consistency of meaning. But the Court has pointedly rejected that same assumption with respect to agency-administered statutes. In *Chevron*, the Court acknowledged that the EPA had given “the word ‘source’ . . . a [broad] definition for some purposes and a narrower definition for other

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276. Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073, 1093 (1992).

277. 447 U.S. 807, 826 (1980).

278. *See id.* at 812.

279. *Id.*

280. *Id.* at 826.

281. *Id.* (acknowledging that “the interests of justice might be served in this particular case by a bifurcated construction of [the] word”).

purposes.”<sup>282</sup> The Court noted approvingly that the EPA had interpreted the term “flexibly—not in a sterile textual vacuum, but in the context of implementing policy decisions in a technical and complex arena.”<sup>283</sup> Indeed, it touted such flexibility as a distinctive advantage of agency decisionmaking.<sup>284</sup>

The judicial tendency to interpret different statutory provisions *in pari materia* is compounded by stare decisis. Although technically restricted to the holding of a case, courts regularly rely on the reasoning in previous decisions for guidance when addressing new issues. As a result, a line of reasoning on Issue A—for example, that Congress sought to encourage voluntary compliance with Title VII—can lead to a similar decision on Issue B.<sup>285</sup> Agencies might opt to follow a similar interpretive practice. Unlike courts, however, they are under no jurisprudential obligation to do so.

Taken together, stare decisis and the judicial penchant for coherence suggest that agencies hold a weaker advantage with respect to inter-issue consistency than Stephenson assumes, at least when compared to individual courts. Of course, the federal judiciary is not a single court, but many. Nevertheless, the Supreme Court stands alone. And, while its decisions tend to be slow in coming, they do tend to be consistent across related statutory issues. For legislators interested in diversifying inter-issue risk, therefore, judicial administration should be preferable to agency process only during the period before the Court steps in.

## CONCLUSION

This Article has sought to bring a new perspective to the allocation of interpretive authority between courts and agencies. Rather than approach the question in the abstract, as previous work has done, I have explored how the allocative choices embodied in Title

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282. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 856 (1984).

283. *Id.* at 863.

284. *Id.* at 863–64 (“[T]he agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis.”); see also Mashaw, *supra* note 273, at 509 (suggesting that “an agency interpretive posture that seeks to harmonize its actions with the whole of the legal order risks forgetting that agencies are created precisely to carry out special purpose missions”).

285. See, e.g., *Faragher v. City of Boca Raton*, 524 U.S. 775, 805–06 (1998) (using the reasoning of *Albemarle* to support the adoption of an affirmative defense to liability for supervisory sexual harassment for employers who can show that they have taken steps to try to prevent such harassment); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975) (explaining, in the context of an application of disparate-impact theory, that the “primary objective” of Title VII is not to provide redress but to avoid harm).

VII have played out over the statute's life so far. The Title VII experience brings to light some of the ways that courts and agencies differ—and also how they are the same.

The history of Title VII suggests that judicial interpretations are likely to be narrower than those of agencies, as the Supreme Court was heavily dependent on specific indications of congressional intent, while the EEOC focused on the overall purpose or “mission” of the statute—which is, after all, the agency's *raison d'être*. The EEOC's mission-focus also calls attention to the importance of the details of institutional design and role orientation. Although the EEOC's strongly claimant-friendly reading of Title VII may reflect agencies' greater susceptibility to interest group influence, it is also linked to the particular roles into which the EEOC was thrust in the early days of its existence, and the resource constraints that made it difficult to process individual claims of intentional discrimination. Having been denied enforcement authority, the EEOC took on the role of victims' advocate, which naturally pushed the agency toward a claimant-friendly reading of the statute. The Court, on the other hand, was cast into the role of enforcer. That role, together with the adversary system's tendency to focus on identifying and righting wrongs, encouraged the Court to keep Title VII tethered to notions of blameworthiness.

Considerations of institutional design and role also expose a certain irony in Title VII's division of labor. Legislators concerned that Title VII would be used to do “too much” sought to protect employers by restricting the authority of the new agency. But those same limitations on the EEOC's resources and authority led the EEOC to conclude that it could not accomplish much through claims-processing, and to turn to more creative ways of combating the systemic causes of discrimination. Measures designed to weaken the agency, then, helped inspire its most ambitious readings of the statutory language. This history highlights just how unpredictable delegated decisionmaking can be and calls into question the common assumption that legislators can and do pick “allies” from the set of possible delegates.

Interestingly, neither institution's decisionmaking reveals much responsiveness to political influence from Congress or the President. That fact might provide some useful clues about the possibility of political influence over independent agencies and insulated judges, but my analysis suggests that the answer is more complicated. The most aggressive effort to shift the direction of Title VII interpretations was made by the Reagan administration. By the time Reagan took office, however, many of the EEOC's more controversial positions already had been accepted by the federal



courts, which proved unwilling to revisit issues already settled. Thus, Reagan's failure to alter the course of the law may have been due in large part to the timing of the Supreme Court's decisions and to the fact that the courts have primary interpretive authority over Title VII.

Finally, the Title VII experience generates useful insights into the nature of judicial and agency decisions. As others have observed, one advantage of administrative process is that a single agency can adopt a single rule that governs across different jurisdictions, and a single agency may be more likely than the judicial system as a whole to adopt similar interpretations of different statutes or of different parts of the same statute. But the Court's interpretations of Title VII indicate that courts may act more like agencies than is commonly assumed. Judges' methodological commitments lead them to seek coherence both across and within statutes, which generates a form of inter-issue consistency. As for stability, while courts' insulation from politics and adherence to precedent may render judicial decisions more stable than administrative rules in theory, the reality of Title VII suggests otherwise. Not only have the EEOC's guidelines been very stable over time, but the time lag between statutory enactment and conclusive Supreme Court interpretation significantly reduces the temporal stability of judicial decisionmaking.

In sum, the picture that emerges is far more complicated and context-dependent than the formal models developed in other works on the choice of delegate—but so is the choice that Congress must make. Rather than assuming away the messy details of actual practice, this Article seeks to expose them. What is lost in terms of parsimony is made up by a richer and more nuanced view of the consequences of a choice between judicial and administrative process.