Legislative Delegation of Authority to Bureaucratic Agencies

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Delegation is a foundational characteristic of American representative democracy. Citizens delegate responsibility to legislatures who, in turn, choose whether to delegate policymaking responsibility to the executive branch. Moreover, determining how institutions allocate policymaking authority is a puzzle of governance that extends well beyond the Founding of the American Republic. For example, to solve the constitution crisis in 17th century England, the executive (Crown) was afforded the responsibility to offer spending proposals while the legislature (Parliament) possessed authority by both authorizing and appropriating funds in response to these proposals (North and Weingast 1989: 818). In fact, the foundational roots of delegation decisions can be traced further back to ancient Biblical times (Bendor, Glazer, and Hammond 2001: 235; Bendor and Meirowitz 2004: 293).

However, delegation of authority in the American political system described so insightfully by Bert Rockman in his essay affords both benefits and challenges. Separating power among different government institutions can diffuse conflict, and thus induce stability requisite for effective, albeit imperfect, governance. Nonetheless, this diffusion of policymaking authority comes at the expense of an efficient system whereby electoral accountability is blurred and coordination among government branches often becomes exceedingly difficult (Wilson 1885 [1973]).

Scholars of U.S. political institutions have made both great theoretical and empirical strides examining the causes of legislative delegation to the executive branch. This literature
reflects a strong affinity to a Madisonian conception of the separation of powers (SOP) insofar that the legislative branch is a separate institution with a unique power base that distinguishes it from the executive. Although James Madison in *Federalist 51* makes it abundantly clear that this distribution of power is necessary to thwart abuse of authority, it nonetheless states that the legislative branch is predominant by constitutional design (see also, Wilson 1885 [1973]). As a matter of fact, the preeminent role of Congress in the administrative state has been viewed as desirable on a normative level (Rosenbloom 2000).

It is thus hardly surprising that modern theories of a legislative delegation view the legislature as a principal (i.e., the supplier of policymaking authority) and the executive as the agent (i.e., the recipient of policymaking authority). This is logically consistent with the Framers constitutional intent. In this view, the delegation problem simply entails the legislature making strategic choices regarding when they should delegate authority to the executive versus when they should not. Focused on this meta-question, scholarly research on legislative delegation has developed both a sophisticated and well–grounded view of how delegation works from the legislature’s perspective in the form of (1) the tension between committee and floor preferences (e.g., Epstein and O’Halloran 1999; Ferejohn and Shipan 1990), (2) the importance of legislative capacity (Huber and Shipan 2002) and bureaucratic capacity (Huber and McCarty 2004), (3) the principal’s strategic decision calculus under general conditions (Bendor and Meirowitz 2004), and (4) the ability to mitigate credible commitment problems through legislative delegation (Falaschetti and Miller 2001).

Generally, however, the key contributions made to the study of legislative delegation to the bureaucracy emanate from scholars whose primary interests are intended to provide a better
understanding of legislative institutions (see Moe 1990). I argue in this essay that while this legislature-centric perspective has netted valuable insights into delegation problems, it has also had important repercussions in limiting the development of our social scientific understanding on this topic. In particular, the executive’s problem when it comes to delegation has typically been given short shrift, thus precluding a better understanding of delegation problems (e.g., but see Bertelli and Feldman 2007; Krause 2003; Lavertu 2009; Moe 1990; Miller 2000). Thus, although the marriage between the Framers intent and our current treatment of legislative delegation is compatible in normative terms, it misses the practical complications that arise for an executive whose power and structure are purposely defined as ambiguous by the Framers (James 2005). For this reason, greater attention and effort is needed to theorize (both analytically and verbally) the role of the executive in the analysis of legislative delegation if scholars are going to make meaningful future strides on this research program.

In making this argument, I discuss and critique what are deemed three 'generations' of legislative delegation literature in the modern era. 'Modern' is defined as research published over the last thirty years. My use of the term 'generation' is not meant to convey temporal order, but rather shifts in the substantive focus, of research in the modern era. I start with the 'first generation' of research on the core rationale underlying the delegation choice confronting legislatures vis–a–vis executive discretion. Approached as a principal-agent problem with implications solely for legislative choice, this first-generation focused on legislatures' balancing of the benefits and costs associated with the delegation choice. While transaction costs were implicit in these studies (see, for example, Dodd and Schott 1979; Fiorina 1986; Ogul 1976; Weingast 1984), however, they were not made explicit. Legislatures desire policy control, but I
stress that they must temper this desire with the need for greater policy expertise and institutional
capacity derived from the executive. Next, I discuss and critique some of the major theoretical
and empirical developments of a 'second generation' of research in the legislative delegation
literature. Still within a principal-agent framework, this research placed the delegation choice
within a separation of powers framework that explicitly incorporated transaction costs. I
conclude with three recommendations regarding how the literature on delegation studies can
most fruitfully develop from a social scientific perspective. Serving collectively as a 'third
generation' research agenda, each recommendation seeks to advance Moe's (1990) call two
decades ago for greater theoretical incorporation of executive branch actors in delegation studies.
My prescriptions, however, are distinct yet complement Moe's by emphasizing the importance of
more fully understanding executive agents’ incentives and policy actions within the context of
delegation.

The 'First Generation' Study of Legislative Delegation to the Bureaucracy

The modern delegation literature in political science views legislatures as the 'principal'
and the executive branch as the 'agent' (see Wood in this volume for an extensive discussion of
the logic of principal-agent theory). The determination as to whether the agent is the president
or bureaucracy depends upon the context by which delegation is being studied. As a result, we
will use both actors as agents throughout this essay depending upon context. From a normative
perspective, the Framers of the U.S. Constitution thought it desirable for legislators to act as
'principals' by possessing the authority to choose whether or not to delegate authority to
executive branch policy actors (Federalist 51). Because legislatures possess diffuse authority
relative to popularly elected executives, this view of delegation seeks to ensure against tyranny by a singular (elected) executive. Furthermore, legislators are elected representatives who are comparatively closer to the will of the people than are executive branch agents, given legislators' re-election motives. With this said, however, legislators possess limited means to handle policymaking authority, because the executive branch possesses greater expertise and capacity in *absolute* terms. As a result, the legislative branch has an incentive to delegate responsibility to the executive branch under conditions deemed favorable to the former branch.

More specifically, the benefits of legislative delegation are (1) increased policy expertise resulting in better policy outcomes; (2) greater time and resources that can be spent on other more preferred legislative activities, since oversight and monitoring are costly with little electoral return; (3) mitigating policy responsibility, and hence blame, for unpopular policies or outcomes – especially when the opposition party controls the executive branch; and (4) mitigating dynamic problems relating to policy instability and a lack of credible policy commitment. Meanwhile, the costs of legislative delegation result, in principal-agent terms, entail a loss of policy control and/or effectiveness generated from adverse selection problems (i.e., delegating to the 'wrong' agent) and moral hazard problems relating to bureaucratic drift (i.e., agent shirking).

In this section, I review the intellectual development of the 'first generation' of modern delegation literature. Examined using the lens of how legislatures’ theoretically weigh the benefits and costs of delegation are four primary foci of that research genre: oversight mechanisms as latent controls, legislative 'stacking of the deck' through procedural controls, budgetary controls on policy discretion, and structural controls on agency discretion. While
Wood touches on each of these areas, I restrict my attention to how it relates to delegation problems and also discuss the some of these limitations in the extant research program.

**Oversight Mechanisms of Policy Control**

First generation research on modern delegation was predicated on explaining two puzzles. First, can legislators control policymaking and implementation when they apparently spend little effort at such tasks? Further, can legislators design institutional mechanisms (via rules, procedures, and structures) to ensure that those agents possessing delegated authority act in a manner consistent with legislative preferences? In tandem, both puzzles are at the core of the modern study of legislative delegation. The former puzzle pertains to the optimal minimization of monitoring costs incurred from moral hazard (i.e., agency loss resulting from shirking), while the latter puzzle pertains to maximizing incentive compatibility designed to ensure that executive branch agents act in a manner consistent with legislative intent.

Noting the demise of legislative oversight activity during the postwar era, many congressional scholars claim that legislative oversight is a low payoff activity for legislators seeking electoral rewards and policy influence (Aberbach 1990; Ogul 1976; Scher 1963). This, however, did not necessarily mean that legislative abdication of policymaking had occurred. In a series of published works, Mathew D. McCubbins (and his various collaborators) explored the incentives legislatures had for delegating policymaking authority to the executive branch, without abdicating control over it.

In the realm of legislative oversight, members of Congress created 'fire alarms' that would enable organized interests to notify them of when executive branch actors were deviating from legislative intent (McCubbins and Schwartz 1984). The use of 'fire alarms' allows
legislators to save their scarce time and resources for electoral and policy activities that accrue higher payoffs to them. The logic of 'fire alarm' oversight means that legislators can minimize investment in monitoring costs (oversight activities), while simultaneously maximizing incentive compatibility with organized interests so that the latter can provide surrogate labor in monitoring executive action. In the event that organized interests have similar preferences to that of the agency, yet diverge from those of the legislature, then 'fire alarm' oversight may be ineffectual since the principal’s (legislature) and de facto monitor’s (organized interests) policy preferences are not aligned with one another.

However, Epstein and O’Halloran (1995) have extended this logic by claiming that in equilibrium no 'fire alarm' is touched off. Moreover, they claim that legislators can effectively control multiple competing interest groups by making decisions based on the range of moderate groups that straddle along the lines of support/no support for agency actions. Therefore, a legislature may find it easier to ensure compliance when interest groups are biased against agency policy than when they share identical preferences. However, this logic subsumes, first, that there are multiple groups so that organized interest power is sufficiently diffuse. When power is not diffuse, then the legislature may experience agency losses from having an 'opposing' organized interest that does not share their own policy aims. Second, the above logic subsumes that organized interests possess equal power. If some groups, however, are advantaged in the struggle for obtaining policy benefits, one cannot presume that the legislature will split differences down-the-middle among moderate factions if the more powerful groups oppose legislative preferences. More generally, a dual on the concentration/diffuseness of interest group power and their relative preference location vis-à-vis the legislature and agency is critical for
further extending the logical implications of ‘fire alarm’ oversight beyond what we know at present.

**Procedural and Rule-Based Control**

The specific issue of procedural and rule-based constraints on the exercise of bureaucratic discretion is critical for understanding the precise mechanisms intended to show how agency compliance is obtained. As Wood points out in his essay, McNollgast (1987, 1989) claimed in a seminal pair of articles that legislators can minimize monitoring costs while maximizing incentive compatibility by constraining future executive action via enactment of rules and procedures (see also, Moe 1989). Procedures and rules, in particular, can be used to not only mitigate information advantages enjoyed by bureaucratic institutions, but also embolden important legislative constituencies (i.e., organized interests). Moreover, by allowing them to participate in agency activities, organized interests can ensure that the latter are responsive to the former’s preferences (McNollGast 1987: 244).

In this manner, legislatures rely on the electoral connection between themselves and organized interests who are beneficiaries of policymaking as a means of incentive compatibility designed to reduce Congress’ effort at labor-intensive oversight activities. 'Deck–stacking' thus means that the legislature is essentially delegating its monitoring function to loyal organized interests that possess shared incentives. Because the Administrative Procedures Act of 1946 standardized administrative procedures across all federal agencies, Congress can more easily constrain executive policymaking authority by requiring all promulgated rules pass enhanced legislative scrutiny and uniform guidelines for procedural compliance (McNollgast 1987: 255–258; see Rosenbloom, Mashaw, and Kerwin and his associates in this volume for extensive
discussion of this dynamic and its consequences for American bureaucracy). Such procedural constraints are tightened when executive agencies are granted more policy responsibilities and also when policy conflict among legislators rises (McCubbins 1985).

The key insight drawn from this particular line of inquiry is that much of the political control that takes place is latent (i.e., ex ante) insofar agencies choose policies sufficiently closer to legislative preference so as to avoid sanctions (e.g., Calvert, McCubbins, and Weingast 1989). Yet, the empirical evidence testing legislative control of the bureaucracy via rules and procedures has, at best, provided mixed evidence in favor of the deck–stacking hypothesis (e.g., Balla 1998; Hamilton and Schroeder 1994; Spence 1997; Potoski 1999). Perhaps one reason for the paucity of clear and consistent evidence supporting the efficacy of procedural constraints as conceptualized by McNollGast is that it fails to consider legislators’ desire to tradeoff between statutory (ex ante) and oversight (ex post) controls (Bawn 1997). That is, legislators not on the relevant standing committee prefer statutory control to diminish the power of 'cozy iron triangles,' while those members serving on the relevant standing committee prefer oversight control whenever they can accrue benefits from constituents for their casework activities involving administrative agencies (Bawn 1997: 119). Still another reason for the chasm between theory and evidence in the realm of procedural-rule type controls is that they can be circumvented by executive agents for reasons discussed later in this essay (see ‘Toward a Third Generation of Research’ section).

**Budgetary Mechanisms of Policy Control**

In the realm of budgetary politics, D. Roderick Kiewiet and Mathew D. McCubbins (1991) argue that Congress’s desire to delegate construction of the U.S. federal government
budget to the executive branch is not abdication (also see Mullins and Mikesell in this volume for a discussion of how political rationality and technical rationality intersect in this process). According to the logic of their bilateral bargaining veto model, presidents are constrained in offering budget proposals that exceed what Congress wishes to appropriate. This is because presidents’ veto authority regarding appropriation bills can only be effective when Congress prefers a higher level of spending. Therefore, the president’s veto authority is rendered ineffective when executive budget proposals exceed congressional appropriations. Alternatively stated, Congress gladly cedes discretion to executive budgetary preferences so long as the executive request does not exceed legislative appropriations. Whenever this condition is not met (i.e., the president wishes to spend more than Congress), the legislature takes the reins of budget policymaking away from the executive branch. Subsequent research by Nolan McCarty (1997) has shown that a president’s veto reputation is not immutably fixed through time, but instead wanes across the life cycle of their administration. In a related vein, Brandice Canes–Wrone (2006), shows that popular support of the president can afford chief executives a tangible advantage in extracting the resources that they desire from the budget process. In sum, the legislature enjoys the upper hand in presidential-congressional budgetary relations, albeit it can be conditionally weakened by a popular president during the early portion of their tenure in office.

While this work tells us a great deal about legislative delegation in terms of presidential influence over budgetary outcomes, it does not speak to how budgetary outcomes are translated into bureaucratic action. Furthermore, even if the legislature does possess strong discretionary authority over resources between these two branches, this policymaking tool may be of limited...
influence due to an inherent tradeoff between desirable policy outcomes that provide additional (slack) agency resources and less preferable outcomes that come at a lower cost (Ting 2001). Moreover, the boundedly rational nature of information processing yields a sluggish agency response to congressional budgetary signals (Carpenter 1996; also see Workman and his associates, as well as Bendor and Hammond on the impact of bounded rationality for generally). Further, agency policy outputs endogenously affect resource growth, and thus legislators are merely reacting to bureaucratic autonomy displayed by administrative agencies (Krause 1999). Therefore, even if legislators enjoy a robust position in determining budgetary outcomes as presumed in legislative delegation models, how this is translated into bureaucratic policymaking remains rather ambiguous as it relates to policy control.

Recent work by Jason MacDonald (2009) has offered a novel extension of the legislative delegation literature in the realm of budgetary control. MacDonald claims that past studies understate legislative control of the bureaucracy since they fail to consider ‘limitation riders’, which forbid agencies from spending money on specific tasks, as a tool of political control within the delegation literature. As a result, the importance of bureaucratic expertise as a mechanism for bureaucratic discretion is overstated while preference configurations as a mechanism of legislative incentives understate political control in existing theories and tests of legislative discretion. MacDonald’s logic centered on limitation riders provides a more stringent (and cleaner) test of legislative control over the bureaucracy than those focused on procedural constraints since these can be more easily circumvented by organizations relative to exacting resource constraints (Pfeffer and Salancik 1978). Nonetheless, since limitation riders are predicated on inaction, political control through this mechanism presumes that agencies
monotonically desire more tasks (e.g., enforcement) and does not examine bureaucratic action as a dependent variable – a common implicit assumption in all but a handful of legislative delegation studies. This is not always the case since regulatory or administrative retrenchment may occur (e.g., Nathan 1983; Waterman 1989). In such instances, what may appear as legislative control via limitation riders will be observationally equivalent to the agency’s preferred outcome. Conversely, while these limitation riders may signal political control through bureaucratic inaction, they may be observationally equivalent to intra–branch conflict between presidents (via political executives) and agencies (via agency executives & other careerists). Therefore, while this test makes an important advance to our understanding of legislative choice in delegation studies, it remains far from being a definitive test of legislative control over the bureaucracy for this pair of reasons.

**Structural Mechanisms of Policy Control**

Finally, first-generation studies also emphasized that delegation choices were affected by venue options: the choice between entrusting policymaking authority to an executive branch agency or an independent commission (Bernstein 1955; Fiorina 1982, 1986). I hasten to add that research has gone beyond this choice in institutional venue, and that legislators can also determine whether to divide policy tasks among two or more agencies, or let a single policy possess sole jurisdictional authority over it (see Ting 2002). However, I shall focus primarily on research studying the executive branch-independent commission choice.

Independent commissions enjoy greater insulation from executive politics due to having multi–member leaders, staggered appointment terms that do not coincide with a president’s tenure in office, and in some instances, partisan balancing requirements (Lewis 2003).
Executive agencies are much more subject to presidential influence since leadership at the agency comprises a single agency head, presidents can 'hire and fire' agency heads at–will, and these agencies are subject to legislative and budgetary oversight restrictions by OMB (see Durant and Resh in this volume for an extensive discussion of efforts to 'presidentialize' the federal bureaucracy, as well as Rosenbloom and Kerwin and his associates). Indeed, counter-intuitively, Bertelli and Feldmann (2007) even argue that presidents have an incentive to appoint political executives whose preferences are less closely aligned to their own in order to offset pressures from organized interests. It comes as no surprise, then, that legislatures seeking policy control typically prefer independent commissions to executive agencies as the institutional structure that houses policy administration activities (McNollgast 1987, 1989; Moe 1989). Moreover, from an interest group perspective (that legislators certainly pay attention to), de Figueiredo (2002) makes the positive assertion that interest groups’ preference for insulating policy structures will occur when they are politically weak, and hence, do not expect to have sufficient influence over the governance of the administrative agency in question.

Empirical evidence on the executive-commission choice shows that this logic is borne out. If left to their own devices, legislatures prefer to 'hard wire' agencies by creating institutional structures that are purposely insulated from executive influence – especially if their policy preferences diverge from one another (e.g., Lewis 2003; Volden 2002a; Wood and Bohte 2004). Furthermore, insulated institutional structures have the added benefit of being better able to absorb policy conflict and volatility arising from both politicians and organized interests (Lavertu 2009). Lavertu extends this delegation logic by claiming that presidents (or governors) will often prefer an insulated design so as to considerably reduce administrative uncertainty
induced from conflict among organized interests.

Besides setting \textit{ex ante} constraints via institutional design choices, legislative delegation decisions are also affected by the available venue options that the legislature has at its disposal at any point in time. Volden (2002a) has formally shown that legislatures are prone to delegating authority to executive agencies under unified government when preferences between the executive and legislative branches are aligned with one another; and that independent commissions are more apt to receive delegated authority than executive agencies under divided government when these electoral institutions possess divergent preferences (see also, Volden 2002b). Volden’s distinction between type of delegatory institutions is a vital contribution since policy delegation of legislative authority is not merely an 'all or nothing' proposition since some minimal level of legislative delegation is necessary in practically all policy matters. Rather, the delegation decision entails the legislatures’ rational pursuit of maximizing incentive compatibility by selecting the ‘correct’ policymaking venue – executive agency or independent commission – in accordance with the alignment of legislative and executive branch preferences.

\textbf{The 'Second-Generation' Study of Legislative Delegation to the Bureaucracy}

Much of the first generation modern delegation literature has focused on the legislature’s choice by underestimating the costliness of delegation. Whether it is grounded in bilateral bargaining behavior whereby the legislature is in a ‘favored’ position, or organized interests performing \textit{de facto} monitoring activities on behalf of the legislature, the true costs of delegation were seen as underestimated in this body of research. Second generation research on this topic
has explicitly incorporated transaction cost theories to these principal–agent relationships in order to better understand the true nature of the costs associated with delegating policymaking authority to other institutions. Specifically, the aim of this second–generation research program has been to identify how legislators balance the costs associated with delegating to an executive that does not share similar preferences in relation to the benefits accrued from policy expertise. In this section, I focus on two key areas of research as illustrations: the weighing of informational mechanisms and institutional capacity as policy control mechanisms.

**Informational Mechanisms of Policy Control**

Creating administrative procedures and grants of statutory discretion that provide the bureaucracy with an ample measure of policy independence enable these institutions to fully utilize its technical expertise. But as noted, this comes at a potential social cost: a lack of responsiveness to evolving democratic preferences. Inefficiencies and agency loss due to 'incomplete' nature of contracts make both compliance and enforcement costly (Huber and Shipan 2000: 28). Transaction costs arising from moral hazard problems will not lead to perfect political control, but rather to some degree of loss of control due to inefficiencies and agency loss inherent to principal–agent based delegation problems (Huber and Shipan 2000: 35).

The second generation of the modern delegation literature has wrestled with these transaction costs incurred by legislators regarding the decision to delegate. This typically centers on legislators balancing the tension between working with a bureaucracy whose preferences are often not closely aligned with their own, against their desire to delegate policymaking authority to public agencies as a means of reducing policy uncertainty and enjoying the benefits of policy expertise. This tension’s basic logic is best summarized by David
Epstein and Sharyn O’Halloran (1999: 27): ‘....But it is incorrect to conclude that Congress wants only to restrict agency discretion; legislators want to strike a balance between granting agencies too much leeway and constraining them so tightly that there is no room to incorporate bureaucratic expertise into policy outcomes.’

Epstein and O’Halloran’s basic argument regarding the range of delegation afforded by the legislature to the executive is simple and powerful. When the principal (legislature) and the agent’s (executive’s) policy preferences are sufficiently distinct under a separating equilibrium, the legislature will not delegate policymaking authority to the executive branch. Conversely, when the principal (legislature) and the agent’s (executive’s) policy preferences are sufficiently similar under a pooling equilibrium, the legislature will delegate policymaking authority to the executive branch (67–68).

Perhaps the most important testable implications derived from Epstein and O’Halloran’s particular logic are twofold. First, divergence between legislative (median floor) and executive (presidential) preferences results in a lower level of discretion granted to public bureaus (Proposition 2: 75). Also, greater policy uncertainty (often, but not always pertaining to task complexity) will also increase the odds that the legislature chooses to delegate policymaking authority to the bureaucracy (Proposition 1: 75). This is because greater policy uncertainty makes legislative delegation an increasingly attractive option because legislators can avoid blame for obtaining inferior policy outcomes (Huber and Shipan 2000: 38–39).

Thus unlike first-generation modern delegation research which places little or no concern with policy competence, the second generation posits that legislators balance their desire to direct policy (political control) with the need for expert policy administration (technical
competence) so as to balance the tension among competing interests in the policy environment (see Bawn 1995). Restrictive procedures hinder public agencies capacity to weigh all relevant policy information and thus make an unfettered policy decision. Loose procedures adversely affect politicians’ capacity to direct policymaking. The crux of Kathleen Bawn’s (1995) logic in this regard is that the legislature’s granting of discretion to a public agency – in the form of relaxed administrative procedures -- is increasing as uncertainty over policy outcomes exceeds uncertainty arising from agency action. And while not directly related to the legislature but certainly having implications for members, this tradeoff logic is further developed from the perspective of the president by Lavertu (2009). Specifically, he argues that presidents will prefer to tradeoff policy control in favor of reducing policy outcome uncertainty by requesting less policy discretion since they do not wish to deal with the 'costs' associated with interest group conflict, and the resulting policy outcome uncertainty that arises from it.

The logic from this second generation literature of the 1990s and early 2000s not only accounts for procedural, political, and policy uncertainty that is often given short shrift in first–generation research of the 1980s. As a result, the conceptual advances made in the study of legislative delegation of the bureaucracy have evolved in a fruitful manner. Initially they sought to advance a general logic regarding legislators’ singular incentive for maximizing policy control over bureaucrats with as little effort exerted as possible. Later they sought to determine the conditions by which legislators seek to tighten or loosen policy control over administrative agencies for a variety of institutional mechanisms.

**Institutional Capacity Mechanisms of Policy Control**
The research surveyed up until this point has assumed that the institutional capacity of both political and bureaucratic institutions is immutably fixed. Simply, past research assumes a generic legislature and a generic agency. Each is assumed to have a fixed level of institutional capacity. Moreover, by definition, the agency possesses greater capacity (in the form of technical expertise) than the legislature, making delegation a potentially desirable choice for legislators. In recent years, however, scholars have been examining how varying institutional capacity affects the delegation decision. This issue is an important matter since even well-intentioned institutions lacking sufficient capacity are incapable of making credible policy commitments. That is, legislatures seeking desirable policy outcomes must be more willing to delegate authority in the face of inter-branch opposition, largely because they do not have sufficient capacity to handle policymaking responsibility on their own accord.

John Huber and Charles Shipan (2002) persuasively claim that legislators may possess a rational incentive to delegate even when executive branch preferences sharply diverge from their own. This is because low capacity legislatures incur large costs by not exploiting bureaucratic expertise in policy administration, costs that outweigh any accrued benefits from maintaining policy control. This is true, they argue, even when policy conflict between the executive and legislative branches is robust and political uncertainty surrounding enacting coalitions is sufficiently high due to electoral turnover. In a related article, Huber, Shipan, and Pfahler (2001) empirically demonstrate that state legislatures with low levels of institutional capacity (measured as low legislator salary compensation) are significantly more inclined to delegate policymaking authority to state health agencies in the executive branch charged with administering the Medicaid program even when divided party government exists and when legislative–executive
branch conflict is high.

In addition, recent theoretical research has begun to emphasize the institutional capacity of the agent—viz., the bureaucracy. For instance, John Huber and Nolan McCarty (2004) offer an analytical model of delegation that explains what occurs when bureaucratic capacity (defined as bureaucratic competence involved in policy implementation) is low. Huber and McCarty’s theory predicts that low bureaucratic capacity not only yields poorer policy performance resulting from lower technical expertise, but also has the negative second-order effect of making bureaucratic compliance to legislative intent less likely. Contrary to the standard predictions arising from delegation theories, Huber and McCarty predict that governments with low levels of bureaucratic capacity will choose to delegate less authority to bureaucrats possessing similar preferences. This theoretical result is of vital importance on a normative level. It suggests that the vicious cycle of low bureaucratic capacity cannot be addressed by the standard principal–based remedies of placing a premium on political loyalty and oversight mechanisms, respectively. Rather, the solution to this problem must entail much more costly structural reforms that enhance the governance capacity of both electoral and non-electoral government institutions.

More recent research has begun to turn its attention to examining the endogenous nature of bureaucratic expertise, and its implications for understanding legislative delegation. Previous research assumed bureaucratic expertise was exogenously determined vis-à-vis the legislature, with technical expertise and skills attributed to bureaucrats primarily through the channels of organizational solidarity, professional networks, and educational background (e.g., Carpenter 2001; Mosher 1982; Rourke 1984; Wilson 1989). Nonetheless, recent scholarly attention has
focused on whether bureaucrats are more likely to alter their costly marginal investment in acquiring additional information under a variety of circumstances related to their political environment. Put another way, administrative agencies as organizational bodies possess a reservoir of knowledge and expertise due to organizational continuity, standard operating procedures, and the like. However, agencies’ incentives for devoting marginal additional effort of being informed about a given policy matter will be endogenously determined by their political environment.

Relatedly, Matthew Stephenson (2007) argues that an ‘uninformed’ agency will, in fact, only increase its technical expertise when leaders prefer to adopt new regulations because of their political environment. In turn, this means that agencies are only willing to make costly research investments in expertise when they prefer a new regulation to the status quo policy, and also when they have a better sense of learning the true effects of that particular new regulation. Sean Gailmard and John Patty (2007, 2008) also endogenize bureaucratic expertise in a sophisticated dynamic legislative delegation model. They show that civil service job protections and lower outside wage offers, coupled with granting bureaucrats discretion over policy, will produce a regime of politicized competence. Gailmard and Patty also provide an innovative theoretical contribution to the study of delegation by focusing on agents’ implicit incentives attributable to career concerns (see also, Alesina and Tabellini 2007; Dewatripont, Jewitt, and Tirole 1999 for more general applications to public bureaucracy), rather than the standard approach that relies on explicit incentives bound directly to ex ante and ex post contractual–based mechanisms.

Although these conceptions of endogenous bureaucratic expertise hold considerable
promise by shifting focus from bargaining among politicians to those responsible for utilizing delegated policymaking authority, this nascent strand of inquiry must tackle a few critical remaining issues before its promise can be fully realized. First, the human capital stock residing within agencies is effectively ignored, since these theories are limited to examining only marginal investments in expertise that reflect human capital flows. This focus on relatively small changes in bureaucratic expertise can provide a highly misleading sense of bureaucratic capacity because most of this commodity has already been (exogenously) established prior to the arrival of individual bureaucrats in a given agency (individual–level). Second, any incremental change in human capital investment flows may be offset by agencies having to function under a prescribed set of norms for administering policy consistent with the agency’s mission or the broader professional culture (Carpenter 2001a; Rourke 1984; Wilson 1989).

Third, and relatedly, this human capital stock (which occurs exogenously to the legislative–agency bargaining relationship) varies considerably across agencies based upon the structural demand for bureaucratic expertise, and by the institutional context in which the exercise of bureaucratic expertise is insulated from political influence (Bohte and Wood 2004; Lewis 2003; Moe 1989). Fourth, endogenous human capital investment theories ignore variations in organizational stability, and in turn, how they affect the marginal costliness of investment in expertise. That is to say, low personnel turnover and routinized procedures lower the costly investment of additional information needed to augment bureaucratic expertise. Finally, by internalizing all of the costs of marginal information search to the agency/bureaucrat in question, these models fail to explicitly consider the well–established informational role played by organized industry and professional groups that are capable of lowering the marginal
costs associated with bureaucratic decision-making (see Carpenter 2002; 2004; also see Ricucci and Keiser in this volume for broader notions of the role of representation, recapitalization of assets, and legal requirements). Nonetheless, the study of endogenous bureaucratic expertise has considerable promise for understanding legislative delegation since it creates a more sophisticated portrait of incentive compatibility problems facing both the principal and agent than merely assuming that the latter’s effort is divorced from legislative action.

Toward a 'Third Generation' of Research: Reconsidering the Nature of Legislative Delegation to the Bureaucracy

Even with its limitations, the modern delegation literature has provided both a constructive and informative research program for understanding the allocation of power among governmental institutions. From the core insights of McNollGast (1987, 1989) through the most elegant (and general) treatment of stylized delegation models by Bendor and Meirowitz’s (2004), the modern delegation literature has shed important light on the incentives, mechanisms, and circumstances by which legislative control of, or delegation to, bureaucratic agencies occur. Specifically, legislators possess the conflicting incentives of: (1) wishing to have policy outcomes come as close to their most preferred outcome (ideal point) as possible, (2) the desire to see successful policy outcomes that are closely related to levels of bureaucratic expertise and discretion, (3) to all this, while minimizing the costs associated with both sides of these conflicting incentives.

Legislators use various mechanisms when delegating authority ranging from
administrative rules and procedures to budgetary resources to institutional structures. The general conclusions that can be drawn from this extant literature is that legislatures should be more willing to delegate policymaking authority to the bureaucracy under the following circumstances when: (1) their (principal’s) monitoring costs rise, (2) incentive compatibility for the bureaucracy (agent) increases, (3) policy conflict between the legislature and agency declines, (4) policy uncertainty rises, (5) the agent’s expertise and/or effort rises, and (6) an increasing desire exists to 'lock–in' policy to solve credible commitment problems.

However, for advances in theory building on legislative delegation choices to occur, a more explicit and sophisticated treatment of the role of the executive branch in bureaucratic policy making had to advance beyond what has been done to date. Because most of the advances in legislative delegation emanate from students of legislative politics in political science, it is hardly surprising that considerably more effort has been expended in modeling the role of the legislature than for the executive branch (Moe 1990). The extent of modeling the executive branch in separation of powers models of delegation is often relegated to providing a unique ideal point for agency heads and presidents (but see Bendor and Meirowitz 2004; Gailmard and Patty 2007; Ting 2002 for notable exceptions).

Framing delegation models as the principal’s (legislature’s) choices makes perfect *prima facie* sense to political scientists studying the legislature. However, it comes at considerable expense to theory building by providing an oversimplified portrait of the agent’s behavior in such settings. Put another way, the modern delegation literature is primarily focused on understanding the supply of bureaucratic discretion, with little explicit concern with either the demand or actual exercise of bureaucratic discretion. As a result, it is difficult to pinpoint the
causal mechanisms relating to bureaucratic policymaking generated from the current modern delegation literature. The importance of focusing on the agent’s problem in matters of public authority is most articulately captured by Terry Moe (1990: 234) in the following quote:

....But alas, not only is control destined to be imperfect in political practice, it is destined to be doubly imperfect: there is slippage as groups try to control politicians, and there is slippage as politicians try to control their bureaucratic subordinates. Bureaucrats will therefore have a measure of autonomy, perhaps a substantial measure—and they can use the coercive power of public authority to pursue their own interests at the expense of their creators.

Put simply, a fundamental criticism of the extant legislative delegation literature is that it makes implied statements about bureaucratic policymaking since it tells us little about executive action, and hence, what bureaucrats actually do with the policy discretion that they are granted by the legislature, and the resulting policy outcomes. In contrast, and as many of the essays in this handbook attest, public administration and public management scholars have focused largely on what bureaucrats do with their discretion, and much less on the conditions whereby their discretion is expanded or restricted. These obstacles notwithstanding, I offer three broad recommendations for reorienting the research attention of legislative delegation scholars toward topics critical for our understanding to advance appreciably about how delegation decisions get translated into actual bureaucratic policy actions.

**Recommendation # 1: Strengthen the Presumed 'Weak' View of Executive Authority**

Existing theories of legislative delegation assume that grants of executive discretion are
restricted to occur only within the legislative process via statutory means. In reality, presidents can circumvent a legislature’s decision to withhold policymaking authority by employing executive orders to grant themselves greater policymaking discretion (Howell 2003; see Durant 2008 and 2009, as well as Durant and Resh in this volume, for constraints on these actions during implementation). In such instances, legislatures are almost always powerless since they have little chance of passing legislation that overturns unilateral executive actions (Moe and Howell 1999). Future research on legislative delegation that explicitly accounts for the possibility of unilateral action as a ‘side option’ at the president’s disposal may unearth previously unobserved limits of legislative policy control. For instance, when legislatures do not have veto override majorities in both chambers and the executive sufficiently cares enough about the policy in question, it is quite possible that a strategic president or governor will circumvent the legislature’s delegation decision by issuing an executive order designed to grant themselves with greater policy control.

A second manner in which executive branch actors can be fortified in delegation models is to account for how they endogenously create greater autonomy from the legislative branch. Specifically, bureaucratic agencies, at various organizational levels, can cultivate autonomy from political institutions through their own actions through both selective recruitment of individuals who share the agency’s core mission, as well as building a reputation for policy competence and credibility (Carpenter 2001a, 2001b). Not only is bureaucratic autonomy distinct from bureaucratic discretion which is bestowed upon agencies by politicians, but it lies outside a formal contractual relationship that is the embodiment of the canonical legislative delegation problem (Carpenter 2001a: 16–18). The difficulty of remedying this problem using the existing
principal–agent based framework rooted in explicit incentives is that bureaucratic autonomy lies outside the contractual relationship since agency actions are unaffected by attempts at legislative control (Carpenter 2001a; Krause 1999; also, various essays in this volume—e.g., Johnston and Romzek and Frederickson and Stazik--discuss the limitations on principal-agent theory when it comes to analyzing the multiple principle-multiple agent arrangements of the networked or new governance models discussed in Section 3).

One possible alternative theoretical framework to study such problems recently proposed by Carpenter and Krause (2009) is an audience–based framework that allows for bureaucratic agents to be motivated outside the explicit, formal contract with political institutions. These 'external' sources of influence include, implicit contracts such as career concerns (e.g., Alesina and Tabellini 2007; Dewatripont, Jewitt, and Tirole 1999; Holmstrom 1982), reputation building among professional peer associations and groups (e.g., Balla 2001; Carpenter 2001a; Frumkin and Galaskiewicz 2004; Krause and Douglas 2006); the vitality of local institutions directly affected by bureaucratic policy choices (e.g., Scholz and Wang 2006); and organizational identification with both the agency’s goals and the expectations placed upon the agency arising from sources external to non–market transactions (e.g., Akerlof and Kranton 2005; Hannan 2005; Simon 1991).

Certainly, public administration researchers have recognized for at least six decades that these factors have both negative and positive effects on accountability (e.g., Finer 1941; Friedrich 1940; Mosher 1982; Khademian in this volume). So, too, have sociological institutionalists placed legitimacy at the heart of organizational behavior (Hall and Taylor 1996). Yet they have been lacking in legislative delegation research. Failing to account for such
'exogenous' shifts induced by bureaucratic agents’ political legitimacy may erroneously equate high levels of policy discretion granted by the legislature – reflecting latent political control – with an absence of bureaucratic autonomy (Carpenter 2001a: 357). For legislative delegation research, such a focus requires examining the endogenous symbiotic interaction between organized interests and professional associations with bureaucratic agencies that is distinct from the current predominant perspective that treats legislatures and interest group as natural allies (e.g., fire alarm oversight logic).

This is hardly a trivial concern. If one views policy discretion granted by legislators to bureaucrats as representing a minor portion of agency policymaking authority (Carpenter 2001a: 17), then it naturally follows that the current state of legislative delegation research still has considerable room for development to properly understand the actual exercise of policymaking authority. Any such attempt to account for a more robust portrait of executive authority must address the complexities noted above – even if in a piecemeal fashion – so that our scholarly understanding of legislative delegation to the bureaucracy can substantially progress.

**Recommendation # 2: Provide a Richer Portrait of Hierarchical Relations within the Executive Branch Between Presidents and Administrative Agencies**

As noted, most legislative delegation theories and empirical tests generally focus on the nature of conflict and uncertainty regarding legislative–executive relations (e.g., Epstein and O’Halloran 1999). Subsequent theoretical advances have distinguished between agency and presidential preferences (e.g., Volden 2002a). Delegation research has also focused on hierarchical distinctions between floor and committee preferences (e.g., Epstein and O’Halloran 1999; Ferejohn and Shipan 1990). A focus on hierarchy within legislatures is valuable since it is
essential for understanding the focal point of coordination within a given institution (Cox and McCubbins 1993; Weingast and Marshall 1988).

However, the legislative delegation research program has spent little effort at examining these vertical or hierarchical coordination dilemmas within the executive branch among presidents, political executives, and career executives. Because these dilemmas are difficult to resolve (Miller 1992: Chapter 5) and any particular solution has unintended consequences (Hammond and Thomas 1989), addressing this matter is a daunting challenge for students of legislative delegation research. Successful resolution often requires trust and cooperation between superiors and subordinates (Brehm and Gates 1997; Miller 1992) that is eschewed in existing legislative delegation models. These models are typically centered on the dual pillars of formal authority and coercive means – whether explicit or implicit – to obtain compliance.

Nonetheless, these hierarchal dilemmas are of even greater consequence in executive branch politics. Because actors at different levels of the executive branch possess varying incentives and preferences (Krause 2009; Miller 2000), these vertical coordination problems make cohesive executive action much more difficult than envisioned in current theories and empirical tests of legislative delegation. In a recent paper analyzing the staffing of different rungs within an administrative hierarchy, Stuart Jordan (2009) advances a clever argument. He argues that even if bureaucrats at these different organizational levels (e.g., federal executives versus street-level bureaucrats) possess identical preferences, they will exhibit internal disagreement because their subunit environments are sufficiently different from one another by organizational design as a means of avoiding 'extremist' administrative behavior that either favors or rejects client requests in every instance (Jordan 2009).
Given that bureaucrats’ preferences do systematically vary across these organizational subunits within public agencies (e.g., Aberbach and Rockman 2000; Seidman and Gilmour 1986), this internal disagreement, and hence hierarchical coordination problems, are even more severe in practice than characterized by Jordan’s conservative theoretical model. To properly understand how policy discretion is actually used by bureaucrats, one must focus on such thorny intra–branch relationships if the legislature’s delegation choice is going to be explicitly linked to actual policy outcomes involving bureaucratic action.

The view of a unified executive adopted in many delegation theories may be consistent with constitutional design features (e.g., Epstein and O’Halloran 1999), yet does not closely mirror the practice of governance within the executive branch (West 2006). In reality, political executives (appointees) often serve as the broker between the president seeking to exert their will over policy administration and the permanent career bureaucracy (Aberbach and Rockman 2000). That is, formal authority has limits in obtaining compliance in hierarchical relationships (Miller 1992: 120; also see especially Durant and Resh, Bendor and Hammond, and Rosenbloom in this volume for diverse perspectives on these dynamics). In U.S. executive branch politics, presidents must rely on bargaining strategies to ameliorate the information asymmetries that they encounter in relation to their staff and agency–level subordinates (Rudalevige 2005). Because the severity of this information asymmetry problem increases as one moves from the president to street level bureaucrats responsible for enforcing laws and administering public policies, the slippage that occurs in the chain of command within the executive branch is more pervasive than what transpires within the legislative branch among chambers, parties, and committees.

Further exacerbating executive branch coordination is the fact that presidents and
political executives possess much shorter policy time horizons than do both the career executives and street-level bureaucrats who comprise the permanent bureaucracy. Presidential attempts at controlling bureaucratic policymaking are hampered by their short-time in office (Waterman 1989: 189). Likewise, the 'revolving door' for political executives (Heclo 1977) adversely affects both organizational continuity and expertise. This problem is further exacerbated by presidents who strategically manage political executive positions through cyclical creations and reductions in the proportion of appointees in order to establish policy and administrative control over agencies (Lewis 2008; also see West 2006 for a contrarian perspective that challenges the notion that presidents do, or can, think strategically in this fashion).

This tension between personnel with differing time horizons means that when legislatures choose to delegate policymaking authority to the executive branch, it is quite uncertain how that authority will be exercised. The implications of intra–branch coordination within the executive branch are far reaching for understanding the consequences of legislative delegation. This is because delegation choices often have unintended policy consequences since conflict and instability make the exercise of policy discretion allocated by the legislature rather difficult. Resolving these intra–branch coordination dilemmas is necessary for properly understanding the linkage between policy discretion supplied by the legislature and subsequent policy outcomes involving bureaucratic action.

**Recommendation # 3: Characterize the ‘Demand–Side’ of Executive Discretion**

As I have argued elsewhere (Krause 2003), classic treatises on public organizations view discretion as a variable commodity that can either spurned or embraced by administrators depending on self-interest (Rourke 1984: 41–42; Wilson 1989: 251; Thompson 1967: 118).
Unfortunately, the modern delegation literature does not share this understanding of policy discretion. Canonical treatments of legislative delegation presume that the executive branch monotonically obtains greater utility from increases in policy discretion (but again see Bendor and Meirowitz 2004 and Ting 2002 for important exceptions). Yet, for example, if bureaucrats are not seeking greater discretion, what implications does this executive abdication of policymaking authority have for understanding legislative control over the bureaucracy?

When the legislature chooses not to supply policy discretion to an agency, by definition the appearance of political control is merely illusory if public agencies are not demanding more discretion. Put simply, if bureaucrats want less policy discretion (control) and legislators oblige by granting them less discretion, then bureaucrats are the party getting their desired outcome. Similarly, if bureaucrats want less policy discretion (control) and legislators do not oblige by granting them additional discretion, then the legislature is imposing its preferences for policy discretion over the agency.

Contrary to the prevailing view of modern delegation studies, bureaucratic agencies are, in fact, proactive in shaping the contents of legislation (Rieselbach 1995: 212–214; see also Wilson 1989: 251). And in shaping legislation, several reasons exist as to why bureaucratic agencies may seek less, and not more, policy discretion. Bureaucratic agencies may not only be risk–averse with respect to policymaking uncertainty, but also find themselves in a negative discretionary context where the marginal net benefits associated with discretion are negative (Krause 2003: 46). Under these conditions, agencies may seek less discretion whenever the following conditions exist: high levels of political fragmentation (e.g., divided government), high task complexity, low organizational (agency) stability, and high issue salience.
In addition, the emergence and corresponding growth of the executive branch arising from the modern institutional presidency (Burke 1992; Dickinson 1997) has meant that many bureaucratic agencies are sufficiently occupied with present policy and administrative tasks such that they are not in a position to seek additional responsibilities. It is even possible that agencies may be seeking less discretion as a way to economize scarce resources. At the same time, executive branch actors may seek less discretion as a means to avoid conflict with, and hence blame, from organized interests (Lavertu 2009). In addition, higher levels of legislative capacity relative to executive capacity may also result in the executive branch actively seeking less discretion since they are less sufficiently equipped to handle policymaking responsibility without restrictions emanating from the legislative branch.

Regardless of the reasons for agencies not wanting additional discretion, the need to focus on demand for executive discretion is critical. To do otherwise is to only know of legislative intentions without directly observing those actors most proximate to policy outcomes – bureaucrats. A greater focus on the executive branch may even eventually yield a unified theory of policymaking in which legislative delegation is a key component that intersects with executive action. At present, the delegation literature provides a very useful lens into bureaucratic policymaking regarding the legislature’s incentives for allocating formal policymaking authority to the executive branch. Nonetheless, this literature has yet to constitute a holistic view of policymaking and implementation within the modern administrative state.

Addressing the recommendations advanced in this essay will not only facilitate our scholarly understanding of legislative delegation, but also shed new insights into how public bureaucracies function within the context of a broader administrative environment where
delegation is only partially responsible for its policymaking authority (Carpenter and Krause 2009). Greater research attention to these three recommendations might also provide an ancillary benefit of providing insight regarding whether the commonly accepted 'first–principle' assumptions motivating the legislative delegation decision are, in fact, empirically valid. That is, does legislative delegation to a public agency truly lead to superior policy performance? If not, why? Further, does legislative delegation to an insulated agency (e.g., independent commission) provide superior performance vis-à-vis a less insulated agency under the direct aegis of the executive branch? If not, why? Does a lack of legislative delegation necessarily result in a loss of bureaucratic influence over policymaking? If not, why? Answers to these questions can only strengthen the logic underlying legislative delegation studies. Most critically, placing a greater focus on the agent (i.e., executive branch) is essential for obtaining a clearer understanding of this phenomenon.
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