Understanding Congress's Choice of Delegate: An Empirical Analysis of Judicial and Agency Interpretations of Title VII

Margaret H. Lemos

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UNDERSTANDING CONGRESS’S CHOICE OF DELEGATE: AN EMPIRICAL ANALYSIS OF JUDICIAL AND AGENCY INTERPRETATIONS OF TITLE VII

Margaret H. Lemos*

ABSTRACT

Although Congress delegates lawmaking authority to both courts and agencies, we know remarkably little about the determinants—and even less about the consequences—of the choice between judicial and administrative process. The few scholars who have sought to understand the choice of delegate have used formal modeling to illuminate various aspects of the decision from the perspective of the enacting Congress. That approach yields useful insight into the likely preferences of rational legislators, but tells us nothing about how (or whether) those preferences play out in the behavior of courts and agencies. Without such knowledge, we have no way of testing the existing theories, and little on which to base new ideas about what ought to be driving the legislative choice.

This Article takes a new approach to the choice between judicial and administrative process. Using a real-world example of a delegation to courts—Title VII of the Civil Rights Act of 1964—I examine how the Supreme Court and the Equal Employment Opportunity Commission interpreted the statute over more than four decades of enforcement. The empirical evidence confirms the importance of the choice of delegate, revealing substantial differences between judicial and agency interpretations of the statute. It also calls attention to some surprising similarities between the two institutions, both of which exhibited markedly stable decisionmaking in the face of political upheavals in Congress and the White House. The picture that emerges is far more complicated and context-dependent than the stylized models of prior work would allow—but so is the decision that Congress must make. By exposing the legal and political consequences of a delegation to courts in one area of federal law, this Article offers a richer and more nuanced understanding of a critical, but largely overlooked, question of institutional choice.

* Assistant Professor, Benjamin N. Cardozo School of Law. Many thanks to Rachel Barkow, Rick Bierschbach, Lisa Bressman, Barry Friedman, Arthur Jacobson, Terry Maroney, Max Minzner, Anne Joseph O’Connell, Rafael Pardo, Neil Siegel, Kevin Stack, Matthew Stephenson, and Stewart Sterk for helpful comments on earlier drafts of this Article. I am grateful to Shriram Bhashyam, Nathaniel Boyer, Stephanie Cirkovich, Matthew Diament, Matthew Mishkin, Evan Sugar, and Aaron Zakem for research assistance.
INTRODUCTION
Congress often delegates aspects of its lawmaking authority to other institutions, particularly administrative agencies. 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. In response to these and other critiques, a rich literature has grown up to defend Congress’s practice of delegating to administrative agencies. 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.

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 every day life—working, traveling, transacting, recreating, indeed eating, drinking, and breathing—are affected by the work of federal administrative agencies . . . ”).


4 See Spence & Cross, supra note 3, at 135-36 (explaining why it is difficult for Congress to legislate with specificity).
Building from that premise, 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.  

The literature on delegation tends to view Congress’s choice as binary: Congress either can resolve policy issues itself or it can leave the relevant decisions to an agency. There is a third option, however. Congress can and does delegate policymaking discretion to the federal courts. 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? Those questions have received remarkably little attention to date. 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. Those commentators have not sought to understand how the relevant considerations are reflected in the 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 the choice of delegate, exchanging the stylized models of previous work for an empirical investigation into the conduct of courts and agencies. Using a real-world example of a delegation to courts—Title VII of the Civil Rights Act of 1964—I show how the court-versus-agency choice has operated in one domain of federal law. 

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5 See, e.g., id. 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.”); Cass R. Sunstein, Beyond Marbury: The Executive’s Power to Say What the Law Is, 115 YALE L.J. 2580, 2582 (2006) (“For the resolution of ambiguities in statutory law, technical expertise . . . [is] highly relevant, and . . . the executive has significant advantages over courts.”); 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.”). 

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 remedies for statutory violations. Judicial enforcement also involves the efforts of private parties, of course. 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. 


8 42 U.S.C. § 2000e-1 to 2000e-17
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 to date, 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 through the Supreme Court’s 2007 Term. Indeed, although it has received far less attention, the choice of delegate may be every bit as important as the choice to delegate.9

To be very sure, the Title VII example does not hold all the answers to the complex choice between delegations to courts and delegations to agencies. Nevertheless, examination of the statute and its implementation by the courts 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.10 The aim is not to devise a tidy formula that explains every statute, but to provide a deeper and more nuanced 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

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9 See Fiorina, Delegation, supra note 7, at 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.
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 exceptionally 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 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 imaginable detail of every legislative scheme. Nor, for that matter, would perfectly specified legislation be normatively desirable. Every minute spent on statutory details is a minute not spent on other, potentially more important, matters. And there is little reason to believe that Congress is institutionally well-suited to decide many of the details 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.

Agency decisionmaking also is thought to be significantly more flexible than legislation under the constraints of bicameralism and presentment, enabling agencies to respond more nimbly than Congress could to new information or changed circumstances.

Even on issues that Congress is competent to resolve, a variety of factors may make decisions difficult or politically unfeasible. “Cycling and agenda manipulation can paralyze the legislative

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11 See, e.g., 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, 401 (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, Statutory Interpretation and the Structural Conditions of Agency Delegation (unpublished manuscript on file with author), at 11 (“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 claim 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 circumstances.”).

15 See David Epstein & Sharyn O’Halloran, Administrative Procedures, Information and Agency Discretion, 38 Am. J. Pol. Sci. 697, 754 (1994) (noting that “one of the primary reasons for delegating” is “the ability of agencies to respond flexibly to changed conditions”).

16 Cf. Fiorina, Delegation, supra note 7, at 35 (“Complexity 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.”).
process, and delegating important decisions to agencies can yield a decision when one would not otherwise be made.” 17 Delegation likewise may be attractive when a majority of legislators agree on a general policy direction but not on the details. 18 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. 19 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. 20 One option is to do nothing, but inaction is a risky strategy when constituents are clamoring for a legislative response to some pressing problem. 21 Instead, Congress often opts for legislation that addresses the problem generally but leaves the most contentious details unresolved. 22 By delegating the ultimate decision to an agency, Congress can take credit for doing something while dodging the blame from disappointed constituents. 23

B. Delegations to Courts

Although delegations to agencies have received the lion’s share of attention, Congress also

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17 Spence, supra note 3, at 432-33.
18 See id. (“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.”).
19 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.”).
20 See Mark A. Graber, The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary, 7 STUD. AM. POL. DEV. 3, 39 (Spring 1993) (“Mainstream politicians do their best to avoid taking firm public stands on those matters that internally divide their coalition.”).
21 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.”).
23 See Bressman, supra note 12, at 11 (“Congress writes just enough policy to receive a positive response for its action, while deflecting any negative attention for the burdensome details to the agency that handles those details.”); 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.”).
delegates policymaking authority to the federal courts. The most prominent example is the Sherman Act, which broadly prohibits “[e]very contract, combination, or conspiracy in restraint of trade,” leaving it to courts to work out the details. Recognizing that all contracts restrain trade—“[t]o bind, to restrain, is of their very essence”—the Supreme Court was quick to disclaim a “literal approach to [the Act’s] language.” The operative question, the Court has explained, is not whether the conduct at issue restraints trade, but whether it does so unreasonably. Neither the Sherman Act nor its legislative history provides any guidance to courts on that question. Rather than resolving the many difficult puzzles of antitrust itself, Congress opted for “regulation by lawsuit,” relying on the courts to strike the appropriate balance between competition and collusion.

Although the Sherman Act may represent the most open-ended delegation to the courts, it is hardly the only one. 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; the Copyright Act, which exempts “the fair use of a copyrighted work” from the prohibition on copyright infringement; the Education For All Handicapped Children Act, which calls upon courts to enforce handicapped children’s right to “free appropriate public education”; 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; and Title VII—the focus of this Article—which prohibits “discrimination against any individual with respect to his compensation, terms, conditions, or privilege of employment” because of race, gender, religion, or national origin. Although agencies often play

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24 See generally Margaret H. Lemos, The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine, 81 S. Cal. L. Rev. 405 (2008). 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).


26 Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918).


28 Id.


31 See National Society of Professional Engineers 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.”); 1A Philip Areeda & Herbert Hovenkamp, Antitrust Law ¶ 103d2 (2d ed. 2000) (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 20, at 50 (arguing that the Sherman Act was designed to push off to the courts the difficult questions of antitrust policy).


35 29 U.S.C. § 185(a); see Textile Workers Union of America v. Lincoln Mills of America, 353 U.S. 448, 451 (1957) (interpreting Section 301 as authorizing courts to develop a substantive law regarding enforcement of collective bargaining agreements).

some role in administering such statutes, the ultimate authority for interpreting and enforcing their terms is vested in the federal courts.

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 administered 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.

The more difficult question is why Congress sometimes chooses to delegate to courts instead of agencies. Despite the voluminous literature on delegations generally, 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 a decision one way or the other.

II. CURRENT PERSPECTIVES ON THE CHOICE OF DELEGATE

What considerations might lead Congress to choose the federal courts as its delegates rather than leaving statutory implementation in the hands of an administrative agency? The few scholars who have addressed the question have identified four factors that, they claim, inform Congress’s choice: predictions about which institution is most likely to interpret the statute in accord with the policy preferences of the enacting coalition; a desire to avoid blame for unpopular decisions; the relative expertise of possible delegates; and the relative flexibility or stability of delegated decisionmaking. This Part provides an overview of the four factors, exposing a common shortcoming. The existing literature is dominated by efforts to explain the choice of delegate in the abstract. Given that approach, commentators have not paid adequate attention to the receiving end—the 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. Parts III and IV begin to fill that gap by examining what has transpired in the context of an actual

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37 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 24, 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.

38 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 20, at 44 (“Having a judiciary available to make policy decisions is a particular boon to elected officials whenever they are faced with 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, 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”).

39 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.”).
delegation to courts, Title VII.

A. The Ally Principle

Imagine a legislator who must choose between delegating 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 the legislator’s own policy preferences. Scholars have modeled legislative behavior to demonstrate the (theoretical) importance of the ally principle to Congress’s decision to delegate. They have tended to view Congress’s choice as binary, however—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 it stands to reason that the choice between judicial or agency administration will 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. Building from that premise, Fiorina concludes that a 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. Unfortunately, Fiorina does not explain why courts should be expected to enforce the preferences of the median legislator. That assumption is open to question, to say the least. 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. The Court’s focus, on that account, is not on the preferences of the median legislator but on those of powerful committees, the President, or the legislators whose votes would be needed to override a presidential veto. Moreover, the claim is that courts are responsive to the views of current legislators, not the median enacting legislator. Perhaps most important, Fiorina’s theory

40 See id. 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.”).


42 Fiorina, Delegation, supra note 7, at 39.

43 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. LAW & 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. See 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.


45 See Eskridge, supra note 44, at 644-48.
assumes that the intent of the median legislator is discernible by courts. But the class of cases in which we 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 slack-minimization question is to focus on how the decisionmaking of agencies and courts, respectively, can be influenced or controlled. That factor would seem to weigh strongly in agencies’ favor, as Congress itself can steer agency policymaking through procedural requirements, budget control, oversight hearings, and informal interactions with agency decisionmakers. Matters are complicated, however, by the fact that agencies also are subject to influence by various other actors and institutions—the President, congressional committees, future 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. 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.

46 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 “[i]f the legislature writes a vague law and empowers an agency to interpret and enforce it”). He is not, in other words, comparing 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.


48 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.").

49 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.").


51 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 (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, 2281-309 (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). 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).

52 See sources cited supra note 47; see also Kathleen Bawn, Political Control Versus Expertise: Congressional Choices About Administrative Procedures, 89 AM. POL. SCI. REV. 62 (1995); Epstein & O’Halloran, supra note 15.
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.\textsuperscript{53} 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.\textsuperscript{54}

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. The first is that, 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 delegations to courts.\textsuperscript{55} 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 to begin with.\textsuperscript{56} 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—and 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,\textsuperscript{57} 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.”\textsuperscript{58} More concretely, commentators have suggested that procedural questions lend themselves more readily to judicial than agency

\textsuperscript{53} See supra notes 19-23 and accompanying text.

\textsuperscript{54} 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.”).

\textsuperscript{55} See 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.

\textsuperscript{56} 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.

\textsuperscript{57} See Thomas W. Merrill & Kristen 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.”).

\textsuperscript{58} 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).
expertise. Yet it is hard to see why judges would be more expert than agencies on questions of procedure generally. Judicial expertise is likely to be trained on a particular type of procedure—litigation under the adversary system. Such expertise does little to explain delegations to courts, since litigation in court is hardly the only way to deal with social problems. Thus, a focus on courts’ specialized expertise in matters of procedure (if in fact such expertise exists) simply begs the question why Congress would opt for “regulation by lawsuit” rather than, say, agency rulemaking.

A similar argument about judicial expertise is that judges are more expert than agencies at “matters of law.” While that claim is never 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.” 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. As Chevron recognizes, the work to be done in filling in statutory gaps or construing vague statutory language is not the sort of work that benefits from the “traditional tools of statutory construction.” 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 information or changed circumstances in a way that statutes cannot. 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—and because courts’ political insulation means that their decisions tend to persist across different administrations and congressional configurations rather than shifting with the prevailing...

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60 BICKEL, supra note 30, at 130.

61 Breyer, supra note 59, at 397; Stephenson, supra note 7, at 1042.

62 See Graber, supra note 20, at 39 (noting that, when courts are called upon to make policy decisions, “[i]ndependent 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”).

63 467 U.S. 837 (1984). Under Chevron’s famous two-step rule, the reviewing court must first ask whether Congress clearly expressed an intent on the “precise question at issue.” Id. at 842. If not—if instead “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.

64 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.”).

65 See supra notes 14-15 and accompanying text.

66 See William N. Eskridge, Jr., Overruling Statutory Precedents, 76 GEO. L.J. 1361, 1362 (1988) (discussing “super strong” statutory stare decisis in the Supreme Court); 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.”).
political winds.\textsuperscript{67}

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.\textsuperscript{68} Therefore, courts may be particularly attractive delegates in areas marked by strong reliance interests, where stability is especially important.\textsuperscript{69}

Stephenson’s theory is based on “plausible” “assumptions” about judicial behavior.\textsuperscript{70} There is reason to doubt, however, whether judicial decisionmaking is reliably stable with respect to the sort of 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 (perhaps even abandoned) with respect to “common law” statutes like the Sherman Act.\textsuperscript{71} Agency rulemaking also might be more stable than Stephenson assumes, because agencies hold onto the “mission” specified by the enacting Congress,\textsuperscript{72} because certain types of agencies might be resistant to short-term political changes,\textsuperscript{73} or because of ossification of the rulemaking process.\textsuperscript{74} Thus, while Stephenson may be correct that judicial decisionmaking overall is more stable than agency decisionmaking, there is likely to be significant variation within those 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 is neither surprising nor disappointing. The choice between courts and agencies plainly cannot be reduced to a simple algorithm. Context matters, and

\textsuperscript{67} 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 . . . .”).

\textsuperscript{68} Stephenson, supra note 7, at 1040.

\textsuperscript{69} 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. See 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.

\textsuperscript{70} Id. at 1049.

\textsuperscript{71} 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 66, at 1376-81.

\textsuperscript{72} 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).

\textsuperscript{73} 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).

\textsuperscript{74} 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.”).
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. 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 delegate, and how their decisions compare to those of the relevant agency. Through an empirical analysis of what has happened in one area of federal law, the analysis in this and the following Part begins to fill the gaps left by the extant literature, exposing some of the consequences of the choice between judicial and administrative process.

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; both of those factors 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) that 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 like the EEOC 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. As 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.75 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 at best 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.76

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

75 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.

76 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’ approach 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 (2005) (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, ___ Mich. St. L. REV. ___ (forthcoming 2009 symposium issue). 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).

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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.\(^{77}\) Congress faced powerful pressure 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.\(^{78}\) 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. That is just what Congress did with Title VII.

Substantively, Congress faced a choice between two distinct models of anti-discrimination legislation: a distributive-justice model aligned with affirmative measures to achieve racial equality, and a corrective-justice model focused on color-blind, individualized redress for identifiable wrongs.\(^{79}\) 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.”\(^{80}\) Section 703(a) of the statute broadly prohibited discrimination by employers or unions on the basis of race, sex, religion, or national origin.\(^{81}\) But other provisions contained important limitations designed to restrict its reach to intentional wrongs.

The substantive choices reflected in Title VII were linked to a series of decisions about enforcement, as Congress struggled with the choice of delegate. 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.”\(^{82}\) Republicans and Southern Democrats opposed giving the EEOC


\(^{78}\) 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.”).

\(^{79}\) 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.”).

\(^{80}\) Id. at 706-07

\(^{81}\) 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.

\(^{82}\) Lieberman, supra note 78, at 706-07. For a discussion of why civil rights groups favored EEOC enforcement over a private right of action in the courts, see Farhang, supra note 77, at 17-19, 22.
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 on the part of the National Labor Relations Board, which served as the template for the EEOC.\(^83\) A second objection to direct enforcement by the EEOC was that Washington bureaucrats should not be empowered to prescribe employment policies for businesses nationwide.\(^84\) Although tightly connected to Southern opposition to 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.\(^85\) 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.\(^86\)

Ultimately, Title VII as enacted “substantially hollowed out the enforcement authority of the new EEOC.”\(^87\) Enforcement authority was divvied up among the EEOC, the federal courts, and the Department of Justice.\(^88\) 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.\(^89\) 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 General for litigation.\(^90\) But the bulk of the work would be done by individuals acting as “private attorneys general.”\(^91\) To that end, Title VII created a private cause of action for any individual harmed by prohibited employment practices,\(^92\) and provided for attorneys’ fees for prevailing plaintiffs.\(^93\)

As for interpretive authority, Congress delegated to the EEOC the power to create procedural

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\(^83\) See Graham, supra note 77, at 130; see also Farhang, supra note 77, at 24 ("[T]he analogy of the proposed EEOC to the 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 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 77, 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.").

\(^86\) See Graham, supra note 77, at 129-30; H.R. Rep. No. 88-914, at 2515-2516 (1963), reprinted in 1964 U.S.C.C.A.N. 2355, 2391 (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”).

\(^87\) Lieberman, supra note 78, at 706-07


\(^90\) 78 Stat. 261, § 707(a) (1964).

\(^91\) See Albermarle Paper Co. v. Moody, 422 U.S. 405, 415 (1975) (noting that the attorneys fees provision of Title VII, 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”).


rules. Substantive issues—such as the critical details of what constitutes prohibited “discrimination”—were left to the courts.

The choice-of-delegate question surfaced again in the late 1960s and early 1970s as Congress considered amendments to Title VII. Proponents of strong enforcement argued for increasing the role of the EEOC. They maintained that “employment discrimination was a problem requiring expert assistance and technical perception, which in turn required a specialized agency with adjudicatory powers.” Women’s groups, which had not fared well in the federal courts, also favored granting more enforcement authority to the EEOC. 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.

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, “in part because they felt that southern federal courts would provide stricter definitions of the law than the EEOC,” which continued to be viewed as biased in favor of employees. Concerns about EEOC bias led some civil rights interests to oppose cease-and-desist authority as well, though the bias they feared cut in the opposite direction. Those views found purchase 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.”

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

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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 77, at 253-54; Farhang, supra note 77, at 50-67.
98 See GRAHAM, supra note 77, at 435.
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) (“By 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 Frymer, supra note 77, at 54-55.
100 Frymer, supra note 99, at 490.
101 See GRAHAM, supra note 77, at 425; H.R. Rep. No. 238, supra note 97, at 59 (noting that the EEOC had “attained an image as an advocate for civil rights” and as a “mission” agency), reprinted in 1972 U.S.C.C.A.N. 2137, 2168.
authority was necessary if the “poor, enfeebled” EEOC were to give effect to the promise of the 1964 Act. 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.”  

Finally, the chairman of the EEOC argued (perhaps disingenuously) that cease-and-desist authority would deprive the victims of discrimination of a powerful ally by forcing the EEOC to shift from the role of advocate and prosecutor to that of a neutral quasi-judicial body.

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. The Attorney General would maintain control of EEOC litigation in the Supreme Court—a fact that would prove 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. 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.

The persistent debates about enforcement authority highlight the perceived importance of the choice of delegate. Perhaps even more significant, 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 enforcement would impact the scope and 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, and we are now in a position to assess what the EEOC and the courts have done with Title VII. I analyzed every case decided by the Supreme Court after oral argument that involved a question of interpretation or application of Title VII. By the end of its 2007 Term, the Supreme Court had

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104 Id. at 435.
105 Id. at 429.
106 42 U.S.C. § 2000e-5(f)(1). 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. 42 U.S.C. § 2000e-6(c).
108 See Grah am, supra note 77, at 425.
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. My research assistants and 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.,
resolved 120 Title VII-related issues (in 102 cases). 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), a compliance manual for employers, enforcement guidelines for EEOC employees, and in EEOC decisions and various less formal sources. I was able to 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. As noted above, moreover, 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 broadly. 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. And both have interpreted the statute to permit voluntary affirmative action. Indeed, the conventional wisdom on Title VII holds that neither the Court nor the EEOC has adhered to the intent of the 88th Congress.
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.\textsuperscript{117} Consistent with the predictions of some legislators, the EEOC’s interpretations of Title VII have, on the whole, been more “liberal”—or pro-claimant—than the Court’s. The EEOC’s position was liberal on 89, or 91\%, of the 98 Title VII-related issues that both the Court and the EEOC addressed.\textsuperscript{118} The Court, by contrast, took a liberal position on only 73, or 61\%, of the 120 Title VII-related issues it resolved after oral argument.\textsuperscript{119}

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 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 determinants and the consequences of a choice between judicial and administrative process. The proactive in the pursuit of equality than Congress . . . envisioned.”).

\textsuperscript{117} The rate of disagreement between the EEOC and the Court is likely higher than the one-third figure suggests. First, 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. See, e.g., EEOC v. Commercial Office Prods. Co., 486 U.S. 107, 115-16 (1988); Local No. 93, Int’l Ass’n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland, 478 U.S. 501 (1986); Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986); E.E.O.C. v. Shell Oil Co., 466 U.S. 54 (1984); McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976); Griggs v. Duke Power Co., 401 U.S. 424 (1971). 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.

Second, the imperatives of data collection and management inevitably result in the loss of some nuance. Consistent with the conventions of existing literature, I coded 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.” Accord 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). But, of course, interpretations can be more or less liberal. For example, in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), 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. However, while the EEOC appeared to 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. See also infra text accompanying notes 158-162 (discussing subtle differences between the EEOC’s and the Court’s approach to claims of sexual harassment by supervisors). Because I did not attempt to distinguish between different gradations of liberal (or conservative) decisionmaking for purposes of this study, my results almost certainly understate the real rate of disagreement between the two institutions.

\textsuperscript{118} If anything, those numbers 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. If the Solicitor General-induced switches are omitted from the count, the percentage of liberal EEOC positions is 96%.

\textsuperscript{119} Perhaps predictably, there is a strong correlation between the Justices’ votes on Title VII issues and their presumed political preferences. As Chart 1 shows, Justices who are thought to be “liberal” as a general matter have cast a high proportion of “liberal” votes in the Title VII context, while the opposite is true for Justices typically deemed “conservative.” Interestingly, there is one Justice whose votes in Title VII cases seem notably different from his votes in other areas. That is Justice Thomas, who consistently is ranked as one of the most conservative Justices on the modern Court, yet who 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.
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, I suggest, 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, however, 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 generally have changed more than the EEOC’s. Both findings call into question the common assumption that judicial process tends to be 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 the EEOC’s. Although there certainly are counterexamples, the Court has tended to hesitate before expanding the scope of the antidiscrimination principle. It consistently has sought indications of congressional intent, and, notably, its typical approach to questions on which congressional intent is unclear or indeterminate is to limit the reach of the statute.

120 The most important counterexample is Griggs v. Duke Power Co., 401 U.S. 424 (1971), in which the Court endorsed the disparate-impact theory of liability. It bears emphasis that the Court there quite self-consciously followed the path marked out by the EEOC. See infra notes 142-151 and accompanying text.

121 See, e.g., Ledbetter v. Goodyear Tire & Rubber Co., 127 S. Ct. 2162, 2177 (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. 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. Chemical Constr. Corp., 456 U.S. 461 (1982) (refusing to depart from traditional rules of preclusion without explicit direction from Congress); Northwest Airlines, Inc. v. Transport Workers, 451 U.S. 77, 95-98 & n.41 (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 v. Manhart, 435 U.S. 702, 721 (1978) (refusing to...
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. When that purpose conflicted with statutory text, purpose won out. 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.” Most important for present purposes, it is strikingly different from the behavior 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 was adequate to take 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 they had accumulated over their years of employment. The EEOC was quick to recognize the unfairness of such a system—indeed, it identified seniority systems, along with job testing, as one of the major causes of systemic racial disparities in many sectors of the workforce. The agency therefore 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. But the EEOC faced an obstacle in the text of Title VII, which specifies in § 703(h) that “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.” The agency’s solution was to attribute to Congress a

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.”); General 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 employers, 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 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.’”).

122 See GRAHAM, supra note 77, at 249.

123 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: Does the Who Affect the How of Statutory Interpretation? __ Mich. St. L. Rev. __ (forthcoming 2009 symposium issue).

124 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.


126 See GRAHAM, supra note 77, at 248; Frymer, supra note 99, at 489.

127 GRAHAM, supra note 77, at 252-53

broad antidiscrimination purpose—that of correcting the “economic plight of the minority worker”—and to emphasize that purpose over the rather more narrow language of the statute.129

Although the EEOC had used a similar strategy to convince courts to recognize the so-called “disparate impact” theory of liability (discussed in more detail below), it was far less successful with respect to seniority systems. The issue of seniority came to a head in the Supreme Court in three cases decided in 1977, 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.130 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.131 The Court extended Teamsters in American Tobacco Co. v. Patterson, holding that § 703(h) also immunizes a seniority system with discriminatory impact that was adopted after the enactment of Title VII.132 It rejected the contrary view, reflected in the EEOC’s guidelines, which would have distinguished between an application of a preexisting seniority system (protected) and the adoption of a new system (not protected).133 For the Court, the text of Title VII was clear, and drew no distinction between pre-Act or post-Act discrimination.134

To the extent that Title VII is representative of judicial decisionmaking in other fields,135 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 (or could be used to do) “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 (as Fiorina suggested136), 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 enforces137 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

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129 GRAHAM, supra note 77, at 249-51.
134 See Patterson, 456 U.S. at 69.
135 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 44, at 2081.
136 See supra note 43 and accompanying text.
137 Mashaw, supra note 124, at 891.
decisionmaking. 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 regulation, or by placing the burden of proof on the agency to justify regulation rather than on regulated groups to oppose it.

Congress’s ability to specify agencies’ duties, procedures, and so on, can be understood as an important part of the choice of delegate, as 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. Instead, it was authorized to investigate charges of discrimination, issue right-to-sue letters, and to 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 pro-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. As the backlog increased, EEOC leadership “concluded that complaint processing was a losing game.” The fledgling agency therefore trained its scarce resources on a different goal—imposing record-keeping and reporting requirements on all employers covered by Title VII. The data allowed the EEOC to observe racial hiring and employment trends nationwide, and to pinpoint problem areas by geographic region and/or by industry. The results were striking, revealing “employment patterns that were

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138 See generally McCubbins, et al., *Administrative Procedures*, supra note 47.
139 See id. at 268 (explaining how legislation enacted in 1981 requires the Consumer Produce Safety Commission to invite proposals for voluntary standards from the industry to be regulated before it may issue new rules; “[i]f a feasible voluntary standard is proposed, 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.”).
140 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).
141 Lieberman, *supra* note 78, at 707.
142 GRAHAM, supra note 77, at 239.
143 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 id. at 193-97.
144 See *The Story of The United States Equal Employment Opportunity Commission: Ensuring the Promise of Opportunity for 35 Years 9-10* (2000) (describing early record-keeping requirements and providing examples of some of

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so massively skewed, especially by race, that they intuitively demanded an inference of systematic job discrimination.”\(^{145}\) 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.\(^{146}\)

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].”\(^{147}\) 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.’”\(^{148}\) 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 such tests are empirically “validated” as job-related.\(^{149}\) The Supreme Court drew heavily from those guidelines in \textit{Griggs v. Duke Power Co.},\(^{150}\) 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.\(^{151}\)

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.”\(^{152}\) 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. “[T]he 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 that

\(^{145}\) \textit{Graham}, supra note 77, at 244.

\(^{146}\) See Blumrosen, supra note 125, at 64 (observing that “[t]ests and educational requirements were adopted extensively in the early 1960s” in order to perpetuate the subordination of black workers through “seemingly neutral personnel policies”); \textit{cf.} \textit{Gene Grove, When a “No. 2” Applies for a Job}, N.Y. TIMES SM32, 156 (Sept. 18, 1965) (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.”).


\(^{148}\) Id. at 249 (quoting EEOC commissioner Samuel C. Jackson, \textit{EEOC vs. Discrimination, Inc., The Crisis 16-17} (Jan. 1968)). 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. \textit{See Blumrosen, supra note 125, 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.”)}.

\(^{149}\) 29 C.F.R. 1607 (1970); \textit{see Blumrosen, supra note 125, at 60 & n.5 (describing the impetus for and the original form of the EEOC guidelines, which the author helped formulate)}.


\(^{152}\) \textit{Graham, supra note 77, at 430.}
Title VII seeks to correct." 153

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. 154 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 good at finding nuanced solutions to complicated social realities. 155

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. 156 As in Griggs, the Court relied heavily on the EEOC’s guidelines and well-established precedents in the lower courts. 157 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 a simple answer: The employer is strictly liable for the acts of its agents and supervisory employees. 158 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 12 more years of litigation, the Court finally settled on the rule that an employer is liable for sexual harassment by its supervisors when the employer knew or should have known of the harassment, 159 or where the supervisor uses his agency relationship with the employer to take “tangible employment actions” against the employee. 160 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 that the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities. 161 The “tangible employment action” requirement has added significant complexity to litigation over sexual and other forms of harassment. 162 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

153 Id. at 429 (quoting Hearings on S. 2453, N.Y. Times Aug. 12, 1969).
154 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.”).
155 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”).
157 See id. at 65 (noting that, “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”).
158 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.”); 45 Fed. Reg. 74676 (1980) (stating that “the strict liability imposed in § 1604.11(c) is in keeping with the general standard of employer liability with respect to agents and supervisory employees.”).
160 See id. at 760.
161 Id. at 765; Faragher v. Boca Raton, 524 U.S. 775, 807-08 (1998).
jurisprudence, including its treatment of disparate-impact liability,\textsuperscript{163} voluntary affirmative action\textsuperscript{164} and seniority systems.\textsuperscript{165} Indeed, many of the issues on which the Court and the EEOC disagreed can be understood in terms of the competing models of corrective versus distributive justice.\textsuperscript{166} 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.\textsuperscript{167}

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 natural tendency to transform questions into a tort-like mold. And judges, equally naturally, 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.\textsuperscript{168} That point should be obvious in some respects. Courts simply could not perform the role of the Food and Drug Administration, for example, in testing and permitting drugs. Their procedures do

\textsuperscript{163} Disparate impact liability can be understood in either distributive- or corrective-justice terms. See Suk, supra note 116, at 424-26. 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 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., Inc. v. Atonio, 490 U.S. 642, 600 (1989), 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. Congress overturned aspects of Wards Cove in the Civil Rights Act of 1991, see infra notes 191-194 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 116, at 458-59.

\textsuperscript{164} Both the Supreme Court and the lower courts have tended to 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 (1976). The Court has avoided that problem by focusing on a different set of wrongs—the wrongs that would be righted by affirmative action. See Weber, 443 U.S. at 208-09 (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).

\textsuperscript{165} The Court has refused to invalidate seniority systems on the basis of discriminatory effects and absent proof of intentional wrongdoing. See supra notes 131-134 and accompanying text; Belton, supra note 88, at 955 (emphasizing the Court’s focus on purposeful discrimination in seniority-systems cases).

\textsuperscript{166} See, e.g., Price Waterhouse v. Hopkins, 490 U.S. 228 (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), overruled by the 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 (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 (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 (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).

\textsuperscript{167} See Suk, supra note 116, at 438.

\textsuperscript{168} 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).
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, even if other approaches are possible, legislators should hesitate before giving courts authority to implement measures that might or 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.\footnote{Cf. Crane, supra note 29 (explaining that antitrust enforcement has followed a crime-tort model rather than a corporate-regulatory model).}

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 agency procedures in an effort to ensure that the agency’s decisions track the preferences of the legislators and their constituencies.\footnote{See McCubbins, et al., Administrative Procedures, supra note 47.} 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 elected federal 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 attorney’s fees should be available to prevailing parties, what remedies are available for statutory violations, which party bears the burden of proof, and so on.\footnote{See Sean Farhang, Private Litigation, Separation of Powers, and the Struggle Over Job Discrimination Enforcement, 1981-1991, available at http://repositories.cdlib.org/csls/fwp/60, at 3 (“[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).} Those choices can shape, in significant ways, 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: It is unlikely that any legislators anticipated that by limiting the EEOC’s enforcement power, funding, and staff, they 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, 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 Sean Farhang has shown, “[t]he volume and efficacy of Title VII litigation far exceeded anyone’s expectations,”\footnote{See Farhang, supra note 77, at 11-12} representing “a potent strengthening of Title VII’s enforcement framework, though clearly this was not [the Republicans’] intention.”\footnote{Id. at 91.} 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 endogenous to courts and agencies can shape their decisionmaking. But various exogenous 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. 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’ assumed insulation from politics should in theory generate a more stable decisionmaking record.

Title VII provides a useful window onto 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 the EEOC’s and the Supreme Court’s decisionmaking seem to have been influenced by changes in the political climate, and then address the issue of interest group influence on delegated decisionmaking. I address the more general question of the stability of judicial and agency decisionmaking in Part IV.C.

a. 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, including a commitment to limit civil rights enforcement to righting individual wrongs.\footnote{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.”); \textit{see also} Drew S. Days, \textit{The Court’s Response to the Reagan Civil Rights Agenda}, 42 VAND. L. REV. 1003, 1008 (1989) (“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 had a corollary: Enforcement of civil rights laws utilizing concepts of ‘discriminatory effect’ or ‘disparate impact’ should be de-emphasized.”).} A key component of Reagan’s civil rights agenda was to cut back on all forms of affirmative action, which benefited minorities at the expense of so-called “innocent nonblack employees” or applicants.\footnote{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.” \textit{Walton, supra} note 84, at 133 (quoting Juan Williams, \textit{Chairman of EEOC Tells Panel Statistics Misused to Prove Bias}, WASH. POST, Dec. 15, 1984, at A4)); \textit{see also} Juan Williams, \textit{EEOC Chief Cities Abuse of Racial Bias Criteria}, WASH. POST, Dec. 4, 1984, at A13 (quoting Thomas as saying that Griggs had been “overextended and overapplied”).} Reagan also was opposed to \textit{Griggs} and the disparate-impact doctrine that grew out of it.\footnote{See Andrew M. Dansicker, \textit{A Sheep in Wolf’s Clothing: Affirmative Action, Disparate Impact, Quotas, and the Civil} \textit{DRAFT—please do not cite or circulate without permission}} 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.\footnote{177 See Andrew M. Dansicker, \textit{A Sheep in Wolf’s Clothing: Affirmative Action, Disparate Impact, Quotas, and the Civil}
Reagan pursued his agenda in several different ways. First, he appointed Clarence Thomas—a conservative Republican and now Justice—to head the EEOC, and by 1982 had attained a Republican majority on the five-member commission. Second, Reagan pressed the EEOC to shift its enforcement focus away from class-based relief and toward seeking “full relief” for individual claimants. Third, he attempted unsuccessfully to induce the EEOC to change its guidelines on employee selection procedures—the guidelines on which the Supreme Court and lower courts had relied to shape the contours of disparate impact analysis. Finally, Reagan urged the courts themselves to adopt a narrow reading of Title VII.

Reagan enjoyed mixed success in the courts. As Chart 2 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. 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 percentage of liberal decisions and the identity or party of the administration in office.

As Neal Devins and David Lewis have explained, Reagan aggressively utilized the appointments process to place ideological allies in positions of agency leadership, “vet[ting] nominees for ideological consistency and intensity” and “emphasiz[ing] the need for appointees to see themselves as part of a unitary executive.” Neal Devins & David E. Lewis, Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design, 88 B.U. L. Rev. 459, 481 (2008).

Notably, the final strategy did not require the EEOC’s participation or assent. 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. 225 (1994). Not surprisingly, then, 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, __ Mich. St. L. Rev. __ (forthcoming 2009 symposium issue). Also not surprisingly, 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 36 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 34 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.

These findings are consistent with those in Segal, supra note 117, 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 44, 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
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. For example, the percentage of liberal opinions issued during the Reagan administration was a relatively high 70%. That figure dipped to 46% 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. But that explanation is hard to sustain when one examines the individual Justices’ voting records in Title VII cases. As it happens, 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.

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 United States came out roughly even. The most successful issue for Reagan was seniority systems, on which the Court took a consistently employer-protective approach. But Reagan faced an uphill battle on disparate-impact liability and affirmative action, as the Court already had spoken approvingly to those issues.

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., Inc. v. Atonio.* 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

before. The Court rendered a liberal decision on 6 out of the 13 issues it considered in the 1977-79 Terms (46%), and on 12 of the 23 issues it considered in the 1980-83 Terms (52%). *Compare* Eskridge, supra note 44, at 396 n.205 (reporting that the Court rendered a liberal decision in 10 of the 17 statutory civil rights cases decided during the 1977-1979 Terms, and in 11 of the 33 such cases decided during 1980-1983).

Justice O’Connor replaced Justice Stewart, who had a more conservative voting record on Title VII cases (51% liberal) than she would have (57% 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% liberal) was more conservative than Scalia’s proved to be (43% liberal). The same pattern holds for Justice Kennedy (49% liberal) who replaced Justice Powell (45% 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% liberal), but Justice Marshall’s voting record was one of the more lopsided: 88% 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 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).

That is not to say, of course, that judicial appointments are irrelevant to the Title VII story. As Chart 1 shows, Justices appointed by Democratic presidents, on the whole, cast more liberal votes on Title VII issues than Justices appointed by Republican presidents. That result is consistent with the widely held view that the appointments process plays an important role in influencing the direction of Supreme Court decisionmaking. Nevertheless, the appointment process is hardly a sure-fire mechanism for ideological consistency. *See generally* Lee Epstein, et al., *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 N.W. U. L. Rev. 1483 (2007). 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.

183 Justice O’Connor replaced Justice Stewart, who had a more conservative voting record on Title VII cases (51% liberal) than she would have (57% 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% liberal) was more conservative than Scalia’s proved to be (43% liberal). The same pattern holds for Justice Kennedy (49% liberal) who replaced Justice Powell (45% 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% liberal), but Justice Marshall’s voting record was one of the more lopsided: 88% 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 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).

184 See supra notes 130-134 and accompanying text.


186 490 U.S. 642 (1989)
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.\textsuperscript{187} \textit{Wards Cove} appeared to adopt a standard more lenient than either of the two prevailing contenders, explaining that the defendant need only show that the practice “serves, in a significant way, the legitimate employment goals of the employer.”\textsuperscript{188} The Court also shifted the burden of persuasion on the justification point.\textsuperscript{189} 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.\textsuperscript{190}

Although \textit{Wards Cove} was a victory for the Reagan administration, it was short-lived. A Democrat-controlled Congress quickly introduced legislation to overrule \textit{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.”\textsuperscript{191} The new Bush administration, fearing a push toward 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.”\textsuperscript{192} After narrowly losing a veto battle over the issue,\textsuperscript{193} Congress opted to omit any definition of the key term “business necessity” and President Bush signed the bill, the Civil Rights Act of 1991.\textsuperscript{194}

Reagan faced similar challenges with respect to affirmative action. In 1979, a divided Court held in \textit{United Steelworkers of America v. Weber} that Title VII does not prohibit all private, voluntary, race-conscious affirmative action plans.\textsuperscript{195} Although the Justices made no mention of

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\textsuperscript{187} The Court stated in \textit{Griggs} that “the 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,” \textit{id.}, “are demonstrably a reasonable measure of job performance” or have “a manifest relationship to the employment in question,” \textit{id.} at 432. Clearly, “necessary” and “related” are—or at least could be—significantly different standards. \textit{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 177, at 16 & nn.15-16. Subsequent decisions by the Court provided little guidance, as they appeared to vacillate between a strict and more lenient approach. See \textit{id.} at 19-20; compare Albemarle Paper Co., 422 U.S. at 421 (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 New York Transit Auth. v. Beezer, 440 U.S. 568, 587 n.31 (1978) (concluding that because the defendant employer’s goals were “significantly served by—even if they do not require—[the challenged] rule,” the record “demonstr[ated] that [the] rule bears a manifest relationship to the employment in question” (internal quotation marks omitted)), \textit{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).

\textsuperscript{188} \textit{Id.} at 659 (disclaiming any requirement “that the challenged practice be ‘essential’ or ‘indispensable’ to the employer’s business”).

\textsuperscript{189} \textit{Id.} at 659-60.


\textsuperscript{192} Eskridge, supra note 44, at 639.

\textsuperscript{193} 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, 101st Cong., 2d Sess. § 3 (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. \textit{See} Neil A. Lewis, \textit{President’s Veto of Rights Measure Survives by 1 Vote, N.Y. Times}, Oct. 25, 1990.

\textsuperscript{194} 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,” but did not define the key term.

\textsuperscript{195} 443 U.S. 193 (1979).
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.  

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, 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. 

Reading the majority opinion to prohibit quota relief of any sort, the Reagan administration touted Stotts as an important move away from Weber. Again, however, the triumph was fleeting. In Local 28, Sheet Metal Workers’ International Association v. EEOC, five Justices agreed that in appropriate circumstances a court may order preferential treatment for non-victims in order to remedy Title VII violations. And in Johnson v. Transportation Agency, Santa Clara County, CA, 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. 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. 

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. In the end, although Reagan was able to populate the lower courts with sympathetic judges, his losses in the

196 44 Fed. Reg. 4422 (Jan. 19, 1979). 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.


198 Id. at 579. 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 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 In Support of Petitioners, at 36 n.23, Firefighters Local v. Stotts, 1983 U.S. S. Ct. Briefs LEXIS 427.

199 See Joel L. Selig, The Reagan Justice Department and Civil Rights: What Went Wrong, 1985 U. ILL. L. REV. 785, 824-26 (1985); William Bradford Reynolds, The Reagan Administration and Civil Rights: Winning the War Against Discrimination, 1986 U. ILL. L. REV. 1001, 1015 (1986) (“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.


201 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 181, at 299-300 (“[W]hen the EEOC explained its position to SG attorneys, it was flatly told that it . . . would have to swallow DOJ opposition to affirmative action.”).


204 See Reynolds, supra note 199, at 1014 (describing Johnson as “a significant setback”).

205 See Graham, supra note 174, at 108 (noting that “appointing youthful conservatives to the federal courts[] was a
Supreme Court meant that voluntary affirmative action and disparate impact analysis would live on.

Reagan’s agenda also was at odds with EEOC’s practices circa 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.206 As for class-based relief, the EEOC 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.207

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, and 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.”208 In practice, that shift resulted in less enforcement by the EEOC, as 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.209 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.”210

Reagan was quite unsuccessful, moreover, 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.\textsuperscript{211}

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 statutory meaning. At first blush, 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.\textsuperscript{212} Such agencies also are exempt from executive orders requiring OMB review and the like, while they remain subject to the typical means of control by Congress.\textsuperscript{213} Although independent agencies are by no means fully independent from the President,\textsuperscript{214} it should not be terribly surprising that an independent agency like the EEOC

\textsuperscript{211} See Norton, supra note 180, 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 likely would have met with more success than was possible under Title VII.

\textsuperscript{212} See Alan B. Morrison, How Independent are Independent Regulatory Agencies?, 1988 DUKE L.J. 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.”); Angel M. Moreno, Presidential Coordination of the Independent Regulatory Process, 8 ADMIN. L.J. AM. U. 461 (1994) (explaining that, while “no uniform definition of independent agency appears to exist in American scholarship,” most definitions “emphasiz[ed] that the president cannot remove . . . commissioners”); see also Strauss, supra note 51, 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).

\textsuperscript{213} See Linda R. Cohen & Matthew L. Spitzer, 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 147, 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 178, at 464 (explaining that Congress is more likely to delegate authority to independent commissions when they “fear they 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. In an 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—Sean 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.” Sean Farhang, Public Regulation and Private Lawsuits in the American Separation of Powers System, available at http://repositories.cdlib.org/cls/fwp54, at 33. Although Farhang focuses on congressional empowerment of potential litigants rather 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 will prefer private enforcement through the courts over an enforcement scheme that leaves all enforcement power in the hands of an agency.

\textsuperscript{214} 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 generally Devins & Lewis, supra note 178; see also 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”). 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.
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 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.215

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. That is because of 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,216 or judicial overruling, which is even more rare,217 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 and Griggs and Weber) will face a steeply uphill battle. b. 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,218 and can prioritize or rule out certain considerations for decisionmaking.219 Congress also can exert ex ante control by

215 See Farhang, supra note 171, at 8 (“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 . . . .”).

216 In an empirical study of congressional overrides of Supreme Court statutory decisions, William Eskridge found an average of 10 overrides per Congress, or five per year. Eskridge, supra note 135, at 338.

217 In an empirical study of the Supreme Court’s application of stare decisis to statutory precedents, William Eskridge identified 50 cases decided between 1961 and 1986 in which the Court explicitly or implicitly overruled prior statutory interpretations, for an average of approximately 2 per year. Eskridge, supra note 66, at 1427-34.

218 See Robert Pear, Congress Passes Bill With Protections for Disabled, N.Y. TIMES A21 (Sept. 18, 2008) (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”).

219 For example, the Civil Rights Act of 1991 contained a provision limiting the legislative history that courts could use
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 well be made after many (perhaps all) members of the enacting Congress have left office. Congress is not a static body, but 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 the years 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. 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 significant shift in the EEOC’s interpretation of Title VII, though again statutory enforcement seems more susceptible to political influence than interpretation.

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. Therefore, we might expect the Court to take advantage of the congenial political atmosphere during those periods and render more conservative decisions. There is no evidence of such strategic behavior in the Title VII context. In fact, the converse is true: There is a statistically significant negative correlation between Democratic control of Congress (either the House, the Senate, or both) and liberal decisionmaking by the Supreme Court.

As Chart 3 demonstrates, some of the Court’s most conservative periods overlapped with democratic control of Congress—including during the Clinton administration. For example, the

to supply meaning to the term “business necessity.” Pub L. No. 102-166, § 105(b), 105 Stat. 1071, 1075 (1992). The only authorized source of legislative history is an interpretive memorandum stating that “the 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 (1991). 220 The Democrats took control of the Senate on May 24, 2001, when Senator Jeffords switched parties, but lost it again in the 2002 elections.

221 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.

222 See, e.g., Cohen & Spitzer, supra note 213, at 445 (describing the median Justice at the time of Reagan’s inauguration as “a moderate/conservative”); Stephenson, supra note 183, at 676 (reporting, based on several different gauges of judicial ideology that “[t]he 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.”).

223 See Appendix, infra.
Court returned a handful of conservative decisions in the late 1980s, after the Republicans had lost control of the Senate. Those decisions prompted override legislation that ultimately was passed—after a veto battle with President George H.W. Bush—in 1991. The Court’s behavior suggests that the Justices are not paying particularly close attention to the political winds blowing their way from the Capitol.

Indeed, Congress has been unusually active in the Title VII arena, stepping in to override six Supreme Court decisions.\(^{224}\) 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 lawmaker can take one of two forms: efforts to influence decisionmaking before it occurs, and efforts to correct “bad” decisions that already have made.\(^{225}\) 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.\(^{226}\) 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.\(^{227}\) 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.”\(^{228}\)

Although Congress can address agency decisions through ex ante influence as well as ex post corrections, legislative sanctions are the primary mechanism Congress has to control judicial decisionmaking.\(^{229}\) The upshot is that legislators can assure disappointed constituents that unpopular judicial decisions were outside their control—it is for this reason that some commentators have suggested that delegations to courts should be particularly attractive to legislators intent on avoiding blame for controversial policies.\(^{230}\) But Congress’s inability to

\(^{224}\) See supra note 117. 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 213, 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”).

\(^{225}\) See generally McCubbins, et al, Administrative Procedures, supra note 47.

\(^{226}\) See id. at 253-64 (describing ex ante means of control).

\(^{227}\) On the many forces that can conspire to block override legislation, see, for example, 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); McNollgast, Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation, LAW & CONTEMP. PROBS., Winter & Spring 1994, at 3, 11.

\(^{228}\) McCubbins, et al., Administrative Procedures, supra note 47, at 252.

\(^{229}\) Cf. McCubbins, et al., Structure and Process, supra note 47, 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 47, at 256.

\(^{230}\) See supra note 54 and accompanying text.
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 disensus 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.\footnote{See Jeb Barnes, Overruled? Legislative Overrides, Pluralism, and Contemporary Court-Congress Relations 89 (2004) (finding that 89 of 100 randomly sampled overrides followed judicial disensus).} Perhaps not surprisingly, then, the available empirical evidence suggests that overrides are most frequent in areas where courts (rather than agencies) enjoy primary interpretive authority: criminal law, civil rights, and antitrust.\footnote{See Eskridge, supra note 216, at 344 Table 4.} 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 \textit{Ward Cove} suggest that they are\footnote{See Dansicker, supra note 177, at 3 (describing the issue of racial quotas, brought to the fore in the debates leading up to the 1991 overrides of \textit{Wards Cove} and other unpopular judicial decisions, as a “political minefield”). Recent controversy over the Supreme Court’s decision in \textit{Ledbetter v. Goodyear Tire & Rubber Co.}, 550 U.S. 618 (2007), including the override legislation, provides an additional example.}—it follows that the advantages of judicial process for blame-shifting might be balanced out by the new risks created by unpopular and highly visible Supreme Court decisions.

c. Interest Groups

A common, though contested, complaint about administrative agencies is that they are subject to undue influence by concentrated interest groups.\footnote{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, \textit{Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy} 95-96 (1994). 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 generally Aranson, et al., supra note 2 (arguing that delegations to agencies facilitates the collective provision of private goods); Eskridge, supra note 121, 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., \textit{Structure and Process}, supra note 47, 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).} Yet the relationship between agencies and interest groups has gone largely unnoticed in the literature on Congress’s choice of delegate.\footnote{But see Salzberger, supra note 7, at 369 (noting in passing that agencies are “more influenced by interest groups” than courts).} That oversight is unfortunate because—at least at first blush—there is reason to believe that interest group dynamics 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.\footnote{The foundational work on the subject is Mancur Olson, \textit{The Logic of Collective Action: Public Goods and the}}} Thus, automobile
manufacturers can band together to persuade Congress not to adopt higher emission standards, while the groups that will bear the costs of nonregulation—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.\textsuperscript{237} 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.\textsuperscript{238}

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.\textsuperscript{239} 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.\textsuperscript{240} Building from these premises, some commentators have argued for an enhanced judicial role in statutory and constitutional law.\textsuperscript{241}

Interest group dynamics have played out in an interesting way in the Title VII context.\textsuperscript{242} First, the dominant interest groups—groups such as the NAACP and NOW—do not clearly fit the public-choice mold.\textsuperscript{243} They are large, and while their members share a common interest, it is

\textsc{Theory of Groups} (1965). For a sampling of the literature that has built on Olson’s insights as applied to agencies, see Croy, supra note 1, at 12-25, 34-56, and the sources cited therein. For critiques, see Croy, 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, \textit{Explaining Administrative Process: Normative, Positive, and Critical Stories of Legal Development}, 6 J.L. ECON. \\& ORG. 267, 280 (1990) (“[T]he empirical record of [public choice theory] is one that should induce the utmost caution in its practitioners.”).

\textsuperscript{237} For an overview of the “capture” literature, see Bagley & Revesz, supra note 51, at 1284-92.

\textsuperscript{238} 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 \textit{generally}, e.g., \textsc{Paul J. Quirk, Industry Influence in Federal Regulatory Agencies} (1981) (finding no empirical support for the notion that agencies are systematically biased in favor of business interests); Mark Kelman, \textit{On Democracy-Bashing: A Skeptical Look at the Theoretical and ‘Empirical’ Practice of the Public Choice Movement}, 74 VA. L. REV. 199 (1988) (exposing tensions between public choice theory and the actual performance of administrative agencies). Cf. Croy, supra note 1, at 142-43 (arguing that “the regulatory regime’s legal process rules do not seem very well designed to facilitate regulatory rent-seeking by special interest groups”).


\textsuperscript{240} See Eskridge, supra note 121, at 305.

\textsuperscript{241} See, \textit{e.g.}, id. at 315 (advocating “a more aggressive approach to statutory interpretation” to ameliorate public choice dysfunctions); Jonathan Macey, \textit{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 “transform[ing] statutes designed to benefit narrow interest groups into statutes that in fact further the public interest”). Others have argued that the characteristics that give certain groups a leg up in the political arena also will aid them in court. See \textit{generally} Komesar, supra note 234, at 123-150; Einer R. Elhauge, \textit{Does Interest Group Theory Justify More Intrusive Judicial Review?}, 101 YALE L.J. 31 (1991); Paul H. Rubin, \textit{Common Law and Statue Law}, 11 J. LEGAL STUD. 205, 206-07, 217 (1982).

\textsuperscript{242} See Graham, supra note 174, at 109 (“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.”).

\textsuperscript{243} See Eskridge, supra note 121, at 320 (acknowledging that public choice theory does not satisfactorily explain the enactment of the Civil Rights Act of 1964); Jonathan Turley, \textit{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
unlikely that the immediate benefits of Title VII are high per capita. That is not to say that the total benefits of reducing racial and gender discrimination are insubstantial, but that they are spread over many individuals, and that the number of women or African Americans who will benefit directly from a prohibition on outright discrimination likely represent 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. Individuals also might derive solidaristic and expressive value from the mere “act of associating.” The Title VII experience suggests a somewhat different explanation. Recall that, 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. Simply put, the EEOC needed help, and civil rights groups were quick to provide it. 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. 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. That is, if interest group influence can be measured in results, the EEOC’s strongly pro-claimant record indicates a high success rate for “client” organizations with overtly ideological agendas.

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244 See, e.g., Russell Hardin, Collective Action 103-12 (1982); Elhauge, supra note 241, 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)).

245 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 (1985) (stressing the variety of benefits, both selective and collective, tangible and intangible, that individuals receive from group membership).

246 See Robert C. Lieberman, Private Power and American Bureaucracy: The EEOC and Civil Rights Enforcement, at 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.’”).

247 See id. at 21-33.

248 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 at the agency.”).
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.\footnote{249}

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

Matthew Stephenson has provided one of the few serious efforts to understand Congress’s choice to delegate to courts rather than to agencies. Stephenson’s theory rests in part on 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.”\footnote{250} Building from those assumptions, Stephenson argues that legislators will favor delegations to courts when they value intertemporal consistency and interissue risk diversification, and will favor delegations to agencies when intertemporal risk diversification and/or interissue consistency are more 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.\footnote{251}

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 the courts of appeals. When it did make changes, they were consistently in a pro-claimant direction. 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.\footnote{252} In 1972, and without explanation, the agency deleted that limitation from its guidelines.\footnote{253} 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.\footnote{254} 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

\footnote{249} 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, \textit{supra} note 77, at 59 (quoting Jack Greenberg, Director-Counsel of the NAACP: “I have no doubt that if there had been only administrative enforcement, employers and 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.”).

\footnote{250} Stephenson, \textit{supra} note 7, at 1047.

\footnote{251} 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).

\footnote{252} 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”).


other disabilities.\textsuperscript{255} Again, the EEOC backed away from that opinion in subsequent years, and its 1972 guidelines flatly prohibited discrimination against pregnant employees.\textsuperscript{256}

The one counterexample is the EEOC’s Guideline on Employment Selection Procedures. First enacted in 1966, the guideline set forth the agency’s view (later endorsed by the 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.\textsuperscript{257} The guideline prescribed a slew of requirements employers must satisfy in order to “validate” tests as job-related.\textsuperscript{258} Several other federal agencies adopted similar—but not identical—requirements for employers in other contexts.\textsuperscript{259} After several failed attempts to settle on a uniform set of guidelines,\textsuperscript{260} 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 guideline in several respects, primarily by liberalizing the means by which employers could validate challenged tests as job related.\textsuperscript{261} The changes were relatively technical, however, and the guideline has not undergone substantive amendment since.

With the exception of the handful of examples discussed above, 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, then, the choice between the EEOC and the federal courts seems to be a wash.\textsuperscript{262}

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. That is because of the potential for a substantial time lag between the first judicial decision on an issue and the Supreme Court’s eventual decision.\textsuperscript{263} Until the Court resolves the issue, different circuits may well adopt different rules, leading to substantial geographical disuniformity.\textsuperscript{264} For example, more than two decades elapsed between the first circuit court decisions addressing the question of employer liability for supervisor harassment and

\begin{footnotesize}
\begin{enumerate}
\item[256] 29 C.F.R. § 1604.10 (1973).
\item[257] The guidelines were issued in pamphlet form in 1966, see Blumrosen, supra note 125, at 60 n.5, and later codified at 29 C.F.R. § 1607 (1970).
\item[259] For example, the Department of Labor’s Office of Federal Contract Compliance Programs had adopted employee selection guidelines to apply to federal contractors, who were subject to anti-discrimination mandates by Executive Order 11,246. See 41 C.F.R. § 60-3.1 to 60-3.18 (1976). Similarly, the Civil Service Commission had adopted analogous guidelines to apply to the federal government as a civilian employer. See 5 C.F.R. §§ 300.101 to 300.104 (1976).
\item[260] See Rubin, supra note 258, at 609 for a description of the efforts to coordinate the guidelines prior to 1978.
\item[261] See id. at 620-60 (describing the differences between the Uniform Guidelines and the prior EEOC guidelines).
\item[262] 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.
\item[263] 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).
\end{enumerate}
\end{footnotesize}
the Supreme Court’s ultimate resolution of that issue. And the lower courts still are divided on how to interpret the term “business necessity” from the Court’s 1971 decision in *Griggs*.266

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 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 entail significant “switching costs”267 if the Supreme Court’s decision cuts in a different direction.268 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 the other side of the equation: interissue 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.269 Stephenson certainly is correct that an agency, by virtue of its centralized decisionmaking system, has an institutional advantage over courts when it comes to interjurisdictional consistency. Agencies’ ability to render a clear, uniform national rule on any given

265 See *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) (setting out rules to govern employer liability for supervisor harassment); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) (same); *Tomkins v. Public Serv. Elec. & Gas Co.*, 568 F.2d 1044, 1047-48 (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 contraven[es] employer policy without the employer’s knowledge and the consequences are rectified when discovered”); *Willingham v. Macon Telegraph Publishing Co.*, 507 F.2d 1084, 1091 (5th Cir. 1975) (en banc) (holding that employer is strictly liable for sexual discrimination by supervisors that causes tangible job detriment). 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.

266 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 194 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, *When Health Insurers Deny Coverage for Breast Reconstructive Surgery: Gender Meets Disability*, 1997 Wts. 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)).

267 See *Stephenson*, supra note 7, at 1056.

268 For example, prior to the Supreme Court’s decision in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), the lower courts uniformly had held that employers would violate Title VII if they offered benefits for some disabilities but not for pregnancy. See id. at 147 (Brennan, J., dissenting). In order to comply with that rule, employers would have to reduce benefits from 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, 92 Stat. 2076, § 2(b) (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 the enactment of this Act.”).

269 See *Stephenson*, supra note 7, at 1059 (discussing both interissue and interjurisdictional inconsistency).
statutory question is frequently touted as an important benefit of the administrative process.\(^{270}\)

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.”\(^{271}\) Consistent 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.\(^{272}\) The Court also borrowed heavily from the reasoning in other cases outside of the Title VII context, including constitutional decisions.\(^{273}\) That behavior is consistent with

\(^{270}\) See generally Strauss, supra note 57.

\(^{271}\) Eskridge, supra note 216, at 373-74; see also Jerry L. Mashaw, Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation, 57 Admin. 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 67, 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”).

\(^{272}\) See, e.g., Burlington Northern & Santa Fe Ry. v. White, 548 U.S. 53, 66 (2007) (relying on NLRA analogy to support the conclusion that Title VII prohibits a wide body of retaliatory behavior); EEOC v. ARAMCO, 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. 990, 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.”); Arizona Governing Committee For Tax Deferred Annuity and Deferred Compensation Plans v. Norris, 463 U.S. 1073, 1089 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, 225 n.8 (1982) (explaining that, because “[t]he principles developed under the NLRA generally guide . . . courts in tailoring remedies under Title VII, . . . throughout this opinion we refer to cases decided under the NLRA as well as under Title VII.”); 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);

\(^{273}\) 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); Ellerth, 524 U.S. at 755-57 (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, UAW v. Johnson Controls, 499 U.S. 187, 201, 202-03 (1991) (observing that Court has read the bona-fide-occupational-qualifications exception to the Age Discrimination in Employment Act “just as narrowly” as the equivalent exception to Title VII and reasoning by analogy from a case applying the ADEA); Commercial Office Prods. Co., 486 U.S. 107, 123-24 (1988) (relying on an Age Discrimination in Employment Act 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 Brotherhood 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); EEOC v. General Elec. Co. v. Gilbert, 429 U.S. 125 (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 555 (arguing that the Court’s focus on purposeful discrimination in Int’l Brotherhood of Teamsters v. United States, 431 U.S. DRAFT—please do not cite or circulate without permission
empirical research suggesting that “judicial decisions are the dominant source of authority” on which courts rely when interpreting statutes.\textsuperscript{274}

The Court also 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 in all. The Court followed that approach in \textit{Mohasco Corp. v. Silver}, for example, where it considered the various filing requirements prescribed by Title VII.\textsuperscript{275} 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 60 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.\textsuperscript{276} The question in \textit{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 60 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.\textsuperscript{277} 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.\textsuperscript{278} “It is our task,” the Court explained, “to give effect to the statute as enacted.”\textsuperscript{279}

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 \textit{Chevron}, the Court acknowledged that the EPA had given “the word ‘source’ . . . a [broad] definition for some purposes and a narrower definition for other purposes.”\textsuperscript{280} 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.”\textsuperscript{281} Indeed, it touted such flexibility as a distinctive advantage of agency decisionmaking.\textsuperscript{282}

The judicial tendency to interpret different statutory provisions \textit{in pari materia} (a demand that the Court has not applied to agency decisionmaking) is compounded by stare decisis. Although

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{274} Nicholas S. Zeppos, \textit{The Use of Authority in Statutory Interpretation: An Empirical Analysis}, 70 Tex. L. Rev. 1073, 1093 (1992).
\item \textsuperscript{275} 447 U.S. 807 (1980).
\item \textsuperscript{276} See id. at 812.
\item \textsuperscript{277} Id.
\item \textsuperscript{278} Id. at 826.
\item \textsuperscript{279} Id. at 819 (acknowledging that “the interests of justice might be served in this particular case by a bifurcated construction of [the] word”).
\item \textsuperscript{281} Id. at 863.
\item \textsuperscript{282} 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 271, 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”).
\end{itemize}
\end{footnotesize}
technically applicable only 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. 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 interissue 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 interissue 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 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 don’t.

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 equally likely to stem from 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 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

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283 *See, e.g.*, 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); 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).
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 than that. 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 (and not the EEOC) 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. A single agency also 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 prove closer to agencies than is commonly assumed, as judges’ methodological commitments lead them to seek coherence both across and within statutes. Judicial process also may be comparable to administrative process in terms of the stability of delegated lawmaking. Although courts’ insulation from politics and their adherence to precedent may render judicial decisions more stable than administrative rules in theory, the reality of Title VII suggests otherwise, and 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 work 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.
Statistical analysis confirms that there is a strong correlation between the party of the appointing President and the direction (i.e., liberal or conservative) of a Supreme Court Justice’s votes on Title VII issues: Justices appointed by Democratic presidents tend to render significantly more liberal decisions than Justices appointed by Republican presidents.

<table>
<thead>
<tr>
<th>Democratic Appointee</th>
<th>Liberal Decision</th>
<th>( \text{Yes} )</th>
<th>( \text{No} )</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>Yes</td>
<td>178 (147.98)</td>
<td>64 (94.02)</td>
<td>242</td>
</tr>
<tr>
<td>Yes</td>
<td>No</td>
<td>461 (491.02)</td>
<td>342 (311.98)</td>
<td>803</td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td>639</td>
<td>406</td>
<td>1045</td>
</tr>
</tbody>
</table>

Note: Expected values are reported in parentheses. The p-value for a chi-square test with one degree of freedom is less than 0.0001.
Chart 2 suggests that the direction of the Court’s decisionmaking is not correlated with the party of the President in office. Statistical analysis confirms that there is no meaningful association between presidential politics and the percentage of liberal decisions on Title VII by the Supreme Court.

<table>
<thead>
<tr>
<th>Democratic President</th>
<th>Liberal Supreme Court Decision</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Yes</td>
</tr>
<tr>
<td>Yes</td>
<td>19 (21.90)</td>
</tr>
<tr>
<td>No</td>
<td>54 (51.10)</td>
</tr>
<tr>
<td>Total</td>
<td>73</td>
</tr>
</tbody>
</table>

Note: Expected values are reported in parentheses. The p-value for a chi-square test with one degree of freedom is 0.2366. By conventional standards, a p-value greater than 0.05 is not statistically significant.
Chart 3: Percentage of liberal Supreme Court decisions by party control of Congress and the White House

<table>
<thead>
<tr>
<th>Year</th>
<th>Democrats control House</th>
<th>Republicans control House</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1971-1976</td>
<td>Democrats control House</td>
<td>Republicans control House</td>
<td></td>
</tr>
<tr>
<td>1977-1980</td>
<td>Democrats control House</td>
<td>Republicans control House</td>
<td></td>
</tr>
<tr>
<td>1981-1986</td>
<td>Democrats control House</td>
<td>Republicans control House</td>
<td></td>
</tr>
<tr>
<td>1987-1992</td>
<td>Democrats control House</td>
<td>Republicans control House</td>
<td></td>
</tr>
<tr>
<td>1993-1994</td>
<td>Democrats control House</td>
<td>Republicans control House</td>
<td></td>
</tr>
<tr>
<td>1995-2000</td>
<td>Democrats control House</td>
<td>Republicans control House</td>
<td></td>
</tr>
<tr>
<td>2001-2006</td>
<td>Democrats control House</td>
<td>Republicans control House</td>
<td></td>
</tr>
<tr>
<td>2007-2008</td>
<td>Democrats control House</td>
<td>Republicans control House</td>
<td></td>
</tr>
</tbody>
</table>

Note: Expected values are reported in parentheses. The p-value for a chi-square test with one degree of freedom is 0.0498.

Chart 3 suggests that there is no strong correlation between the politics of the party in control of the Congress and the direction of Supreme Court decisionmaking in the Title VII arena. 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.
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. The results for full Democratic control of the political branches—that is, Democratic control of House, Senate and Presidency—are slightly different, but still negatively and significantly associated with liberal decisionmaking by the Supreme Court.

<table>
<thead>
<tr>
<th>Democrats Control Senate</th>
<th>Liberal Supreme Court Decision</th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Yes</td>
<td>No</td>
<td></td>
<td>Total</td>
</tr>
<tr>
<td>Yes</td>
<td>36 (41.37)</td>
<td>32 (26.63)</td>
<td></td>
<td>68</td>
</tr>
<tr>
<td>No</td>
<td>37 (61.63)</td>
<td>15 (20.37)</td>
<td></td>
<td>52</td>
</tr>
<tr>
<td>Total</td>
<td>73</td>
<td>47</td>
<td></td>
<td>120</td>
</tr>
</tbody>
</table>

Note: Expected values are reported in parentheses. The p-value for a chi-square test with one degree of freedom is 0.0428.

<table>
<thead>
<tr>
<th>Democrats Control House, Senate and Presidency</th>
<th>Liberal Supreme Court Decision</th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Yes</td>
<td>No</td>
<td></td>
<td>Total</td>
</tr>
<tr>
<td>Yes</td>
<td>12 (17.03)</td>
<td>16 (10.97)</td>
<td></td>
<td>28</td>
</tr>
<tr>
<td>No</td>
<td>61 (55.97)</td>
<td>31 (36.03)</td>
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<td>91</td>
</tr>
<tr>
<td>Total</td>
<td>73</td>
<td>47</td>
<td></td>
<td>120</td>
</tr>
</tbody>
</table>

Note: Expected values are reported in parentheses. The p-value for a chi-square test with one degree of freedom is 0.0261.