Political Uncertainty and Administrative Procedures*

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Free elections are central to the institutional structure of democratic governments. As Hamilton noted in the *Federalist Papers*, elections create "an immediate dependence on, an intimate sympathy with, the people" (Hamilton, Jay and Madison 1966: 165). But although elections establish an ongoing connection between representatives and citizens, their impact on policy implementation is less clear. Regular elections create *uncertainty* about who will hold office and for how long. They therefore introduce an additional set of considerations for those who design the structure of government agencies beyond simple organizational effectiveness. In this chapter, we explore the relationship between electoral uncertainty and the adoption of a particularly important aspect of agency structure: the *administrative procedures* public officials require government agencies to follow when agencies issue policies.

There are two literatures that address the issue of why public organizations are structured in particular ways. The first addresses the problem of how elected officials can use structure to control agencies. A number of scholars have shown that organizational design, administrative procedures, and other aspects of organization structure can provide elected officials with a means of overcoming agency problems. According to this scholarship, structural choices are the product of a struggle between independent-minded bureaucrats and their political fathers (Weingast and Moran 1983; McCubbins, Noll and Weingast 1987; Fiorina 1983; Ferejohn and Shipan 1983; Bawn 1995; Epstein and O'Halloran 1994, 1996, 1999; Lupia and McCubbins 1994; Epstein and O'Halloran 1999; de Figueiredo, Spiller and Urbiztondo 1999; Huber and Shipan 2001). Importantly, one of the key insights in this literature is that the nature of control, and thus delegation, will depend on the degree of political homogeneity: when control over political institutions is unified, delegation to executive agencies will be less constrained by thick administrative requirements and procedures.

This vein of the scholarship on delegation suffers from an important shortcoming, however. While all of this literature demonstrates the way in which a legislature or president can overcome basic moral hazard problems—either a lack of effort or implementation of a new policy position—the actors in these models are static. In democracies, however, elected officials and the interests they represent will change. This means that agencies are not the only actors who threaten the future implementation of the officials' or group's target policy. In addition, *current* officials must be concerned that *future* holders of public authority will undo what has been accomplished in the present period. Unfortunately, since the actors never change in most of the control and delegation models, these studies leave this fundamental design problem largely unexplored.

A second literature adds such a dynamic perspective. A number of scholars, including Moe (1989, 1990), Rothenberg (1993), Horn (1995), and McCubbins, Noll and Weingast (1987, 1989), argue that elected officials are keenly aware of the likelihood of their own demise. Thus, the policies they enact are subject to possible sabotage by future winners (Moe 1991, Horn 1995, Rothenberg 1994). The potential for such destructive behavior means that today's winners must install protective mechanisms against the future actions of one's opponents (Moe 1989). In the context of American bureaucracy, this means that prevailing groups will legislate a number of "insulation mechanisms" to ensure that their creation is not undermined. As Moe explains:

> The driving force of political uncertainty, then, causes the winning group to favor structural designs it would never favor on technical grounds alone: designs that place detailed formal restrictions on bureaucratic discretion, impose complex procedures for agency decision making, minimize opportunities for oversight, and otherwise insulate the agency from politics. The group has to protect itself and its agency from the dangers of democracy, and it does so by imposing structures that appear strange and incongruous indeed when judged by almost any reasonable standards of what an effective organization ought to look like (Moe 1990, 137).

In this context, organizational design can be seen as a product of the political uncertainty with which political actors live (Horn 1995; Moe 1989, 1991). In sum, this literature makes two claims about the relationship between such uncertainty and the structure of government: first, that political uncertainty leads to structural insulation of government agencies, and second, that this structural insulation leads to greater inefficiency of agency outputs.

For students of public organizations, however, the existing dynamic theory also requires expansion. In particular, the theory has two shortcomings. First, the dynamic theory assumes that control is complete. This ignores the possibility that administrative procedures will be the outcome of a bargain, a bargain which must be implemented politically itself. As the literature on static delegation points out, the outcome of such bargains will depend on the political homogeneity, or heterogeneity, of the actors controlling various political institutions. Second, the dynamic theory ignores the possibility that electoral uncertainty itself is a *variable*. In fact, at different times in the history of the federal government *and* the state governments, uncertainty about who would hold elected office has varied greatly. In some cases, outcomes are highly volatile from election to election. In others, electoral outcomes are stable, and virtually preordained.

In this paper, we develop a model which brings together these central features of the design of administrative procedures, combining insights about political feasibility and political incentives in a static delegatory environment, with insights about political uncertainty and the dynamic considerations implied by electoral volatility. The model proceeds in two parts. The first component is a formal model that captures the interaction between a legislature, an elected executive and a representative executive-branch agency. The model establishes a benchmark case in which actors are only concerned about current period outcomes. In the model, the players must interact to determine both the administrative constraints placed on the agency and an agency's implementation of policy under these procedural guidelines. This approach highlights that implementation of administrative procedures might be politically infeasible in environments where the legislature would want to propose them. Additionally, when such procedures are politically feasible, the legislature and governor might not find them beneficial. Only under specific conditions will implementation of administrative procedures be *both* beneficial *and* politically feasible.

In the second part of the model, we extend this *static* analysis to explicitly take into account the *degree of uncertainty* about future political environments. We do this using a decision-theoretic model incorporating expectations. The model serves to generate a number of important insights—and testable hypotheses—about when and where electoral uncertainty can lead to the use of administrative procedures. First, incorporating expectations into the decision-making calculus, the executive and legislature both benefit from thicker procedures in a greater number of environments. In this sense, the model shows how the introduction of electoral uncertainty expands the set of cases under which agency structure will be used to insulate policy decisions. Second, the model points to an important revision to the existing theory on when electoral competition will lead to thick procedural guidelines. As discussed previously, one of the central claims in the extant literature is that *uncertainty* leads to procedural richness. This would imply that when future election outcomes are expected to be very close—in other words when uncertainty is maximal—public officials will be most likely to impose such procedures. Our model predicts, however, that political parties, and the interest groups which support them, must feel that their future prospects are *weak* in order to be willing to bear the costs of reduced agency flexibility. The reason is that they will be the most willing to pay the costs of "insulation" by procedures since they will frequently be out of power. In this sense, it is under conditions of greater certainty—when the likelihood that one side will win is high—that we are most likely to see such procedures. Finally, by bringing in political *feasibility*, the model provides an important redefinition of the relationship between divided government and future expectations by showing how the two interact to determine when and where we are likely to see more robust procedural restrictions placed on agencies.

The paper proceeds as follows. In the following section, we lay out the static model which provides intuition for the relationship between political incentives and political feasibility. In Section 3, we turn to dynamics, exploring how uncertainty about future control over political institutions affects the results from a model with no uncertainty. Importantly, the results of this analysis point to the need to alter our current understanding of how political uncertainty relates to agency insulation. In Section 4, we illustrate the most important result in the paper by discussing two cases: the origins of the Consumer Product Safety Commission, and the emergence of the Federal Communications Commission and broadcast radio regulation. These two cases serve to emphasize how electoral strength and not uncertainty, are the key to understanding when thick procedural requirements will be placed on agencies. When groups are confident they will be out of power, they tend to protect their policies from future drift with thick procedures, but when they are not worried about their future prospects of control, agencies will be relatively unencumbered by such procedural mechanisms. Finally, in Section 5, we offer some concluding thoughts.

<A> Current Incentives and Agency Costs

Consider a single dimensional policy space with each actor's preferences being single peaked on the real line. Assume, that utility functions are given by $U^i = -|x-i|$ where x is the relevant policy and *i* is actor *i*'s ideal point. Let L, G and A represent the ideal points of the current legislature, elected executive and representative agency respectively. Note that we use the acronym G to indicate the elected executive and will use the term "governor" to refer to her. Assume, for the moment, that the governor is able to appoint agency heads with similar preferences (i.e., A=G).[1]

We analyze a three-stage game. In the first stage, the legislature proposes a statute to impose procedural complexity on the representative agency. Adopting administrative procedures imposes decision costs on agencies.[2] Thus, the legislature proposes to impose an exogenously determined level of cost T^A on agencies, or the legislature imposes no cost, indicated by $T^A=0$. To propose T^A, the legislature pays a cost $C(T^A)$.[3] The governor either supports or vetoes the proposal. In stage two, the agency examines the status quo policy (x^0) and chooses to support it at no cost or to promulgate a rule $x^a \in \mathbf{R^1}$, in accordance with the administrative procedures, at a cost to the agency equal to T^A. In stage three, the legislature observes the agency's decision and chooses to support the agency at no cost or to propose a new statute x^S at cost T^L.[4] Again the governor will support or veto the proposal.

Without loss of generality, assume that the current legislature's ideal point L = 0. Also assume that $G=A\leq L$. As such, there are three cases to consider capturing the relative position of the status quo policy relative to G,A and L: first, $x^0 < A$; second, $x^0 \in [A,L]$; and finally, $x^0 > L$. We refer to these three cases as the “aligned preferences”, “zero-sum” and “radical agency” game respectively.

Individual rationality, subgame perfection and complete and perfect information are assumed throughout. Thus, we solve the game by backward induction. In order to gain both intuition and insight about the equilibrium to the model, in the following subsections, we take each stage of the game in turn to discuss the outcomes. Notably, we provide a formal proof of the results in the appendix.

<B> *Overturning the Agency*

We begin by analyzing the behavior of the legislature and governor given the agency’s decision in stage two. For the “aligned preferences”, “zero-sum” and “radical agency” game, the behavior of these two actors in stage three will be the same. The intuition is straightforward. Whether the agency maintains the status quo or promulgates a new rule, the legislature and governor have an option to revise the statute. The legislature will want to revise policies that are far from their ideal point relative to the cost of the revision. To propose a revision to policy is costly. The legislature, will therefore, only propose a revision if the benefit outweighs the proposal cost *and* the governor supports the proposal. The governor will only support revisions that move policy closer to its ideal point. Of course, with supermajority support, the legislature can override a gubernatorial veto and will propose a revision.

<B> *Agency Rulemaking*

The agency makes its decision given the behavior of the legislature and governor in stage three. The agency will take into account several factors: the cost to the agency of rulemaking, the cost to the legislature of proposing a revised statute, the size of the legislative coalition that proposes a revised statute, and the governor's support for a proposed statute.

<C> *Aligned preference environment.* Recall that in this environment the preferences of the governor, agency and legislature are aligned relative to the status quo. If the legislature's proposal costs are large relative to the status quo, then the agency will be able to promulgate rules equal to its own ideal point since the legislature does not realize a net benefit from proposing a revision.

The interesting action, however, occurs when the current legislature's statutory costs are relatively small. In that case, the legislature might have an incentive to propose a revision to the status quo policy. Additionally, the legislature will want to overturn an agency rule if it is far from the legislature relative to the proposal cost. Whether the legislature actually proposes a revision will depend on its *political feasibility,* i.e., gubernatorial support or their ability to override a veto. Foreseeing this, the agency will rule such that the current legislature either supports the rule or the legislature cannot override a gubernatorial veto. That is, if the cost of rulemaking is small enough, the agency will rule as close to its ideal point as possible without triggering legislative action that either garners the support of the governor or can override a gubernatorial veto.[5] Since the governor and agency's ideal points are the same, the agency is only concerned with the legislature if it has supermajority support for a revision. In any event, policy made by the agency, in this *aligned preferences environment*, will make all parties better off.

<C> *Zero-sum environment*. In this environment the preferences of the governor/agency are in opposition to the desires of the legislature relative to the status quo. In contrast to the "aligned preferences environment," any movement of policy away from the status quo makes either the legislature or the governor/agency worse off. In this case, as before, the agency will set policy taking into account costs and veto points. Unlike before, any agency decision is likely to decrease the utility of the legislature and increase the utility of the governor/agency.

<C> *Radical agency environment.* In this environment the status quo is to the right of the legislature's ideal policy and the governor/agency would like to see (from the legislature's perspective) *radical* moves in policy to the left (i.e., decreases legislature's utility relative to status quo). Similar to the "zero-sum environment," there are potential agency rulings that will make the legislature worse off. The agency will have an incentive to make this type of ruling when it has radically different preferences than the legislature, the cost of rulemaking is small enough, and the cost of proposing revised statutes that receive supermajority support is relatively high.

<B> *The Choice of Procedures*

The legislature and governor impose costs T^A on the agency given the agency's incentive to promulgate rules and the governor and legislature's incentives to revise agency decisions. While the elected actor's behavior in stage three is the same in all environments, the agency will behave differently depending on the relative location of the status quo, veto considerations, and the magnitude of the costs of both rulemaking and legislating. Thus, we examine the decision to impose costs on agency decision making in each environment.

Proposition 1: *In an "aligned preference environment," the equilibrium cost imposed on the agency by the legislature and governor is* $T^{A*} = 0$.

Proposition 1 provides an intuitive result. The actors' preferences are aligned relative to the location of the status quo. Any movement in policy via rulemaking will make the legislature, governor and agency better off. While there are instances where a *majority* of the legislature would like the agency to make policy even closer to its ideal policy, any proposed revision will be vetoed by the governor. As a farsighted actor, the legislature will impose no additional rulemaking costs on the agency ($T^A = 0$). For all values of the proposal cost (T^L), the agency will promulgate rules in a manner consistent with the legislature's preferences, at the least possible cost to the legislature. The legislature does not have to act to achieve this outcome.

Proposition 2:[6] *In both "zero-sum" and "radical agency" environments, the legislature will impose durable costs on agencies only when a supermajority supports the statute.*

Figure 1 illustrates Proposition 2 for the zero-sum environment. The policy space is single dimensional as illustrated by the horizontal line, with the utility or payoff of the actors indicated on the vertical axis. L represents the ideal point for the legislature. In this model, we simplify the analysis by setting L = 0. The utility that L receives for a given policy x in the policy space is graphically illustrated by the downward sloping line. As you can see, L's utility declines linearly as the location of a policy outcome moves away from L's ideal point of zero (0). That is L's utility is equal to $-|x|$ for all potential policy outcomes. In this example, the agency's (A) ideal policy is assumed to be to the left of the legislature's and equal to the executive's (G) ideal point. As discussed, the model explains the legislature's choice to impose costs on agency rulemaking (T^A). To impose these costs, however, the legislature considers three exogenous factors: the cost to overturn agency rules through a statute (T^L), the cost to impose rulemaking costs on the agency $C(T^A)$, and the location of the status quo policy (x^0).

The legislature (L) will impose costs on the agency only if the cost to the legislature ($C(T^A)$) of imposing T^A on the agency is small enough. A farsighted agency, with sufficiently low rulemaking costs, will account for the legislature's cost to revise the status quo (T^L) and, thereby, promulgate rules further from the legislature's ideal point. For example, if $T^A = 0$, then A can promulgate a rule at the point in the policy space ($x^a = -T^L$) where L is indifferent between the agency's rule and overturning the agency at a cost of T^L to achieve its ideal policy. The legislature may prevent this "policy drift" by imposing rulemaking costs (T^A) on the agency that are large enough to discourage agency action. That is, the agency will be indifferent to the status quo policy (x^0) and promulgating a new rule at a cost T^A to achieve policy x^a. The legislature is only willing to incur $C(T^A)$ to impose rulemaking costs on the agency if the legislature realizes a net benefit of maintaining the status quo. This will happen only if the legislature's cost of imposing structure on the agency is small enough ($C(TA) < |(-T^L) - x^0|$ and it can override a gubernatorial veto. In this case, the net payoff from imposing costs on the agency and maintaining the status quo ($U^L(x^0) - C(T^A)$) is greater then the payoff from the agency moving policy close to its ideal point ($U^L(x^a)$).[7]

[FIGURE 1 about here]

An interesting implication of the above analysis is that in no instance will the governor support legislative proposals to impose costs on agencies for the *current legislative session*. In those environments where the legislature might have an incentive to enact procedural legislation, the governor will veto any such proposal. Even in an environment where the preferences of the legislature and governor are aligned procedural legislation will not obtain, since the legislature's net benefit is greatest from not imposing costs on agencies. Thus, when net benefits accrue to a *majority* of the legislature, passage of procedural legislation is not *politically feasible*. When the governor and legislature are aligned so that imposing costs on the agency is politically feasible, such legislation does not provide net benefits to the legislature. Political feasibility and net benefits *both* obtain only when the legislature and governor have opposing interests *and* a supermajority of the legislature supports imposing costs on the agency.[8] This result reflects, in part, behavior confined to the current legislative session. As we will now show, incorporating expectations into the decision-making calculus, expands the set of political environments in which a statute imposing costs on agencies is both politically feasible and provides net benefits to the legislature and governor.

<A> **Future Expectations and Agency Costs**

The above model highlights an important tension that exists between the governor and legislature. This tension reflects, in part, that there is a time-inconsistency between the durability of the decision costs and the information the legislature uses to make its decisions. The durability of statutes (which survive beyond the current legislative session) suggests that the legislature and governor will take into account expectations over future political preferences when designing administrative procedures. Incorporating *political expectations* into the model changes the calculus of the legislature and governor in important ways. Therefore, while the legislature might not be able to gain gubernatorial support for decision costs imposed on the *current* bureaucracy, the governor and legislature might have an incentive to enact durable decision costs, if they expect that future agencies will have divergent preferences. Additionally, the risk of future policy drift will vary over time and across political environments. Accordingly, the opportunities for elected actors to impose costs on agencies will also vary across polities and over time.

To incorporate expectations of the legislature and governor about future agency preferences into the analysis, we characterize two potential political outcomes for each elected official. First, we assume that the governor and legislature have the same information and thus symmetric expectations. To fix the intuition for the dynamics, we will refer to the groups in terms of parties. The public officials' thus have expectations are over which political party will control the legislative and executive branch in the future. Notably, although we refer to these as parties, it is important to note that the main literature that we use takes interest groups as the main actors in the politics of structural choice. Following this literature, our model speaks primarily to interest group competition, as mediated by parties (Moe 1990). However, in order to fix concepts for later empirical work which test the propositions laid out here, in which parties will be a proxy for interest group representation (see, e.g. de Figueiredo 2001b), as we develop predictions here we will refer to parties.

There are two political parties (Republican or Democrat) and four potential outcomes. Figure 2 outlines the political expectations of the current governor and legislature. The probability that the Republicans (Democrats) will control the legislature is p (1-p). For future governors, q (1-q) is the probability of Republican (Democrat) control.

[FIGURE 2 about here]

By characterizing the current political environment similarly (i.e., four environments representing party control of the legislature and governor), we can analyze the current political actor's incentive to impose costs on future agencies, *given their expectations* over future outcomes.

Table 1 lays out the sixteen potential environments. Each cell of the table represents a "current political environment." Note, for example, the environment called "stable homogeneity" the legislature and governor are currently aligned and they expect to continue to be aligned (and of the same party) in the future. In this type of environment, there is negligible risk of future agencies promulgating rules that drift far from the current preferences of the legislature and governor. This is qualitatively similar to the “aligned preference environment” in the model in the previous section. A statute might be politically feasible but it does not provide a net benefit to the legislature. As such, there is little incentive for the legislature (and governor) to impose long run decision costs on the bureaucracy.

[TABLE 1 about here]

Contrast “stable homogeneity” with the two cells labeled “stable heterogeneity.” This environment is equivalent to the “zero-sum” model derived above. In this environment, the legislature and governor have opposing preferences and expect the same relative preferences in the future. The legislature thereby perceives some risk that the bureaucracy will promulgate rules which drift away from the legislature and will want to impose long-term costs on the bureaucracy to insure against that drift. The governor, however, will want to oppose implementation of the statute. Thus, enactment of legislation is politically feasible and provides a net benefit only when the legislature has a supermajority to override a gubernatorial veto.

Finally, note the six examples of “unique homogeneity.” In the unique homogeneity environment the legislature and governor are currently aligned and they expect the agency to have substantially different preferences in the future. Here, there is an incentive to impose long-term costs on the agency. The current legislature and governor both perceive net benefits accruing to them if they protect against future rulemaking by a bureaucracy with substantially different preferences. Thus, the legislation is now both politically feasible and provides a net benefit to all of the political actors.

This analysis suggests a number of testable “all things equal” hypotheses about the use of administrative procedures to constrain agency policymaking. First, the probability of observing a statutory policy enacted that imposes long-run decision costs on the bureaucracy is lower when the legislature and governor have stable aligned preferences. Second, this probability is higher when the legislature and governor have stable opposing preferences *and* the legislature currently holds a supermajority of the seats. And finally, this probability is higher when the legislature and governor are currently aligned *and* the governor and/or legislature is expected to have opposing preference in the future.

<A> **Two Empirical Illustrations: Strong vs. Weak Groups and Procedural Intensity**

In the preceding analysis, we examined the effect that uncertainty about electoral outcomes has on the nature of procedural requirements placed on agencies by public officials. In particular, one of the most important findings was that the focus in the literature should not be on uncertainty per se, but on the difference between groups that are relatively stronger or weaker. Indeed, the formal analysis indicated that while it is true that groups who gain a “moment in the sun,” or in Kingdon’s terms, a “policy window”—in other words, when given the opportunity of unified control of public authority—will logically place thick procedural requirements on agencies, as a means of insulating them from future sabotage, the opposite does not necessarily hold (Moe 1989; Kingdon 1984).

While a deep empirical analysis is beyond the scope of this paper, a few stylized examples are instructive. As noted earlier, the work of Moe (1989, 1990, 1991) and others (e.g.

Horn 1995) provides consistent evidence that groups with a tenuous hold on public authority, such as environmentalists and consumers, will saddle government agencies and the policy implementation apparatus with mechanisms which at once reduce the agency's ability to carry out its mandate, but also protect it from future interference. Importantly, however, these two cases are outliers, in that groups which are only occasionally in power temporarily gain control of public authority (which is by definition a rare event). The models, above, however, provide a more general understanding of the politics of structural choice.

In the rest of this section, therefore, we describe two examples that illustrate the results from the above models and supplement the previous analysis. First, we briefly recapitulate the case of consumer safety regulation, emphasizing that the case was indeed one in which a weak, vulnerable group had temporarily gained control. The second case— early broadcast radio regulation and the origins of the Federal Radio Commission (FRC) and later the Federal Communications Commission (FCC)—is an example of the more common one left out by Moe and his colleagues: one in which a strong group erects a thin and flexible administrative apparatus.

<B> *Consumer Product Safety Regulation*

As argued in Moe (1990), understanding the politics surrounding the erection of the Consumer Product Safety Commission (CPSC) is crucial to understanding its structure. Despite being ensconced in a complex policy environment in which relatively arcane scientific requirements might have favored a flexible, discretionary agency, when erected, the CPSC was an agency whose structure was intentionally burdensome on regulators.[9]

A number of features of the CPSC's initial structure illustrate the structural choice of an agency with limited flexibility. First and foremost, the agency was organized as an independent commission, rather than as an executive agency. Although this would come with all of the pathologies of earlier independent commissions, it would serve to provide a modicum of protection from future drift relative to placement in the executive (Moe 1990). As Lemov (1983) notes, even an attempt to set up a very limited product safety office in the executive Department of Health, Eduacation and Welfare was defeated on the Senate floor, as it was feared that from its innocuous beginnings, such an office would co-opt the CPSC's mandate. Second, the agency was burdened with a number of restrictions on what standards it could promulgate and how they could be enforced. As a case in point, in many areas the CPSC was not given discretion to choose between bans and more limited "work through" remedies in response to non-compliance (Lemov 1983).[10] Finally, the standards which were to be developed were based on a process in which the agency was beholden to standard-seeking private parties and outside groups. On the one hand, rule making was to be initiated by petitions from the public. On the other hand, specific standards were to be developed not by the agency by itself, but through a process in which private parties would be enjoined to develop precise standards.[11] As Moe (1990: 293) summarizes, "…[Its creators] loaded the [CPSC] down with cumbersome procedural requirements and checks on its behavior and discretion. These structural choices made it difficult for the agency to do anything very effectively."

The crucial question which arises is why would its creators design such an ineffective agency? The model illuminates two conditions necessary to observe insulation of policies. First, a group has to have been previously shut out of complete control of public authority, which answers "why then (and not earlier)?" Second, a group has to be fearful that its newfound control will not persist, which answers, "why at all?" Consistent with Moe's story, then, the reason the agency was so hampered was a combination of the past, present and future of the consumer movement. Historically, the consumer movement went from being non-existent to weak. Prior to the 1960s consumers were largely unorganized, with protections limited primarily to food, medicine and trust regulation (Mayer 1989). Organizations such as the Consumer Union, the National Consumers Leagues and the rural electrical cooperatives were limited in scope and political power. As Nadel (1971: 32) describes of the period from the Progressive Era to the 1960s, "While *Consumer Reports* began to run articles on chemicals in foods, meat inspection, and finance rackets, it was largely a voice in the wilderness and the period was one of general quiescence for consumer protection (as many other later reform issues) until the early 1960s." In the 1960s however, an organized, politically powerful consumer movement began to emerge. A combination of conditions—rising prices, increasing depersonalization and increasingly national and even international scale in product markets, increasing complexity of consumer choice, strong political entrepreneurship and decreasing costs of organization—all led to the development of a strong consumer movement (Mayer 1989; Nadel 1971; Pertschuk 1982). By the early 1970s, "in Congress, consumer groups were dominant." (Moe 1990; see also Nadel 1971; Vogel 1996)

But while the emergence of a "newfound" political power was necessary to lead the creators to erect an agency which was procedurally constrained, it was not sufficient. In addition, consumer leaders also feared that their current preeminence would give way to the old situation of political dominance by other groups. There were a number of reasons consumer groups feared their loss of power. On the one hand, in the late 1960s and early 1970s, consumers were already faced a hostile executive branch which was at best interested in co-opting and modifying their agenda and at worst subverting it. Second, as Moe (1990) argues, these groups were uneasy for historical reasons. While the groups enjoyed their current dominance, they were fully aware of their previous difficulties in gaining control. Third, the emergence of the movements for social regulation had created a mission among opponents, business groups, which became increasingly organized in response (see Vogel 1996, Chapter 6). Finally, the coalition which had pushed the consumer agenda had already begun to show signs of weakness. As the movement moved from general to specific policies, the unified strength of the movement began to weaken (Vogel and Nadel 1976; see also Vogel 1996, Pertschuk 1982). For all of these reasons, "it was unclear how long consumer dominance was going to last…[and] the next fight might well come out differently." (Moe 1990)

As Moe argues, the consumer movement and the emergence of the CPSC was a case in which a vulnerable group, enjoying a "moment in the sun," had found itself in control over public authority. This gave the movement an opportunity to pass a program of consumer protection which was far-reaching. The group, however, fearful of its future position, did so in a way which ultimately limited the ability of the agency to implement vigorous product safety regulation. The importance of this case, therefore, is two-fold. On the one hand it illustrates the consistency of the model with the effect that Moe describes for vulnerable groups. On the other, it illustrates that these conditions are perhaps rare and unique: the groups which achieve their position occasionally and therefore, by definition, rarely, will take these actions. Cases of agency insulation described in the literature, therefore, are selective and outlying, not typical.

<B> *Broadcast Radio Regulation*

The origins of radio regulation presents a different set of political conditions to the case of consumer product regulation. The main difference in the political environment was that in this case, regulation was being pushed for by the dominant coalition, with very little opposition. In this context, an administrative structure was erected which was much less constrained but also much more subject to future interference.

Broadly speaking, the two major pieces of legislation which created a formal administrative apparatus for radio regulation were the 1927 Radio Act, which created the FRC and the 1934 Communications Act which created the FCC, folding the FRC into the new agency. Prior to 1927, federal policy toward radio frequency regulation was governed by a series of legislative acts—the 1887 Interstate Commerce Act, 1910 Mann-Elkins Amendments to the Interstate Commerce Act, 1910 Wireless Ship Act and 1912 Radio Act—that were designed for the management of commercial shipping frequencies and not commercial broadcasting. The latter did not emerge as a viable economic business until after World War I.[12] With the emergence of broadcast radio, the courts began to rule against the applicability of previous legislation to management of the broadcast frequencies. In a series of court and executive decisions, it became increasingly clear that extant statutes would not be sufficient to manage the new technology.[13]

This gap in the regulatory framework created a strong alignment of interests in the mid-1920's behind the erection of an agency to manage radio frequencies. The relatively unopposed coalition was lead by existing or aspiring broadcasters, who saw regulation as a boon in two senses: on the one hand, it was sorely needed to eliminate negative externalities from congestion and lack of coordination; second, it provided stations with a way to maintain a strong position in growing and potentially competitive markets. These broadcasters who were demanding regulation had little to fear from opponents in the future, both in the short and long-term. In the short term, the growing disorganization of the industry, with no coordination, meant that all segments of interests were clamoring for the government to step in and more actively organize the use of the airwaves: the nascent broadcasters, listeners, religious groups, content providers and commercial radio operators all had a common and intense interest in limiting congestion, interference and a lack of coordination.[14],[15] Even in the future, consumer interests were unlikely to play much role, as they were largely unorganized. Alternatively, the broadcast industry, as it evolved, was very quickly extremely organized, with the National Association of Broadcasters becoming an important force driving the development of legislation in the four National Radio Conferences in the 1920's and 1930's.

The lack of opposition, a situation that was likely to maintain for the foreseeable future, was reflected in the focus on efficiency rather than insulation. As noted earlier, the sincere interest in solving this problem meant that almost all parties supported removing any jurisdiction from the Interstate Commerce Commission (ICC) which was perceived as more interested in other domains and lacked sufficient focus. Given that a separate regulatory agency was to be set up, the question was how to structure its powers. This classic structural choice, however, was resolved in a way much different than the debate over the organization of the Environmental Protection Agency (EPA) or Consumer Product Safety Commission (CPSC) discussed by Moe. In this case, the agency was, in almost every area, given leeway, discretion and a very wide range of motion. Rather than giving the FRC a very specific statute to implement, in the 1927 Act, "Congress turned essentially all radio regulation over to the new agency, whose discretion was limited mainly by a new requirement that its actions serve the public interest."[16] (Wollenberg 1989: 65; see also Emery 1971: 45-49) Indeed, specific procedures that were considered and summarily discarded highlight the nature of this debate. One issue was how to structure the Commission's decision making authority over licenses. One possibility was to house decisions over license appeals in the full body of the agency, which would have served to lessen the impact any single commissioner might have had on the implementation of policy. Instead, however, Congress arranged that the each commissioner would have full authority over licensing decisions in five regional zones. (Radio Act of 1927 § 29) While this enhanced the speed and efficiency in which licenses were granted, it made it more susceptible to future appointments by potential rivals. Further, unlike the previous statutory regime, now the courts supported the broad powers granting the executive wide latitude to implement restricting and coordinating license policies.[17] This broad mandate meant that in the period from 1927 to 1934, there was a sea change in the implementation of radio policy, primarily by a largely unfettered Radio Commission.[18]

The other significant piece of legislation concerning regulation of radio was the 1934 Communications Act. It was prompted by the desire to integrate regulation of all communications into a single agency. The 1927 Act had divided control over communications policy between the FRC, which regulated radio, and the ICC, which retained control over common carriage. The 1934 Act eliminated the FRC, but transferred all control over radio to the newly created FCC. The broad discretion granted to the FRC in 1927 might have been altered in 1934, with the passage of the Communications Act of 1934; in fact, with respect to radio regulation, the procedural constraints remained muted, only in some limited sense becoming more stringent. (Krasnow 1982: 10) Title III of the 1934 Act, which governed the licensing of broadcast radio operators, added a number of provisions to the previous statute, but all were innocuous and did not provide much constraint on the implementation of policy.[19] If anything, the 1934 Act maintained the executive's discretion while expanding its reach. Under the same discretion as before, the FCC was to "have the authority to suspend the license of any operator" in addition to the authority to revoke it. (Communications Act of 1934, § 303(m)) Similarly, section 302 of the Act included additional rulemaking powers for the FCC to govern chain broadcasting, again with no constraint on the agency's interpretation or implementation except that it be in the public interest.[20] More generally, the issue of the extent of judicial review was also debated as a potential constraint on the agency. During hearings about the Act, a number of radio broadcasters who had had their licenses revoked objected to the limited extent of review and appeal granted in the 1927 Act. (Cass 1989: 86-87; U.S. Congress, Senate Hearings: 1934, 56-57) In the end, review powers were very limited as Congress decided to limit the review powers of the courts and leave discretion to the agency.[21] Further, the Act provided strong, discretionary powers for enforcement, allowing for fines and penalties, in addition to revocation of licenses. Importantly the use of these powers was largely left to the FCC's discretion.[22] In the end, the main limitation on the FCC was, as with the 1927 Act, a stricture to regulate in the "public interest." This standard was broadly interpretable, and meant that the agency was granted a great degree of discretion to manage licenses and promulgate regulations.[23]

The history of early regulation of radio broadcasting is a balancing example to regulations initiated by groups that perceive themselves as enjoying only a "moment in the sun." Both in the

1927 Radio Act and further in the 1934 Communications Act, regulation was not initiated by such a constellation of interests, but by groups who did not fear loss of power in the future. The result was legislation that culminated in the 1934 Act which enabled the agency to act on its own. As Cass (1989: 90) notes, “The Commission’s capacity to shape policy in a manner that responds to changing circumstances and shifting interests is further advanced by the broadly worded authority delegated to the Commission in Titles II and III and by the limited scope of judicial review available.” Indeed, Robinson (1989: 18) provides a similar assessment, “What is remarkable about the communications field is the degree of freedom permitted the agency not merely to adapt its powers to deal with new contingencies, but indeed to expand its jurisdictional reach to concerns wholly different from those that animated the regulation in the first instance.” In this sense, the relaxed procedural and jurisdictional control was made possible precisely by absence of any fear that the agency would be captured in the future by politically opposed interests.

<A> **Discussion**

One of the key aspects of uncertainty in politics is that created by elections. This uncertainty potentially has a profound effect on the nature of organizational structures in public bureaus. Unlike private organizations, public ones face the prospect of ever changing principals. In this paper, with an eye to empirical examination, we develop a deeper understanding of how this electoral uncertainty affects the incentives behind and the structures created by elected officials when implementing policy.

The contribution of the paper is two-fold. First, we connect two stream of literature on delegation to government agencies: the static delegation literature, which emphasizes both how procedures can constrain agencies from drifting too far from political principals' wishes and that such constraint will be particularly imposed under conditions of divided control of political institutions; and the dynamic structural choice literature which emphasizes how electoral uncertainty leads to the insulation of agencies through administrative procedures. By connecting these two streams, we show how the choice of administrative procedures is a function not only of each of these factors separately, but that uncertainty and feasibility interact to lead to variation in the adoption of procedural constraints.

The second contribution of the paper, following de Figueiredo (2001a,b), is to redefine the relationship between uncertainty and structural choice. In particular, the literature makes the general claim that uncertainty leads to insulation of government agencies through structure. Translating this claim in terms of electoral competition, this would imply that one should observe the greatest degree of constraint imposed when competition, and thus uncertainty, is most intense. Our model, and subsequent examination of two extreme cases, indicates that the focus on uncertainty per se is misplaced. Instead, it is in environments where uncertainty is at its lowest that we are likely to observe the institution of such procedures. Further, the analysis clarifies that the incentives of groups, or parties, in this situation are not symmetric. Weak groups, when temporarily in power, will be willing to bear the costs of both passing and living with relatively inflexible agencies; they are willing to do so to gain benefits when they are out of power regularly in the future. But stronger groups, who will not be hit as hard by future sabotage since their opponents will rarely have the opportunity to do so, will be less likely to bear such costs, and therefore will not have similar incentives.

This last point raises a final important consideration when we turn to the question of whether electoral uncertainty can be used as an explanatory of any perceived agency inefficiency. Notably, if as the model shows, the only groups that have an incentive to constrain agencies' flexibility through the use of thick procedural guidelines—and therefore their ability to adapt to changing circumstances, fully utilize their expertise, and set good policy—are the ones who are rarely in power, then by implication, observed structural inefficiency can not be broadly attributed to political uncertainty. In fact, elections will only therefore rarely lead to bureaucratic sclerosis.

APPENDIX[24]

Assume single dimension, single peaked preferences with well defined ideal points. Assume, utility functions are given by $U^i = -|x-i|$ where x is the relevant policy and i is actor i's ideal point. L, A represent the ideal points of the current supermajority legislature and representative agency respectively.

In this three stage game, the legislature proposes to impose a level of cost T^A on agencies at a cost $C(T^A)$.[25] In stage two, the agency examines the status quo policy (x^0) and chooses to support it at no cost or to promulgate a rule $x^a \in \mathbf{R^1}$ at a cost T^A. In stage three, the legislature supports the agency at no cost proposes a new statute x^S at cost T^L.[26] Individual rationality, subgame perfection and complete and perfect information are assumed throughout. The game is solved via backward induction.

Without loss of generality, assume that L = 0, and that $A \leq L$.[27] As such, there are three cases to consider: first, $x^0 < A$; second, $x^0 \in [A,L]$; and finally, $x^0 > L$. We refer to these three cases as the "aligned preferences", "zero-sum" and "radical agency" game respectively. We explicitly prove the "radical agency" case here. The results for the other two cases follow directly, according to the same logic.

Stage Three:

Define the payoff for player i as $\pi^i(x) = U^i(x) - T^i(x)$. If the agency maintains x^0, then the current legislature will also maintain x^0 if $\pi^L(x^0)\Box\geq \pi^L(x^S)$, otherwise the legislature enacts a new policy x^S. Note if the current legislature were to revise x^0 in favor of $x^S \in \mathbf{R^1}$, it will rule $x^S = L$.

This reflects that the supermajority legislature is the final player of the game. Thus, the legislature supports the status quo policy if $U^L(x^0) \geq U^L(x^S) - T^L$. This implies that the current legislature will support x^0 (enact x^S) only if $T^L \geq |x^0|$ ($T^L < |x^0|$). The calculus of the current legislature with respect to an agency rule (x^a) is similar. If the agency promulgates a rule x^a, then the current legislature will support x^a (overturn x^a in favor of x^S) only if $T^L \geq |x^a|$ ($T^L < |x^a|$).

Stage Two:

The agency will either support status quo or promulgate a rule depending on the payoff. The payoffs depend on the magnitude of the legislature's cost of policy making (T^L). Examine two cases: $T^L \geq |x^0|$ and $T^L < |x^0|$.

Radical agency environment

That is $x^0 > L=0 \geq A$. In this environment, the agency and legislature both prefer policy outcomes for any $x \in [-x^0, x^0]$. From the agency's perspective, any movement of policy to the left of x^0 is preferred. This is not the case for the legislature. The legislature prefers the status quo to any policy to the left of $-x^0$. Thus, when the agency's ideal policy $A \notin [-x^0, x^0]$, then the legislature knows that the agency will seek "radical" rulings relative to the legislature.

Consider the agency's behavior when the cost of legislating is small relative to the status quo. The agency knows that when $T^L < |x^0|$ that the legislature will revise x^0 in favor of $x^S=0$. In that case, the agency's payoff would be $-|A|$. If the agency promulgates a rule $x^a = \min\{-T^L, A\}$, however, it avoids the statutory revision and worse outcome of $x^S=0$. The agency's payoff, $\pi^A = -|x^a - A| - T^A$ means that the agency will rule if $-|x^a - A| - T^A > -|A|$. If $A \geq -T^L$, then the agency will rule if $T^A < |A|$. If $A < -T^L$, however, then the agency will only rule if $T^A < T^L$. Intuitively, this says that since the legislature will overturn x^0 in favor of x^S=0, if the agency supports x^0, then the agency will only rule closer to its ideal if the distance from the ruling to x^S is large relative to the cost of rulemaking.

When the cost of legislating is large relative to the status quo, then the agency must compare its payoff from rulemaking to the payoff from the status quo policy. In this case, if $A \geq -T^L$ (i.e., the cost of writing a statute is large even relative to the agency's ideal policy), then the agency rules $x^a = A$ so long as $T^A < |x^0-A|$. If $A < -T^L$, however, then the agency rules $x^a = -T^L$ if $T^A < |-T^L-x^0|$. In either case, the cost of rulemaking must be smaller than the distance that the agency can move the policy away from the status quo, to motivate agency action.

<u>Stage One</u>:

Proposition 2.1: In a "radical agency environment", the legislature will impose costs on the agency as follows:

a. $T^{A*} = 0$ for $T^L < |x^0|$

b. $T^{A*} \geq |x^0 - A|$ for $T^L \geq |x^0|$, $A>-T^L$ and if $C(T^A) < |A - (-x^0)|$

c. $T^{A*} \geq |(-T^L)-x^0|$ for $T^L \geq |x^0|$, $A<-T^L$ and if $C(T^A) < |-T^L - (-x^0)|$

Proposition 2.1.a states that when the legislature's cost of revising the status quo is small then the agency no matter how "radical" is restricted by this low cost. The agency will be willing to promulgate a rule closer to its ideal point and the legislature's. In this instance, the legislature will not have to incur any cost to realize a greater payoff.

Proposition 2.1.b says that the legislature will pass a statute limiting agency action if the cost of writing that statute is less than the distance the agency will move policy away from the legislature's utility from the status quo. Figure A.1. illustrates this result.

Proposition 2.1.c is a similar result. It shows that the legislature will pass a statute to discourage agency action, and thereby maintain the status quo, if the cost of discouraging agency rulemaking (C(TA)) is smaller than the distance that the agency would move policy taking into account the cost to the legislature of overturning the agency's rulemaking.

[FIGURE A1 about here]

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TABLE 1

		Current Party Control - Legislature/Governor			
		R/R	R/D	D/R	D/D
Expected Future Party Control - Legislature/Governor	R/R	STABLE HOMOGENEITY (--)	UNSTABLE HETEROGENEITY (0)	UNSTABLE HETEROGENEITY (0)	UNIQUE HOMOGENEITY 3 (++)
	R/D	UNIQUE HOMOGENEITY 1 (+)	STABLE HETEROGENEITY (+)*	UNSTABLE HETEROGENEITY (0)	UNIQUE HOMOGENEITY 2 (+)*
	D/R	UNIQUE HOMOGENEITY 2 (+)*	UNSTABLE HETEROGENEITY (0)	STABLE HETEROGENEITY (+)*	UNIQUE HOMOGENEITY 1 (+)
	D/D	UNIQUE HOMOGENEITY 3 (++)	UNSTABLE HETEROGENEITY (0)	UNSTABLE HETEROGENEITY (0)	STABLE HOMOGENEITY (--)

* Supermajority in legislature increases probability of enacting statute

Zero-Sum Environment:

Impose cost on Agency of $T^{A}* > |(-T^{L}\_-x^{0}|$ to discourage rulemaking

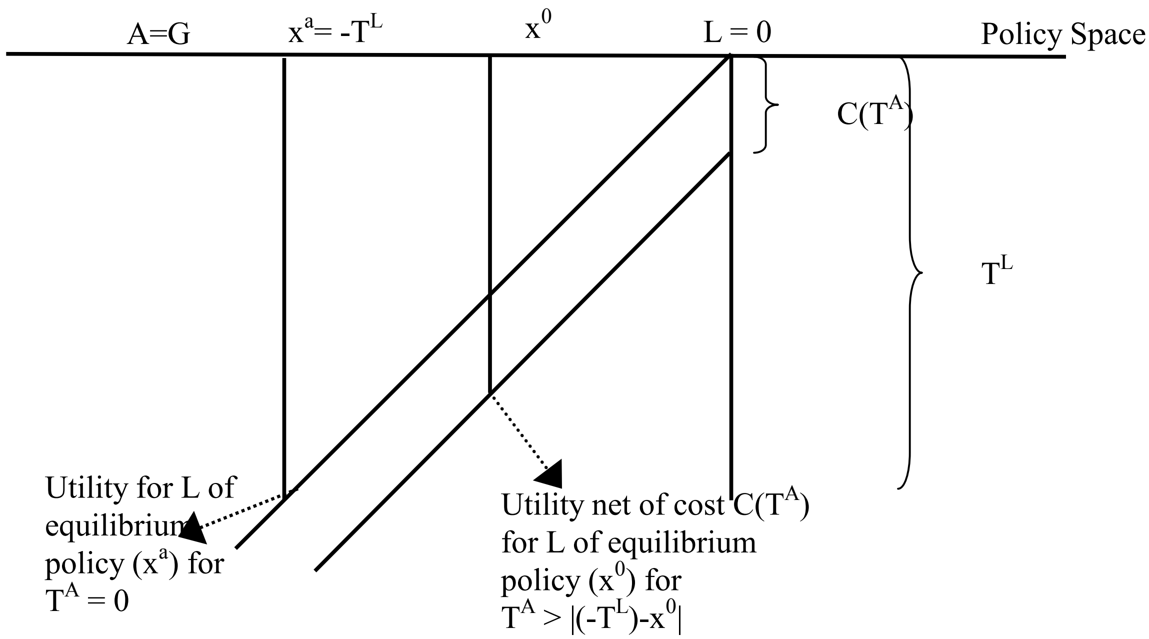


FIGURE 1

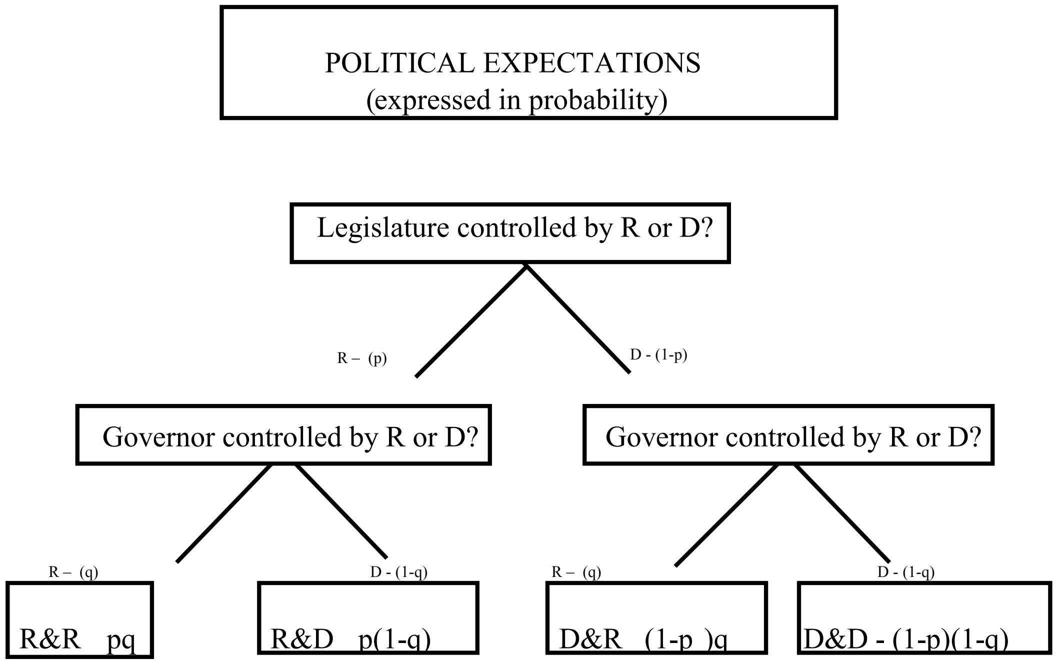
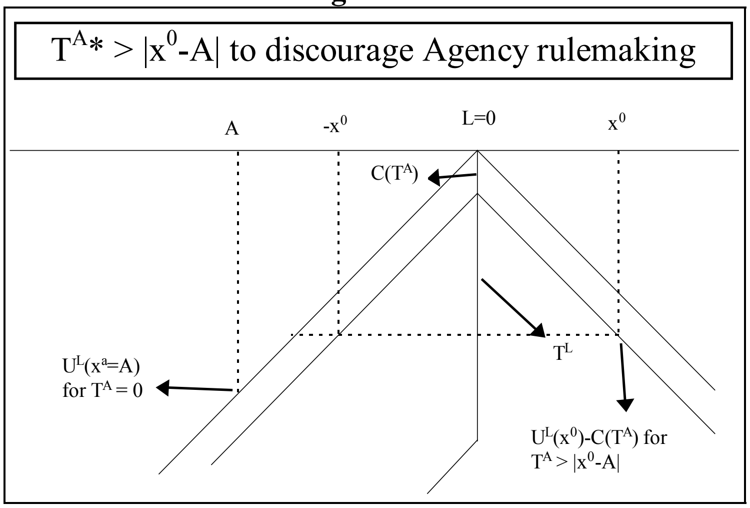

POLITICAL EXPECTATIONS
(expressed in probability)
Legislature controlled by R or D?
R – (p)
D - (1-p)
Governor controlled by R or D?
Governor controlled by R or D?
R – (q)
D - (1-q)
R – (q)
D - (1-q)
R&R pq
R&D p(1-q)
D&R (1-p)q
D&D - (1-p)(1-q)

FIGURE 2

Figure A.1


T^A* > |x^0-A| to discourage Agency rulemaking
A
-x^0
L=0
x^0
C(T^A)
T^L
U^L(x^a=A)
for T^A = 0
U^L(x^0)-C(T^A) for
T^A > |x^0-A|

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[1]Is assumption follows Epstein and O'Halloran (1996). A more general assumption would be that the agency's preferences reflect bargaining between the executive and legislature, depending on the appointment rules. In fact the qualitative results of the model do not change when we relax the assumption and allow α to be less than one. We discuss this further below.

[2]See the following articles for support for this modeling simplification: Asimow (1996); Benjamin (1942); Bonfield (1986); Cooper (1965); Davis (1978); Gifford (1977); Heady (1952); Horn (1995); Kleps (1947); Nathanson (1948); Riegel and Owen (1982); Spiller and Tiller (1997); Stason (1948); Tiller and Spiller (1995, 1996); Tunks (1948).

[3]The source of the proposal costs come from effort to form a majority coalition. Additionally, we assume that the legislature alone pays the proposal costs and that the governor does not have to incur costs in proposing statutes. As such, only the legislature proposes legislation. Also, assume that $C(T^A)$ is equal to zero for $T^A=0$, and strictly positive for all $T^A > 0$.

[4]The current legislature could revert the agency policy (x^a) back to the status quo or enact a new statute x^S. We assume that the cost to the legislature is the same, T^L. This assumption is consistent with McCubbins, Noll and Weingast (1989). They say, "...the outcome of a legislative attempt to rectify an act of noncompliance by an agency will not, *in general*,

reproduce the policy outcome that was sought by the winning coalition, even if the preferences of the members of the legislative body remain unchanged." (page 433, emphasis added). If the legislature chooses to overturn an agency rulemaking via statute then no matter where the new policy is relative to the agency rule, the legislature realizes cost T^L.

[5]This result is consistent with other important insights that elected officials can only partially mitigate the risk of bureaucratic arbitrariness (McCubbins, Noll and Weingast, 1987; McCubbins, Noll and Weingast, 1989; Moe, 1987; Wilson, 1989).

[6]See appendix for detailed formal discussion of Proposition 2.

[7]The intuition for the radical agency environment is similar and is provided in the appendix. Note that when the cost of revising the status quo is small for a supermajority legislature, then the agency (no matter how "radical") is restricted by this low cost. In this instance the legislature will not have to incur any cost to realize a greater payoff. In the "zero-sum" environment and the "radical-agency" environment the agency will make a ruling so that the supermajority legislature is indifferent between the ruling and a revision. In any event, for low revision costs, the legislature benefits from this ruling without incurring any cost.

[8]The model generates qualitatively equivalent results when we relax the assumption about the preferences of the agency, i.e., when $\alpha < 1$. In this situation, there are political environments where the governor would benefit from imposing costs on agencies. A majority of the legislature, however, would not benefit in those environments and will therefore not propose legislation. In environments where a majority of the legislature would benefit from imposing

costs on the agency, the governor will oppose. As above, political feasibility and net benefits obtain only when the legislature has supermajority support for a proposal.

[9][9] The case of the CPSC is discussed as one of two cases in the literature in which a high degree of political uncertainty led agencies to be insulated. The discussion in the literature—of groups concerned for their political futures—is consistent with the richer theory provided here. They are recapitulated and reinterpreted here to provide a complete picture. Two points are worth noting about this discussion. First, the cases while capturing the "right" incentives, are not standard, but rather unique, as will be shown in contrast to the FCC case. Second, the other cases (the Environmental Protection Agency and the Occupational Safety and Health Administration) discussed in Moe (1990) are not "clean" cases of simply the impact of political uncertainty: they combine political uncertainty to a certain degree with the other part of the Moe's theory, political compromise.

[10] One example of such restrictions on discretionary enforcement was that private parties could enjoin litigation to enforce agency standards. Another was that bans were made mandatory for all violating imported products. (Lemov 1983; Moe 1990; *Congressional Quarterly Weekly Report* 1972).

[11] See Consumer Product Safety Act (1972) § 15, § 8, 15 USC § 2057.

[12] Wollenberg (1989, 62) reports that at the beginning of 1919, there were no broadcast radio stations. By 1922 there were five hundred sixty four.

[13] Immediately following the passage of the 1912 act, for example, the Attorney General opined that the executive could not *manage* licenses under the act; instead it must issue to all

falling within the aegis of the act. In the 1923 Court of Appeals decision in *Hoover v Intercity Radio*, the court ruled that under the 1912 Radio Act, the Secretary of Commerce—at the time, Herbert Hoover—did not have discretion to withhold licenses, effectively eliminating the ability of the government to manage the common pool congestion problem or to coordinate the allocation of frequencies. This decision was further strengthened by a 1926 District Court ruling in *United States v Zenith Corporation*, where it was ruled that the Secretary could not promulgate any rules under the aegis of the Act. After *Zenith*, the Secretary essentially withdrew from involvement, setting up a bureau in the department strictly to act as a registration and recording service with no administrative authority. (Emery 1971, Wollenberg 1989, McMahon 1979)

[14] As Wollenberg (1989: 62) notes, "[In 1927,] virtually all interested segments of the public, notably including the broadcast industry, sought legislation as reflected in the recommunications of the fourth radio conference in 1925." This view was seconded by Hoover who stated, "It [radio regulation] is one of the few instances that I know of where the whole industry and country is earnestly praying for more regulation." (cited in Krasnow 1982: 17)

[15] Indeed, unlike in some other regulatory domains, their interest extended to common views on the exact nature of the policy: because the economic impact on individual consumers of broadcast regulation was indirect—since the stations did not charge for their use—most of the policy proposals which limited competition—licensing, content regulation, operational standards—were supported by the public and the broadcasters. As Robinson (1989, 11) notes, for example, the issue of content regulation, in which certain portions of programming were

required for "public service" uses were not objected to by industry. This at once served as an entry barrier for the industry and served the public interest in voters' minds. As he states, "The broadcast industry did not dissent to this imperative of public obligation; they embraced it." Mahan (1982: 165-166) makes a similar point: "What the Radio Act did by justifying regulation of the radio interest in the name of the radio industry in the name of the public interest was, in essence, to identify the interests of the industry with those of the public at large, and thus, the protection of radio business interests with the protection of radio audiences."

[16] As Wollenberg (1989: 65) continues, "The Radio Commission's general regulatory powers under the 1927 Act were expansive, as they were intended to be given the chaotic state of radio when the law was enacted."

[17] In both the *KFBK Broadcasting Association v. Federal Radio Commission* (1931) and *Trinity Methodist Church, South v. Federal Radio Commission* (1932), the District of Columbia Circuit Court upheld the FRC's right to deny licenses. In these cases, the courts gave the FRC broad latitude to interpret and implement the public interest standard contained in the statute.

[18] As Wollenberg (1989: 68) notes, "During its short existence, the Radio Commission moved strongly in the direction of making bold social judgments about who should hold licenses and why."

[19] As Wollenberg (1989) outlines, these three were that the FRC had to provide a public announcement and hearing when there were changes to existing licenses; limited transfers according to the same broad public interest provision for new licenses; and required construction permits to have been granted for the existing licenses. The first of these three is probably the

most constraining, although the public hearings were not construed—as they are today—to be a significant restriction on the agency. The hearing did not grant standing, for example, to potential interested parties, a universal procedure governing administrative rulemaking under the Administrative Procedure Act of 1946.

[20] Indeed, when this power was challenged in the courts, the Supreme Court reaffirmed the FCC's broad powers, stating, "…[Although] the Act does not explicitly say that the Commission shall have the power to deal with network practices found inimical to the public interest…Congress was acting in a field of regulation which was both new and dynamic…In the context of the developing problems to which it was directed, the Act gave the Commission not niggardly but expansive powers." (*National Broadcasting Co. v. United States* 319 US 190, 218-219 (1943))

[21] As Representative Beck commented, "I am certain it is true—that the present commission has made many mistakes, yet we are of the opinion that there would be less abuse by reason of lodging that discretion to them than there would be to some court [that discretion…" (U.S. Congress, House Record 1932: 3683).

The specific language of the Act limits review by stating, "Provided however, that the review of the court shall be limited to questions of law and that findings of fact by the commission, if supported by substantial evidence, shall be conclusive unless it shall appear that the findings of the commission are arbitrary and capricious." (Communications Act of 1934) As Cass notes, "Basically the same division of review had obtained under the initial Radio Act appeals provision, well before joinder of radio and wireless regulation was contemplated." (Cass

1989: 87) Further, as Cass (1989: 91) points out, the Act's language mean when the courts did review FCC decisions, they would be more than likely to defer to the agency: "[T]he restricted scope of review probably has made for at least a marginal increase in judicial deference, and if the statistics can be credited, the FCC has not fared badly in open court."

[22] According to the Act, the FCC has the power to initiate investigations "concerning which any question may arise under any provisions of the Communications Act. Following such an inquiry, the FCC is authorized to take any action within its general authority it deems appropriate." (Communications Act of 1934, , § 402) As Cass (1989, 88) comments, "Together with the specific rule-making authority granted elsewhere, this [Section 402] power constitutes a strong tool for promoting coherent regulation of communications."

[23] As Krasnow (1982: 19) concludes: "The flexibility inherent in this elusive public interest concept can be enormously significant to the FCC…as a means of modifying policies to meet changed conditions and to obtain special support…"

[24] In this appendix we provide a simplified formal argument to highlight the qualitative analysis. We assume that the legislature has supermajority support and we only work through the logic for the "radical agency" environment. Detailed formal analysis of the remainder of the model is available upon request.

[25] The source of the proposal costs come from effort to form a majority coalition. Additionally, we assume that the legislature alone pays the proposal costs and that the governor does not have to incur costs in proposing statutes. As such, only the legislature proposes

legislation. Also, assume that $C(T^A)$ is equal to zero for $T^A=0$, and strictly positive for all $T^A > 0$.

[26] The current legislature could revert the agency policy (x^a) back to the status quo or enact a new statute x^S. We assume that the cost to the legislature is the same, T^L. This assumption is consistent with (McCubbins, Noll and Weingast 1989). They say, "...the outcome of a legislative attempt to rectify an act of noncompliance by an agency will not, *in general*, reproduce the policy outcome that was sought by the winning coalition, even if the preferences of the members of the legislative body remain unchanged." (page 433, emphasis added). If the legislature chooses to overturn an agency rulemaking via statute then no matter where the new policy is relative to the agency rule, the legislature realizes cost T^L.

[27] The game where $G=A\geq L$ is symmetric.