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NUNO GAROUPA & JUD MATHEWS\*

## Strategic Delegation, Discretion, and Deference: Explaining the Comparative Law of Administrative Review†

*This paper offers a theory to explain cross-national variation in administrative law doctrines and practices. Administrative law regimes vary along three primary dimensions: the scope of delegation to agencies, agencies' exercise of discretion, and judicial practices of deference to agencies. Working with a principal-agent framework, we show how cross-national differences in institutions' capacities and the environments they face encourage the adoption of divergent strategies that lead to a variety of distinct, stable, equilibrium outcomes. We apply our model to explain patterns of administrative law in the United States, Germany, France, and Commonwealth jurisdictions.*

### I. INTRODUCTION

In this Article, we develop a general model to explain cross-national variation in administrative law regimes. We focus on explaining three features in particular: legislative practices of delegation to agencies, the exercise of discretion by agencies, and the application of deference by reviewing courts to agency actions. We show how these features of an administrative system are linked to one another in ways shaped by the background features of the legal and political system.

The emerging field of comparative administrative law has highlighted significant cross-national differences in administrative law processes and institutions, including the different roles played by courts.<sup>1</sup> Of course, administrative law is just one of the many dimensions along which national legal and political systems vary, with

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1. For a recent and concise overview of the field, see Francesca Bignami, *Comparative Administrative Law*, in CAMBRIDGE COMPANION TO COMPARATIVE LAW 145 (Mauro Bussani & Ugo Mattei eds., 2012). See generally COMPARATIVE ADMINISTRATIVE LAW (Susan Rose-Ackerman & Peter L. Lindseth eds., 2010).

others including constitutional structure, legal tradition, and the organization of the economy (for example, the size of the public sector and the influence of the state as an economic actor). While scholars have catalogued cross-national variation in administrative arrangements, few to date have tried to explain the sources of that variation systematically. The work of drawing connections between variations in administrative law and these other legal and political differences remains in its early stages.<sup>2</sup>

In the United States, by contrast, scholars have made substantial progress applying political economy theories to explain the distinctive features of the American administrative process. Political economy theories start from the view that institutional arrangements are the product of competition among interested stakeholders, competition that is shaped in important ways by the fixed features of the legal and political landscape.<sup>3</sup> Pioneering works in this vein include influential accounts explaining the prominence of public participation,<sup>4</sup> judicial review,<sup>5</sup> and citizen lawsuits in American administrative procedure.<sup>6</sup> Others offer explanations for when and why legislatures choose to delegate broadly to administrative agencies,<sup>7</sup> and why Congress sometimes favors regulation by agency as opposed to courts.<sup>8</sup> In a different article, one of us has explained why agencies face deep uncertainty over what measure of deference their interpretations of statutes will receive from courts—a deference lottery—and how this might affect agency behavior.<sup>9</sup>

Few scholars have extended the political economy model to administrative law in other jurisdictions. Some have offered political

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2. See MURRAY J. HORN, *THE POLITICAL ECONOMY OF PUBLIC ADMINISTRATION* 3 (1995) (noting that “[m]uch more could be done to explore the effect on institutional design of different constitutional arrangements, including the impact of different relationships between the legislature and the executive”). A number of works have explained the administrative structures of a given country with reference to the political, institutional, and legal context. See, e.g., Mariana Mota Prado, *Presidential Dominance from a Comparative Perspective: The Relationship Between the Executive Branch and Regulatory Agencies in Brazil*, in *COMPARATIVE ADMINISTRATIVE LAW*, *supra* note 1, at 225. What has been in shorter supply has been scholarship building a general theory of institutional choice in public administration that explains cross-national variation.

3. See Terry M. Moe, *The New Economics of Organization*, 28 AM. J. POL. SCI. 739 (1984).

4. Mathew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J. LAW, ECON. & ORG. 243 (1987).

5. Mathew D. McCubbins et al., *The Political Origins of the Administrative Procedure Act*, 15 J. LAW, ECON. & ORG. 1 (1999).

6. Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165 (1984).

7. JOHN D. HUBER & CHARLES SHIPAN, *DELIBERATE DISCRETION? THE INSTITUTIONAL FOUNDATIONS OF BUREAUCRATIC AUTONOMY* (2002).

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

9. Jud Mathews, *Deference Lotteries*, 91 TEXAS L. REV. 1349 (2013).

economy explanations for why particular organizational forms are favored for addressing particular public policy issues,<sup>10</sup> and for distinctive features of international administrative regimes.<sup>11</sup> But the central thrust of these works has not been to explain cross-national variation in basic structures of administrative law and administrative process, and most have had very little to say about the role of courts. One recent piece by two prominent American scholars did focus precisely on this question, but the authors conclude that political economy theory comes up short: it can account for some, but not all, of the observed cross-national differences.<sup>12</sup>

Elizabeth Magill and Daniel Ortiz begin their analysis by noting that there is a significant institutional difference that explains the more limited use of courts outside of the United States, namely, parliamentary versus presidential political regime.<sup>13</sup> In a principal-agent environment, with a parliamentary regime and unified government, agents cannot really defect from the principal's preferences because it is easy to pass new legislation to correct possible agency innovations. Whereas in the American model judicial review is perceived as a check against deviant agencies, in the European model judicial review should be limited, they argue, because the principal's preferences are easily and readably observable.

These variations might explain the perceived differences between the United States and the United Kingdom. However, once France and Germany are included, the simple political economy model fails to provide good insight. Not only is administrative review surprisingly more relevant in France than the model would anticipate, but also the variations between France and Germany are difficult to understand.

What distinguishes our approach from the Magill and Ortiz account, and what gives it additional explanatory power, is explicit attention to differences in the courts available to the administrative process. Drawing in part on the comparative work that one of us has done on judicial systems,<sup>14</sup> we show how institutional differences in the courts that can be enlisted to monitor agency behavior alter the strategies available to other stakeholders.

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10. See, e.g., HORN, *supra* note 2; FABRIZIO GILARDI, *DELEGATION IN THE REGULATORY STATE: INDEPENDENT REGULATORY AGENCIES IN WESTERN EUROPE* (2008); *THE POLITICS OF DELEGATION* (Mark Thatcher & Alec Stone Sweet eds., 2002).

11. Eyal Benvenisti, *The Interplay Between Actors as a Determinant of the Evolution of Administrative Law in International Organizations*, 68 *LAW & CONTEMP. PROBS.* 319 (2005).

12. M. Elizabeth Magill & Daniel R. Ortiz, *Comparative Positive Political Theory*, in *COMPARATIVE ADMINISTRATIVE LAW*, *supra* note 1.

13. *Id.* at 136-37.

14. See Nuno M. Garoupa & Tom Ginsburg, *Reputation, Information and the Organization of the Judiciary*, 4 *J. COMP. L.* 226 (2010).

We start by recognizing that, in a complex world, law is incomplete by nature.<sup>15</sup> The legislator cannot anticipate all possible future contingencies. Even if the legislator could predict all possible future states of the world, it would probably be too costly to draft sufficiently detailed legislation. Furthermore, there are cheaper mechanisms to fill in the gaps in legislation when needed rather than anticipating them. Consequently, legislators draft incomplete statutes *ex ante* that need to be completed by regulators and courts *ex post*. Administrative law provides the conceptual mindset for this allocation of work across legislature, agency and courts.

If incompleteness of law is a reality across jurisdictions, responses to the problem vary. Our model shows that contextual variables shape how jurisdictions respond to the challenges imposed by the inevitable incompleteness of the law. The respective roles played by legislatures, agencies, and courts in the administrative law regime are determined in part exogenously, owing to a system-specific set of constitutional constraints, and in part endogenously, through strategic interaction among the institutions against the backdrop of those constraints.

By looking at transaction costs and political structures, our paper explains why the United Kingdom and other Commonwealth jurisdictions differ from the United States, but also why Germany and France present an interesting diversity. The dominant strategies in each jurisdiction are consistent with institutional constraints which we treat largely as exogenous to the model. We characterize four possible arrangements, with variations in the degree and kind of autonomy of the agencies and courts.

While a transaction cost perspective on legislative drafting is common to political economy treatments, explicitly considering variation in judicial institutions expands the explanatory power of our approach. If the kind of courts available to review administrative action are, for reasons beyond the legislature's control, reliable and predictable in the performance of their duties, then the legislature may be able to enlist them as effective monitors of agency performance. If, on the other hand, the available courts are unreliable or unpredictable, then building them into the administrative process can introduce a new source of variability into administrative programs, and new possibilities for subverting the legislature's policy agenda. Strikingly, when unreliable courts have a wide scope of review over the merits of administrative action, grants of discretion to agencies may ultimately amplify the courts' capacity to shape admin-

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15. See H.L.A. HART, *THE CONCEPT OF LAW* (1961); Katharina Pistor & Chenggang Xu, *Incomplete Law: A Conceptual and Analytical Framework and its Application to the Evolution of Financial Market Regulation*, 35 J. INT'L LAW & POL. 931 (2003).

istration. Legislatures do well to take account of the interactions they anticipate between courts and agencies when they design programs and regulate the scope of judicial review, and our model predicts that the interactions among all three institutions will fall into one of several possible patterns.

In Section II, we explain the basic model in the context of the principal-agent theory. We consider the possible strategies of the different actors and provide basis for the analysis of the possible solutions.

In Section III, we detail the contextual and institutional determinants of behavior. We argue that the payoffs for each actor respond to the degree of government concentration and the character of legal institutions. They explain why different jurisdictions can illustrate the possible solutions to the model.

In Section IV, we frame each of the possible solutions in terms of the autonomy of agencies and courts. We argue that the solutions of the model can be understood in a common framework. These variations are discussed in more detail in reference to specific jurisdictions.

Section V concludes the article.

## II. THE THEORY

This section explains how we model the phenomena we seek to explain. We work from the inside out, first describing in generic terms the relevant institutional actors, the choices each must make, and the processes that link them. The following section then fills in the institutional context, describing relevant variations in the structure of legal and political systems, and explaining how these variations affect the set of options open to the actors and the payoffs from them.

At root, we are interested in the interaction between three institutions: the legislature, an agency, and a reviewing court. The basic sequence of events is straightforward: the legislature designs a policy, the agency implements it, and the court reviews the agency's implementation.

The role of each player is readily conceptualized in terms of principal-agent theory: a principal (the legislature) appoints an agent (the agency) to carry out a task (the execution of a statute), and also enlists a monitor (the court) to supervise the agency's performance.<sup>16</sup> Principal-agent theory also captures the basic tension that animates this tripartite relationship: the legislature would like the agency to

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16. The principal is the actor with less information, and the agent is the actor with more information. This information asymmetry creates transaction costs. Political economy studies how institutional design reduces these transaction costs.

carry out its wishes faithfully, but ensuring the fidelity of the agency may be costly, if not impossible. The legislature can use the court to monitor agency performance, but the legislature's relationship to the court is subject to its own set of agency control problems.

Each of the players has one or more choices to make about how it will perform its task. For each institution, the payoff from any choice depends not only on that choice, but also on the choices made by the other institutions. Hence, we can readily think about the relationship as a game, as the term is used in game theory, and the choices the players must make as moves in that game.

Below, we characterize in generic terms the moves each player has to make, and the set of possible options—the strategies—available to each. For simplicity's sake, we suppose that each player can choose between two strategies for each move, where the two strategies characterize the different ends of a spectrum of possible options open to the players.<sup>17</sup>

#### A. *Legislature*

The legislature must make two choices: it must (a) make a statute-specific decision about how to delegate authority, and (b) set global rules about the scope of judicial review over agency policy decisions.

With respect to the first decision, the legislature can choose between a *narrow delegation* and a *broad delegation*. That is, on the one hand, the legislature could choose to draft a detailed statute, hemming in the scope for agency discretion. On the other hand, the legislature could draft a more open-ended statute, in effect delegating to the agency broad latitude to use unverifiable expertise—that is, specific human capital that cannot be directly observed by the legislature.

Generally speaking, the legislature's choice will depend on the cost of writing detailed statutes, on the alignment of interests between legislature and agency, on the ability to rely on courts (monitors), and on the possibility of palliatives (using other strategies, including the "fire alarm" strategy of putting triggers in the statute to make agency missteps highly public).<sup>18</sup> We will discuss these factors further below.

With respect to the second decision, the legislature has the chance to control, or at least shape, the scope of review exercised by the monitoring court. To be clear, it is beyond the powers of legislatures to set the scope of *constitutional* review exercised by courts, but

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17. As we discuss below, players may also choose "mixed strategies" alternating between different strategies.

18. See McCubbins & Schwartz, *supra* note 6.

legislatures do have the power to set the scope of statutory review, even if in practice they often merely codify existing judicial norms.<sup>19</sup>

The legislature can, for instance, provide that courts can only strike down agency acts that are *ultra vires*—beyond the limits of their granted power—but may not review the merits of agency policy choices. This is the rule in Britain, at least as a formal matter.<sup>20</sup> On the other hand, the legislature may grant courts more probing review that reaches into the merits. For example, the American Administrative Procedure Act appears to give courts *de novo* review power over agency interpretations of law.<sup>21</sup> More generally, legislatures determine which administrative decisions are subject to review and which are insulated from review entirely. While legislatures can delegate more or less power varying from statute to statute, generally their choices about scope of review are contained in framework statutes that apply globally. In other words, in choosing a scope of review strategy, legislatures should consider what overall strategy would work best across the entire run of statutes: *narrow review*, or *broad review*.

Granting courts the authority to review the merits of agency decisions empowers courts to monitor agency performance more aggressively. However, it also expands courts' capacity to substitute their own policy judgments for the agency's, under the guise of ensuring fidelity to the statute.

Taking the legislature's two choices together, we see four possible strategies: (1) broad delegation with broad review (general statute with powerful courts), (2) broad delegation with narrow review (general statute with weak courts), (3) narrow delegation with broad review (detailed statute with powerful courts), and (4) narrow delegation with narrow review (detailed statute with weak courts).

## B. Agency

The agency must decide how to implement the statutes it is charged to administer; in other words, how to exercise its discretion.<sup>22</sup> Of course, the permissibility of different agency actions will depend on the terms of the delegation from the legislature.

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19. And indeed, courts may be able to use constitutional grounds for review to evade legislative efforts to limit the scope of statutory review.

20. Paul Craig, *Competing Models of Judicial Review*, in JUDICIAL REVIEW AND THE CONSTITUTION 373, 374 (Christopher Forsyth ed., 2000).

21. Administrative Procedure Act § 706, 5 U.S.C. § 500 (1946).

22. The administrative law doctrine of many jurisdictions defines "discretion" rather formalistically, and considers agencies to be applying discretion only in circumstances when a statute explicitly confers on the agency the power to make a choice. See, e.g., Yutaka Arai-Takahashi, *Discretion in German Administrative Law: Doctrinal Discourse Revisited*, 6 EURO. PUB. LAW 69, 69 (2000) (discussing the doctrinal definition of discretion in German administrative law). We take a functional view of



Two strategies can be identified. One strategy is to *play it safe* and implement the statute in the least controversial, most defensible manner possible. An agency playing it safe will choose among possible actions based on how easily they can be justified with respect to the statutory scheme they are charged with implementing. A second strategy is to *apply unverifiable expertise*, by which the agency uses specific human capital to implement the statutes. Agencies will be more constrained in their ability to apply expertise when the scope of their delegation is narrow than when it is broad.

Applying expertise in a policy domain may result in the agency choosing a policy other than the safest, most readily defensible one. However, by applying expertise, the agency may be better able to realize the preferences of the legislature than it could by playing it safe: indeed, legislatures delegate to agencies precisely in the hope of reaping the benefits of their expertise. However, at the same time, in applying unverifiable expertise, agencies may also be in a position to serve their own preferences at the expense of the principal's. So the agency's assertion of "expertise" may be genuine, and promote the principal's goals efficiently, or it may be a smokescreen for the agency to promote its own agenda (which in a presidential system may be the president's agenda). In other words, "expertise" can be a vector for the introduction of agency slack, and it may be difficult or costly for those outside the agency to discern the agency's true motive behind invoking expertise.

In choosing which course of action to take, an agency's priorities could include (1) surviving judicial review, (2) pursuing their own policy preferences, and (3) applying expertise to fulfill the principal's objectives. These priorities should respond to a particular institutional context. For example, if defections from the legislature's objective are easy to detect, and a defecting agency can be easily reshuffled or otherwise disciplined, there is little sense in pursuing objectives different from those of the principal. At the same time, if the principal can directly punish defection, the role of judicial review is of second-order importance. As agencies evolve into more independent institutional modes (as observed in the last decades and in many contexts due to external pressure such as EU membership), all these priorities are affected.

### C. Court

The monitor (the court) has to determine whether to *uphold* or *strike down* the agency's action.

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discretion, and consider an agency to be exercising discretion whenever it is making a choice about how a statute should be administered.

The court must make the choice in light of three principal considerations: (1) whether the legislature's delegation to the agency is narrow or broad, (2) whether the agency's action plays it safe or applies unverifiable expertise, and (3) whether the scope of the court's own power of review is narrow or broad.

The court's goals could include (1) fidelity to the principal, (2) pursuing their own policy preferences, and (3) minimizing work or conflict.

Crucially, the payoff for the court from its choice of strategy depends not only on the scope of review granted to it by the legislature, but also by the scope of the legislature's delegation to the agency, and how the agency uses its discretion. If the legislature's delegation to the agency is narrow, then it is more straightforward to evaluate whether or not the agency is compliant with the statute: if the agency plays it safe, it should be upheld, and if it applies expertise where the narrowness of the statute forbids it, the agency should be overturned.

On the other hand, if the scope of delegation is broader and the agency chooses to apply expertise, the court will have substantial latitude to decide whether the agency is doing so in a manner faithful to the statute. In other words, a broad delegation to the agency effectively adds to the scope of the court's power of review, unless the legislature has taken pains to limit the scope of review. For instance, suppose a statute instructs an agency to set the maximum level of some air pollutant "requisite to protect the public health." Just as there's no level that is obviously wrong, under such a vague standard, there is no level that is obviously right. No matter what the agency does, the statute provides little protection against a court that wants to overturn the agency's choice, when that court's own powers of review are quite broad.<sup>23</sup> Like the agency, the court may be genuinely interested in promoting the ends of the statutory scheme, or it may prefer to use its reviewing power to pursue interests of its own. Conversely, the agency may be able to protect itself against judicial reversal to some extent by playing it safe even when the statute licenses a broader exercise of discretion; a reviewing court cannot credibly claim under those circumstances that the agency's action violates the statute.

### III. INSTITUTIONAL CONTEXT

Officials act within the context of a strategic environment structured by fixed features of their regimes, many of which are

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23. See, e.g., *Industrial Union Department v. American Petroleum Institute* (The Benzene Case), 448 U.S. 607 (1980) (invalidating OSHA's choices of benzene exposure levels on the grounds that OSHA should have been requiring proof of a significant degree of harm from higher levels, notwithstanding the absence of any such requirement in the statute).

constitutional in character. We treat these regime-level features as exogenously given: they make up the environment in which officials operate, and they cannot be changed in the short term. Of course, the constitutional and institutional features of regimes are themselves the products of political processes, but these basic structures are not up for grabs in the "ordinary politics" of legislative enactment. Constitutional rules, for instance, are typically protected by super-majority requirements.<sup>24</sup>

These environmental features are extremely important to the outcome of the "game" we analyze, because they constrain the moves that officials can make and determine the payoffs of those moves. We can subsume the most important factors under two broad headings: (1) government concentration, and (2) legal institutions that are relevant for how they shape the legislature's relationship with the agency and the reviewing courts, respectively. Effectively, these factors matter insofar as they bear on the autonomy of the agency and the court, as discussed below.

The degree of government concentration matters for several related reasons. First, divided government increases the costs of writing detailed statutes that constrain agency discretion *ex ante*.<sup>25</sup> This is so because transaction costs increase as more players have to be involved in statute drafting.<sup>26</sup> Second, divided government limits a legislative majority's ability to shape the selection of regulators. The more players have an effective veto over the regulator, the more preferences must be taken into account in choosing one, with the result that the regulator's preferences will probably align less closely with the median legislator's. Lastly, concentrated governments can direct the activities of regulators and dismiss defecting regulators more easily than divided governments.<sup>27</sup>

There are several dimensions to divided government that are relevant in this context. Federalism can matter, depending on how it bears on the administrative process. For instance, federalism may be

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24. The constitutional features are the outcome of a meta-game that is exogenous for the purposes of our analysis. It could be that administrative law and judicial review shape the payoffs of the meta-game (that is, constitutional features could in part reflect concerns with administrative law and judicial review), but given the stability and duration of such constitutional features, we take them as given in our analysis. Note the role of history and path dependence in establishing a set of exogenous features.

25. For our purposes, the more veto players have a stake in decisions, the more divided government is. A veto player is "an individual or collective actor whose agreement is required for a policy decision." George Tsebelis, *Decision Making in Political Systems: Veto Players in Presidentialism, Parliamentarism, Multicameralism and Multipartyism*, 25 BRIT. J. POL. SCI. 289, 293 (1995).

26. See HUBER & SHIPAN, *supra* note 7.

27. See generally HORN, *supra* note 2, at 13-14; HOWARD ROSENTHAL, *PARTISAN POLITICS, DIVIDED GOVERNMENT, AND THE ECONOMY* (1995); GEORGE TSEBELIS, *VETO PLAYERS: HOW POLITICAL INSTITUTIONS WORK* (2011).

relevant if it means that national policies are carried out by subnational agencies which are accountable to subnational officials. This kind of arrangement has the potential to create more competition of vested interests in the administration of law. On the other hand, when federalism takes the form of strictly separate spheres of national and subnational administration, it will not matter for our purposes.<sup>28</sup>

A second aspect is the party structure, which is, of course, partially a function of a country's electoral rules.<sup>29</sup> The more parties in a system, the less likely it is that any one party will possess the legislative majority necessary to pursue its agenda. In a two-party system, the majority party in a legislative chamber should be able to push a well-defined set of priorities, assuming some party discipline. On the other hand, when parties must join in coalition to form a majority, the different groups within the coalition will support different substantive agendas.<sup>30</sup>

A third factor, the distinction between presidential and parliamentary regimes, simply amplifies the concentration or division of government power. Parliamentary systems link control over the executive to control over the legislature, while presidential systems split the two. The consequences will vary, depending on party structure. For instance, most of the time in the United Kingdom and Germany, the executive and legislature are controlled by a small group led by the prime minister.<sup>31</sup> In the United States, leaving aside personal styles, there is no similar concentration of power. France is somewhere in the middle, because the executive and legislature are sometimes dominated by the same party, while at other times there is the "cohabitation" of different parties.<sup>32</sup>

Thus, these elements—political system, party system, and federalism—play important roles in determining the costs of drafting a more detailed statute, the likelihood of alignment of preferences between the principal and the agency, and the possibility of effective ex post control. Through all of these channels, divided government thus contributes to the effective autonomy of agencies vis-à-vis the legislature. Interbranch divided government—divergent party control of the legislative and executive branches—means a legislative majority cannot necessarily dominate the appointment or oversight of agency

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28. THOMAS O. HUEGLIN & ALAN FENNA, *COMPARATIVE FEDERALISM: A SYSTEMATIC INQUIRY* 35-36 (2006). See also Vivien A. Schmidt, *The EU and its Member-States: Institutional Contrasts and their Consequences*, 4 J. EUR. PUB. POL'Y 128 (1997).

29. See generally GARY W. COX, *MAKING VOTES COUNT: STRATEGIC COORDINATION IN THE WORLD'S ELECTORAL SYSTEMS* (1997).

30. See MICHAEL LAVER & NORMAN SCHOFIELD, *MULTIPARTY GOVERNMENT: THE POLITICS OF COALITION IN EUROPE 186-92* (1998).

31. DUNCAN WATTS, *UNDERSTANDING US/UK GOVERNANCE* 89 (2003).

32. Jean V. Poulard, *The French Double Executive and the Experience of Cohabitation*, 105 POL. SCI. W. 243 (1990).

personnel; and intrabranched divided government—divergent party control of the legislative houses—increases the difficulty both of constraining agency behavior through detailed statutory mandates or through effective ex post oversight. The problems compound one another: it is legislatures in divided governments that might find detailed statutory mandates most useful as devices to constrain agency behavior, owing to the alignment problem, but they also find it most difficult to enact them. These factors also shape the importance of courts, in ways to be described further below.<sup>33</sup>

There are several aspects to legal institutions that may matter as well. Key features that tend to distinguish continental and commonwealth systems include (1) recognition vs. career judiciary (selection and appointment of judges<sup>34</sup>), and (2) specialized jurisdiction in administrative law.<sup>35</sup> Commonwealth systems traditionally combine recognition judiciaries with the involvement of ordinary courts in administrative review, both of which tend to mean that the judiciary stands far apart from the administration and operates with a higher degree of autonomy than in continental systems. By contrast, continental systems tend to rely on career judiciaries and a specialized, bureaucratized jurisdiction in administrative law.<sup>36</sup>

These legal institutional factors, too, are relevant for the dynamics under study insofar as they bear on autonomy—here, the autonomy of the reviewing court. To be clear, in civil law systems as well as common law systems, courts review agency action with a high degree of independence from the other branches of government.<sup>37</sup> Call this autonomy from the other branches of government “horizontal autonomy.” However, the specialized administrative courts typical of civil law jurisdictions are commonly embedded in judicial bureaucracies that exert real constraints on the effective autonomy of individual judges. Typically, the professional stature of administra-

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33. More generally, see R. KENT WEAVER & BERT A. ROCKMAN, *DO INSTITUTIONS MATTER?: GOVERNMENT CAPABILITIES IN THE UNITED STATES AND ABROAD* (1993).

34. Nuno Garoupa & Tom Ginsburg, *Hybrid Judicial Career Structures: Reputation vs. Legal Structure*, 3 J. LEG. ANALYSIS 411 (2011).

35. Nuno Garoupa & Carlos Gómez Ligüerre, *The Syndrome of the Efficiency of the Common Law*, 29 B. U. INT'L. L.J. 287 (2011).

36. Canonically, a key difference between judging in civil law and common law countries is the reliance on case law and binding precedent in the latter. See, e.g., Joseph Dainow, *The Civil Law and the Common Law: Some Points of Comparison*, 15 AM. J. COMP. L. 419, 425 (1967). There is reason to suppose, somewhat counter intuitively, that reliance on case law and precedent can enhance the effective autonomy of judges, by providing them with a resource they can deploy strategically, choosing among available lines of cases to justify a preferred outcome. However, the distinction is of little relevance when it comes to administrative law, where case law and precedent matter significantly in many civil law jurisdictions. Any resulting effect on judicial autonomy would likely be limited.

37. Dominique Custos, *Independent Administrative Authorities in France: Structural and Procedural Change at the Intersection of Americanization, Europeanization, and Gallicization*, in *COMPARATIVE ADMINISTRATIVE LAW*, *supra* note 1.

tive judges in such systems depends on more senior judges' evaluations of the quality and consistency of their work.<sup>38</sup>

So even while the administrative judiciary as a whole may enjoy a large measure of horizontal autonomy from the other branches of government, its judges lack the "vertical autonomy" of, for instance, federal judges in the United States, who enjoy life tenure in a high stature position. Judges with high vertical autonomy are less constrained in their judging, in the sense that they face no meaningful discipline from above for, say, results-oriented rulings that suit their personal preferences or enhance their power. By contrast, the hierarchy of an administrative court system is likely to discourage results-oriented judging, because the prestige and legitimacy of the administrative judiciary is tied to its reputation as part of a neutral, apolitical civil service.<sup>39</sup> Of course, for the court at the apex of the administrative hierarchy, any such restraint must be self-imposed, and is therefore likely to be weaker.<sup>40</sup>

Together, these system-level features affect the principal's capacity to rely on both the agent and the monitor. The degree to which these players have the type of autonomy we identify as most relevant—horizontal autonomy in the case of the agency, and vertical autonomy in the case of the court—will influence the strategy the legislature chooses, which in turn bears on the choices of these other actors. Simplifying, we could imagine that constitutional differences across jurisdictions produce agents of two types: "high-autonomy" agents (where the principal has little effective control over the agency) and "low-autonomy" agents (where the principal has substantial control). Similarly, we can describe two ideal types of courts: "high-autonomy" and "low-autonomy" courts. Putting this all together, there are four possible cases as summarized by Table 1:

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38. David S. Law, *How to Rig the Federal Courts*, 99 GEO. L.J. 779, 795-803 (2011) (describing judicial control over promotion in Japan).

39. On the self-conception of the civil service in France, see EZRA N. SULEIMAN, *POLITICS, POWER, AND BUREAUCRACY IN FRANCE: THE ADMINISTRATIVE ELITE* 13-24 (1974). On the concept of individual vs. collective (branch) reputation in general as well as in the context of France, see Garoupa & Ginsburg, *supra* note 14.

40. Also, to the extent that administrative decisions are subject to review in constitutional courts, this logic of restraint does not apply to those courts—but constitutional review falls outside the purview of this paper.

TABLE 1: TYPES OF INSTITUTIONAL ARRANGEMENTS

		Agencies	
		<b>LOW AUTONOMY</b> <i>Contributing factors:</i> <ul style="list-style-type: none"> <li>• Parliamentary system</li> <li>• Unitary government</li> <li>• Few parties</li> </ul>	<b>HIGH AUTONOMY</b> <i>Contributing factors:</i> <ul style="list-style-type: none"> <li>• Presidential system</li> <li>• Federal government</li> <li>• Many parties</li> </ul>
Courts	<b>LOW AUTONOMY</b> <i>Contributing factors:</i> <ul style="list-style-type: none"> <li>• Career judiciary</li> <li>• Specialized courts</li> </ul>	low-autonomy agencies, low-autonomy courts	high-autonomy agencies, low-autonomy courts
	<b>HIGH AUTONOMY</b> <i>Contributing factors:</i> <ul style="list-style-type: none"> <li>• Recognition judiciary</li> <li>• Generalist courts</li> </ul>	low-autonomy agencies, high-autonomy courts	high-autonomy agencies, high-autonomy courts

#### IV. EQUILIBRIUM OUTCOMES

To recap, the object of our investigation is the sequence of choices made by three institutional actors: a legislature, an agency, and a court. The legislature acts first, making both a system-level decision on whether the scope of administrative review will be broad or narrow, and a statute-specific decision about whether to make a broad or narrow delegation of power to an agency. Second, the agency decides how to implement the statute, either playing it safe, by choosing a conservative interpretation of the statute to minimize chances of judicial reversal, or taking a bolder course, pushing the borders of what the statute permits on a hard-to-verify claim of "expertise."<sup>41</sup> Lastly, the court will decide whether to uphold the agency or reject it.

In game theory terms, we have the elements of an extensive-form game (that is, a game in which players make moves sequentially, rather than simultaneously; the latter being called a standard-form game, such as the popular "Prisoner's Dilemma").<sup>42</sup> We do not undertake a formal game-theoretic analysis (although we do include in the Appendix a game tree that maps out the sequence of moves available to the players). Even so, thinking about the institutions' choices in game theory terms is illustrative, because it helps us see which

41. Again, the agency's assertion of expertise may be genuine, and promote the principal's goals efficiently, or it may be a smokescreen for the agency to promote its own agenda.

42. Specifically, an extensive form game consists of a set of players, the order in which they move, the choices they have when they move, the payoffs they receive from their moves, and the knowledge the players have, about other players and payoffs. See DREW FUDENBERG & JEAN TIROLE, *GAME THEORY* 77 (1991). Notice that one other element of some games, the probability distribution over exogenous events, is not relevant to this game. We have defined the first three elements of the game above, and below will further discuss players' payoffs, which we assume are open knowledge to all players.

choices for each institution would yield the best outcomes, given the other institutions' choices.

Game theorists solve a problem like this by asking what strategies from the players would lead to an equilibrium outcome in which no player could improve his payoff by making different choices, given the choices the other players made. The method for determining what those strategies are is called backwards induction. Backward induction starts by considering the last move in the game, and asks which choice would yield the best outcome for the player making the move, for each possible combination of choices made by players earlier in the game. Next, it proceeds up one move, and asks what would be the best choice for the player who has that move, given what we know about how the player who has the last move would likely act. The process continues up the sequence of moves in this way, until we have determined all the best strategy for all of the players for the whole of the game.

What follows is an informal backwards induction analysis of the four different configurations identified in Table 1. The purpose of this exercise is to show how different institutional features lead to different optimal choices with respect to delegation, discretion, and deference. The first time through, we work through the whole sequence of moves, and for the subsequent iterations, focus on the areas where differences in how the institutions are configured favor different choices.

After explaining our expectations for the strategies chosen under each configuration, we then illustrate the points with reference to the administrative law of a representative legal system. The cases we consider—Germany, France, the Commonwealth systems of Britain, Canada, and Australia (discussed together), and the United States—were selected both because in our view they collectively represent all of the four types listed in Table 1, and also because they are accessible to English-language readers, in that each is already the subject of a substantial body of scholarship in English.

Before proceeding, some caveats are in order. The discussions below are in no way offered as proof of the correctness of our model. Such a small number of cases provide no firm basis for drawing conclusions about the validity of our account. And while our characterizations of different systems are based on our evaluation of the relevant doctrine and scholarship, cross-national comparisons on matters such as the extent of legislative delegations necessarily contain a subjective element.

Moreover, one outcome variable about which the model makes some predictions—how agencies exercise the discretion they are granted—is particularly resistant to meaningful and systematic measurement. Well-informed observers will disagree about whether a



given agency action used discretion in good faith, and objective measures are lacking. As a result, we largely omit discussion of it below, except to note that the prominence of the topic of agency defection from legislative policy objectives in the administrative law scholarship of a country may serve as a rough proxy for how significant a problem national experts perceive it to be.

Lastly, our model necessarily excludes from consideration many factors that may bear on national differences in administration, and we do not pretend otherwise. For all of these reasons, the case studies should be regarded as illustrative sketches that serve to demonstrate the model's plausibility as an explanatory account. We leave it to the readers to judge whether the account is convincing.

One last limitation of our model is that it is static, in the sense that it does not account for changes within systems over time, although of course, administrative systems do evolve.<sup>43</sup> But we present it as a reasonable first-cut theory for explaining some major, observed variations. It must be left for future projects to consider how changes currently underway in some of the systems under review, including a broader embrace of institutionally-distinct independent regulators, will change the institutional equilibrium.

#### A. *Low-Autonomy Agencies and Low-Autonomy Courts*

We start with a low-autonomy agency and a low-autonomy court. A low-autonomy court is, all else equal, a more reliable monitor of agency performance than a high-autonomy court: the court faces real costs for defecting from its responsibility, either by privileging its own policy preferences or shirking its responsibility to carry out a meaningful review.

If such a court is granted a broad scope of review, when the agency is operating under a narrow delegation of power, we can expect the court to uphold agency action when the agency plays it safe and reverse when the agency exceeds the scope of its mandate by applying expertise. If such a court is granted a broad scope of review and the agency is operating under a broad delegation of power, we expect the court to uphold the agency when it's playing it safe, and when it's applying expertise, either to uphold or reverse the agency, based the court's best judgment as to whether the application of expertise is valid.

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43. For a recent piece thoroughly considering some recent changes in French public law, see Susan Rose-Ackerman & Thomas Perroud, *Policymaking and Public Law in France: Public Participation, Agency Independence, and Impact Assessment*, 19 COLUM. J. EURO. L. 225 (2013). The discussion below does not delve into how the effective degree of government concentration will vary over time in non-parliamentary systems, because control of the legislative and executive branches will sometimes be divided among parties, and sometimes shared.

If, on the other hand, the court is granted a narrow scope of review only, the court will be effectively shut out from reviewing how the agency exercises its discretion when it operates pursuant to a broad delegation of power. (We would not expect a low-autonomy court to try to circumvent the limits on its own scope of review, in order to effectively arrogate to itself the power of merits review.) When the agency's delegation is narrow, the court will uphold when the agency plays it safe, and reverse when the agency applies expertise in contravention of the limits of its delegation.

Consider now the behavior of the low-autonomy agency. If granted a broad delegation of power, the agency will predictably apply expertise in furtherance of the principal's interests. If the agency is delegated a narrow grant of power, it will presumably play it safe: both because it seeks to implement the legislature's preferences, and also because it would anticipate judicial reversal if it were to behave otherwise.

The legislature must decide how broadly to delegate authority to agencies, and how much authority to give to the courts against the backdrop of the anticipated strategies of these institutions. We would expect broad delegations to agencies to be common in systems with low-autonomy agencies and low-autonomy courts: legislatures can delegate broadly in order to reap the benefits of agency expertise without worrying much about agencies misusing their discretion in ways beyond the legislature's power to correct. When courts have to worry less about agency misbehavior, vigorous monitoring is less essential—and could in fact be detrimental, if courts are unskilled at evaluating whether agencies are deploying discretion in ways that further the statutory schemes. So we would expect judicial review to be confined to serving the more limited purpose of protecting individual rights implicated by administrative action, rather than policing agency policy choices more generally.

<b>Profile:</b>	Low-autonomy agencies, low-autonomy courts
<b>Prediction:</b>	Broad delegation; narrow scope for judicial review; application of expertise by agencies; judicial review plays marginal role
<b>Example:</b>	Germany

In many respects, Germany fits the model of a legal system with low-autonomy administration and low-autonomy courts. Germany is a parliamentary democracy; the party or coalition that controls the legislature also controls the executive.<sup>44</sup> Accordingly, the government

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44. Seats in the popularly-elected *Bundestag* are assigned on the basis of proportional representation, but no seats are given to seats that fail to meet a "5% hurdle," which discourages the proliferation of small parties.

in power appoints the leaders of the national ministries.<sup>45</sup> For most of the postwar period, two major parties have captured the lion's share of the seats in the parliament, although in recent years smaller parties have increased their shares.

As a federal republic, Germany diverges from the ideal type identified in Table 1, and federalism does indeed shape how statutes are both written and administered. Under the Basic Law, Germany's constitution, legislation on certain subjects must be approved not only by the *Bundestag*, which is the popularly-elected national assembly, but also by the *Bundesrat* (Federal Council), which represents the interests of the sixteen *Länder*.<sup>46</sup> Moreover, responsibility for implementing legislation is shared between administrations at the national level and the administrations of the *Länder*. And although the national government plays "a predominant role regarding legislation," "the main responsibility regarding administrative matters lies with the *Länder*."<sup>47</sup>

Nonetheless, federalism expands the autonomy of administrators at the *Land* level only to a limited extent. First, the national ministries have the constitutional authority to issue administrative rules that confine the discretion of lower-level administrators,<sup>48</sup> and they make extensive use of it.<sup>49</sup> Second, owing to their central role in administration, *Länder* are consulted during the legislative process, so that their own positions are reflected in the legislation they are tasked with implementing.<sup>50</sup> In certain policy areas, the role of the *Länder* is institutionalized in *Bund-Länder* "Work Circles," consultative bodies of federal and *Land* officials, which "exert a strong influence on the content of both laws and regulations."<sup>51</sup>

Similar consultative processes also function to solicit political input on the content of regulations precisely when matters have high

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45. Germany also has established a modest number of independent agencies, such as the German Central Bank (Deutsches Bundesbank), the Federal Competition Agency (Bundeskartellamt), and the Federal Network Agency for Telecommunications, Gas, Electricity, Mail, and Railroads (RegTP). These have higher autonomy than the ministries, and are also less subject to the strictures of general administrative law.

46. GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND (GG), Art. 73 (Ger.). The Bundesrat also has a limited power to veto legislation more generally. GG Art. 77 (3)-(4) (Ger.).

47. INTRODUCTION TO GERMAN LAW 86 (Werner F. Ebke & Matthew W. Finkin eds., 1996). The role of the *Länder* in the administration of statutes was simplified and streamlined in 2006 constitutional reforms. See Simone Burkhart, *Reforming Federalism in Germany: Incremental Changes Instead of the Big Deal*, 39 *PUBLIUS: THE JOURNAL OF FEDERALISM* 341 (2009).

48. GG Art. 84 sec. 2 (Ger.).

49. See CHRISTIAN HEITSCH, *DIE AUSFÜHRUNG DER BUNDESGESETZE DURCH DIE LÄNDER* 228-33 (2001) (detailing multiple types of administrative rules that ministries issue).

50. See SUSAN ROSE-ACKERMAN, *CONTROLLING ENVIRONMENTAL POLICY: THE LIMITS OF PUBLIC LAW IN GERMANY AND THE UNITED STATES* 66 (1995).

51. *Id.* at 67.

political salience, tightening the link between elected officials and the administration. While the administration has “significant latitude in developing policies” in matters of low political salience, there is an understanding that “significant political issues cannot be settled within the routine bureaucratic regulatory process, or even by seeking to get ministers onside.”<sup>52</sup> Rather, bureaucrats structure the process such that contentious issues are kicked upstairs to be explicitly hammered out at the political level before regulators proceed with their work.<sup>53</sup>

Judicial review of administrative actions in Germany takes place within specialized administrative courts with a low degree of vertical autonomy. Organizationally, Germany’s administrative courts belong to the judicial branch and not the administration, as in France,<sup>54</sup> and the independence of the judiciary from the other branches of government is guaranteed by the Basic Law.<sup>55</sup> Internally, however, the administrative judiciary is sharply hierarchical, professionalized, and bureaucratized. Judicial appointment practices vary by *Land*, but generally, the recommendations of sitting judges are critical to appointment.<sup>56</sup> Judges are dependent on the assessments of senior judges for their advancement, and may be disciplined, among other reasons, for “the contents or merits” of their work.<sup>57</sup> In other words, individual administrative judges in Germany have strong incentives to conform their rulings to the institutional standards set within the administrative hierarchy.

Our model would predict broad delegations, faithful applications of expertise by agencies, and a marginal role for judicial review. When we look to the German administrative law system in practice, what we see appears consistent with these predictions. German statutes frequently contain broad delegations of power to the ministries that implement them.<sup>58</sup> To take one example, Germany’s most important piece of air quality legislation, the Federal Pollution Control Act (*Bundes-Immissionsschutzgesetz*), identifies broad objectives that emissions controls should serve, but leaves it to the administration to provide the real policy content.<sup>59</sup> Also, in sharp contrast to the

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52. EDWARD C. PAGE, *POLICY WITHOUT POLITICIANS: BUREAUCRATIC INFLUENCE IN COMPARATIVE PERSPECTIVE* 68 (2012).

53. *Id.* at 68, 76-78, 83.

54. *See infra* Part IV.B.

55. GG Art 101(1) (Ger.). *See also* MAHENDRA SINGH, *GERMAN ADMINISTRATIVE LAW IN COMMON LAW PERSPECTIVE* 190 (2010).

56. MAHENDRA SINGH, *supra* note 55, at 193.

57. *Id.* at 195.

58. Rose-Ackerman, *supra* note 50, at 57 (noting the lack of specificity of many statutes).

59. BUNDES-IMMISSIONSSCHUTZGESETZ, BGBl.I, p. 721; *See also* Monika T. Neumann, *The Environmental Law System of the Federal Republic of Germany*, 3 ANN. SURV. INT’L & COMP. L. 69, 87-89 (1996). On some occasions, the Bundestag will subsequently amend a broadly-written law, adding more specificity in light of the

rulemaking regime set up by the American Administrative Procedure Act, Germany's analogue, the *Verwaltungsverfahrensgesetz*, leaves the administration almost complete discretion over the procedures it is to follow in formulating regulations.<sup>60</sup> Of course, there is no easy way to assess whether administrators take advantage of the broad delegations of power to implement legislation at odds with the policy goals of the legislature. But this we can say: if administrative abuse of policymaking discretion were perceived as a significant problem in Germany, we would expect it to be a major topic of discussion in the German administrative law scholarship, and it is not.

We also predict that judicial review plays a limited role in German administrative law, in large part because the legislature has effective means for controlling administrative behavior without resorting to judicial review. The focus of administrative review, as enshrined in Germany's Administrative Procedure Act, is squarely on the protection of individual rights, rather than oversight of policy-relevant discretion.<sup>61</sup> In comparative terms,<sup>62</sup> "unlike the French *Conseil d'Etat*, the present German administrative courts are not considered primarily a super watchman over the activities of the administration to keep it within the law. They are primarily the protectors and defenders of the rights of an individual against the administrative excesses."<sup>63</sup> Administrative law doctrine accords to administrators a "margin of appraisal" (*Beurteilungsspielraum*) in determining how legal concepts apply in some concrete situations,<sup>64</sup> and broader, policy-relevant determinations—setting permissible exposure levels for specific pollutants, for instance—often escape review altogether.<sup>65</sup>

### B. High-Autonomy Agencies and Low-Autonomy Courts

Consider now the expected equilibrium with high-autonomy agencies and low-autonomy courts. This is a situation in which courts can provide a valuable service as monitors.

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administration's experience in implementing the law. *See id.* at 91-93 (describing the evolution of Germany's legal regime for protecting water quality).

60. *See* Rose-Ackerman, *supra* note 50, at 60.

61. *See* VERWALTUNGSVERFAHRENSGESETZ, Art. 40 (Ger.) (granting administrators authority to exercise discretion consistent with the law; *See also* MARINA KÜNECKE, TRADITION AND CHANGE IN ADMINISTRATIVE LAW: AN ANGLO-GERMAN COMPARISON 78 (2010) (noting sharp limits on judicial review on exercises of discretion).

62. For more discussion of judicial review in France, *see infra* Part IV.B.

63. SINGH, *supra* note 55, at 191.

64. *See* Arai-Takahashi, *supra* note 22, at 75-80 (discussing the doctrine). Interestingly, on occasions when it has reviewed administrative law issues, Germany's Constitutional Court—which sits at the apex of the judicial system and thus enjoys high vertical and horizontal autonomy—has been substantially less deferential to discretionary decisions.

65. *See* ROSE-ACKERMAN, *supra* note 50, at 60.

The strategies courts would choose in each of the various situations they might confront (or more technically, the different nodes of the game tree) are the same as in the above discussion, because the courts are of the same type.

The agency's strategies, however, may differ. If there is a broad delegation of power and broad scope of review, the agency's choice between playing it safe and applying expertise will depend on its preferences (achieving policy ends versus avoiding reversal)—assuming judicial competence at distinguishing valid from invalid applications of expertise. With effective judicial review in place, the agency cannot use the application of expertise as a smokescreen to promote its own policy interests. So long as the agency's own interests are not better served by playing it safe, we should expect to see agencies applying expertise, and doing so in a way faithful to the statute's goals.

However, if the scope of judicial review is narrow, a broad delegation of power to the agency effectively licenses it to pursue its own policy interests under cover of applying expertise. On the other hand, if the delegation to the agency is narrow, the agency will predictably play it safe, knowing that the court would otherwise reverse it.

The legislature's choice between narrow and broad delegations will ultimately come down to how highly it values expertise, how reliable the agencies are, and to its capacity for writing detailed statutes. Generally speaking, in this state of affairs, judicial review can provide safeguards against the abuse of expertise, and make it worth a legislature's while to draft statutes to give agencies some running room. But the quality of judicial review—here assumed—is key: if courts are not adept at distinguishing between valid and invalid applications of expertise, the results will be less salutary, as discussed below.<sup>66</sup>

<b>Profile:</b>	High autonomy agencies, low-autonomy courts
<b>Prediction:</b>	broad delegation; broad scope for judicial review; application of expertise by agencies; judicial review plays important role
<b>Example:</b>	France

The Constitution of France's Fifth Republic, adopted in 1958, establishes a semi-presidential political system, in which the President, who heads the executive branch, is elected independently of the parliament.<sup>67</sup> When the President and the parliamentary majority come from the same party, the dynamics of governing roughly approximate

66. *Infra* Part IV.C.  
67. LA CONSTITUTION DU 4 OCTOBRE 1958 Oct. 4, 1958, art. 6-8, 24 (Fr.).

those of a parliamentary democracy. But the situation is different under "cohabitation," when the president's party does not hold a majority in the National Assembly, the lower house of parliament. Under cohabitation, the President must appoint a prime minister acceptable to the National Assembly, which means in effect, a prime minister from the party holding the parliamentary majority.<sup>68</sup> Thus, at least during periods of cohabitation, the concentration of power in France is reduced,<sup>69</sup> and the government is less reliably able to exert direct control over the ministries.<sup>70</sup>

Of course, the claim that the French administration enjoys high autonomy, especially during cohabitation, must be understood as both a generalization and a relative claim. As a recent study shows, political leaders are sometimes involved in the drafting of regulations in France.<sup>71</sup> Notably, however, the impetus for regulation more often comes from within the administration, arising from bureaucrats' interactions with interest groups, with politicians remaining "relatively silent" through the process.<sup>72</sup>

Like Germany, France has in recent years established some independent agencies,<sup>73</sup> but most statutes are still implemented by the administration. The administration itself has high autonomy: it is vested with substantial powers and subject to inconsistent oversight by the political branches. "It is an outstanding characteristic of modern French administration," in the words of a leading British authority on the subject, "that discretion should be given to officials rather than politicians."<sup>74</sup> And although the stability of governments since 1958 may have strengthened political influence over administration, "parliamentary control through effective ministerial accountability and workable specialist committees remains to be achieved."<sup>75</sup>

Although judicial review in France differs in important respects from Germany, France shares with Germany an administrative judiciary with low vertical autonomy. Administrative courts in France

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68. L. NEVILLE BROWN & JOHN S. BELL, *FRENCH ADMINISTRATIVE LAW* 10 (1998).

69. See MATTHEW SOBERG SHUGART & JOHN M. CAREY, *PRESIDENTS AND ASSEMBLIES: CONSTITUTIONAL DESIGN AND ELECTORAL DYNAMICS* 60-61 (1992).

70. A further source of division in the French constitutional order is that the Constitution distinguishes between a *pouvoir réglementaire* of the government and a *pouvoir législatif* of parliament, and accords to the executive "sweeping powers to regulate by degree." BROWN & BELL, *supra* note 68.

71. PAGE, *supra* note 52, at 42-44.

72. *Id.* at 43.

73. For an exhaustive treatment, see CONSEIL D'ETAT, *RAPPORT PUBLIC 2001 : JURISPRUDENCE ET AVIS DE 2000. LES AUTORITÉS ADMINISTRATIVES INDÉPENDANTES*.

74. BROWN & BELL, *supra* note 68, at 26.

75. *Id.* at 27. See also FREDERICK F. RIDLEY & JEAN BLONDEL, *PUBLIC ADMINISTRATION IN FRANCE* (1969).

are themselves a part of the administration, not the judicial branch.<sup>76</sup> The administrative courts have significant independence from the political branches, but internally, they are hierarchical, bureaucratized, and professionalized. No political involvement is permitted in the selection or promotion of judges, whose careers instead are governed by meritocratic and seniority-rewarding rules.<sup>77</sup> Collegial decision-making and the secrecy of decisions also ensure that judges know to be responsive to the internal norms of their profession, rather than the wishes of outside political actors.<sup>78</sup>

In such a system, we would expect to see broad delegations from the legislature, and broad latitude on the part of courts to review administrative decisions, in order to keep the administration in line. Article 38 of the 1958 French constitution permits an open-ended delegation of legislative authority to the administration (subject to the possibility of a legislative countermand),<sup>79</sup> and the delegations from the Parliament leave substantial latitude to the administration.<sup>80</sup>

Also, French administrative law equips administrative courts with powerful tools to keep the administration in line. The French administrative judge, “as compared to its counterparts elsewhere in Europe . . . has perhaps some of the broadest range of powers.”<sup>81</sup> Substantively, French administrative judges have broad-ranging powers of review, and an unusually wide array of remedial powers, including powers to impose damages and to annul administrative actions.<sup>82</sup> In the words of one authority,

The administrative judge in France not only has authority to hear actions for damages . . . but also actions seeking annulment of administrative acts as *ultra vires*, something that in other European countries is often limited to certain categories of acts, whether to those of an exclusively individual or

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76. “In house” judicial review of administration dates back to Napoleonic days, and is the source for Henrion de Pansey’s famous observation that to judge the administration is itself administration (“*Juger l’administration, c’est encore administrer*”). HENRION DE PANSEY, *DE L’AUTORITÉ JUDICIAIRE EN FRANCE* (1818). For more on the historical background, see Bignami, *supra* note 1, at 4-6.

77. Jean Massot, *Powers and Duties of the French Administrative Judge*, in *COMPARATIVE ADMINISTRATIVE LAW* 415, 415-16 (Susan Rose-Ackerman & Peter Lindseth eds., 2010).

78. *Id.* at 416.

79. BOGDAN IANCU, *LEGISLATIVE DELEGATION: THE EROSION OF NORMATIVE LIMITS IN MODERN CONSTITUTIONALISM* 254-55 (2012).

80. Rose-Ackerman & Perroud, *supra* note 43, at 228 (describing the ideal of French administration as that “[s]tatutes should set out broad frameworks, but their concrete implementation should be left to impartial, expert bureaucrats committed to republican values.”).

81. Massot, *supra* note 77, at 417.

82. *Id.*; DIDIER TRUCHET, *DROIT ADMINISTRATIF* 136-38 (2008).



an exclusively regulatory character depending on the system.<sup>83</sup>

As Neville Brown and John Bell argue, these broad judicial powers serve as a counterweight to the broad powers given to administrators.<sup>84</sup> We add that what makes this compromise acceptable to the Parliament is the reliability of the administrative courts.

### C. *Low-Autonomy Agencies and High-Autonomy Courts*

What situation results when we have a low-autonomy agency and a high-autonomy court? From a principal-agent perspective, this is a situation where the presence of judicial review with a broad scope degrades the quality of policy. In the absence of judicial review, the legislature would delegate broadly, and the agency would apply unverifiable expertise. If the court possessed a broad scope of review, it could use it as a pretext for substituting its own policy judgments for the agency's. It makes sense, then, for the legislature to restrict the scope of judicial review. But courts themselves will push the boundaries of their limited scope of review. This is generally consistent with administrative law in Britain, Canada and Australia.<sup>85</sup>

What is interesting in this respect, and not surprising, is that courts can seek to expand the scope of their effective review by aggressively interpreting their grants of authority from the legislature. And, as discussed below, we do see evidence of this phenomenon.

<b>Profile:</b>	High autonomy courts, low-autonomy agencies
<b>Prediction:</b>	Broad delegation; narrow scope for judicial review; application of expertise by agencies; courts push to expand role of judicial review
<b>Example:</b>	British Commonwealth

Three Commonwealth countries, Australia, Great Britain, and Canada, illustrate the dynamics in systems with low-autonomy agencies and high-autonomy courts. Although these three systems differ in many important respects, their common legal background means that they share a number of features that are relevant to our purposes.<sup>86</sup> All are parliamentary democracies with a common law

83. *Id.* at 417.

84. BROWN & BELL, *supra* note 68, at 27 ("In essence, administration by bureaucrats is made more palatable because, through the administrative courts, the bureaucrats have established their own control and supervisory machinery.")

85. S. DE SMITH, JUDICIAL REVIEW OF ADMINISTRATIVE ACTION 93-376, 379-583 (4th ed. 1980); H. WADE, ADMINISTRATIVE LAW 213-409, 319-409 (5th ed. 1982); S. HOTOP, PRINCIPLES OF AUSTRALIAN ADMINISTRATIVE LAW 327-54 (6th ed. 1985); John Willis, *Canadian Administrative Law*, 6 J.S.P.T.L. 53 (1961).

86. In a similar vein, Stephen Gardbaum has recently argued that the Commonwealth countries together define a new model of constitutionalism, notwithstanding

heritage, and as such, each combines a low degree of agency autonomy with a high degree of judicial autonomy.

As discussed above,<sup>87</sup> parliamentary democracy concentrates control of the executive and legislative branch in the same party or coalition, lowering the barriers to legislative control over administration. In each of the three countries, the government in power appoints the heads of ministries; in each, the number of national political parties is small, and having a single party in power is the norm. However, Australia and Canada are both federal regimes, which dilutes the concentration of government power to some extent. Also, in recent decades, Australia, Britain, and Canada have all experimented with independent or quasi-governmental agencies, which have a more attenuated relationship to political control, but these have by no means displaced the traditional organization of administration into ministries.

As common law systems, they share in a tradition where administrative action is reviewed by ordinary courts, as opposed to specialized administrative jurisdictions. And the ordinary judiciary has a high degree of independence, in the sense of both vertical and horizontal autonomy. This tradition, too, has come under pressure in recent decades, and in all of these systems, administrative actions are also subject to review by specialized administrative tribunals, albeit to varying extents.<sup>88</sup> Still, ordinary courts continue to play an important role in administrative law.

As expected, in the Commonwealth systems, we see substantial delegations of power to administrative agencies, in order to take advantage of administrators' expertise. All of these systems have sought to constrain the scope of judicial review by the ordinary courts, to keep those courts from substituting their own judgment for that of administrators. Interestingly, the ordinary courts have in many instances fought back, pushing against the efforts to limit the scope of review.

For instance, in Britain, the ordinary courts chafed at legislative efforts to limit the scope of their review. The *Anisminic* doctrine illustrates the dynamic at work. The Foreign Compensation Act of 1950 ostensibly placed decisions on compensation claims made by an administrative tribunal beyond the scope of judicial review. The House of Lords, however, declared that the ouster clause did not prevent the courts from declaring that the tribunal lacked jurisdiction because it misconstrued the organic statute.<sup>89</sup> *Anisminic* in effect converts all

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their differences. See STEPHEN GARDBAUM, *THE NEW COMMONWEALTH MODEL OF CONSTITUTIONALISM: THEORY AND PRACTICE* (2013).

87. See *supra* text accompanying notes 24-32.

88. See *infra* text accompanying notes 89-94.

89. *Anisminic Ltd v Foreign Compensation Commission*, [1968] 2 AC 147 (H.L.) (Appeal taken from Eng.).

errors of law into jurisdictional errors, and hence vaporized the limit on judicial review. The *Anisminic* decision was one of the "assertive steps that made [the courts] the conclusive arbiters on all questions of law."<sup>90</sup> Likewise, through the doctrine of "jurisdictional facts," courts in Australia have arrogated to themselves authority to make conclusive, *de novo* determinations on any facts that bear on whether the agency properly has power to act.<sup>91</sup>

Nor are Commonwealth judiciaries inclined to show great deference to administrators on questions of law. The Supreme Court of Canada initially struck a deferential tone in *Canadian Union of Public Employees Local 963 (CUPE)* (1979), declaring that the Court should only overturn patently unreasonable interpretations of statutes. But the Supreme Court diminished its deference in the late 1980s and early 1990s.<sup>92</sup> Australia's Supreme Court has also rejected the American-style *Chevron* approach as too deferential, preferring instead an approach that "favors wider judicial control over administrative action."<sup>93</sup> It is important not to overstate the point: Australian courts have respected some of the limits on their review of administrative action.<sup>94</sup> But the general pattern is one in which courts push against the legislatively-imposed constraints on their review of agencies.

#### D. High-Autonomy Agencies and High-Autonomy Courts

The last configuration is a high-autonomy agency and a high-autonomy court. What strategies of delegation, discretion, and deference will the players choose?

Starting again with the courts, if the legislature delegates broadly and the agency plays it safe, a court will generally uphold what the agency does—but the very breadth of the delegation may mean that there is no fully "safe" move for the agency, opening the possibility of some reversals, particularly if the courts disapprove of the agency's policy outcome. If the agency applies expertise pursuant to a broad delegation, highly autonomous courts thus have wide latitude either to uphold or to reverse. We can expect courts to take

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90. Michael C. Tolley, *Judicial Review of Agency Interpretation of Statutes: Deference Doctrines in Comparative Perspective*, 31 POLICY STUD. J. 421, 426 (2003).

91. *Id.* at 427.

92. The key cases are: *Union des Employes de Service, Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048 (Can.) and *Canada v. Public Service Alliance of Canada* [1991] 3 S.C.R. 572 (Can.) (Supreme Court tightens up on deference). Court first determines *de novo* whether agencies exceeded jurisdiction, must then determine (*de novo*) whether interpretative matter is itself jurisdictional, and only if it's not, court applies reasonableness test: but reasonableness simpliciter, not patently unreasonable.

93. Tolley, *supra* note 90, at 427.

94. For instance, the Australian courts have generally declined to contest their exclusion of review of what we would call legislative rules. See W. B. LANE & SIMON YOUNG, *ADMINISTRATIVE LAW IN AUSTRALIA* 74 (2007).

advantage of this latitude, to uphold the agency action some of the time, and reverse it some of the time—whether from suspicion that the agency is claiming “expertise” as a pretext for pursuing its own policy preferences, or as a pretext for pursuing *the court’s* own policy preferences. Now consider what happens if the legislature delegates narrowly to the agency. If the agency plays it safe, we can expect that the court generally will uphold the agency’s action—failing to do so exposes it as unfaithful to the statute—although, since the court’s autonomy shields it from meaningful censure, it may still reverse the agency’s “safe” decision on occasion. Conversely, if the agency applies unverifiable expertise when the statute seems to foreclose this, the court will probably reverse the agency, but may on occasion be emboldened to uphold the agency if the court likes the policy outcome. The net effect is that the outcomes of judicial review are hard to predict, though both legislatures and agencies can take actions to diminish the probability of reversal.

What will the agency do? In effect, the agency faces a deference lottery. In terms of the model, the agency’s best response may be a “mixed strategy,” in which the agency plays it safe some of the time, and applies expertise some of the time. In the real world, the agency may be able to choose a policy that lies between these extremes. The particulars of the agency’s choice will depend on the particular node where it finds itself and its preferences (including how much it wants to avoid reversal and the extent to which its policy preferences are at odds with the legislature’s). But generally, the unpredictability of judicial review will encourage the agency to play it safe more than they otherwise might, in order to provide some insulation against reversals.

The legislature, in turn, could choose a narrow delegation (that is, high statutory specificity), which would generally induce faithful implementation by the agency and favorable review by the court, but this comes at a cost: it deprives the policy of the benefit of agency expertise, and it uses a lot of legislative capacity (at least in a system with separation of powers) to draft detailed statutes. The legislature could also delegate broadly, but restrict the scope of review. The cost would be that it would diminish or even eliminate monitoring, and in the circumstance when it is most needed (when there’s a broad delegation of power). The legislature’s best bet is to adopt a mixed strategy of its own: granting a wide scope of review to permit some effective monitoring, and alternating between delegating narrowly and broadly consistent with its capacity.

<b>Profile:</b>	High autonomy courts, high-autonomy agencies
<b>Prediction:</b>	Mixed strategies: broad and narrow delegations; agencies sometimes apply expertise, and sometimes play safe; courts sometimes review aggressively, sometimes defer to agency
<b>Example:</b>	United States

These features generally describe what we see in the United States, a system with both highly autonomous agencies and highly autonomous reviewing courts. The separation of powers system, under which agencies are instrumentalities of the executive branch and report to the President, leaves Congress with few tools to prevent *ex post* defections by agencies implementing congressional statutes. And the profusion of "veto players"<sup>95</sup> in the U.S. bicameral legislative system, in which bills must satisfy not only two houses of Congress, but also powerful committee "gatekeepers," and a President vested with veto power, sharply limits Congress's capacity to control agencies *ex ante* by providing minutely-detailed delegations of power.<sup>96</sup> Both of these factors contribute to agencies' effective autonomy from Congress.

Review of American administrative agencies is confided to the ordinary federal courts. Federal judges, of course, have life tenure under the U.S. Constitution.<sup>97</sup> And although federal courts are vulnerable to having their rulings reversed by courts higher in the judicial hierarchy, judges do not depend for job security or their professional advancement on their superiors' satisfaction with their rulings.

Faced with a limited capacity to control agencies, Congress takes a mixed approach, delegating broadly in some instances, and specifying agency details in minute detail in other statutes.<sup>98</sup> For instance: Congress maintains tight control over the imposition of federal taxes by maintaining an exhaustively detailed federal tax code, but gives only the broadest guidelines to the agencies charged with ensuring workplace health and safety.<sup>99</sup> Of course, a number of factors bear on *which* policy areas Congress maintains a tight control over, including, possibly, the political salience and importance of the subject, and the importance of flexibility in response to changing circumstances. Our point is that Congress's limited capacity means it cannot always specify in detail how agencies should perform, even when it might

95. See generally TSEBELIS, *supra* note 27.

96. See also KEITH KREHBIEL, *PIVOTAL POLITICS* (1998) (explaining more generally how the structures of the American legislative process restrict Congress's capacity to change the status quo legislatively).

97. U.S. CONST. Art. III sec.1.

98. HUBER & SHIPAN, *supra* note 7.

99. Occupational Health and Safety Act, 29 U.S.C. § 651 (1970).

wish to, and that Congress instead does what it can, investing in ex ante controls in a selection of areas.

The U.S. administrative law system assigns a prominent role to courts and judicial review. The basic framework of the Administrative Procedure Act of 1946 grants federal courts extensive powers of review, including the authority to decide all questions of law relevant to agency decision-making.<sup>100</sup> And in practice, judicial review of agencies in the United States resembles a mixed strategy. Courts defer to agency decisions some, but not all, of the time. Indeed, as one of us has shown, in the context of agency constructions of federal law, the judicial approach is almost impossible to predict.<sup>101</sup> In previous work, one of us has emphasized how doctrinal uncertainty can contribute to judicial inconsistency in deference decisions.<sup>102</sup> Yet from a strategic point of view, deference lottery serves two ends: it both provides political cover for decisions motivated by policy preferences, and it also is less costly than applying a high level of scrutiny across the board.

As noted above, it is difficult to develop system-wide characterizations of how agencies exercise discretion, but what we do know suggests a highly variegated picture, where agencies play it safe some of the time and at other times apply unverifiable expertise, sometimes in the service of policy agendas at odds with the statutory mandates they are tasked to serve.<sup>103</sup>

## V. CONCLUSIONS

Comparative administrative law has identified important variations in the way regulatory agencies comply with statutes and courts deal with administrative disputes across jurisdictions. One of the most common explanations relies on legal culture, tradition or ideology. The loose distinction between common law and civil law (in the sense of legal culture and institutional design) is used to identify important variations. However, such explanations cannot provide for more detailed and subtle differences with the same legal family.

Economic and social realities are also considered to matter, at least, in the way they generate different challenges to regulatory agencies and courts. For example, Table Two shows important differences concerning government spending and intensity of regulation (a possible measure of government intervention in the economy) that inevitably generate a distinct context for administrative procedure and litigation. Clearly the role of administrative law responds to particular needs and there are significant variations in these needs, as

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100. APA § 706.

101. Mathews, *supra* note 9.

102. *Id.*

103. *Id.*

documented by Table Two. Overall, these various arrangements reflect varying social preferences.<sup>104</sup>

TABLE 2

	Government Spending as % of GDP (2009, OECD)	Product Market Regulation Indicator <sup>105</sup> (2008, OECD)
United States	43%	0.84
United Kingdom	51%	0.79
Australia	37%	1.23
Canada	44%	0.96
Germany	48%	1.27
France	57%	1.39

Our article suggests a systematic explanation for the behavior of regulatory agencies and courts based on a political economy theory. The apparently different patterns of regulatory delegation and court reaction respond to similar decisions, notwithstanding varying payoffs. These variations on expected payoffs are conditioned by legal tradition and economic realities as well as by political and constitutional arrangements. We show that they form different bundles of institutional factors that change in significant ways the expected payoffs of governments (principal), regulatory agencies (agent), and courts (monitor). As a consequence, faced with an identical set of possible strategies, the relevant actors choose different responses as a function of the varying bundles of institutional factors. In our model, different patterns of regulatory behavior and court deference emerge as rational responses to identical problems conditioned on exogenous parameters.

The conventional explanations are captured in our approach by the distinction between low-autonomy and high-autonomy courts. However, as we note, this distinction does not capture the nuances across jurisdictions within similar legal families. A political economy

104. See Mark J. Roe, *Legal Origins, Politics, and Modern Stock Markets*, 120 HARV. L. REV. 460 (2006) (arguing that social democracy, rather legal origin, explains differences across jurisdictions in relation to designing corporate law).

105. According to the OECD, this integrated indicator measures “the extent to which policy settings promote or inhibit competition in areas of the product market where competition is viable.” See <http://www.oecd.org/economy/growth/indicatorsofproductmarketregulationhomepage.htm> (last visited Oct. 9, 2013). By measuring one type of state intervention in the economy, it partially explains the potential demand for administrative law (i.e., a less regulated economy begs for less administrative law).

model based only on low versus high-autonomy courts fails to address essential features of regulatory behavior and court performance.

Our approach considers a second dimension, i.e., low-autonomy and high-autonomy agencies. By coupling the court dimension with the variation in agencies, our model can explain differences within legal families in a way that previous political economy models could not.

The political economy model developed in this article proposes four possible equilibrium arrangements that capture four models: low autonomy of both agencies and courts (Germany), high autonomy of both agencies and courts (United States), low autonomy of agencies with high autonomy of courts (United Kingdom and Commonwealth jurisdictions), and vice-versa (France). Broader or more limited delegation to agencies as well as judicial review can be understood in the context of these four types. Differences across administrative law agencies can be framed in the context of our model. They respond to strategic choices in different institutional contexts that reflect different costs in drafting statutes and aligning preferences between agency and principal.





the game. As noted above, we predict mixed strategies in the case of the high-autonomy agency, high-autonomy court regime. Lastly, the game tree cannot represent the phenomenon we predict in Part IV.C. above: courts seeking to broaden the scope of their review beyond what was intended by the legislature.

