

AGENCY AS PRINCIPAL

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“If the intent of Congress is clear, that is the end of the matter; for . . . the agency . . . must give effect to the unambiguously expressed intent of Congress.”¹

“The EPA is simply trying to bully Congress by saying, ‘Either you pass a bill that will raise costs for American families and destroy jobs or we’ll pass regulations that will be even worse.’”²

I. INTRODUCTION

In 2009, the Environmental Protection Agency (EPA) made a formal finding under the Clean Air Act that greenhouse gases from automobile emissions endanger public health and welfare.³ By issuing its highly publicized and politically controversial finding, referred to as an endangerment finding, the EPA triggered a number of important regulations under the Clean Air Act, including regulation of motor vehicles and, due to the domino-like nature of the Clean Air Act, industries across the country.⁴ By taking this step, the EPA began to do through regulation what Congress had refused to do through legislation.⁵

While a great deal could be said about the merits of using the Clean Air Act to regulate greenhouse gases,⁶ for the moment, consider the political commentary arising from those upset with the EPA’s decision. Senator Saxby Chambliss (R-Georgia) argued

¹ *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

² Press Release, Senator Chuck Grassley, EPA Resolution Fails in Senate (June 10, 2010), http://www.grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=26975.

³ Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009) (to be codified at 40 C.F.R. ch. 1).

⁴ *Cf. id.* at 66,501 (noting the prediction by some commenters that an endangerment finding would trigger several other regulatory programs).

⁵ *See id.* (noting that Congress had been considering legislation).

⁶ *See, e.g.*, Control of Emissions From New Highway Vehicles and Engines, 68 Fed. Reg. 52,922-02 (Sept. 8, 2003); *Massachusetts v. EPA*, 549 U.S. 497 (2007); Regulating Greenhouse Gas Emissions Under the Clean Air Act, 73 Fed. Reg. 44,354 (proposed July 30, 2008) (to be codified at 40 C.F.R. ch. 1); Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496; Arnold W. Reitze, Jr., *Federal Control of Carbon Dioxide Emissions: What Are the Options?*, 36 B.C. ENVTL. AFF. L. REV. 1 (2009); Jonathan H. Adler, *A Tale of Two Climate Cases*, 121 YALE L.J. ONLINE 109 (2011), <http://yalelawjournal.org/2011/09/13/adler.html>; Lisa Heinzerling, *Climate Change and the Clean Air Act*, 42 U.S.F. L. REV. 111 (2007).

that the endangerment finding served as a way to “bull[y]” Congress “into passing bad legislation.”⁷ Similarly, Senator Lisa Murkowski (R-Alaska) claimed that the regulation amounted to “a misguided attempt to move a climate bill forward.”⁸ Representative James Sensenbrenner (R-Wisconsin, 5th District) asserted that the EPA’s decision was “conveniently timed to push . . . politics.”⁹ Commentators outside of Congress have likewise claimed that the EPA’s attempt to regulate greenhouse gases represented a “regulatory cudgel”¹⁰ and that the EPA had used the finding to “force cap-and-trade opponents to fall in line.”¹¹

Fair or not,¹² the fact that political insiders can claim with straight faces that an administrative agency tried to force Congress to legislate should cause those interested in administrative law and politics to do a double-take. After all, at the heart of administrative law, we find a rich literature that focuses on the extent to which Congress and the Executive control¹³ or at least ought to control¹⁴ the federal bureaucracy.

⁷ Senator Saxby Chambliss, *Congress Must Stop EPA’s Vast Overreach*, THE HILL (Feb. 23, 2010, 5:32 PM), <http://thehill.com/special-reports/agriculture-a-food-safety-february-2010/83235-congress-must-stop-epas-vast-overreach>.

⁸ Press Release, U.S. Sen. Comm. on Energy & Natural Res., Sen. Murkowski Seeks to Halt EPA Endangerment of U.S. Economy (Dec. 14, 2009), *available at* <http://www.energy.senate.gov/public/index.cfm/repUBLICAN-news?ID=bc8e520b-ac56-452f-8a33-ccdcea989d3f>.

⁹ Jim Sensenbrenner, *Stimulate, don’t Stifle the Economy*, 183 CONGRESSMAN JIM SENSENBRENNER NEWS FROM CONGRESS 1, 2 (Jan. 2010), http://sensenbrenner.house.gov/UploadedFiles/008_Sensenbrenner-Dec09_Sen.pdf.

¹⁰ Steven Mufson & David A. Fahrenthold, *EPA is Preparing to Regulate Emissions in Congress’s Stead*, WASH. POST (Dec. 8, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/12/07/AR2009120701645.html>.

¹¹ Bryan Walsh, *EPA’s CO₂ Finding: Putting a Gun to Congress’s Head*, TIME (Apr. 18, 2009), <http://content.time.com/time/health/article/0,8599,1892368,00.html>.

¹² There are a number of counterarguments typically employed to confront this line of thinking. Just to name a few, one could argue that this did not amount to pushing Congress; that the EPA had no choice given the state of the science and a nondiscretionary duty to make such a finding under the Clean Air Act when the science warrants it; or that if pushing occurred, it was President Obama doing the pushing and the EPA was only stuck in the middle. This Article revisits these and other versions of endangerment finding story in Part III.

¹³ *See, e.g.*, 3 CHARLES KOCH, JR., ADMINISTRATIVE LAW AND PRACTICE 7:20–39 (3d ed. 2010); GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 47–169 (4th ed. 2007); RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW, CONCEPTS AND INSIGHTS SERIES 133–48 (2008) (discussing the methods used by Congress and the Executive to control agency decisionmaking); STEVEN A. SHULL, PRESIDENTIAL POLICY MAKING: AN ANALYSIS 147 (1979) (“The [P]resident . . . can influence implementation only if bureaucrats follow his wishes.”); KEITH WERHAN, PRINCIPLES OF ADMINISTRATIVE LAW 43–98 (2008) (discussing

congressional and presidential controls on administrative agencies); Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 106 (2006) (“Reporting requirements are . . . an effective tool that Congress uses to exert control over the executive branch.”); J.R. DeShazo & Jody Freeman, *The Congressional Competition to Control Delegated Power*, 81 TEX. L. REV. 1443, 1452–56 (2003) (discussing why Congress delegates power to agencies and methods it uses to control agencies after it delegates); Thomas H. Hammond & Jack H. Knott, *Who Controls the Bureaucracy?: Presidential Power, Congressional Dominance, Legal Constraints, and Bureaucratic Autonomy in a Model of Multi-Institutional Policy-Making*, 12 J.L. ECON. & ORG. 119, 120 (1996) (“The [P]resident and Congress bring different resources to [their] struggle over control of the bureaucracy.”); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2341 (2001) (“Alone among the actors competing for control over the federal bureaucracy, the President has the ability to effect comprehensive, coherent change in administrative policymaking.”); William V. Luneburg, *Civic Republicanism, the First Amendment, and Executive Branch Policymaking*, 43 ADMIN L. REV. 367, 370 (1991) (listing factors affecting the President’s “power to ‘persuade’ the bureaucracy from the top down”); Jonathan R. Macey, *Separated Powers and Positive Political Theory: The Tug of War over Administrative Agencies*, 80 GEO. L.J. 671, 675 (1992) (“[T]he executive and Congress are involved in a healthy, ongoing tug of war over control of administrative agencies.”); Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 247–48 (1987) (discussing Congress’s and the President’s role as principals in an agency relationship with bureaucracies); Mark Seidenfeld, *Bending the Rules: Flexible Regulation and Constraints on Agency Discretion*, 51 ADMIN. L. REV. 429, 466 (1999) (“The White House and Capitol Hill have each established . . . mechanisms for reviewing the wisdom of agency rules.”); Sidney A. Shapiro, *A Delegation Theory of the APA*, 10 ADMIN. L.J. 89, 96 (1996) (discussing the problems that might arise when Congress tries to control agency policymaking through procedural and organizational methods); Sidney A. Shapiro & Robert L. Glicksman, *Congress, the Supreme Court, and the Quiet Revolution in Administrative Law*, 5 DUKE L.J. 819, 822–24 (1988) (discussing models of delegated power); Paul R. Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV. 943 (1980) (noting the considerable attention that has been given to the President’s role in agency policymaking).

¹⁴ See, e.g., ALAN BRINKLEY, *THE CHALLENGE TO DELIBERATIVE*, in ALAN BRINKLEY, NELSON W. POLSBY & KATHLEEN M. SULLIVAN, *NEW FEDERALIST PAPERS: ESSAYS IN DEFENSE OF THE CONSTITUTION* 23, 25 (1997) (discussing how bureaucracies can act as a buffer between popular will and public action); THEODORE J. LOWI, *THE END OF LIBERALISM* 92–94 (2d ed. 1979) (criticizing Congress for broad delegations); DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* 99–106, 135–52 (1993) (discussing how Congress secures political power through broad delegations); Terry M. Moe, *The Politics of Bureaucratic Structure*, in *CAN THE GOVERNMENT GOVERN?* 267, 327–29 (John E. Chubb & Paul E. Peterson eds., 1989) (discussing how presidential and congressional control of agencies can sometimes conflict and speculating “that the current administrative tangle may actually get worse over time”); Theodore J. Lowi, *Two Roads to Serfdom: Liberalism, Conservatism and Administrative Power*, 36 AM. U. L. REV. 295, 296 (1987) (“[T]he delegation of broad and undefined discretionary power from the legislature to the executive branch deranges virtually all constitutional relationships and prevents attainment of the constitutional goals of limitation on power, substantive calculability, and procedural calculability.”); Thomas W. Merrill, *Rethinking Article I, Section I: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2153–54 (2004) (“Broad delegation is necessary . . . to leverage up the

Simply put, the story of the EPA using political leverage to control Congress and force it to legislate has no home within that literature. Indeed, the very thought that an agency can force Congress to do *anything* seems backwards: if forcing is to be done, the elected branches should be the ones forcing the bureaucracy, not the other way around.

Far from a narrative of an agency bullying Congress, we find a rich body of literature in which scholars have characterized the relationship between agencies and the elected branches as a principal-agent relationship.¹⁵ And, while principal-agent stories often differ as to which elected branch acts as the principal in such relationships, we consistently find agencies playing the role of agents. This treatment of agencies is no surprise; they are *agencies* after all. The existing literature, as is typical of principal-agent literature, generally focuses on the ways agent agencies shirk the control of the principals—Congress and the White House—in order to satisfy the preferences of the agent agencies. This literature generally identifies institutional features that can affect opportunities of agent agencies to shirk and principal elected branches to reign in wayward agents. Being able to run and hide, however, is a far cry from playing the role of political bully.

lawmaking function of government in order to generate the volume of regulations necessary to carry out the wide-ranging functions of modern government.”); Richard J. Pierce, Jr., *Political Accountability and Delegated Power: A Response to Professor Lowi*, 36 AM. U. L. REV. 391, 404 (1987) (“Given the nature and level of government intervention that Congress now authorizes, it could not possibly make the hundreds, or perhaps thousands, of important policy decisions that agencies make annually.”); Seidenfeld, *supra* note 13, at 467 (explaining that the Executive and Congress “must be able to ensure that the values underlying an agency’s policies do not deviate greatly from those generally held by the polity”); Shapiro & Glicksman, *supra* note 13, at 841–45 (detailing specific instances of the benefits and limitations from Congress giving agencies prescriptive, coercive, or ministerial authority to regulate); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1672 (1975) (“The requirement that agencies conform to specific legislative directives not only legitimates administrative action by reference to higher authority, but also curbs officials’ exploitation of the governmental apparatus to give vent to private prejudice or passion.”).

¹⁵ See, e.g., Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 UCLA L. REV. 117, 164–65 (2006) (describing agencies as agents of “the executive branch, Congress, or the people as a whole”); McCubbins, Noll & Weingast, *supra* note 13, at 247–48 (describing Congress and the President as “principals in an agency relationship with an executive bureau”); Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111, 1140 (1990) (“Congress, the principal, delegates certain functions to its agent, the administrative agency, expecting that benefits will accrue to it through this delegation.”).

While the typecasting of administrative agencies as agents is often warranted, sometimes it is simply not accurate. If administrative agencies and the elected branches were to characterize their relationship status on Facebook, they would post: “It’s complicated.” At least, it is a good deal more complicated than the conventional understanding assumes.¹⁶ This Article argues that understanding the ways this relationship is more complicated is essential in understanding the modern administrative state.

The thesis of my argument is simply this: sometimes agencies can turn the tables on Congress and the Executive. When this happens, it is wrong to think about agencies as agents, even stubborn ones. Rather, in such situations, we should think about agencies as principals manipulating the elected branches, which in turn take on the role of agents.

So, how do agencies become principals? Consider a few examples, some more surprising than others but all reinforcing this central theme. Think about the subtle, perhaps at times even passive-aggressive nudging that agencies use to refocus the elected branches and to frame issues before them. Examples of this sort of agenda-setting behavior can take the form of the problems agencies highlight in the reports they publish, the data they make public, and the responses they provide to inquiries from the elected branches. While many of these agency actions seem mundane, the political significance of such agency work is often lost on legal and political players, even as it is relied upon and cited by them to lend their arguments credence. Next, consider the ways those in agencies attempt to lobby elected branches, ranging from endorsing pending proposals to drafting policies and legislation and then shopping these to those within the elected branches. Moreover, sometimes those in agencies criticize those in the elected branches publicly. While such a strategy comes with obvious political risks, such criticisms can have great power within the public debate. Sometimes, agency actions alter the political landscape facing the elected branches. Those in agencies might

¹⁶ While this point has often gone overlooked in scholarship, this is not entirely the case. *See, e.g.*, 7 CHARLES H. KOCH, WEST’S FEDERAL ADMINISTRATIVE PRACTICE § 7910 (3d ed. 2001) (“Whatever control Congress exercises over the bureaucracy, the bureaucracy is not powerless to influence Congress.”).

gain political leverage in many ways, including through agency decisions in rulemaking and orders, positions taken in litigation, stories leaked to the press or political players, and even the threat of resignation of those within the bureaucracy also within the public eye. All these scenarios introduce us to a world where agencies can shed their typical role of agents to the elected branches and step into the role of political principals, if only for a time. Granted, we might find disagreement as to when those in agencies can rightly be said to be pulling the strings of the elected branches, instead of the other way around. To accept my thesis, however, all that is required is that we find agreement at some point along the way. This is enough to lead us to the conclusion that our conventional understanding of the relationship between agencies and the elected branches is lacking.

Why has the point that agencies sometimes act as principals been ignored up until now? Here are a few reasons. First, while we sometimes find those in agencies pushing the elected branches, most of the time we do not. Second, even when agencies are in the principal position, it often occurs in subdued ways and away from the limelight. After all, even though the power dynamic is much more fluid than we typically assume, those in agencies are generally reticent to antagonize those in the elected branches because sooner or later the tables may turn again. Third, the idea that the elected branches are somehow manipulated by administrative agencies is uncomfortable. It seems to run counter to the constitutional hierarchy. It seems this hierarchal way of thinking has held us within its sway and obscured the realities of how agencies interact with the elected branches. (However, if the relationship does indeed run counter to the constitutional hierarchy, understanding the ways it does becomes all the more important.)

Yet, for those closest to workings of government, the observation that those in agencies can be and often are political players who sometimes gain political leverage over Congress and the White House rings true and may even seem obvious. And, upon reflection, wouldn't it be surprising if this weren't the case? After all, bureaucracies breed policy experts,¹⁷ and these experts are likely to

¹⁷ See, e.g., *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 760 (1988) (reasoning that the creation of a licensing system for expressive activity will in turn create an agency and thus "breed[] an expertise" (internal quotation marks omitted)); Gerald E.

be sensitive not only to their areas of expertise but also to the political fallout and opportunities that might accompany their policy spheres. Additionally, particularly in contrast with Congress and the White House, agencies often have large staffs that allow them to swarm any issue that affects an agency's portfolio.¹⁸ Furthermore, those at the helm of agencies are often proven leaders in government, the military, education, and industry.¹⁹ The list of those with leadership roles in agencies would include some of the nation's most capable citizens, including Robert Kennedy, John Marshall, Colin Powell, Franklin Roosevelt, Elizabeth Dole, J. Edgar Hoover, Condoleezza Rice, James Madison, Henry Kissinger, Thomas Jefferson, Hillary Clinton, Alexander Hamilton, Harold Ickes, and Theodore Roosevelt. Additionally, agencies constantly interact with Congress, the Executive, the Press, and a wide range of political constituencies, each providing different opportunities for those in agencies to gain leverage. Finally, those in agencies, particularly those in non-appointed positions, often outlast those in the elected branches, particularly those in the White House. All of this suggests that agencies have expansive opportunities to take advantage of and even shift the political winds and often have the wherewithal and grit to do it.

In order to bridge the gap between conventional wisdom and the political reality, this Article lays out the theory of agency as principal and illustrates this theory with a wide range of examples mostly rooted in environmental policy and administration. In

Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1318, 1321 (1984) (describing the expertise model of understanding bureaucratic institutions); Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 430 (2009) (arguing that dividing employees into agencies breeds cultures that promote decisionmaking based on expertise).

¹⁸ See, e.g., U.S. Office of Pers. Mgmt., *Table 2--Comparison of Total Civilian Employment of the Federal Government by Branch, Agency, and Area as of August 2009 and September 2009*, FEDERAL EMPLOYMENT STATISTICS (Sept. 2009), <http://www.opm.gov/feddata/html/2009/September/table2.asp> (noting that the Legislative Branch had 30,859 employees, the Executive Office of the President had 1,769, and the Executive Departments had 1,905,137 employees); Stuart Minor Benjamin & Arti K. Rai, *Fixing Innovation Policy: A Structural Perspective*, 77 GEO. WASH. L. REV. 1, 33-34 (2008) (noting that agencies typically have large staffs).

¹⁹ See James W. Fesler, *Politics, Policy, and Bureaucracy at the Top*, 466 ANNALS AM. ACAD. POL. & SOC. SCI. 23, 27 (Mar. 1983) ("Cabinet members are an abler lot than the conspicuous exceptions lead us to believe. Many have achieved distinction in their careers and, for good or ill, are members of the establishment.").

addition to providing context to the theory, a significant portion of the examples represent the fruit of significant historical research, including a personal interview with William Ruckelshaus along with the examination of thousands of documents found in repositories around the country.

To set the stage, Part II provides an overview of the administrative law literature that characterizes the relationship between administrative agencies and the elected branches, with a particular focus on the literature that relies on principal-agent theory. Part III begins to lay out the theory of agency as principal in a general way. Parts IV through VI build on this general framework. Part IV discusses the characteristics of agencies, elected branches, and some of the other most predictable players in agency-as-principal interactions. Part V discusses the strategies that those in agencies might use to play the role of principal. In addition to a general discussion of strategies, the Article provides two brief case studies surrounding the first Administrator of the EPA, William Ruckelshaus, and the Forest Service's most prominent forester, Gifford Pinchot. Part VI provides a brief discussion of the payoffs those in agencies receive in playing principal and how they can mitigate the risks of taking on that role. Part VII concludes the Article and also raises a number of implications that surrounds those in agencies acting as principals.

II. BACKGROUND

This Part briefly highlights the administrative law and literature that characterizes the relationship between the elected branches and administrative agencies. It provides an overview of the scholarship, growing out of law and political science, that discusses how the elected branches of government can control, fail to control, and ought to control administrative agencies. This Part also discusses some background principles of administrative law and some of the most noteworthy contributions of the literature that portray the relationship between the elected branches and administrative agencies as a principal-agent relationship.

A. RELEVANT ADMINISTRATIVE LAW AND POLITICS BACKDROP

In the landmark case, *Immigration and Naturalization Service v. Chadha*,²⁰ the Court examined the constitutionality of Congress's attempt to exercise a unicameral legislative veto, which the Court ultimately found to be unconstitutional.²¹ The purpose of exercising the legislative veto, though, is overshadowed by the holding of the case: Congress's attempt to keep an agency in check. Indeed, the efforts (and limits of those efforts) of the three branches of government to keep agencies in check, according to Justice Breyer and his co-authors, comprise one of four major themes of administrative law.²² Speaking of Congress's attempt to control agencies, Chief Justice Burger said in *Chada*:

The Constitution provides Congress with abundant means to oversee and control its administrative creatures. Beyond the obvious fact that Congress ultimately controls administrative agencies in the legislation that creates them, other means of control, such as durational limits on authorizations and formal reporting requirements, lie well within Congress' constitutional power.²³

Chada, like much that has been written in the administrative law context, looks at the power relationship between elected branches and agencies as one where the elected branches dominate the bureaucracy.²⁴ That is the work at hand in *Chevron*: "If the intent of Congress is clear, that is the end of the matter; for . . . the agency must give effect to the unambiguously expressed intent of Congress."²⁵ It was at the heart of *Bowsher v. Synar*: "[W]e conclude that Congress cannot reserve for itself the power of

²⁰ 462 U.S. 919 (1983).

²¹ *See id.* at 956 (concluding that the unicameral veto was "not authorized by the constitutional design of the powers of the Legislative Branch").

²² *See* STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW & REGULATORY POLICY 3 (5th ed. 2001) (stating that administrative law includes those legal principles that "outline the role of reviewing courts and other organs of government in their relation to administrative agencies").

²³ *Chadha*, 462 U.S. at 955 n.19.

²⁴ *See id.* at 925–26 (noting that Congress had veto power over the agency determination under the Act).

²⁵ *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

removal of an officer charged with the execution of the laws except by impeachment.”²⁶ *State Farm* dealt with the balance between executive control and agency deliberation.²⁷ It is the thrust of what is at stake in *American Trucking*,²⁸ or any of the non-delegation cases.²⁹ We see the same tensions play out in major treatises and textbooks.³⁰ Legal scholarship is almost entirely uniform in its treatment of painting agencies under the control of the elected branches, and not the other way around.³¹

²⁶ 478 U.S. 714, 726 (1986).

²⁷ See *Motor Veh. Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 59 (1983) (Rehnquist, J., dissenting) (“As long as the agency remains within the bounds established by Congress, it is entitled to . . . evaluate priorities in light of the philosophy of the administration.”).

²⁸ See *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 485 (2001) (“An agency cannot cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute.”).

²⁹ See, e.g., *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 430 (1935) (finding a federal statute that authorized the president to prohibit shipment of petroleum in interstate and foreign commerce to be an unconstitutional delegation of power); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551 (1935) (finding unconstitutional Congress’s grant of code-making authority to the President in the National Industrial Recovery Act).

³⁰ See, e.g., ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, *ADMINISTRATIVE LAW* 1 (2d ed. 2001) (“Administrative law pertains to those agencies of government assigned the task of implementing various social, economic, and quality of life programs within our nation.” (emphasis added)); *id.* at 565 (“In making these kinds of decisions, agencies are held politically accountable to the democratically elected branches of government in a number of ways.”); ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW* 293 (2d ed. 2005) (“The existence of broad delegations of legislative authority to administrative agencies is part of the constitutional problem posed by administrative agencies.”); WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRET, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 1139 (4th ed. 2007) (“If legislators choose to delegate broadly, they face monitoring costs because bureaucrats may have their own policy objectives that diverge from Congress’s.”); RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW* 133 (2008) (“Administrative law courses tend to focus primarily on the relationship between courts and agencies, but the Legislative and [Executive] Branches have far more control over agency actions than does the Judicial Branch. That is as it should be in a democracy . . . If we do not like the way Congress or the President are shaping agency policies, we can simply vote the President or the members of Congress out of office.”); PETER L. STRAUSS, TODD D. RAKOFF & CYNTHIA R. FARINA, *ADMINISTRATIVE LAW: CASES AND COMMENTS* 138 (10th ed. 2003) (“[D]elegation simply opens the door to a whole different set of inquiries about how the assigned power can be influenced and controlled by the named constitutional actors.”); WERHAN, *supra* note 13, at 9–10 (describing the statutes that create administrative agencies as “enabling acts” through which Congress empowers the agency to act and limits the agency’s scope of authority).

³¹ While much could be said here, consider some of the more explicit examples of the assumption of agencies as agents that pervade legal scholarship. See, e.g., Marianne Koral Smythe, *Judicial Review of Rule Rescissions*, 84 COLUM. L. REV. 1928, 1936 (1984) (“An agency as ‘agent’ of Congress is no freer to disregard the will of Congress when acting to

Indeed, control over agencies is, and has been, a major theme of the literature focused on agencies for more than a century. Many would trace the scholarship focused on the relationship between the elected branches and administrative agencies back to Woodrow Wilson's seminal article, *The Study of Administration*.³² In the year he published his article, 1887, the federal government created the Interstate Commerce Commission³³—an agency so distinct from the agencies that preceded it, due both to its broad delegation and regulatory authority, that it ushered in “a new era for the federal government.”³⁴ Wilson framed the challenge of controlling agencies as merely a question of management skill.³⁵ As surprising as it is coming from a man who would later serve as president, he saw the role of administration “outside the proper sphere of politics.”³⁶

Jumping ahead a few decades to a time marked by significant increases in large-scale manufacturing and the innovation of the automobile assembly line, people like Max Weber and Frederick Taylor took up Wilson's challenge to make a science out of administration.³⁷ While perhaps Taylor's work on scientific management³⁸ serves as a more accurate reflection of the time, Weber's work echoes in the literature that followed. In Weber's mind, the most important purpose of bureaucracy was to create

deregulate than when acting to impose regulations.”); James B. Jacobs, *Legal and Political Impediments to Lethal Violence Policy*, 69 U. COLO. L. REV. 1099, 1106 (1998) (“[A]dministrative agencies are subservient to Congress and the president.”); Lars Noah, *Interpreting Agency Enabling Acts: Misplaced Metaphors in Administrative Law*, 41 WM. & MARY L. REV. 1463, 1469–70 (2000) (“Because the Constitution does not specifically provide for such agencies, Congress must first create them. Thus, the enabling legislation essentially represents an agency's charter, and courts continue to describe actions taken beyond the scope of that delegated power as ultra vires, a direct reference to the classical corporate law and principal-agency doctrines.”).

³² Woodrow Wilson, *The Study of Administration*, 2 POL. SCI. Q. 197, 197 (1887).

³³ Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379 (1887).

³⁴ ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 327 (2006).

³⁵ See Wilson, *supra* note 32, at 210 (“It is for this reason that we must regard civil-service reform in its present stages as but a prelude to a fuller administrative reform. We are now rectifying methods of appointment; we must go on to adjust executive functions more fitly and to prescribe better methods of executive organization and action.”).

³⁶ *Id.* (emphasis omitted).

³⁷ See *infra* notes 38–39.

³⁸ FREDERICK WINSLOW TAYLOR, THE PRINCIPLES OF SCIENTIFIC MANAGEMENT (1942).

policy experts.³⁹ However, he saw a potential dark side to expertise. He wrote, “[u]nder normal conditions, the power position of a fully developed bureaucracy is always overtowering. The ‘political master’ finds himself in the position of the ‘dilettante’ who stands opposite the ‘expert,’ facing the trained official who stands within the management of administration.”⁴⁰ While the thrust of Weber’s scholarship focused on controlling bureaucracy from an administrator’s perspective, he also pointed to the passage of laws—in the U.S. context, actions of Congress—as a promising avenue to control bureaucracies.⁴¹

Of course, with the New Deal, the size of government grew tremendously. As the government grew, so did the challenge of controlling the bureaucracy. During that time, it is reported that Franklin Roosevelt once complained:

The Treasury is so large and far-flung and ingrained in its practices that I find it impossible to get the action and results I want. . . . But the Treasury is not to be compared with the State Department. You should go through the experience of trying to get any changes in the thinking, policy and actions of the career diplomats and then you’d know what a real problem was. But the Treasury and State Departments together are nothing compared to the [Navy]. . . . To change anything in the [Navy] is like punching a feather bed. You punch it with your right and you punch it with your left until you are finally exhausted and then you find the damn bed just as it was before you started punching.⁴²

³⁹ MAX WEBER, *ECONOMY AND SOCIETY* 17–22 (Guenther Roth & Claus Wittich eds., 1968) (1944); Max Weber, *Bureaucracy*, reprinted in *CLASSICS OF ORGANIZATION THEORY* 73 (Jay M. Shafritz & J. Steven Ott eds., 5th ed. 2001) (1946).

⁴⁰ MAX WEBER, *FROM MAX WEBER: ESSAYS IN SOCIOLOGY* 232 (H.H. Gerth & C. Wright Mills eds. and trans., Oxford University Press 1946).

⁴¹ MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* 16–17 (Talcott Parsons trans., Routledge 1992) (1930) (depicting a well-functioning, modern government as a “political association with a rational, written constitution, rationally ordained law, and an administration bound to rational rules or laws, administered by trained officials”).

⁴² MARISSA MARTINO GOLDEN, *WHAT MOTIVATES BUREAUCRATS? POLITICS AND ADMINISTRATION DURING THE REAGAN YEARS* 4–5 (2000).

From the New Deal on, a wide range of scholars have agreed with FDR's observation and have focused on and questioned the ability of both Congress and the Executive to control the unwieldy federal bureaucracy.⁴³

Scholars have also focused on what exactly makes agencies tough to control. While the expansiveness of government is a significant barrier,⁴⁴ other scholars have pointed to other reasons as well. Some argue that those who work in bureaucracies often tend to value incentives and norms within their professions and agencies more than incentives that the elected branches can provide.⁴⁵ Others posit that bureaucracies lose their flexibility and become increasingly propelled by their history and decisions of the past.⁴⁶ Still others believe that, like all of us, those within

⁴³ See *supra* notes 13–14.

⁴⁴ See, e.g., HARVEY LEIBENSTEIN, *ECONOMIC THEORY AND ORGANIZATIONAL ANALYSIS* 167 (1960) (stating that the larger the organization, the less control the top authority has over the organization's activities); GORDON TULLOCK, *THE POLITICS OF BUREAUCRACY* 142–93 (1965) (discussing the progressive loss of control over organizational sub-units that accompanies organizational expansion); John Child, *Organizational Structure, Environment and Performance: The Role of Strategic Choice*, 6 *SOCIOLOGY* 1, 7 (1972) (arguing that increasing organizational size makes “the managerial coordination of sub-unit activities more difficult” and leads to a more decentralized style of management, requiring more personnel).

⁴⁵ See JAMES Q. WILSON, *BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT* 115 (1989) (noting that government management is driven by the constraints of the organization instead of its tasks); James G. March & Johan P. Olsen, *The New Institutionalism: Organizational Factors in Political Life*, 78 *AM. POL. SCI. REV.* 734, 738 (1984) (arguing that failed attempts to reorganize bureaucracy indicate a lack of flexibility).

⁴⁶ See DOUGLASS C. NORTH, *INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE* 112–17 (1990) (discussing “path dependence” by institutional organizations, which results “from the increasing returns mechanisms that reinforce the direction once on a given path”); Brigham Daniels, *Emerging Commons and Tragic Institutions*, 37 *ENVTL. L.* 515, 521 (2007) (“[W]e specifically design commons institutions to resist change. These institutions are inertial by design, not accident.”); Paul A. David, *Clio and the Economics of QWERTY*, 75 *AM. ECON. REV.* 332, 333 (1985) (discussing institutional inertia in the context of the QWERTY/DSK keyboard debate, and noting that while users are free to choose their keyboard, they are “held fast in the grip of events long forgotten and shaped by circumstances in which neither they nor their interests figured”); Jody Freeman, *Collaborative Governance in the Administrative State*, 45 *UCLA L. REV.* 1, 18 (1997) (describing “interest representation” faced by agencies as contributing to “a rigid rule-making and implantation process that fails to encourage creativity, adaption, and cooperation in solving regulatory problems”); Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 *DUKE. L.J.* 1385, 1385 (1992) (“During the last fifteen years the rulemaking process has become increasingly rigid and burdensome . . . [E]volving judicial doctrines have obliged agencies to take greater pains to ensure that the technical bases for rules are capable of withstanding judicial scrutiny.”); Richard A. Posner, *Path-Dependency, Pragmatism, and a Critique of History in*

agencies have a limited capacity for rational decisionmaking, and that human decisionmaking is all the more likely to fail given that agencies often lack information and confront complex problems.⁴⁷ Paradoxically, even when agencies have information, they often have so much of it that it impairs an agency's analysis.⁴⁸

Of course, not all scholars are so sour on the prospect of controlling agencies. While few modern scholars have the optimism that Wilson had about managing agencies, many scholars believe—similar to Wilson—that with the right approach, we could make progress in this area. Many scholars look to politics to shape the incentive structures facing agencies.⁴⁹ Without dwelling on the subject, it makes sense to discuss the powers of each of the elected branches in shaping agency incentives.

Taking each elected branch in turn, I will begin with incentives within the control of the Executive. Many scholars and commentators have assumed without much explanation that the Executive should, and in fact does, control the federal bureaucracy. Over the past decade, scholars have vigorously discussed the origins of the Executive's control over the federal bureaucracy,

Adjudication and Legal Scholarship, 67 U. CHI. L. REV. 573, 573 (2000) (describing the institution of law as “the most ‘past-dependent,’ of the professions,” which makes it difficult for “anyone who wants to reorient law in a more pragmatic direction”); Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483, 485–86 (1997) (discussing the “regulatory inertia” inherent in the rulemaking process).

⁴⁷ See Charles E. Lindblom, *The Science of “Muddling Through,”* 19 PUB. ADMIN. REV. 79, 79–80 (1959) (discussing the limited intellectual and decisionmaking capacities of man, specifically agency administrators); Herbert A. Simon, *The Proverbs of Administration*, 6 PUB. ADMIN. REV. 53, 64 (1946) (noting the limits on performance ability and rational thinking inherent to the single member of the administrative organization).

⁴⁸ See Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173, 224 (1997) (“[A]s the amount of information in a decisionmaking context increases, agency decisionmakers are more likely to ‘miss the forest for the trees.’”).

⁴⁹ See, e.g., Matthew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political*, 75 VA. L. REV. 431, 434 (1989) (noting that one solution to a principal–agent problem is for the principal to employ a method in which an agent will be compensated based on the outcome of its actions); Timothy A. Walkins & Terrell E. Hunt, *Agency Discretion and Advances in Regulatory Theory: Flexible Agency Approaches Toward the Regulated Community as a Model for the Congress-Agency Relationship*, 63 GEO. WASH. L. REV. 479, 479 (1995) (“[A] Congress-agency relationship similar to the regulator-regulated relationship propounded in incentive-based theories—freedom of method, accountability for results—would lead to more effective and cost-effective regulation.”).

primarily in the form of debate regarding the merits of what has become known as the unitary executive theory,⁵⁰ which—painting with a broad brush—posits that the Constitution vests control over the bureaucracy solely to the President.⁵¹ The root of the theory arises from language found in Article II, which vests “the executive Power” in the President.⁵² The intense recent interest in the theory in many ways comes from the vigorous assertion of the theory by the second Bush Administration, particularly in presidential signing statements of legislation.⁵³

Regardless of whether the Executive *should* control federal agencies, what tools does the Executive have to shape agency incentives? Perhaps the most important power held by the Executive highlighted in the literature is the power of appointment, including (and perhaps particularly) lower-level appointments that do not need congressional approval.⁵⁴ The Executive also has an

⁵⁰ See Christopher S. Yoo et al., *The Unitary Executive in the Modern Era 1945–2004*, 90 IOWA L. REV. 601, 604–08 (2005) (providing a history of unitary executive theory); Kagan, *supra* note 13, at 2245 (exploring presidential control of agencies). *But see* Christopher R. Berry & Jacob E. Gersen, *The Unbundled Executive*, 75 U. CHI. L. REV. 1385, 1386 (2008) (arguing against a single, solitary unitary executive).

⁵¹ See Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 570–600 (1994) (arguing that the text of the Constitution grants the President the authority to control the execution of federal laws). For examples of how the President has achieved greater control over agency actions see Robert V. Percival, *Who’s in Charge? Does the President Have Directive Authority Over Agency Regulatory Decisions?*, 79 FORDHAM L. REV. 2487, 2488 (2011).

⁵² U.S. CONST. art. II, § 1.

⁵³ See, e.g., Harold J. Krent, *From a Unitary to a Unilateral Presidency*, 88 B.U. L. REV. 523, 534–49 (2008) (discussing President George W. Bush’s “unilateral” view of the unitary executive theory); Kristien G. Knapp, *Resolving the Presidential Signing Statement Controversy: New York State as a Separation of Powers Laboratory*, 6 CARDOZO PUB. L. POL’Y & ETHICS J. 737, 750 (2008) (“Bush II had issued more than 800 signing statements, more than all past presidents combined.”); Vicki Divoll, *The “Full Access Doctrine”: Congress’s Constitutional Entitlement to National Security Information From the Executive*, 34 HARV. J.L. & PUB. POL’Y 493, 531–32 (2011) (arguing that President George W. Bush’s use of signing statements suggests that Bush interpreted the unitary executive theory as giving him the authority to decline to provide reports).

⁵⁴ See, e.g., Patricia W. Ingraham, *Building Bridges or Burning Them?: The President, the Appointees, and the Bureaucracy*, 47 PUB. ADMIN. REV. 425, 426–28 (1987) (describing the increasing number of political appointees and the Executive’s increased reliance on lower level political appointees as a method of bypassing career managers); JUDITH E. MICHAELS, *THE PRESIDENT’S CALL: EXECUTIVE LEADERSHIP FROM FDR TO GEORGE BUSH 10–52* (1997) (discussing the trend toward an administrative presidency that looks to political appointees to shape the bureaucracy); Randall L. Calvert, Matthew D. McCubbins & Barry R. Weingast, *A Theory of Political Control and Agency Discretion*, 33 AM. J. POL. SCI. 588, 602–

important role in setting the stage for the federal budget—one that has grown over the past few decades as the Executive has used the Office of Management and Budget as a clearinghouse for budget recommendations⁵⁵ and thorough review of each agency’s regulatory efforts, mainly through the lens of cost-benefit analysis.⁵⁶

03, 607–08 (1989) (discussing the role of the political appointment process in conjunction with game theory); James O. Freedman, *Crisis and Legitimacy in the Administrative Process*, 27 STAN. L. REV. 1041, 1061 (1975) (“Few would deny that the President invariably has significant opportunities to influence the conduct of the federal administrative agencies through the appointment power, control of the budget, and authority over the process of legislation.”); Macey, *supra* note 13, at 698 (“The executive’s influence over agency policy stems from the presidential appointments power.”); B. Dan Wood & Richard W. Waterman, *The Dynamics of Political Control of the Bureaucracy*, 85 AM. POL. SCI. REV. 801, 822 (1991) (“Concerning the specific mechanisms of political control, the case studies demonstrate that political appointment—a shared tool of the President and Congress—is very important.”).

⁵⁵ See, e.g., MICHAEL E. MILAKOVICH & GEORGE J. GORDON, PUBLIC ADMINISTRATION IN AMERICA 373 (10th ed. 2009) (positing that the strongest way for the President to control an agency is to have control over its budget); Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 44 (2010) (“Interest groups can put pressure on members of Congress to exercise control over an agency through the budget, which Congress has done.”); Morris P. Fiorina & Roger G. Noll, *Voters, Bureaucrats and Legislators: A Rational Choice Perspective on the Growth of Bureaucracy*, 9 J. PUB. ECON. 239, 239 (1978) (“[S]ome government institutions create incentives which lead self interested rational individuals to behave in a manner that causes excessively bureaucratized government.”); D. Roderick Kiewiet & Mathew D. McCubbins, *Presidential Influence on Congressional Appropriations Decisions*, 32 AM. J. POL. SCI. 713, 714–15 (1988) (discussing the President’s influence over appropriations through the lens of game theory); Haoran Lu, *Presidential Influence on Independent Commissions: A Case of FTC Staffing Levels*, 28 PRESIDENTIAL STUD. Q. 51, 61 (1998) (“[P]residents do use budget, specifically staff level, to influence independent agencies.”).

⁵⁶ See, e.g., Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821, 824–30 (2003) (discussing presidential oversight of regulatory agencies over the last two decades and the use of cost-benefit analysis); Kagan, *supra* note 13, at 2275–82 (discussing presidential strategies to assert control over the administrative state, including the Reagan oversight system which used cost-benefit analysis); Alan B. Morrison, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 HARV. L. REV. 1059, 1061–63 (1986) (detailing the increased supervision and centralization of agency rulemaking throughout presidencies, including those of Nixon, Carter, and Reagan); Peter L. Strauss, *Overseer, or “The Decider”?* *The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 701–02, 719–20 (2007) (discussing President George W. Bush’s issuance of an executive order, and later discussing economic impact analysis under the Office of Management and Budget’s Office of Information and Regulatory Affairs supervision); Peter L. Strauss & Cass R. Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181, 200 (1986) (“The President therefore has the constitutional power to require agency officials to prepare cost-benefit analyses, to develop regulatory agendas, to file environmental reports, or to explain the reasons behind proposed courses of action.”).

What about Congress? Even though a good deal of the literature about Congress's control of agencies highlights Congress's inability, or at least unwillingness, to exercise this control,⁵⁷ some scholars, mainly political scientists, have documented a wide range of tools Congress has to control agencies. Discussions of this sort are often divided by the timing of Congress's attempts to influence the direction of agencies (i.e., *ex ante* controls) as compared to Congress's tools to prevent agencies from straying from Congress's goals (i.e., *ex post* controls). Examples of opportunities for Congress to attempt to create *ex ante* controls include Congress requiring particular procedures, delegating tasks that necessitate particular sorts of experts, choosing carefully which agencies to delegate newly enacted programs, and creating opportunities for public involvement in agency decisionmaking.⁵⁸ Examples of *ex post* controls include congressional appropriations, oversight hearings, constituency advocacy, and changes to congressional delegations.⁵⁹

⁵⁷ See *supra* note 14.

⁵⁸ See, e.g., IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE 54–100 (1992) (proposing tripartism by empowering public interest groups as a mechanism for agency control); McCubbins, Noll & Weingast, *supra* note 13, at 253–64 (discussing the procedural solutions to agency compliance problems); Kathleen Bawn, *Political Control Versus Expertise: Congressional Choices About Administrative Procedures*, 89 AM. POL. SCI. REV. 62, 63–67 (1995) (discussing how Congress uses administrative procedures to “stack the deck” in favor of groups Congress wishes to support); David Epstein & Sharyn O’Halloran, *Administrative Procedures, Information, and Agency Discretion*, 38 AM. J. POL. SCI. 697, 703 (1994) (discussing how Congress strategically structures agencies to retain control); David B. Spence, *Administrative Law and Agency Policy-Making: Rethinking the Positive Theory of Political Control*, 14 YALE J. ON REG. 407, 418–21 (1997) (discussing how Congress uses administrative procedural structure, interest group representation, and agency “autopilot” characteristics to establish *ex ante* control); David B. Spence, *Agency Discretion and the Dynamics of Procedural Reform*, 59 PUB. ADMIN. REV. 425, 425–26 (1999) (examining the effectiveness of administrative procedural controls designed to “stack the deck” in favor of particular interest groups).

⁵⁹ See generally, e.g., DAVID EPSTEIN & SHARYN O’HALLORAN, DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS 24–29 (1999) (arguing that limiting the discretion of agencies is more cost-effective than constant monitoring); Jonathan Bendor & Terry M. Moe, *Agenda Control, Committee Capture, and the Dynamics of Institutional Politics*, 80 AM. POL. SCI. REV. 1187 (1986) (examining different methods of agency control developed in response to political environments); Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165 (1984) (arguing that Congress uses a “fire-alarm oversight” mechanism to control agencies); Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765 (1983) (discussing

B. PRINCIPAL-AGENT RELATIONSHIPS AND THE BUREAUCRACY

Beyond documenting the tools that Congress and the Executive have at their disposal to control agencies, a number of scholars have made extensive use of principal-agent theory to explain the interactions between Congress and the Executive (i.e., the principals) on one hand and agencies (i.e., the agents) on the other.⁶⁰ Like much of the literature that employs principal-agent theory (both within and out of the political context), a major theme emerging from this literature paints agents as attempting to escape the grip of their principals and chart their own course.⁶¹

1. *Agencies as Agents and the Elected Branches as Principals.* The rich literature discussing the principal-agent theory of government works from the assumption that agencies always play the role of agents and provides interesting insights into the relationship between agencies and the elected branches. (Of course, that assumption runs counter to the thesis of this Article.)

While there are other contributors to be sure, many use the label “McNollgast” for a significant chunk of this literature, referring to the work of three giants in the world of organizational politics: Professors Mathew McCubbins, Roger Noll, and Barry Weingast. An essay written by this trio under the pen name McNollgast presents the most fundamental problem resulting from using this theoretic lens:

[D]elegation presents a dilemma. The specialized knowledge of an expert agency may be necessary to unravel the technical uncertainties surrounding the impact of alternative policy actions, but the policy preferences of bureaucrats are often different from those of political leaders and, if they have unique expertise, they may use their superior knowledge to

Congress’s use of an incentive system to control agency decisions); Michael M. Ting, *The “Power of the Purse” and Its Implications for Bureaucratic Policy-Making*, 106 PUB. CHOICE 243 (2001) (presenting a model of Congressional control through appropriations).

⁶⁰ See *supra* note 31 and accompanying text.

⁶¹ See, e.g., Hussein Kassim & Amand Menon, *The Principal-Agent Approach and the Study of the European Union: Promise Unfulfilled?*, J. EUR. PUB. POL’Y, 10:1, at 121, 122 (2003) (noting the phenomenon of “slippage,” whereby delegation provides incentives for agents to contradict the ideas of the principal).

advantage themselves rather than to carry out the political leaders' policy wishes.⁶²

While this was written in the context of congressional control, it seems equally applicable to the Executive.

Of particular importance to this literature are discussions about how the elected branches wrangle in their agency agents. As mentioned above, this is a theme that is explored in depth, including by scholars focused on administrative law and theory.⁶³ Within the principal-agent literature specifically, a number of themes emerge. One theme that resonates well in the administrative law literature is how administrative law and procedure can help keep agencies in check.⁶⁴ Similarly, others have looked to clear commands that work to squeeze out administrative discretion.⁶⁵ Another strategy relates to oversight by the elected branches, particularly Congress.⁶⁶

2. *Hierarchical and Situational Views of Power.* Within principal-agent theory, theorists paint the power dynamics of principals and agents differently. Broadly speaking, we can sort these into two groups: those focused on hierarchical power and those focused on situational power.⁶⁷ For example, within the

⁶² McNollgast, *Political Control of the Bureaucracy*, in THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND LAW 50 (Peter Newman ed., 1999).

⁶³ See *supra* Part II.A.

⁶⁴ See, e.g., McCubbins, Noll & Weingast, *supra* note 13, at 243–47 (exploring administrative procedures as an important mechanism of agency control); McCubbins et al., *supra* note 49, at 432 (advancing the argument that political leaders use administrative procedures to guide agency decisions).

⁶⁵ See, e.g., Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 HARV. L. REV. 1035, 1042 (2006) (exploring factors that determine whether Congress will delegate to agencies or courts); Calvert, McCubbins & Weingast, *supra* note 54, at 589 (arguing that agency discretion is limited by appointment power and threat of sanctions).

⁶⁶ See, e.g., McCubbins & Schwartz, *supra* note 59, at 165 (arguing that Congress chooses the form of agency oversight that it believes will be effective in retaining control); Barry R. Weingast, *The Congressional-Bureaucratic System: A Principal Agent Perspective (with Applications to the SEC)*, 44 PUB. CHOICE 147, 154–58 (1984) (suggesting subtle ways that Congress indirectly oversees agencies).

⁶⁷ In the social sciences and sometimes in law, theorists use the monikers of “formalism” and “functionalism.” Of course, these terms have multiple meanings within legal speak. Because of this, the article uses the terms “hierarchical” and “situational.” Despite using different terms, we intend these terms to have the same definitions that the social sciences often ascribe to “formalism” and “functionalism”—specifically, hierarchical power comes from structure and our constitutional framework whereas situational power is to be

context of Congress and agencies, we might expect hierarchical thinking to drive some scholars towards using principal-agent theory simply because from the structure of government laid out in the Constitution, Congress is up the pecking order from agencies; similar thinking underlies much of administrative law.⁶⁸ Following this line of thinking, it is easy to conclude that Congress controls agencies and not the other way around.

Similarly, some might conclude Congress controls agencies because Congress creates agencies. In many ways, their relationship is similar to that of the relationship Bill Cosby described between him and his father: “My father established our relationship when I was seven years old. He looked at me, he said, ‘You know, I brought you in this world, I’ll take you out. And it don’t make no difference to me, because I’ll make another one look just like you.’”⁶⁹ While this sort of thinking is rarely expressed in the context of administrative agencies (and never with humor), for many, the assumption does significant lifting when discussing the roles that elected branches and agencies play.⁷⁰

Contrast this view of control with that of a more situational view. From this perspective, power does not concern itself with who ought to be in charge but rather how things play out in practice. A great example of a situational approach comes from an insightful article by Terry Moe. In critiquing scholarship that

observed from actual practice. See William N. Eskridge, Jr., *Relationships Between Formalism and Functionalism in Separation of Powers Cases*, 22 HARV. J.L. & PUB. POL’Y 21, 21 (1998) (“Formalism might be understood as deduction from authoritative constitutional text, structure, original intent, or all three working together. Functionalism might be understood as induction from constitutional policy and practice, with practice typically being examined over time.”).

⁶⁸ For example, the famous holding from *Chevron*, particularly what is known as “*Chevron* step one,” exemplifies this way of thinking about agency interpretation of statutes: “If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

⁶⁹ BILL COSBY: HIMSELF (20th Century Fox 1983).

⁷⁰ This is not to say that it is never stated. See, e.g., *INS v. Chadha*, 462 U.S. 919, 955 n.19 (“Beyond the obvious fact that Congress ultimately controls administrative agencies in the legislation that creates them, other means of control, such as durational limits on authorizations and formal reporting requirements, lie well within Congress’ constitutional power.”); GARY LAWSON, *FEDERAL ADMINISTRATIVE LAW* 5–6 (6th ed. 2013) (“The entire machinery of the executive arm of the United States government below the level of the President is the result of congressional action. None of the many federal agencies with which we are all familiar has to exist—or has to exist in its present form.”).

focuses upon the control that a particular committee of Congress has over an agency, Moe makes the following argument:

The simple principal-agent model focuses for convenience on one principal and one agent But the extent to which Congress controls a particular agency can hardly be ascertained by riveting attention on the relationship between that agency and one legislative committee. In fact, the agency finds itself surrounded by multiple principals: various authorizing and appropriations committees in both houses of Congress, the Office of Management and Budget, the president and members of his White House staff, and departmental units in the executive branch. These principals compete for influence over the agency—which, as a result, finds itself under crosspressures, forced to make compromises and trade-offs favoring some principals over others⁷¹

Central to Moe's argument is a view that what makes a principal a principal is not hierarchy or a notion of which entity ought to be in charge but rather evidence that an entity actually has sway over agency decisions. (Again, for those familiar with Bill Cosby, it may be useful to remember that even though his father talked tough, it was Bill and his siblings who convinced their father to feed them chocolate cake for breakfast.)

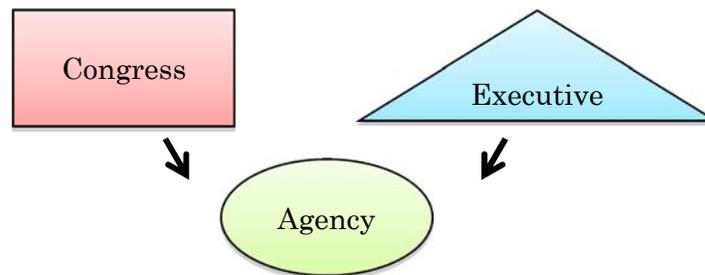
Relying on a similar situational approach, some have argued that the principals controlling agencies include actors such as

⁷¹ Terry M. Moe, *An Assessment of the Positive Theory of 'Congressional Dominance,'* 12 LEGIS. STUD. Q. 475, 482 (1987). Due to the complex relationship between many potential principals, Jody Freeman and Dan Farber explicitly found principal-agent theory unhelpful in some contexts. Jody Freeman & Daniel A. Farber, *Modular Environmental Regulation*, 54 DUKE L.J. 795, 904 (2005) ("As with any governmental decision-making structure, we expect modular systems to be accountable. But this begs the question, accountable to whom? And what is evidence of sufficient accountability? We resist characterizing the accountability challenge in this context as a simple version of a principal-agent problem. That characterization can be appropriate in some instances, but it seems too formal and simplistic for the environmental and natural resource contexts with which we are concerned."). This outlook seems to reflect a situational approach to the power dynamics at play.

industry⁷² and public interest groups.⁷³ Using similar logic, others have characterized agency capture by private interest groups as a principal-agent relationship, albeit a disturbing one.⁷⁴ Of course, there is nothing hierarchical that would suggest any of these relationships exist. The principal-agent relationship arises from observing the context relationships that form between agencies and these other actors.

3. *Two-Level Versus Multiple-Level Principal-Agent Relationships.* Despite whether one takes a hierarchical or situational perspective, a principal may directly or indirectly control an agent. Up to this point, all of the examples of principal-agent interactions discussed in this Article feature one of the elected branches (both principals) attempting to control the agent agency by directly interacting with the agency. This is a two-level principal-agent interaction and is illustrated in Figure 1.

Figure 1: Typical Two-level Interaction



⁷² See, e.g., Michael D. Sant'Ambrogio, *Agency Delays: How a Principal-Agent Approach Can Inform Judicial and Executive Branch Review of Agency Food-Dragging*, 79 GEO. WASH. L. REV. 1381, 1390 (2011) (discussing “agency capture,” occurring when an agency’s policy decisions favor the interests of an industry it serves).

⁷³ See Barry M. Mitnick, *An Incentive Systems Model of the Regulatory Environment*, in PUBLIC POLICY AND ECONOMIC INSTITUTIONS 147, 171–77 (Melvin J. Dubnick & Alan R. Gitelson eds., 1991) (describing how regulatory agencies are incentivized by public interest groups).

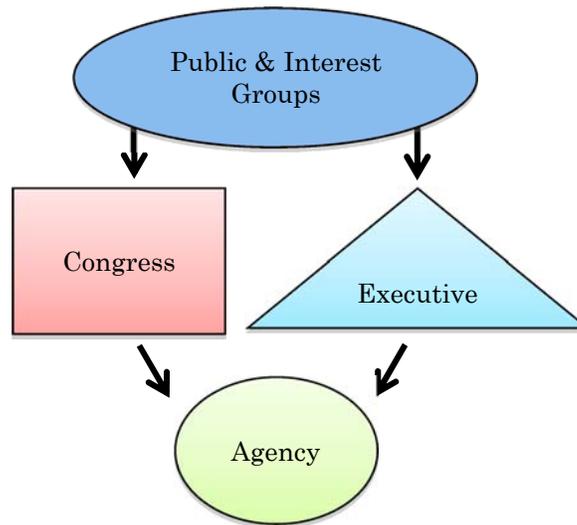
⁷⁴ See Adam I. Muchmore, *Private Regulation and Foreign Conduct*, 47 SAN DIEGO L. REV. 371, 401–02 (2010) (discussing “interest group capture,” which occurs when private interests control the relevant government agencies). Other scholars have noted this possibility but refused to employ Moe’s situational principal-agent approach. See David A. Weisbach & Jacob Nussim, *The Integration of Tax and Spending Programs*, 113 YALE L.J. 955, 966 (2004) (“Agency capture is in a sense just a variant on the principal-agent problem, where the agent’s preferences coincide with the preferences of the regulated industry and do not align with the preferences of the principals.”).

While many principal-agent discussions incorporate such two-level interactions, there are alternatives. One alternative design features a principal attempting to control an agent by using a middleman or even several of them. To get a sense of multiple-level games, consider a three-level game that we see within traditional principal-agent theory. This game is built by two sets of relationships. First, we see elected officials serving as agents to the electorate that serve as principals.⁷⁵ Next we merge this principal-agent relationship with the principal-agent relationship that has received a lot of our attention already—elected branches are principals and agencies their agents. By doing this, we arrive at the following: “Citizens are principals, politicians are their agents. Politicians are principals, bureaucrats are their agents.”⁷⁶ The key to understanding multiple-level games is that a principal attempts to influence a middleman with the hopes that the middleman will in turn influence the middleman’s agent. An example of a multi-level interaction is illustrated in Figure 2. With this as a backdrop, I now move on to consider the theory of agency as principal.

⁷⁵ See TIMOTHY BESLEY, PRINCIPLED AGENTS? THE POLITICAL ECONOMY OF GOOD GOVERNMENT 98 (2006) (“At the heart of political agency models is the principal-agent relationship between citizens and government; the principals are the citizens/voters while the agents are the politicians/bureaucrats.”); HANS GERSBACH, DESIGNING DEMOCRACY: IDEAS FOR BETTER RULES 11–17 (2005) (“[P]oliticians aiming at being reelected must adopt an incentive contract that makes their income or further reelection contingent on future macroeconomic performance.”); Robert J. Barro, *The Control of Politicians: An Economic Model*, 14 PUB. CHOICE 19, 26–32 (1973) (applying an economic theory and analyzing the election process as a mechanism through which constituents influence the self-interest of the officeholder); Stephen Coate & Stephen Morris, *On the Form of Transfers to Special Interests*, 103 J. POL. ECON. 1210, 1214–15 (1995) (advancing the agency style model of political competition through a two-period model); John Ferejohn, *Incumbent Performance and Electoral Control*, 50 PUB. CHOICE 5, 11–14 (1986) (analyzing officeholders’ incentives and responses to various electoral behavior); Markus Müller, *Motivation of Politicians and Long-Term Policies*, 132 PUB. CHOICE 273, 275–78 (2007) (analyzing the effects of elections and incentive contracts on politician efficiency).

⁷⁶ Terry M. Moe, *The New Economics of Organization*, 28 AM. J. POL. SCI. 739, 765–66 (1984).

Figure 2: Typical Three-level Interaction



III. OVERVIEW OF AGENCY-AS-PRINCIPAL INTERACTIONS

At this point, it seems useful to provide a brief overview of where the remainder of the Article will take us. In short, the following Parts discuss intricacies of agency-as-principal interactions. In game theory, we look for a set of players, each with various strategies from which to choose, and payoffs corresponding to these various strategies.⁷⁷ This Part provides several rough sketches of how agency-as-principal interactions play out. Part IV introduces the various players who make appearances in agency-as-principal interactions, with particular focus on the star of our story—the agency. Part V examines the strategies agencies can take to play principal. Part VI focuses on payoffs and discusses how the strategies other players might take could alter the payoffs agencies reap. Part VII concludes and, in doing so, addresses some of the implications of agencies acting as principals.

⁷⁷ See DAVID M. KREPS, *GAME THEORY AND ECONOMIC MODELLING* 10 (1990) (explaining the concept of strategic-form games).

This Part specifically begins by attempting to provide an overview that keys up the question that the Article is designed to provoke: How on earth can agencies ever play principal to either of the elected branches? From a hierarchical perspective, there is very little that would lead us to believe that agencies ever act as principals over the elected branches. The notion contradicts our conventional understanding of the role agencies play, as well as the structure of government laid out in the Constitution. After all, it is Congress that passes laws and the Executive that ultimately executes the law. Note, however, that even though this Article does not incorporate this hierarchical view of the relationship between agencies and the elected branches, this does not mean the hierarchical view is irrelevant. In fact, it is far from it. Once one accepts the theory that agencies can play the role of principal, one would immediately have to confront a wide range of normative, managerial, legal, and even constitutional issues that might arise from bucking the hierarchical relationship. But, I am getting ahead of myself. It is first necessary to explain the theory of agency as principal and to provide an argument in support of the theory. I return to the discussion of the implications of agencies acting as principals in the conclusion.⁷⁸

Instead of relying on power dynamics that flow from the hierarchical relationships between agencies and the elected branches, the theory of agencies acting as principals relies upon situational power dynamics. While an agency playing the role of principal is a major role reversal from what we would ordinarily expect, it is not unusual to see that there is more to power than simply where one falls in the pecking order. After all, most of us are well aware of situations where the people “in charge” are not really in charge. Just go to a self-help section of your local bookstore—assuming that Barnes & Noble and Amazon.com have not already put them out of business—and you will likely find books with titles such as *Lead Your Boss: The Subtle Art of Managing Up*⁷⁹ and *Manipulating Parents: Tactics Used by Children of All Ages and Ways Parents Can Turn the Tables*.⁸⁰

⁷⁸ See *infra* Part VII.

⁷⁹ JOHN BALDONI, *LEAD YOUR BOSS: THE SUBTLE ART OF MANAGING UP* (2010).

⁸⁰ PAUL W. ROBINSON, *MANIPULATING PARENTS: TACTICS USED BY CHILDREN OF ALL AGES AND WAYS PARENTS CAN TURN THE TABLES* (1981).

Our familiarity with such situations is likely one of the reasons for the popularity of television shows like *The Office*,⁸¹ which often highlights the ways in which an office manager is played by nearly everyone in the office, and films like *Ferris Bueller's Day Off*,⁸² in which kids consistently manipulate authority figures.

Of course, such observations go well beyond societal relations and pop culture. We see situational power relationships in various areas of legal scholarship illustrating that authority and power are not always the same thing. For example, within administrative law circles, situational relationships can be found in instances of agency capture, where the regulated turn the tables on the regulator.⁸³ Within international law, we see evidence of individuals or groups—even those subject to dictatorial governments—swaying their governments by reaching out to international powerbrokers and convincing them “to bring pressure on their states from outside”⁸⁴ and other contexts where international aid organizations manipulate their funders.⁸⁵ Within labor law, we see employees topple power structures within all sorts of organizations as they become whistleblowers.⁸⁶ A situational approach to principal-agent theory could be used to map each of these strategic interactions.

⁸¹ *The Office* (NBC television broadcast).

⁸² *FERRIS BUELLER'S DAY OFF* (Paramount Pictures 1986).

⁸³ See, e.g., MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* 3 (2d ed. 1971) (outlining his argument, which includes a novel theory for explaining how large pressure-group organizations obtain their power); William N. Eskridge Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 289 (1988) (stating that those for whose benefit Congress created an agency will, over time, organize themselves to influence the agency); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1713 (1975) (“It has become widely accepted . . . that the comparative over-representation of regulated or client interests in the process of agency decision results in a persistent policy bias in favor of these interests.”); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 3–7 (1971) (arguing that industries will attempt to control regulatory agencies).

⁸⁴ MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* 12 (1998).

⁸⁵ See Darren G. Hawkins & Wade Jacoby, *How Agents Matter*, in *DELEGATION AND AGENCY IN INTERNATIONAL ORGANIZATIONS* 199–200 (Darren G. Hawkins et al. eds., 2006) (explaining that international organizations employ strategies to influence principals).

⁸⁶ See, e.g., Miriam A. Cherry, *Whistling in the Dark? Corporate Fraud, Whistleblowers, and the Implications of the Sarbanes-Oxley Act for Employment Law*, 79 WASH. L. REV. 1029, 1035–42 (2004) (discussing the effects of whistleblowing at Enron and WorldCom).

A. THE THEORY OF AGENCY AS PRINCIPAL GOES BEYOND
INTRACTABLE AND REBELLIOUS AGENCIES

The traditional challenge of principal-agent relationships is encapsulated by a legal parable sometimes just referred to as “soupmeat.”⁸⁷ In order to highlight the differences between difficulties normally found in interactions where an agency acts as an agent—even a recalcitrant one—and where an agency acts as a principal, consider a twist to this classic, illustrative tale.

For those unfamiliar, the soupmeat story is mainly intended as a teaching tool that features two characters, a housekeeper and a domestic. The action begins by the housekeeper directing the domestic to “fetch some soupmeat,”⁸⁸ and then leaving the domestic to fulfill the charge. With this charge, the housekeeper acts as a principal, who desires performance of a specified act from the domestic, who plays the part of an agent. The term soupmeat represents an ambiguous term that the domestic has a degree of autonomy and power to interpret.⁸⁹

As often is the case in legal teaching, soupmeat introduces a situation and allows us to play with different hypotheticals to help us refine our thinking. Most often, these hypotheticals play with how the domestic should interpret the housekeeper’s intent when the story introduces an element of the unexpected. For example, what if the specified meat appears to be rotten at the store? What if one of the members of the house develops an allergy to soupmeat? What if the meat in town is sold-out but available for much more money miles away?

We can also think about hypotheticals that illustrate the ways in which the interests driving the domestic diverge from those of the housekeeper—an overarching theme in the principal-agent literature.⁹⁰ What if it turns out that the domestic’s brother sells

⁸⁷ See FRANCIS LIEBER, *LEGAL AND POLITICAL HERMENEUTICS, OR PRINCIPLES OF INTERPRETATION AND CONSTRUCTION IN LAW AND POLITICS* 18–19 (William G. Hammond ed., St. Louis, F.H. Thomas & Co., 3d ed. 1880).

⁸⁸ *Id.* at 18 (internal quotation marks omitted).

⁸⁹ See *id.* (stating that the domestic “will be unable to execute the order without interpretation”).

⁹⁰ We might think of this problem in the same way Professor McCubbins does: “Problems of agency can be categorized into two general types; shirking and slippage.” Mathew D. McCubbins, *The Legislative Design of Regulatory Structure*, 29 AM. J. POL. SCI. 721, 724 (1985). Alternatively, we could think about this through the lens of Professors Jensen and

an inferior and more expensive soupmeat that still squares up with the original instructions? What if the domestic is buying several days of soupmeat at once, which saves the domestic trips but increases the house's chance of food poisoning? What if the domestic is dishonest about the price of soupmeat and pockets some money during many of the trips to the butcher?

In terms of soupmeat, the idea of agency as principal goes well beyond vexing problems like finding the domestic pig-headed, dishonest, lazy, or rebellious. These are the sort of challenging problems we find when those in agencies act as agent, not principal. When the domestic acts as principal, what we would expect to see is the domestic beginning to exert influence over the housekeeper. To put this in terms of the literature, the challenge of agency as principal goes beyond typical agency costs theory.⁹¹ The point is that the agency is not merely imposing costs, but has turned the tables and is now calling the shots. For example, the domestic might successfully lobby the housekeeper to give up soupmeat and request vegetables from the domestic's family farm, or in *Downton Abbey* fashion, we might see the domestic successfully convince the family to hire the domestic's nephew.⁹²

In other words, within the context of agencies interacting with the elected branches, we want to see agencies influencing the way Congress makes laws and the Executive administers laws, and not merely avoiding the control of the elected branches. Below, I begin to lay out various ways this sort of interaction could be structured.

B. TWO-LEVEL AGENCY-AS-PRINCIPAL INTERACTIONS

To explain agency-as-principal interactions, I start with the simple and then move to the more complicated interactions. In a simple two-level agency-as-principal game, we might, for example,

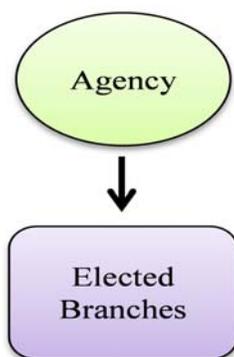
Meckling and think about this behavior simply as agency costs. Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 308 (1976) (noting that agency costs include efforts by the principal to monitor the agent).

⁹¹ For those unfamiliar, an explanation of agency cost theory is provided below. See *infra* Part VI.B.

⁹² *Downton Abbey: Season 3: Episode 1* (PBS television broadcast Jan. 6, 2013). Of course, true *Downton Abbey* fashion would require the new hire to end up in prison, get caught up in a scandal, or die in a truly surprising and unfortunate way (once he had managed to win over our hearts).

have a situation in which an agency opts to lobby members of Congress to pass legislation. One of many examples that could be cited that meet this fact pattern is the way in which the EPA attempted to encourage those in Congress to pass climate change legislation, particularly before the Democrats lost control of the House in 2010.⁹³ This interaction is represented in Figure 3.

Figure 3: Two-Level Agency-as-Principal Interaction



Of course, the EPA lobbying Congress to pass legislation is a far cry from the allegations referenced at the beginning of this Article: the EPA strong-arming Congress into passing legislation.⁹⁴ I revisit alternative versions of this story throughout this Part.

While one will not find the two-level game illustration—where those in an agency are perched in a position superior to that of Congress or the White House—replicated on any government organizational chart, the illustration begins to underscore how fluid the situational power dynamic between agencies and the elected branches can be. For those in agencies to play principal does not require that those in agencies always dominate those in

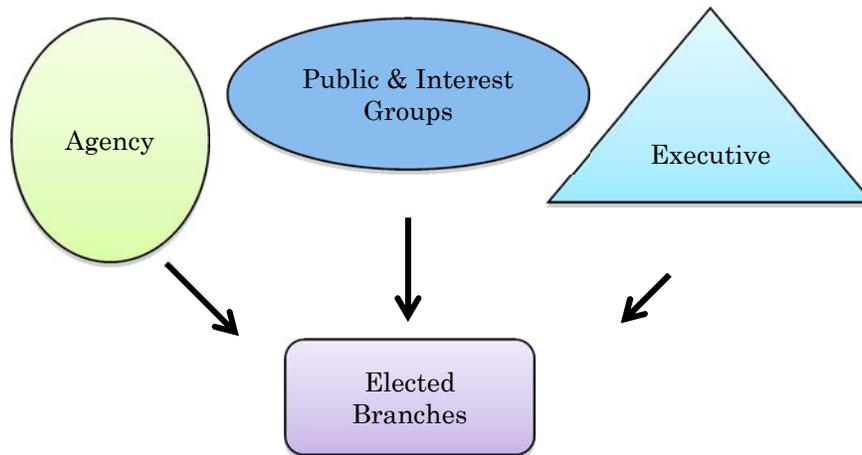
⁹³ An EPA press release, which was issued with the EPA’s proposed endangerment finding for greenhouse gases, emphasized that “[n]otwithstanding [the] required regulatory process, both President Obama and [EPA] Administrator Jackson have repeatedly indicated their preference for comprehensive legislation to address this issue and create the framework for a clean energy economy.” Press Release, Env’tl. Prot. Agency, EPA Finds Greenhouse Gases Pose Threat to Public Health, Welfare / Proposed Finding Comes in Response to 2007 Supreme Court Ruling (Apr. 17, 2009) [hereinafter Press Release], available at <http://yosemite.epa.gov/opa/admpress.nsf/0/0EF7DF675805295D8525759B00566924>.

⁹⁴ See *supra* Part I.

elected branches. Rather, it suggests that within some dimensions of their relationship, the agencies sometimes hold the cards.

In two-level interactions, those in agencies can maximize the prospect of making an impact by teaming up with allies. Reconsider the example of the EPA lobbying Congress to pass legislation. Even as the EPA attempted to convince Congress to take up climate change legislation, there is no doubt that many special interest groups, parts of the public, and the Obama White House attempted to convince those in Congress to do the same.⁹⁵ Such an interaction could be represented in Figure 4.

Figure 4: Allied Two-Level Interaction

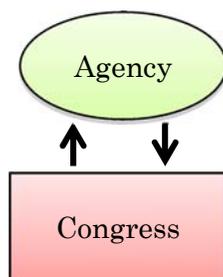


Of course, when those agencies attempt to play the role of principal, they often need to step gingerly. While agencies might dominate an elected branch in certain aspects of their relationship, in others they remain under the thumb of the elected branches. If those in agencies push too hard when dealing directly with branches, they might find themselves dominated again along those same dimensions where those in agencies once dominated.

⁹⁵ For example, in the fight over the Keystone XL Pipeline, Obama lobbied Congress against its construction and against an amendment that would prevent him from being involved in the cross-border permitting decisions. Manu Raju, *Obama Lobbying Dems over Keystone XL Pipeline*, POLITICO (Mar. 8, 2012, 2:32 PM), <http://www.politico.com/news/stories/0312/73767.html>.

It seems quite clear, for example, that some in Congress believe that the EPA has pushed it too hard.⁹⁶ Due to this, we have seen members of Congress attempt, and sometimes succeed, in punishing the EPA by cutting its budget, grilling its leadership, and trimming back its regulatory authority. This set of reciprocal interactions is represented in Figure 5.

Figure 5: Reciprocal Power Relationships



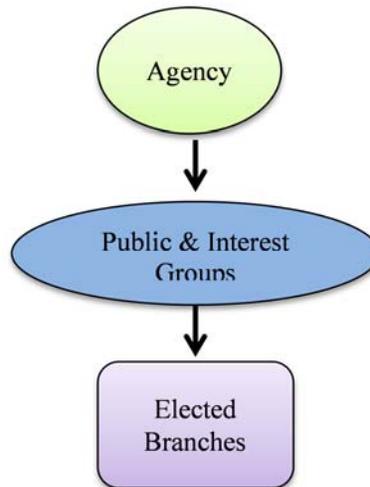
The power dynamic between agencies and the elected branches can be quite fluid, even if an agency has the upper hand at one moment. To introduce a corollary to a policy relied upon by President Theodore Roosevelt: agencies are well advised to step thoughtfully as they carry out their shtick.

C. MULTIPLE-LEVEL AGENCY-AS-PRINCIPAL INTERACTIONS

In moving the discussion on to multiple-level agency-as-principal interactions, I again begin with an example and then discuss possible variations on the theme where new players enter the scene. In this example, employees within the EPA put forward a Clean Air Act endangerment finding with the hopes that industry interest groups and the public will in turn pressure Congress to pass climate change legislation in order to avoid more painful Clean Air Act regulations. To the extent that one argues that the EPA is attempting to bully Congress to pass legislation, something akin to this sort of pressure underlies the logic of the assertion. We see this sort of interaction illustrated in Figure 6.

⁹⁶ See *supra* Part I.

Figure 6: Three-Level Agency-as-Principal Interaction



As discussed in Part II, traditional principal-agent theory suggests that the public and interest groups have an indirect way to get at administrative agencies: exerting influence over the elected branches to in turn exert power over the agencies.⁹⁷ Similarly, as illustrated in this example, agencies have indirect avenues to influence the elected branches—by influencing those with influence over the elected branches. Adding additional levels contributes to the complexity and the fluidity of government power, including the roles that agencies might play. Consider some additional versions of the endangerment-finding story. Some have argued that it was President Obama attempting to force climate change legislation.⁹⁸ The argument goes that Obama did this by exerting pressure on the EPA to make an endangerment finding.⁹⁹ The purpose of doing this, as the argument might continue, was to influence industry

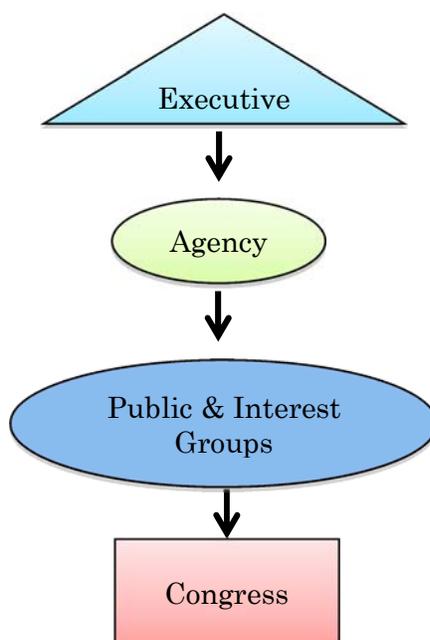
⁹⁷ See *supra* Part II.B.3 (discussing multiple-level principal-agent relationships).

⁹⁸ See, e.g., Brigham Daniels, *Addressing Global Climate Change in an Age of Political Climate Change*, 201 BYU L. REV. 1899, 1908–14 (2011) (discussing various arguments about how President Obama attempted to force climate change legislation through Congress).

⁹⁹ See, e.g., *id.* at 1910 (showing the temporal connection between President Obama's statements to Congress about the "ravages of climate change" and the EPA's proposed endangerment finding).

interest groups and the public to pressure Congress for legislative relief in the form of climate change legislation.¹⁰⁰ In this rendition, the EPA is a conduit, arguably more of an agent than a principal though certainly playing the role of both: an agent to the Executive and a principal to Congress. This strategic interaction is mapped below in Figure 7.

Figure 7: Agency Acting as a Conduit Between the Elected



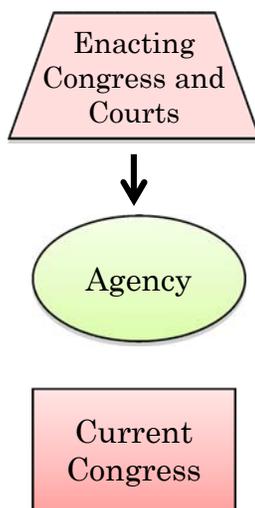
Another way agencies can end up in the middle is when Congress or courts force an agency to take a particular sort of action. For example, some have argued, including the most recent Administrator of the EPA, that there is no reason to blame the EPA for making its endangerment finding.¹⁰¹ The rationale goes

¹⁰⁰ See, e.g., Robert M. Sussman, *Science and EPA Decision-Making*, 12 J.L. & POL'Y 573, 577–78 (2004) (“EPA has enormous influence on many different sectors of our society, including industries, state and local governments, and individual citizens.”).

¹⁰¹ See, e.g., Letter from Lisa Jackson, Adm’r Env’tl. Prot. Agency, to Sen. Jay Rockefeller, U.S. Senate (Feb. 22, 2010), available at http://epa.gov/oar/pdfs/LPJ_letter.pdf (noting that

that given the state of science and the text of the Clean Air Act (as interpreted by the Supreme Court in *Massachusetts v. EPA*¹⁰²), the EPA had no choice in the matter.¹⁰³ In this light, it is difficult to argue that the agency played principal at all. It was not so much of an actor but rather something acted upon. We might map this sort of strategic interaction as shown in Figure 8.

Figure 8: Agency with Nondiscretionary Duty



the EPA must follow the Supreme Court's holding in *Massachusetts v. EPA* that greenhouse gases are subject to regulation under the Clean Air Act).

¹⁰² See 549 U.S. 497, 533–34 (2007) (holding that the EPA had arbitrarily and capriciously refused to decide whether greenhouse gases cause or contribute to climate change). The Court reasoned that

[u]nder the clear terms of the Clean Air Act, EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do. . . . Nor can EPA avoid its statutory obligation by noting the uncertainty surrounding various features of climate change and concluding that it would therefore be better not to regulate at this time.

Id.

¹⁰³ See, e.g., Press Release, *supra* note 93 (announcing that the EPA issued an endangerment finding that greenhouse gases contribute to air pollution based on “rigorous, peer-reviewed scientific analysis”).

The point here is not, of course, to get to the bottom of the history of the endangerment finding. Rather, the point is the potential array of interactions between the elected branches and the agencies and that the relationships involved are complicated. The theory of agency as principal holds that, at least along some dimensions, agencies have power over the elected branches. As illustrated by the examples in this Part, who takes charge can be quite fluid. Regardless, we need to understand that it is a real possibility that bureaucratic politics frequently have the potential to hold sway over Congress and the Executive.

IV. PLAYERS IN AGENCY-AS-PRINCIPAL INTERACTIONS

This Part briefly introduces the sorts of players that commonly appear in agency-as-principal interactions. I begin by discussing agencies and the elected branches, our central players. In addition to introducing these players, I also discuss some of the institutional characteristics of these players that can work toward creating agency-as-principal interactions. I also briefly discuss a range of other players who might appear in agency-as-principal situations.

A. AGENCIES

Not surprisingly, the first sort of player I discuss are those within agencies. This approach confronts difficulties right away. A few years back, Professor Kenneth Shelpse wrote a very well received article entitled, *Congress is a "They," Not an "It."*¹⁰⁴ While the article contributed a good deal more than the title, the point made by the title is an important one, and perhaps even more important when it comes to agencies. After all, it is commonplace to find some of the acronyms that represent the idea of agencies in contemporary thinking representing groups employing tens, hundreds, thousands, and in some cases hundreds of thousands. To complicate things all the more, some of these employees have positions with a great deal of influence, so much so that these

¹⁰⁴ Kenneth A. Shelpse, *Congress is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239 (1992).

individuals become the public face of the agency.¹⁰⁵ But lest we forget, sometimes even a lowly GS-4 can leak information, act as a whistleblower, or otherwise shift the political dynamic. Deciding on issues of who (or what), how many, and of what sort should count as *an agency* is difficult.

At the expense of precision and for the sake of inclusion, the term “agency” within the theory of agency as principal should be read to mean those within an agency—regardless of number or rank—with the ability to shift the political dynamic at play within the elected branches. While this definition captures a nearly number of combinations of those within agencies in a nondiscriminatory way, it is important to remember that the combinations that arise will have a great impact on the sorts of strategies available to those within agencies and the perceived payoffs of endless any such strategies.

Regardless of the number or combination of those who could properly be described as an agency, those within agencies are often well equipped to play the role of principal. To introduce this concept, I will now discuss four commonly cited institutional strengths of agencies and then turn to six other characteristics of agencies that warrant our attention in this context.

1. *Commonly Discussed Institutional Strengths Relevant to Agencies Playing Principal.* I now attempt to untangle some of the relative strengths of agencies documented within the literature and to discuss how these strengths might relate to those in agencies playing the role of principal.

The first agency strength to consider is the time and energy found among those within agencies.¹⁰⁶ Not surprisingly, these

¹⁰⁵ Peter H. Aranson, Ernest Gellhorn & Glen O. Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 35 (1982) (discussing agency leaders’ influence on electoral debates).

¹⁰⁶ See, e.g., ECONOMICS OF ADMINISTRATIVE LAW, at xv (Susan Rose-Ackerman ed., 2007) (listing agency expertise and lack of time on behalf of legislators as reasons that the legislature delegates policy-making authority to agencies); SCHOENBROD, *supra* note 14, at 13 (“Defenders of delegation . . . argue that Congress and the president lack the time to undertake the great quantity of work that agencies do.”); WEBER, *supra* note 40, at 232 (discussing the “economic indispensability” of bureaucracies); Aranson et al., *supra* note 105, at 21 (discussing how delegation of legislative authority to agencies reduces congressional workloads and provides specialists who decide matters about which Congress lacks knowledge); David Epstein & Sharyn O’Halloran, *The Nondelegation Doctrine and the Separation of Powers: A Political Science Approach*, 20 CARDOZO L. REV. 947, 962 (1999)

attributes play an important role in the ability of agencies playing principal. Specifically, those in agencies can often leverage the time and energy to create a reservoir of information, contacts, credibility, and resources that can be leveraged when the opportunity presents itself.¹⁰⁷

Next consider expertise. Many have used agency expertise as a reason to justify delegation¹⁰⁸ along with judicial deference to agency actions.¹⁰⁹ Expertise is the essential ingredient that led Weber to worry that the bureaucracies had the potential to become “the political master” and to convert the elected branches into

(stating that delegating authority to agencies “conserv[es] scarce resources of time, staff, and energy”); Epstein & O’Halloran, *supra* note 58, at 701 (“One of the reasons that bureaucracies are created in the first place is to implement policies in areas where Congress has neither the time nor expertise to micromanage policy decisions.”).

¹⁰⁷ Tracing institutional power to such sources is by no means novel. It has long been maintained that power can come from, “first, access to the resources, information, and support necessary to carry out a task; and second, ability to get cooperation in doing what is necessary.” Rosabeth Moss Kanter, *Power Failure in Management Circuits*, HARV. BUS. REV., July–Aug. 1979, at 65–70, reprinted in CLASSICS OF ORGANIZATION 400, 401 (Jay M. Shafritz & J. Steven Ott eds., 4th ed. 1996).

¹⁰⁸ See, e.g., *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (“[O]ur jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.”); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 440 (1987) (discussing the need for technical expertise in making governmental decisions due to complicated modern regulation). *But see* Aranson et al., *supra* note 105, at 21, 23–24 (citing to the “expertise” rationale but then criticizing it).

¹⁰⁹ See *Zuni Pub. Sch. Dist. v. Dep’t of Educ.*, 550 U.S. 81, 90 (2007) (“The matter at issue . . . is the kind of highly technical, specialized interstitial matter that Congress often does not decide itself, but delegates to specialized agencies to decide.”); *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (“[D]eference to administrative interpretations has been consistently followed by this Court whenever a . . . full understanding of the force of the statutory policy in the given situation has depended upon *more than ordinary knowledge* respecting the matters subjected to agency regulations.” (emphasis added) (citations and internal quotation marks omitted)); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (finding that the agency’s interpretations of the law, “while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance”); Sunstein, *supra* note 108, at 428 (arguing that the degree of judicial deference given to agencies should increase “as the issue becomes more technical or involves issues of policy”); Ronald J. Krotoszynski, Jr., *Reconsidering the Nondelegation Doctrine: Universal Service, the Power to Tax, and the Ratification Doctrine*, 80 IND. L.J. 239, 243 (2005) (“Some congressional delegations reflect a genuine desire to obtain the benefit of scientific and technical expertise when deciding very difficult questions.”); McCubbins, *supra* note 90, at 722 (“Perhaps the most common explanation for legislative delegation is complexity.”).

mere “dilettante[s]” in comparison.¹¹⁰ Agency expertise can play a critical role in agencies becoming principals.¹¹¹ As complexity increases, so does the opportunity to influence and manipulate.¹¹² Agency expertise can also lead those in the elected branches to consult those in agencies—access which in its own way provides an opportunity to influence.¹¹³

Third, some claim that agencies seem more politically insulated and less prone to untoward political pressure than the elected branches.¹¹⁴ While this rationale is not without its critics,¹¹⁵ the fact that, at least in some situations, agencies could be less sensitive to political pressure might be used to an agency’s

¹¹⁰ WEBER, *supra* note 40, at 232.

¹¹¹ *See id.* at 235 (“More and more the specialized knowledge of the expert became foundation for the power position of the officeholder.”).

¹¹² *See id.* (“Hence any early concern was how to exploit the special knowledge of experts without having to abdicate in their favor but preserve his dominant position.”).

¹¹³ *See id.* at 235–36 (“With the qualitative extension of administrative tasks and therewith the indispensability of expert knowledge, it typically happens that the lord no longer is satisfied by occasional consultation with individual and proved confidants or even with an assembly of such men called together intermittently and in difficult situations. The lord begins to surround himself with *collegiate* bodies who deliberate and resolve in continuous session.”).

¹¹⁴ *See, e.g.*, FRANK J. GOODNOW, *POLITICS AND ADMINISTRATION* 63 (1900) (“[U]nder our system of decentralized administration, our local self-government, the localities are in almost all cases important agencies of state government, since they have in their hands the uncontrolled administration of state laws.”); MAX WEBER, *Bureaucracy*, reprinted in *CLASSICS OF PUBLIC ADMINISTRATION* 26–27 (Jay M. Shafritz & Albert C. Hyde eds., 1978) (“The official who is not elected but appointed by a chief normally functions more exactly, from a technical point of view, because . . . it is more likely that purely functional points of consideration and qualities will determine his selection and career.”); Wilson, *supra* note 32, at 209–10 (“The field of administration is a field of business. It is removed from the hurry and strife of politics; it at most points stands apart even from the debatable ground of constitutional study. It is a political life only as the methods of the counting-house are a part of the life of society; only as machinery is part of the manufactured product.”). *But see* Aranson et al., *supra* note 105, at 24–25 (acknowledging this rationale but then criticizing it).

¹¹⁵ *See, e.g.*, Joseph P. Kalt & Mark A. Zupan, *Capture and Ideology in the Economic Theory of Politics*, 74 *AM. ECON. REV.* 279, 279 (1984) (“The economic theory of regulation long ago put public interest theories of politics to rest. These theories have correctly been viewed as normative wishings, rather than explanations of real world phenomena.”). In a similar vein, it should be noted that many scholars have argued that agencies are vulnerable to agency capture. *See* Daniel A. Farber, *Positive Theory as Normative Critique*, 68 *S. CAL. L. REV.* 1565, 1570 (1995) (listing tools that may be used by interest groups to capture administrative agencies); Sam Peltzman, *Toward a More General Theory of Regulation*, 19 *J.L. & ECON.* 211, 212 (1976) (discussing Stigler’s theory of “small group dominance in the regulatory process”); Stigler, *supra* note 83, at 10–13 (noting that “[t]he costs of obtaining legislation” can lead to agency capture).

advantage. For example, an agency might undertake an enforcement action in a particularly controversial way with the hope that the public outrage created could cause the elected branches to recalibrate. In other words, even if an agency and an elected branch share the blame for an unpopular enforcement action, the agency might be better able to withstand the political pressure than those in the elected branch.

Fourth, agency flexibility is also an institutional advantage that is largely recognized and often relied upon to justify delegating authority to agencies.¹¹⁶ Whether due to statutory gaps or just administrative flexibility, agencies have the ability to adjust their strategies as things progress.¹¹⁷ Agencies might also use this same flexibility to capture opportunities to act as a principal as things develop.

2. *Other Characteristics Relevant to Agencies Playing Principal.* Beyond these institutional strengths of agencies, there are a number of other characteristics of agencies that warrant our consideration. Below, I briefly highlight six of them.

First, those in agencies have great access to the elected branches. It is a cliché when talking about lobbyists that access equals influence.¹¹⁸ Of course, lobbyists are not the only ones with access to the elected branches. Those in agencies often have great access to those in elected branches as well. Some of this access is provided because the elected branches want to glean information from agency experts. Some of it arises from entrepreneurial individuals within agencies who meld relationships with those

¹¹⁶ See Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 HARV. L. REV. 1035, 1037 (2006) (discussing the “relative variability of agency” as a reason that a legislator would prefer to delegate authority); Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 811 (1983) (arguing that because agencies may have more knowledge than courts about legislation, their knowledge, if supported with plausible reasoning, should be given weight by the courts).

¹¹⁷ *United States v. Mead Corp.*, 533 U.S. 218, 247 (2001) (Scalia, J., dissenting) (“Where *Chevron* applies, statutory ambiguities remain ambiguities subject to the agency’s ongoing clarification. They create a space, so to speak, for the exercise of continuing agency discretion.”).

¹¹⁸ Richard L. Hasen, *Lobbying, Rent-Seeking, and the Constitution*, 64 STAN L. REV. 191, 219 (2012) (“A lobbyist with access to a legislator is in the best position to influence public policy. Once a lobbyist secures access, she influences policy primarily by providing credible information to a legislator or staffer to argue for a particular legislative action.”).

within the elected branches. This access can prove helpful when agencies attempt to play principal.

Second, those agencies often have good contacts. Those in agencies interface with the public, lobbyists, interest groups, regulated entities, experts outside the agency, the press, and staffers of elected branches. Additionally, many have described the revolving door in Washington among agencies, political staffers, and lobbyists.¹¹⁹ Whether it be through the revolving door or from those who enter an agency's door with regularity, these doors often open to situations that could affect the political landscape, not only for those within an agency but also for the elected branches when those in agencies use these contacts when trying to act as principals.

Third, agencies have some power to control the timing of political stimuli relevant to the elected branches since they are the creators of some of it. Certainly, this control is limited, but the fact that it exists at all is remarkably helpful to those attempting to play principal. We sometimes hear of those within government agencies accused of manufacturing crises.¹²⁰ The fact that it is even a plausible claim is noteworthy, particularly given the way that crisis dictates the political agenda of the elected branches.¹²¹ Additionally, sometimes even the timing of subtle things, like an enforcement action of just the right entity or the release of a report, can alter the political landscape.

¹¹⁹ See, e.g., *Brown v. Dist. of Col. Bd. of Zoning Adjustment*, 486 A.2d 37, 63 (D.C. 1984) (en banc) (“[T]he ‘Revolving Door’ . . . has a special sensitivity in Washington, D.C., being, as it is, the seat of government. Most law firms here continually hire or make partners of former government attorneys to gain their expertise and experience and government contacts.”); Linda Galler, *Emerging Standards for Judicial Review of IRS Revenue Rulings*, 72 B.U. L. REV. 841, 852–53 n.64 (1992) (including an extensive footnote with examples of high-level appointments of former agency officials contemporaneous to the article); Ann McBride, *Ethics in Congress: Agenda and Action*, 58 GEO. WASH. L. REV. 451, 470 (1990) (“The spread of revolving door abuses has been one of the chief causes of concern in the current ethics crisis in Washington.”).

¹²⁰ See, e.g., John Engler, *Obama’s Discretionary Jobs Crisis*, WASH. TIMES (Aug. 4, 2011), <http://www.washingtontimes.com/news/2011/aug/4/obamas-discretionary-jobs-crisis/#ixzz2MK6CQyI> (“[A] ‘manufactured crisis’ seems to be what the Environmental Protection Agency (EPA) is choosing to create with its proposed standards to reduce ozone emissions – the most expensive environmental regulation in U.S. history.”).

¹²¹ See, e.g., Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683, 752 (1999) (noting that when there is massive demand for action on a matter, Congress feels compelled to respond through legislative action).

Fourth, agencies are not only enmeshed in the policy considerations of their decisions but also in the political considerations.¹²² This insight into the politics of policy decisions can give those in agencies a good read of the political currents at work and the players involved, and allow them to draw on this understanding strategically when attempting to sway the elected branches.

Fifth, agencies are repositories of information. While the existence of information and access to information are not always one and the same, the fact that those in agencies have the potential to mine the agency's files, databases, and employee memories can prove quite helpful when those within the agency play principal in attempting to tinker with the elected branches. Even being able to control what information is kept and what is overlooked can prove important. Occasionally, even obscure notes in an agency file can turn a legal proceeding or turn up in a Freedom of Information Act¹²³ request and reinvent the political landscape.

Sixth, agencies have developed additional capacities that could be turned to the advantage of those in agencies tempted to try to play the role of principal. While agencies may not get as much interest from the press and public as those in the elected branches may enjoy, they still have press rooms, press secretaries, and even members of the media that report on them regularly. Similarly, agencies often have offices that focus on the development of new policies, relations with the elected branches, and pending and potential litigation. While all these things might be important in fulfilling agency missions, they are also useful when those in agencies attempt to influence the elected branches.

I now turn to the elected branches.

B. ELECTED BRANCHES

The other critical players in agency-as-principal interactions are the elected branches. I first define the meaning of Congress

¹²² Arguments that public administrators can and should be attuned to public opinion are, not surprisingly, very well established and can be traced to almost the beginnings of efforts to study bureaucracies. See, e.g., Wilson, *supra* note 32, at 216 (“[A]dministration in the United States must be at all points sensitive to public opinion.”).

¹²³ 5 U.S.C. § 552 (2012).

and the Executive within agency-as-principal interactions. Following this, I discuss some reasons those in elected branches are particularly prone to political manipulation by those in agencies.

1. *Congress.* Within traditional principal-agent theory focusing on Congress, scholars have focused on Congress as a whole, congressional committees, and even individual members of Congress.¹²⁴ While this might seem frustratingly inconsistent, it actually makes sense to use a flexible definition because some things done in Congress are done by Congress as a whole, some things are done by committees, and some things are done by individual members. Furthermore, some of the influential power of Congress is not held by members of Congress, but rather by staff.

As such, I define Congress to mean any person or group that has the authority to employ congressional power. In other words, if the congressional power at issue is the ability to pass a law, I would look for a majority of members from both chambers. If the power is that of threatening an oversight hearing, a single member of Congress might have access to the power. If the power at issue is the power to propose legislative alternatives to a committee or to set a member's calendar, I expect that a single staff member would often wield that aspect of congressional power.

2. *The Executive.* While it is commonplace to refer to the President as the Executive, the Executive Branch is much broader than the President, even if the President is its most dominant member. In common parlance, it is also not unusual to run across references to the Executive that are broad enough to include the entirety of the federal bureaucracy. Like most legal scholarship, this Article draws a distinction between the bureaucracy and the Executive; ignoring such a distinction would gloss over the value of administrative law.

Within this Article, at the macro level, the Executive means the White House and the political appendages directly under the control of the White House. This would draw into the umbrella of

¹²⁴ See e.g., Weingast, *supra* note 66, at 168–79 (applying principal-agent theory first to a sub-committee and then to Congress more generally); McCubbins et al., *supra* note 49, at 438–40 (applying theory to houses of Congress); McCubbins & Schwartz, *supra* note 50 (applying theory to individual members and subcommittees).

the Executive the President, White House staffers, and those employed by sub-bureaucracies of the White House like the Office of Management and Budget and the Council of Environmental Quality. It would leave out those in agencies, even those who serve as political appointees with the federal bureaucracy.

The term Executive is a relative term that pivots off of the Executive power in question. If we are talking about signing a presidential proclamation, the President alone holds that power. If it is getting an issue to the President's attention, a senior staffer would generally have that power. Another subset of the Executive might have the ability to influence the content of presidential messages and speeches. Yet, another set of members of the Executive might be able to craft press releases, issue reports, leak information to reporters, put a hold on agency rulemaking, send out letters on White House letterhead, or influence hiring decisions.

3. Factors That Can Make Those In The Elected Branches Prone To Manipulation. At the outset, it is important to recognize that many of the relative institutional strengths of agencies discussed above are relative institutional weaknesses of the elected branches (e.g., agency expertise). This discussion draws on additional factors beyond those already addressed when discussing relative strengths of agencies.

First, even though the elected branches are supposedly in charge of administrative agencies, those in the elected branches often have reason to please those in agencies. This seems particularly true of those not at the highest echelons of the elected branches. Just as recognized in the congressional practice called logrolling (where members of Congress trade support of bills with each other),¹²⁵ those in the elected branches might likewise be willing to trade goodies, endear goodwill, and build relationships with those in administrative agencies, an administrative logrolling of sorts. Playing nice while in the elected branches often leads to the revolving door in Washington, where those in the elected branches end up with plum jobs within the bureaucracy later on.

¹²⁵ Paul M. Johnson, *Logrolling*, in A GLOSSARY OF POLITICAL TERMS, <http://www.auburn.edu/~johnspm/gloss/logrolling> (last visited Feb. 3, 2014).

While we probably would not find much in the way of negotiations, this sort of you-scratch-my-back-and-I'll-scratch-yours mentality has been in fact implicitly recognized by a number of political theorists. We see it most clearly in the literature surrounding how the elected branches exert control over agencies¹²⁶—for example, the idea that agencies appeasing Congress in order to gain funding is a trade of sorts.

Trades can go in the other direction as well. For example, those in agencies often feed information to those in the elected branches, perhaps even selectively.¹²⁷ In addition to this potentially being a way for those in an agency to manipulate the elected branches, those in the elected branches are likely to find this information helpful, even if it is filtered. Other ways that agencies try to play principal might also be welcomed by those in the elected branches. When those in agencies identify legislative fixes or provide outlets for executive power, those in agencies save the elected branches a good deal of effort. One could imagine agencies holding influence due to the policies they pursue, jobs they provide, projects they complete, constituents they help, and media coverage they inspire. These goodies might deter those in the elected branches from stopping those in agencies from playing principal. For this to work, these goodies do not have to be bartered. Rather, the fact that those in agencies have something to offer could be enough to alter the preferences of those within the elected branches.

Second, consider the argument that the elected branches are eager to transfer political costs. Very often, the costs focused upon in this context are the political costs of being held accountable for a decision: delegation to agencies occurs because those in elected positions are eager to shift blame.¹²⁸ Blame is not the only

¹²⁶ See *supra* Part II.B.1 (discussing when elected branches are principals and agencies are agents).

¹²⁷ See generally Amanda Leiter, *Soft Whistleblowing*, 48 GA. L. REV. 425 (2014) (discussing the practices of whistleblowing).

¹²⁸ See, e.g., Aranson et al., *supra* note 105, at 57 (“If he succeeds in shifting to the agency a preponderantly large part of the blame, then the legislator will prefer agency regulations to judicially enforced statutes.”); Jonathan R. Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism*, 76 VA. L. REV. 265, 275–76 (1990) (discussing the observation that delegation to a regulatory agency protects Congress from blame (citing Morris P. Fiorina, *Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?*, 39 PUB. CHOICE 33 (1982))); McCubbins, *supra* note 90, at 723 (explaining Fiorina’s theory that a legislator’s

political cost those in the elected branches worry about. After all, one of the main reasons that lobbyists are thought to have power is that they are willing to help do the legwork for elected officials. Similarly, when agencies attempt to influence the elected branches, those within the elected branches might welcome the help and follow the agency's lead in order to avoid the costs of doing the work themselves, at least within certain parameters.

C. OTHER POTENTIAL PLAYERS

Any other person or entity with influence over the elected branches has the potential to play a role in agency-as-principal interactions. When an agency has the ability to influence those with sway over the elected branches, this provides the agency a potential inroad to influence the elected branches through that connection. While many sorts of entities that may serve as intermediaries in agency-as-principal interactions, it is worth noting three important entities that frequently make appearances in such interactions.

First, consider interest groups. These groups often have contacts within the elected branches and within agencies. Interest groups have the incentive to develop such contacts in order to influence both elected branches and agencies. This connection, however, leaves open the possibility that they can be used as an intermediary in interactions between agencies and the elected branches.

Second, the same is true of the press. Media coverage focused on political issues often finds reason to explore the actions of players both within the elected branches and agencies. Additionally, sometimes those in agencies are privy to information with media appeal, some of it relevant to what is going on in the elected branches and some it relevant to potential future agenda items in those branches. Those within agencies can use this information strategically, sometimes providing it to those within

decision to delegate will hinge on the ability to get the credit for benefits as well as shift the blame for costs); SCHOENBROD, *supra* note 14, at 9–12 (pointing out that by delegating to agencies, lawmakers can escape blame).

elected branches and sometimes to those within the press.¹²⁹ While leaking information to either of these entities comes with risks, the information is the press's lifeblood, and the press is often willing to cultivate and protect agency sources.¹³⁰

Third, the general public, though much more difficult to tweak strategically with any precision, is an important—if not the most important—entity for most within the elected branches. When agencies can influence public opinion, they can have great sway over the elected branches. From the perspective of many of those within the elected branches, a motivated public is perhaps their most important political principal. While some have noted a feedback loop between the public's attention and the actions of those in the elected branches,¹³¹ there is no reason to believe that those in agencies could not likewise fuel the demands the public aims at the elected branches.

There are other potential connections that those in agencies can also leverage. It is worth thinking about the role of courts in providing agencies political cover and how judicial mandates can open the door to new political strategies. State, local, and tribal governments often sit in a position of import and have frequent contacts with those in the federal government and elected officials. Similarly, regulated entities can provide conduits between agencies and the elected branches.

While these are some of the usual suspects, anyone with influence over one of the elected branches could make an appearance in an agency-as-principal interaction. With players in mind, I now consider the sorts of strategies that agencies employ.

¹²⁹ For a detailed and captivating look about how those in agencies can strategically use the press to affect both agency policy and outside decisionmakers see generally Leiter, *supra* note 127.

¹³⁰ See, e.g., Devlin Barrett, *Former FBI Agent to Plead Guilty in leak Case*, WALL ST. J., Sept. 23, 2013, <http://online.wsj.com/news/articles/SB10001424052702303759604579093623280025990> (noting the Associated Press's refusal to comment on its sources).

¹³¹ See Kuran & Sunstein, *supra* note 121, at 685, 751–58 (discussing how elected officials can set off availability cascades, which refer to a process of collective belief formation “through which expressed perceptions trigger chains of individual responses that make these perceptions appear increasingly plausible through their rising availability in public discourse”).

V. STRATEGIES

This Part explores the strategies that agencies might employ to manipulate the elected branches. As one might suspect, while there is overlap between the sorts of strategies that can be used to influence Congress and the Executive, the particular traits of each of the elected branches—as well as differences in their institutional relationships with agencies—lead to some variation in the sorts of strategies that those in an agency might use to try to play principal.

To introduce this conversation, this Part provides vignettes of two prominent public administrators, William Ruckelshaus and Gifford Pinchot. Ruckelshaus was the first Administrator of the EPA¹³² and was appointed by President Nixon.¹³³ Pinchot was first to head the National Forest Service and worked under President Theodore Roosevelt.¹³⁴ While both of these men are giants in the history of the environmental movement in the United States, their services provide interesting bookends for the theory of agencies as principal. Ruckelshaus found a very receptive Congress when it came to moving environmental legislation,¹³⁵ but had a more complex relationship with President Nixon, who at first voiced great support for environmental concerns but eventually soured on the environmental movement.¹³⁶ On the other hand, Pinchot had a great ally in President Roosevelt but faced serious challenges in pursuing policy changes due to resistance in Congress.¹³⁷

This Part, particularly as it concerns Nixon, might take many by surprise because Nixon is often counted as a great environmental President. So, while these short stories are not

¹³² William D. Ruckelshaus, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, <http://www2.epa.gov/aboutepa/William-d-ruckelshaus> (last visited Nov. 20, 2013).

¹³³ J. BROOKS FLIPPEN, NIXON AND THE ENVIRONMENT 88–89 (2000).

¹³⁴ M. NELSON MCGEARY, GIFFORD PINCHOT 61 (1960) (describing the transfer of control of the forests to Pinchot as head of the U.S. Forest Service).

¹³⁵ See FLIPPEN, *supra* note 133, at 88 (noting Congress's readiness to respond to Nixon's environmental legislation when the EPA was formed).

¹³⁶ See *id.* at 102 (describing a testy exchange between Nixon and the president of the Sierra Club in which Nixon referred to environmentalism as a "fad").

¹³⁷ See MCGEARY, *supra* note 134, at 79–80 (describing Pinchot's and Roosevelt's resolve to work around legislation passed by Congress that transferred power to establish forests from the President to Congress).

meant to provide a complete picture by any means, they are still interesting.

After introducing vignettes surrounding Ruckelshaus and Pinchot, this Part then discusses the strategies used by those in the bureaucracies to play principal more generally.

A. NIXON, MUSKIE, AND RUCKELSHAUS

Before President Nixon took office, the Environmental Protection Agency did not exist, nor did the vast majority of the nation's modern environmental laws. However, before Nixon left office, he created the EPA and saw the passage of a number of environmental enactments including the Clean Air Amendment,¹³⁸ the Clean Water Act,¹³⁹ and the Endangered Species Act.¹⁴⁰ These enactments did not come into being by accident: Nixon and a few key legislators, particularly Senator Edmund Muskie of Maine, had a great deal to do with shaping these laws.¹⁴¹ Prior to Nixon taking office, Muskie had toiled for years in the Senate attempting to strengthen federal protection of the environment.¹⁴² And, in 1970, Nixon took many by surprise by calling for strong, new environmental protections in his State of the Union address.¹⁴³ Within weeks, Nixon followed up with an even stronger, more specific speech before Congress that he called his Environmental Message, in which he called for dozens of new environmental laws along with stronger legislation to protect air and water quality.¹⁴⁴

Behind closed doors, however, Nixon was quite hostile to the environmental movement and even to the environmental initiatives that he enthusiastically pushed in public. While one

¹³⁸ Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended in scattered sections of 42 U.S.C.).

¹³⁹ Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified as amended in scattered sections of 33 U.S.C.).

¹⁴⁰ Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (codified as amended in scattered sections of 16 U.S.C.).

¹⁴¹ See FLIPPEN, *supra* note 133, at 7, 107-10 (discussing Senator Muskie's role in shaping the environmental legislation).

¹⁴² See *id.* at 7 (stating that Muskie "helped lay the foundation for an environmental policy that the nation needed").

¹⁴³ Annual Message to the Congress on the State of the Union, 9 PUB. PAPERS 8, 12-13 (Jan. 22, 1970).

¹⁴⁴ Special Message to the Congress on Environmental Quality, 38 PUB. PAPERS 96 (Feb. 10, 1970).

could point to a range of evidence to illustrate this point (more than enough to warrant an entire article in its own right),¹⁴⁵ consider a few illustrative examples.

After the passage of the Clean Air Amendments of 1970 and creation of the EPA, the following conversation was caught on the now infamous Nixon White House Tapes. In the conversation, Nixon painted those pushing the environmental movement in a very dim light:

[T]heir motive is really not to clean up the air and the water, and make everything safe Their motive is defeatist. Their motive is to have the United States cede basically to a secondary position in the world. They hate the system radically . . . and probably it goes much deeper than that

[D]eep down, if we were to put them on a psychiatrist's couch, . . . he would find that they are tearing the country down, and tearing the system down, for reasons that have nothing to do with what's wrong with the country and what's wrong with the system. It has to do with what's wrong with them. That's my analysis of it¹⁴⁶

Similarly, Nixon repeatedly expressed frustration with decisions made on the environment within the federal bureaucracy to his advisers. Though he rarely intervened, some of these decisions mattered a great deal to him. Probably the decision that bothered Nixon most had to do with the controversial insecticide DDT.¹⁴⁷ Due to environmental litigation that occurred prior to the creation of the EPA, Ruckelshaus had to consider the prospect of phasing out most of the nation's domestic uses of DDT because of the threats it posed to people and the natural environment.¹⁴⁸

¹⁴⁵ In future work, I hope to provide such a nuanced view of the Nixon presidency, other major political players, and the environmental movement at the time he served.

¹⁴⁶ Nixon White House Tapes, Tape 559 (August 10, 1971) (available at the Nixon Presidential Library and on file with author).

¹⁴⁷ See FLIPPEN, *supra* note 133, at 172 (stating that Nixon was "furious" with the EPA's decision to phase out all uses of DDT).

¹⁴⁸ See *Env'tl. Def. Fund, Inc. v. Hardin*, 428 F.2d 1093, 1097, 1108 (D.C. Cir. 1970) (finding EDF had standing to contest the Department of Agriculture's decision not to cancel

Consider Nixon's own words (again captured on the White House tapes).

First, after agreeing with one of his aides who stated, "What we have to do is to develop a scheme so that we get a balance automatically in the system so that somebody like Ruckelshaus can't make a decision in response to his pressure groups without subjecting it to the review of people who have adverse evidence,"¹⁴⁹ Nixon went on to say, "I just feel so strongly on this. Let me say, this whole business about pesticides, DDT, et cetera (and environment goes with it, safety goes with it, consumerism goes with it) has become a racket. . . . We are going to stop it. Believe me."¹⁵⁰

It appears that Nixon's feelings initially translated into something more than just talk. In Russell Train's memoir (at the time Train headed the Council of Environmental Quality within the White House), he relates the story of how the White House arranged to have the Attorney General, John Mitchell, meet with Ruckelshaus on a park bench (presumably to avoid leaks) to try to convince Ruckelshaus not to phase out DDT and how Ruckelshaus resisted.¹⁵¹ One of the ways that Ruckelshaus tried to steer Mitchell to convince the White House not to intervene was by citing, among other things, the risk of exposing Nixon to "political fallout."¹⁵²

Ruckelshaus not only resisted in discussing the issue with Mitchell, he also did so with the actual decision, in which he phased out DDT for most uses.¹⁵³ He did this despite the fact that he considered the science surrounding the decision a very close call.¹⁵⁴ Nixon made clear to his advisers at the time that he

all DDT registrations and remanding consideration of cancellation back to the Secretary of Agriculture); *Env'tl. Def. Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 595 (D.C. Cir. 1971) (directing the Secretary of Agriculture to initiate proceedings to determine whether a pesticide's registration should be cancelled).

¹⁴⁹ Nixon White House Tapes, Tape 503 (May 21, 1971) (available at the Nixon Presidential Library and on file with author).

¹⁵⁰ *Id.*

¹⁵¹ RUSSELL E. TRAIN, *POLITICS, POLLUTION, AND PANDAS: AN ENVIRONMENTAL MEMOIR* 165 (2003).

¹⁵² *Id.*

¹⁵³ Consolidated DDT Hearings, 37 Fed. Reg. 13,369 (June 30, 1972).

¹⁵⁴ See Interview with William D. Ruckelshaus, Former Adm'r, EPA, in Seattle, Wash. (May 24, 2011) [hereinafter Ruckelshaus Interview] (transcript of interview on file with

“completely disagree[d] with this decision.”¹⁵⁵ In fact, years later when Nixon wrote his memoir, he almost ignored the topics of Ruckelshaus and the EPA entirely. Yet, in one of the sparse references devoted to the agency, Nixon took the opportunity to criticize Ruckelshaus’s DDT decision.¹⁵⁶

What is interesting from the vantage point of the theory of agency as principal, however, is that despite these strong feelings Nixon had, any pains the White House took to reverse Ruckelshaus’s decision on DDT—assuming that there was any—went unnoticed by Ruckelshaus, who reports that Nixon never talked to him about the decision.¹⁵⁷ In fact, he reports being surprised when he found out about Nixon’s displeasure with the decision when reading memos at the Nixon Presidential Library that had notes by President Nixon in the margins.¹⁵⁸

Given all that Nixon could have done (including firing Ruckelshaus), why did Nixon fail to act? The files that were in the Nixon White House, which are now in the Nixon Presidential Library, show that Nixon received extensive polling data and briefings about how Americans felt about the environmental issue.¹⁵⁹ Additionally, while Nixon at times resisted, he received constant advice from his aides, particularly John Ehrlichman (who had a great deal of influence over Nixon’s domestic agenda) and John Whittaker (who oversaw the portfolio of issues relating to the environment for Nixon).¹⁶⁰ On the Nixon Tapes, Nixon is heard saying, “Both Johns say, ‘I am not kidding’ when they talk about the environment. You know. But I am not kidding, I think the goddamn thing is a phony issue.”¹⁶¹ But still, in public he pushed

author) (“DDT is not an easy decision. It is not black and white. There are a lot of good things that can come from the use of DDT and that had happened historically.”).

¹⁵⁵ FLIPPEN, *supra* note 133, at 172.

¹⁵⁶ See RICHARD NIXON, RN: THE MEMOIRS OF RICHARD NIXON 624 (1978) (referring to Ruckelshaus’ decision to ban DDT as a “panicky” one).

¹⁵⁷ Ruckelshaus Interview, *supra* note 154 (replying “Almost never,” when asked if he interacted with President Nixon regarding the DDT issue).

¹⁵⁸ *Id.* (“They were not nice notes. [Laughing.]”).

¹⁵⁹ See, e.g., Memorandum from John Whittaker to John Ehrlichman, Peter Flanigan, Ken Cole, William Ruckelshaus, and Russell Train: The environment issue (May 12, 1971) (available at the Nixon Presidential Library and partial transcript on file with author).

¹⁶⁰ FLIPPEN, *supra* note 133, at 28, 75.

¹⁶¹ Nixon White House Tapes, Tape 267 (July 29–30, 1971) (available at the Nixon Presidential Library and partial transcript on file with author).

the environmental issue. Why? It benefitted him politically, even if it vexed him. The same is true of Ruckelshaus leading on environmental issues.

While Ruckelshaus and Nixon were by no means close, Ruckelshaus understood Nixon and his White House well enough to lean heavily on the political import of the environment when lobbying Nixon to use his powers as President to protect the environment. Consider the sorts of arguments Ruckelshaus makes in the following memo to attempt to convince those in the Nixon White House to take some undefined steps to protect the Great Lakes:

In recent months the President's reputation as a strong advocate for environmental improvements has suffered.

... [T]he attitude of the press and various environmental groups ... has oscillated from suspicion to downright hostility... As of this date, the situation is continuing to worsen.

...
The environment is a negative political issue... [I]f, say Muskie, could ever convince the American people he was significantly more concerned about the environment than the President it could seriously damage RN. In my opinion you can't win with the environment, but they might beat you with it.

The very people RN appeals to are also vitally interested in the environment... In my opinion a significant percentage of these voters would vote against a man they felt was insensitive to or unconcerned about the environment. I don't believe the situation has reached this pass as yet, but it could, and should be avoided.

... In light of the inevitability of some apparently adverse actions relating to the environment, I recommend we take the offensive. The President's

environmental message and initiatives are important.¹⁶²

While it is difficult to prove causation in such matters, keep in mind when considering this lobbying effort that Nixon signed a treaty with Canada to protect the Great Lakes about a year later, with Ruckelshaus by his side.¹⁶³ Regardless, it is noteworthy that Ruckelshaus's memo does not use language meant to inspire. Rather, he presented facts that are designed to evoke a political response.¹⁶⁴ He got Nixon to act, even if Nixon was a most unwilling follower.

Ruckelshaus's memo includes a number of ploys to get Nixon to change his political calculus. Probably the most aggressive assertion in the memo, the reference to Senator Edmund Muskie, would be lost on many people today. While perhaps Muskie is beginning to fade from the American mind, in the late-1960s and 1970s, he loomed large. The soft-spoken and often introverted Senator from Maine had grown into a political all-star. He built his political career on shepherding through and championing a wide range of environmental initiatives in Congress.¹⁶⁵ In 1968, he ran as vice-president on the Democratic ticket with then-sitting Vice President, Hubert Humphrey.¹⁶⁶ Particularly as the environmental movement began to skyrocket in the 1970s, Muskie's stock only increased along with a wide range of environmental bills.¹⁶⁷ As the 1972 election approached—in fact up until Spring of 1972—he was the frontrunner for the Democratic Party's nomination.¹⁶⁸ Obviously, Ruckelshaus mentioning Muskie in the throes of the 1972 election dialed into some of the White House's chief concerns.

¹⁶² Memorandum from William D. Ruckelshaus, EPA Administrator to John Whitaker 1–2 (Jan. 11, 1971) (copied from the Nixon Presidential Library and on file with author).

¹⁶³ See Richard Nixon: *Remarks on Signing the Great Lakes Water Quality Agreement Between the United States and Canada* (Apr. 15, 1972), available at <http://www.presidency.ucsb.edu/ws/?pid=3378> (discussing his signing of the treaty); Ruckelshaus Interview, *supra* note 154 (discussing traveling to Ottawa for Nixon to sign the treaty).

¹⁶⁴ See *supra* text accompanying note 162.

¹⁶⁵ FLIPPEN, *supra* note 133, at 227–28.

¹⁶⁶ *Id.* at 15.

¹⁶⁷ *Id.* at 68–69.

¹⁶⁸ While his campaign, to the surprise of many, faltered, he remained an important voice in politics, particularly environmental policy. *Id.* at 160.

Having Muskie in the picture benefited Ruckelshaus in a number of ways, at least to the extent that he was interested in playing principal. As illustrated in the example above,¹⁶⁹ when Ruckelshaus took positions that furthered environmental protection (including those that infuriated Nixon), Ruckelshaus used Muskie's political presence and support of environmental protections to soften Nixon. Additionally, Muskie was well-positioned to push environmental legislation and, in fact, eager to do so. Because of this, Ruckelshaus had the ability to work with Muskie directly, and in fact, often found Muskie quite receptive to his requests for congressional action.¹⁷⁰ According to Ruckelshaus, this sort of agency lobbying was quite common from the inception of the EPA:

When I began to administer the Clean Air Act, it became clear to me that there were problems that needed fixing—the act itself needed adjustment. So, I went up and talked to Muskie and Senator Howard Baker—who was then the ranking member. . . . I said, “Okay, why don’t we do this: Why don’t I keep trying to administer this law, and let you know when I am running into trouble with some aspect of it? When we have had enough experience working at it, then we can both endorse some amendments to it.” Muskie was again fine with that. Now, things began to deteriorate in many areas beyond those initial discussions. But, from time to time, I would bring up issues to him; he would be responsive to them.¹⁷¹

While it is little surprise that Ruckelshaus could get Muskie to move on environmental initiatives, a much more interesting story (along with more complex opportunities for Ruckelshaus to exert influence as a principal) unfolded when Ruckelshaus found Muskie unwilling to consider legislation.

One such situation leads us to a classic story of environmental law, though this Article will add a novel twist. The story features

¹⁶⁹ See *supra* text accompanying note 162.

¹⁷⁰ See Ruckelshaus Interview, *supra* note 154 (“I found Muskie easy to deal with.”).

¹⁷¹ *Id.*

the EPA attempting to reduce the number of cars from Los Angeles's roads by means of gas rationing. Because Ruckelshaus is the story's protagonist, perhaps it is best told through his words:

So, [the EPA was] sued in Los Angeles for failure to implement the Clean Air Act. . . . We said, "We are working hard at it, but there is no way we can get there by the deadline" in our arguments in the courts. The judge said, "Impose transportation controls." . . . The judge threatened to hold me in contempt and put me in jail if I didn't impose the transportation controls. So, I decided I would go to Los Angeles and tell them that 80% of the cars would have to get off the road by 1975. . . .

I talked to the mayor and other officials around the county including the air quality guys. . . . I said, "I am going to have to order this. It boils down to my freedom versus your mobility." [Laughing.] I said, "That is a pretty easy question." So, we called a press conference and announced it.¹⁷²

So far, the story rolls along as one would expect. While it is stunning to think that the EPA would dare to eliminate four out of five cars on Los Angeles's roads through gas rationing, the attempt is uncontroverted history.

The next part of the story, however, introduces an unexpected twist that serves as a great example of the theory of agency as principal in action.

Ruckelshaus goes on:

I was convinced that it was not going to happen—we were not going to get 80% of the cars off the road.

But, this [announcement] would get the Congress to face the realities of this statute and the impossible burdens it was placing on a regulatory agency. Sure enough, Senators Tunney and Cranston, who were from California, denounced the decision. Both of them

¹⁷² *Id.*

had voted for the Clean Air Act like everybody else in the Senate. . . .

I remember that at that press conference in L.A. there were 29 cameras—I had counted. The first question after I announced what we were doing was, “Is this a joke?” [Laughing.] I said, “It’s not a joke. It is the law and a requirement from a judge.” I did not say this, but in my mind, the judge had been correctly reading the law. . . .

I was convinced that we would get relief as a result of that [announcement]. And, we did. I did let the White House know what I was doing. I wanted the White House to understand and L.A. to understand and the Congress to understand what sort of problem a combination of the strict deadlines in the statute along with the ambient air quality standards posed for somebody in this agency.¹⁷³

Documents from the Nixon Presidential Library confirm Ruckelshaus’s version of the story. A memo from Ken Cole, Nixon’s head domestic policy adviser, corroborates Ruckelshaus and also provides additional information about the politics going on behind the scenes:

EPA Administrator Bill Ruckelshaus has announced a transportation control plan for the City of Los Angeles. . . .

The EPA plan is unworkable. We know it and Ruckelshaus will say it. . . . Our intention is, of course, never to put such a plan into effect, but is ultimately amend the Clean Air Act to permit administrative discretion in achieving the legislative requirements. . . . To do so, we need to call the problem to the public’s attention. Public hearings will take place shortly after the plan is published. Ultimately we will move legislation to Congress to amend the Act.

¹⁷³ *Id.*

Governor Reagan has been consulted with regard to our plan and he concurs.¹⁷⁴

Not only was then-Governor Reagan apparently consulted, but he also played perfectly into Ruckelshaus's hand. After Ruckelshaus's news conference, Reagan sent a letter to many within the California congressional delegation asking Congress to revisit the Clean Air Act. The letter read as follows in part:

Some of the proposed EPA measures will have a major impact on the economic and social structure of our entire State. EPA admits that even if its proposed measures are implemented, it will further insist upon reducing motor vehicle emissions in the region by greater than 80 percent. There is something seriously awry in federal laws and federal regulations which result in this kind of situation. This may be a case where the cure is worse than the "illness." These difficulties are admitted by EPA, which has indicated its intent to seek legislation to extend the 1977 deadline. . . .

. . . I concur with EPA. . . . I strongly urge you also to review the entire Clean Air Act, particularly those provisions under which EPA is mandating transportation controls. . . .¹⁷⁵

Ultimately, after Ruckelshaus engineered the political situation and despite resistance from Muskie, Congress in fact responded by providing EPA the statutory relief Ruckelshaus desired.¹⁷⁶

B. ROOSEVELT, CANNON, MONDELL, AND PINCHOT

As a lifelong sportsman and committed conservationist, Theodore Roosevelt paid a great deal of attention to issues

¹⁷⁴ Memorandum from Ken Cole to the President, EPA's "Clean Air" Plan for Southern California (Jan. 15, 1973) (copied from Nixon Presidential Library and on file with author).

¹⁷⁵ Letter from Ronald Regan, Governor of California, to the Honorable Alphonso Bell, Member of Congress (July 5, 1973) (copied from Nixon Presidential Library and on file with author).

¹⁷⁶ FLIPPEN, *supra* note 133, at 153.

surrounding public land and wildlife management.¹⁷⁷ While Fredrick Jackson Turner had convincingly argued that the Frontier was gone years before Roosevelt came to office,¹⁷⁸ Washington really did not start to act on that message in a meaningful way until Roosevelt's presidency.

Roosevelt's political career blossomed with the progressive Republican movement that came on strong at the turn of the twentieth century.¹⁷⁹ In public, Roosevelt showed little fear on taking on the establishment and relished the opportunity of serving as a champion of the common person.¹⁸⁰ He also served as an avid commenter and figurehead when it came to issues surrounding natural resource conservation.¹⁸¹

Despite Roosevelt's public persona, much of his early political career grew out of exclusive connections he cultivated with those of power and wealth. A significant part of this came through a hunting society that he formed called the Boone and Crocket Club.¹⁸² While it is uncertain whether he created it due to a desire to help his political career, due to his interest in the outdoors, or both;¹⁸³ this elite hunting club put Roosevelt in the center of many prominent people of his time, including important figures within the American conservation movement.¹⁸⁴

One of the members of this exclusive club was Gifford Pinchot, who in fact was made a member after Roosevelt sponsored his membership candidacy in 1897, while Roosevelt was still governor

¹⁷⁷ DOUGLAS BRINKLEY, *THE WILDERNESS WARRIOR: THEODORE ROOSEVELT AND THE CRUSADE FOR AMERICA* 692–93 (2010).

¹⁷⁸ See generally Frederick Jackson Turner, *The Significance of the Frontier in American History*, in *ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION FOR 1893*, at 199–227 (1894), reprinted in *FREDERICK JACKSON TURNER, THE FRONTIER IN AMERICAN HISTORY* 1–38 (New York, Henry Holt & Co. 1920) (discussing the dissolution of the American Frontier).

¹⁷⁹ EDMUND MORRIS, *THE RISE OF THEODORE ROOSEVELT* 772–73 (1979).

¹⁸⁰ See, e.g., *id.* at 140–67 (describing Roosevelt's time in the New York State Assembly and detailing his energetic demeanor on the floor, which led one newspaper to refer to him as "the Cyclone Assemblyman").

¹⁸¹ BRINKLEY, *supra* note 177, at 692–93.

¹⁸² See *id.* at 201–06 (discussing Roosevelt's creation of the club).

¹⁸³ See *id.* at 136 (suggesting Roosevelt created the club out of a desire to protect big game animals and their habitats).

¹⁸⁴ See HAROLD T. PINKETT, *GIFFORD PINCHOT: PRIVATE AND PUBLIC FORESTER* 53 (1970) (discussing Roosevelt's interaction with Gifford Pinchot through the Boone and Crockett club).

of New York.¹⁸⁵ When they met in 1894, Roosevelt was familiar with Pinchot's forestry projects.¹⁸⁶ The two found that they had much more in common than their devotion to the conservation movement, particularly their love of sport and outdoor adventure. The two became friends—close enough that in true Roosevelt fashion, Roosevelt challenged Pinchot in wrestling and boxing.¹⁸⁷ (While Roosevelt may have had the upper hand in wrestling, Pinchot actually knocked Roosevelt to the floor while boxing.¹⁸⁸) Given their relationship, it should come as no surprise that Pinchot became one of Roosevelt's most trusted advisers.¹⁸⁹

Before Roosevelt came to the White House, Pinchot had labored to reform federal management of public lands in various contexts.¹⁹⁰ The environment was Pinchot's passion, and given that he came from a family of wealth, Pinchot was able to focus his career on this cause.¹⁹¹ In 1889, he traveled to Europe and began studying to become a professional forester,¹⁹² something hardly even known at the time in the United States. He left his studies a year later after coming to the realization that it would not just take expertise but also "close touch with public opinion"¹⁹³ to make a meaningful difference in the United States' forests, particularly the vast reserves held by the United States.¹⁹⁴ As opportunities presented themselves to influence federal land policy, Pinchot floated in and out of the public sector.¹⁹⁵ Under President William McKinley, Pinchot was named head of the Division of Forestry (later renamed the U.S. Forest Service) within the Department of

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 34.

¹⁸⁷ See BRINKLEY, *supra* note 182, at 344 (discussing the matches).

¹⁸⁸ *Id.*

¹⁸⁹ See THEODORE ROOSEVELT, AN AUTOBIOGRAPHY 409 (1913) (describing Pinchot as "the moving and directing spirit in most of the conservation work" during Roosevelt's term).

¹⁹⁰ See *id.* (discussing Pinchot's efforts before Roosevelt's term).

¹⁹¹ See CHAR MILLER, GIFFORD PINCHOT AND THE MAKING OF MODERN ENVIRONMENTALISM 58 (2001) (discussing Pinchot's upbringing and his family's willingness to finance his education).

¹⁹² *Id.* at 78.

¹⁹³ *Id.* at 90.

¹⁹⁴ See *id.* (discussing Pinchot's decision to return to the United States).

¹⁹⁵ See, e.g., *id.* at 91, 102, 142 (noting that Pinchot held positions with the Division of Forestry, Vanderbilt University, and George Vanderbilt); PINKETT, *supra* note 184, at 34–35 (discussing the wide demand for Pinchot's consultation services in 1894).

Agriculture.¹⁹⁶ While the position initially seemed to be one of great promise, his time under McKinley was full of frustration.¹⁹⁷ When McKinley was assassinated in 1901, however, Pinchot's chances of reforming federal land policy changed overnight.

Not surprisingly, Pinchot had no problem gaining personal access to Roosevelt, in both formal and informal settings.¹⁹⁸ This access provided many opportunities to influence Roosevelt. It is telling that one of the first things that Roosevelt did as President was hear out Pinchot on his desire to transfer federal forest reserves from the Department of Interior to the Department of Agriculture, under his control of the Division of Forestry.¹⁹⁹ At this time, Pinchot actually prepared portions of Roosevelt's first message to Congress, which among other things advocated for this precise policy change.²⁰⁰ This was not a one-off either; over the course of their relationship, Pinchot became "accustomed to hearing his words and phrases included in innumerable speeches delivered by Roosevelt."²⁰¹

While Pinchot's influence is apparent in a number of areas, perhaps his fingerprints are seen most clearly within the context of transferring the forest reserves from the Department of Interior to the Department of Agriculture.²⁰² As a forester without a forest to

¹⁹⁶ PINKETT, *supra* note 184, at 47; MILLER, *supra* note 191, at 155; *see also* Gifford Pinchot, *Transfer of the Reserves* 25 (1904) (available at the U.S. National Archives, Gifford Pinchot Papers, Box 974, and on file with author) (arguing in favor of transferring the National Forest Reserves from the Department of Interior to the Department of Agriculture).

¹⁹⁷ *See* MCGEARY, *supra* note 134, at 53 (noting that McKinley never helped Pinchot achieve his goal of transferring forest administration).

¹⁹⁸ *See, e.g.*, Gifford Pinchot, Personal Diary from 1903, June 19 (available at the U.S. National Archives, Gifford Pinchot Papers, and on file with author) (tennis with Roosevelt and Garfield); *id.* at Oct. 20 (lunch with Roosevelt); *id.* at Oct. 21, 1903 (tennis with "T.R."); Gifford Pinchot, Personal Diary from 1902, Feb. 26 (available at the U.S. National Archives, Gifford Pinchot Papers, and on file with author) (horseback riding and dining at the White House); *id.* at May 31 (horseback riding with Roosevelt and Garfield).

¹⁹⁹ *See* ROOSEVELT, *supra* note 189, at 409 (recalling Pinchot's plan to consolidate forest work in the Division of Forestry); MCGEARY, *supra* note 134, at 54 (noting that Roosevelt "appealed to Congress . . . to place in the Bureau of Forestry" the forest reserves); MARTIN L. FAUSOLD, GIFFORD PINCHOT: BULL MOOSE PROGRESSIVE 15 (1961) (remarking on Pinchot's efforts toward achieving his goal of transferring the reserves).

²⁰⁰ ROOSEVELT, *supra* note 189, at 411; MCGEARY, *supra* note 134, at 54; FAUSOLD, *supra* note 199, at 14.

²⁰¹ MCGEARY, *supra* note 134, at 114.

²⁰² *See id.* at 53 (noting that Pinchot worked for years to transfer the forest administration before Congress was ready for the change).

manage, and yet committed to the idea that the Department of Agriculture, instead of the Department of Interior, should manage the forests, Pinchot needed more help than the President could give him. What he needed was an enactment from Congress that would transfer the forest reserves from one department to the other.

Getting Congress to act was no small order. He faced strong resistance from many western members of Congress, including Representative Joseph Cannon, chairman of the House Appropriations Committee and eventually Speaker of the House.²⁰³ It is telling that in 1898, the year that Pinchot took over the Department of Agriculture's Division of Forestry, Congress included a rider to the agricultural appropriation that required the Division to justify its existence.²⁰⁴ Obviously, Pinchot had a long way to climb.

How Pinchot went about convincing Congress to act provides interesting insights into the strategies employed by those in agencies wishing to play principal. Most of what he did at the outset revolved around influencing governmental and private organizations with some pull within Congress and the political landscape generally to take positions that harmonized with his own goals.²⁰⁵ Pinchot urged "dozens of various associations" to pass resolutions urging the transfer of the reserves.²⁰⁶ For example, he convinced the American Forestry Association and the National Board of Trade to petition Congress to transfer the reserves to the Division.²⁰⁷ He also frequently sought out opportunities to make inroads with interest groups and their leaders.²⁰⁸ He also tried to make inroads with local communities.

²⁰³ See Pinchot, *supra* note 196, at 72; GIFFORD PINCHOT, *BREAKING NEW GROUND* 158 (1947) (noting that Cannon strongly opposed the transfer).

²⁰⁴ PINKETT, *supra* note 184, at 47.

²⁰⁵ See DANIEL P. CARPENTER, *THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES, 1862–1928*, at 278 (2001) (stating that Pinchot built the support of business groups, women's groups, progressives, and academics).

²⁰⁶ MCGEARY, *supra* note 134, at 59.

²⁰⁷ See CARPENTER, *supra* note 205, at 278. Note that these same organizations also petitioned President McKinley. *Id.*

²⁰⁸ See, e.g., PINCHOT, *supra* note 203, at 177–82 (describing Pinchot's efforts to reconcile tensions between irrigation ranchers and the Arizona Woolgrower's Association); MILLER, *supra* note 191, at 123–24 (describing Pinchot's trip to Arizona to resolve the disagreement between the farmers and the sheepmen).

To do this, he employed strategies including hiring from local communities, encouraging district rangers to use the press, and setting up an in-house press bureau.²⁰⁹ In an even more shrewd strategy, Pinchot also convinced the Commissioner of the Land Office, within the Department of Interior, to submit a letter, which he helped draft, to the Secretary of the Interior regarding the need for forest management of the federal reserves.²¹⁰ The Secretary, Ethan Hitchcock, took the bait and asked Pinchot to lend his forestry expertise on a number of matters.²¹¹ Pinchot is quite explicit that his work was aimed at preparing himself and his agency for the fight for the reserves that loomed on the horizon: “I was determined that the Forestry Division should know more about the reserves than any other agency of the Government. If we couldn’t claim ownership at this time, we were at least very eager to participate in their administration and to shape the politics which governed them.”²¹² By 1901 and even before Roosevelt became President, Pinchot saw his work pay off when Secretary Hitchcock began supporting transferring the reserves from his Department to Agriculture,²¹³ including by lobbying Congress for the transfer.²¹⁴

Pinchot took other tactics to influence forest policy and convince Congress to transfer the reserves. For example, he wrote an extensive argument about the need for management of the reserves and circulated more than a million copies of it to individuals and organizations that had an interest in the management of reserves.²¹⁵ Pinchot used this method to make inroads on a number of conservation issues with the American

²⁰⁹ See PINKETT, *supra* note 184, at 81–83 (discussing the effective “press agent work” of the Forest Service).

²¹⁰ Pinchot, *supra* note 196, at 8–15 (including a copy of the letter).

²¹¹ See PINKETT, *supra* note 184, at 51 (stating that, at the request of the Secretary, Pinchot gave technical advice on how to manage the reserves).

²¹² Pinchot, *supra* note 196, at 23.

²¹³ See CARPENTER, *supra* note 207, at 278 (noting Hitchcock’s support for a transfer of the reserves).

²¹⁴ See, e.g., Letter from Gifford Pinchot to Gilbert Hitchcock, Chairman of the House Agricultural Committee (Jan. 9, 1901) (requesting the transfer of the reserves and explaining the transfer’s benefits).

²¹⁵ See PINKETT, *supra* note 184, at 53 (noting the publication of his argument in 1899).

public.²¹⁶ Roosevelt said of these efforts, “It is doubtful whether there has ever been elsewhere under the Government such effective publicity—publicity purely in the interest of the people—at so low a cost.”²¹⁷ Whether this actually was in the interest of the people or just cheap publicity, it is clear that it was aimed at altering the political landscape.

Beginning in 1901, there was proposed legislation to transfer the reserves from the Department of Interior to the Department of Agriculture.²¹⁸ In 1902, when the House actually got around to debating bills to transfer the reserves, however, despite Pinchot’s work and Roosevelt’s pressure, Representatives Cannon and Frank Mondell (R-Wyo.), another powerful westerner, were able to stomp out efforts to make the transfer, even as other forest-related reforms passed as legislation.²¹⁹ Ultimately, it was Cannon’s motion that struck the transfer from the House bill.²²⁰

Even as he tried other methods to gain influence on the issue of the transfer, Pinchot took it upon himself to convince Mondell about the wisdom of the transfer.²²¹ This, of course, was a tall order given that Mondell, along with Cannon, helped lead the opposition of the transfer. During the summer of 1903, Pinchot spent a significant amount of time with Mondell, including traveling with him through Yellowstone National Park.²²² By the end of the summer, Pinchot wrote the following to Roosevelt:

One of my principal objects in making the trip in Wyoming with Mondell was to discuss with him the question of the transfer, and, if possible, to get him to change his mind on the subject. While he was not willing to express himself definitely when I left him,

²¹⁶ See *id.* (suggesting that this publication and the Division of Forestry’s good relationship with newspapers were influential in reaching the American public).

²¹⁷ ROOSEVELT, *supra* note 199, at 415.

²¹⁸ See CARPENTER, *supra* note 207, at 279 (noting that the first measure to give the President transfer authority occurred in 1901).

²¹⁹ See *id.* (discussing the opposition from Cannon and Mondell); PINCHOT, *supra* note 203, at 110 (noting a “fiery attack” on the President and the forestry commission); Pinchot, *supra* note 196, at 83 (describing Mondell’s reasons for opposing the transfer which included “suspicion of any policy that tended to regulate or limit grazing”).

²²⁰ CARPENTER, *supra* note 207, at 280.

²²¹ See *id.* (discussing Pinchot’s efforts to change Mondell’s mind about the transfer).

²²² *Id.* at 281; Pinchot, *supra* note 196, at 84.

nevertheless I think I succeeded. In a public speech at Cody he said with great emphasis that there was but one opinion about putting the forest reserves in my charge. . . . I should not be surprised if he were willing, when the time comes, not only to withdraw his opposition, but to take the initiative himself in bringing the transfer about.²²³

A week later he followed up with another letter to Roosevelt that reported,

Your letter . . . saying that you would be glad to push the transfer of the reserves if you could get any western backing for it, . . . filled me with the keenest satisfaction. Modell, you will be glad to know, has withdrawn his opposition entirely, and says that "We" will have no trouble whatever in getting the transfer made at the coming session. I am inclined to believe he is right, partly because I think he intends to take charge of the bill for the transfer himself. . . .²²⁴

Things worked out pretty much according to Pinchot's plan with a couple of bumps along the way. While Pinchot drafted legislation for Mondell's consideration, Mondell actually drafted his own legislation,²²⁵ though it would not be hard to argue that he restated in skeletal fashion what Pinchot originally sent along to him (and in fact Mondell says as much in correspondence to Pinchot).²²⁶ While Pinchot's success in turning around Mondell is evidence enough of Pinchot's influence, consider that when Mondell introduced the bill, he referenced the following to try to sway other members of the House: Roosevelt's speech to Congress that asked Congress to transfer the reserves (which Pinchot drafted), the Commissioner of the General Land Office's recommendation of the transfer (which Pinchot lobbied to secure), and the Secretary of the Interior's concurrence with the

²²³ Pinchot, *supra* note 196, at 85.

²²⁴ *Id.* at 88.

²²⁵ *Id.* at 93.

²²⁶ *Id.*

recommendation (which came as a response to the Commissioner's position).²²⁷ The bill was not without opposition. Still, Pinchot continued to shore up Mondell's support by testifying before Congress²²⁸ and meeting with other members of Congress.²²⁹ This was followed up with Roosevelt providing another message to Congress urging the transfer.²³⁰ Ultimately, even Representative Cannon, who never waned in his opposition to the bill, came to see its passage as inevitable,²³¹ and in fact, it passed and became law.²³²

C. A MORE GENERAL DISCUSSION OF AGENCY-AS-PRINCIPAL STRATEGY

When those in agencies act as political operatives in their dealings with the elected branches, we should expect to see their actions designed to change the political calculus of decisions facing those in elected branches. A political strategist does not merely exercise leverage, she creates it. In his concise, wonderful book, *The Art of Political Manipulation*, Professor William Riker provides multiple snapshots of political strategies designed to alter the political landscape, ranging from the simple ploy of building political alliances to much more nuanced attempts to force a "redefinition of the political situation."²³³

So how does one remake the political landscape? As a classic example of redefining the politics of a situation through nuanced means, Riker points to a question Abraham Lincoln posed to his rival, Stephen Douglas, in the famous Lincoln-Douglas debates.²³⁴

²²⁷ H.R. Rep. No. 48, at 1 (1903).

²²⁸ See Pinchot, *supra* note 196, at 94–102 (including the notes used by Pinchot in his argument before the Senate Public Lands Committee).

²²⁹ See GIFFORD PINCHOT, *THE CONSERVATION DIARIES OF GIFFORD PINCHOT* 98–99 (Harold K. Steen ed., 2001) (containing entries wherein Pinchot mentions meeting with various members of Congress).

²³⁰ THEODORE ROOSEVELT, *THIRD ANNUAL MESSAGE* (Dec. 7, 1903), available at <http://www.presidency.ucsb.edu/ws/?pid=29544>.

²³¹ See Pinchot, *supra* note 196, at 108 (containing a Letter from Mondell to Pinchot in which Mondell quotes Cannon as referring to the transfer as "inevitable").

²³² CARPENTER, *supra* note 207, at 282; MILLER, *supra* note 191, at 197; see also Pinchot, *supra* note 196, at 111 ("[T]he seven-year struggle to bring the reserves into the Department where they logically belonged was ended").

²³³ WILLIAM H. RIKER, *THE ART OF POLITICAL MANIPULATION* 34 (1986).

²³⁴ *Id.* at 1.

Lincoln asked Douglas his opinion about whether it was permissible for citizens in a U.S. Territory to exclude slavery from their territory's borders.²³⁵ Riker explains that as boring as it seems, the genius of the question is that if Douglas answered "yes," he would improve his chances at gaining reelection to his U.S. Senate seat but hurt his chances to win the presidency in 1860; on the other hand, a "no" would hurt Douglas in gaining reelection but help his chances at the presidency.²³⁶ The question posed difficulties because while it had political relevance both within Illinois and throughout the nation, the politics played out differently locally than they did nationally. By asking a simple question, Lincoln introduced a landmine in the political landscape that did not exist before he asked it.

When looking for these more nuanced attempts to redefine the political situation in the context of those in agencies acting as political strategists, what should we look for then? In addition to shrewdness, and at times a bit of guts, it seems that we almost always find an element of agency discretion. In this context, what is meant by discretion is much broader than is often intended within legal contexts. Often by agency discretion, what is meant is that the elected branches leave agencies some ability to interpret a law or policy. While this sort of discretion may very well provide an opening for an agency to attempt to play principal, discretion can come from other sources as well. Discretion might come in the choices an agency has in administering laws, setting priorities, and interacting with the public, the media, pressure groups and other political actors, litigants, courts, and the elected branches. Specific examples of the ways those in agencies leverage discretion are found below. This list is not meant to be exhaustive, and in fact, is not exhaustive at all. Rather, it is illustrative of the sorts of plays that those in agencies can and often do try. After all, political manipulation is more art than science, and its potential form changes with the context that we find it.

1. *Politically Significant Agency Work Product.* While the work products created by agency commentators are often painted as mind-numbing and wonkish, it should be clear to those in agencies

²³⁵ *Id.* at 1–2.

²³⁶ *Id.* at 5.

that the reports, data, and materials they produce will often end up in the hands of those within, or with influence over, the elected branches. The political influence of agency materials, while often significant, is often undervalued and overlooked, even as it is cited by the elected branches, press, courts, and advocacy groups.

The influence of agency materials is often far from accidental. Indeed, sometimes an agency's intent to influence one of the elected branches is overt. For example, agencies sometimes create reports detailing options for policymakers. One example of this is the frequently cited EPA report entitled, *Unfinished Business: A Comparative Assessment of Environmental Problems*,²³⁷ which provided "the public" with insights about the most pressing environmental problems, along with some ideas about what policies "the public" might use to remedy these problems.²³⁸ Yet in other examples, the intended influence of agency work product is less overt.

Within the world of U.S. environmental policy, this sort of influence is about as old as the nation's first efforts to protect the environment. From the federal perspective, one of the government's first attempts to preserve nature dates back to the 1872 founding of Yellowstone National Park.²³⁹ In 1871, Congress funded an expedition headed by Ferdinand Hayden of the U.S. Geological Survey to explore Yellowstone.²⁴⁰ After exploring the region, Hayden returned to Washington and submitted a 500-page report to Congress and made available paintings and photographs from the expedition.²⁴¹ These materials were used extensively by

²³⁷ U.S. ENVTL. PROT. AGENCY, EPA-230-2-87-025a, UNFINISHED BUSINESS: A COMPARATIVE ASSESSMENT OF ENVIRONMENTAL PROBLEMS (1987), available at <http://nepis.epa.gov/Exe/ZyNET.exe/2000BZOP.PDF?ZyActionP=PDF&Client=EPA&Index=1986%20Thru%201990&File=D%3A%5CZYFILES%5CINDEX%20DATA%5C86THRU90%5CTXT%5C00000001%5C2000BZOP.txt&Query=&SearchMethod=1&FuzzyDegree=0&User=ANONYMOUS&Password=anonymous&QField=&UseQField=&IntQFieldOp=0&ExtQFieldOp=0&Docs=>.

²³⁸ See *id.* (discussing environmental problems, including cancer risks, ecological risks, and welfare effects, and providing recommendations on solving these problems).

²³⁹ See PAUL SCHULLERY, SEARCHING FOR YELLOWSTONE: ECOLOGY AND WONDER IN THE LAST WILDERNESS 13 (2004) (stating that Congress created Yellowstone in 1872).

²⁴⁰ *Id.* at 60–61. For a more detailed discussion of this entire episode and Hayden's role in it, see Daniels, *supra* note 46, at 550–54.

²⁴¹ F.V. HAYDEN, PRELIMINARY REPORT OF THE UNITED STATES GEOLOGICAL SURVEY OF MONTANA AND PORTIONS OF ADJACENT TERRITORIES; BEING A FIFTH ANNUAL REPORT OF PROGRESS (1872).

those lobbying to protect Yellowstone and to make it the nation's first national park.²⁴²

2. *Agency Lobbying.* Consider the ways that agencies can sometimes behave like lobbyists by engaging directly with elected officials and their staffs to promote particular use of the elected branch's power. We saw this in the context of Ruckelshaus and Pinchot who worked with those in elected branches to shape how the elected branches used their power.²⁴³ Lisa Jackson, a recent EPA administrator, did not shy away from telling members of Congress that she supported various legislative proposals. Particularly before the Republicans took control of the House in 2010, she pushed for legislation that would begin to address climate change.²⁴⁴

But it does not need to be forceful or even particularly important. Agency lobbying efforts of Congress are commonplace. Agencies often go beyond chiming in and sharing ideas to proposing and even writing legislation that a member of Congress later opts to sponsor. Most agencies have an office that serves as a designated liaison with Congress. For example, the EPA has the Office of Congressional and Intergovernmental Relations, which has a mission that in part reads, “[To] [a]ssist, develop and implement the legislative agenda for the Agency, including legislative initiatives and proposals.”²⁴⁵

Sometimes Congress asks agencies to draft language, and sometimes agencies do so without being asked. It is just the way the game is played, and those with much experience in Washington openly acknowledge this. In fact, some courts employ

²⁴² See PAUL SCHULLERY & LEE WHITTLESEY, MYTH AND HISTORY IN THE CREATION OF YELLOWSTONE NATIONAL PARK 56–57 (2003) (stating that Hayden's activities led to the establishment of Yellowstone); DAVID RAINS WALLACE, YELLOWSTONE 48–49 (2000) (asserting that Hayden's report sparked national interest); Daniels, *supra* note 46, at 551–52 (discussing Hayden's return to Washington to “help lobby for Yellowstone's Protection”).

²⁴³ See *supra* Part V.A–B (discussing Ruckelshaus and Pinchot).

²⁴⁴ See, e.g., Press Release, Env'tl. Prot. Agency, Statement of Lisa P. Jackson Administrator, U.S. Environmental Protection Agency Hearing on American Clean Energy and Security Act of 2009 Committee on Energy and Commerce U.S. House of Representatives (Apr. 22, 2009), available at <http://yosemite.epa.gov/opa/admpress.nsf/a883dc3da7094f97852572a00065d7d8/abd2dba7f33298e852575a0004f26b2!OpenDocument>; *A Danger to Public Health and Welfare*, N.Y. TIMES (Apr. 18, 2009), A22 (applauding Jackson for moving quickly to address climate change).

²⁴⁵ ENVTL. PROT. AGENCY, CONGRESSIONAL AND INTERGOVERNMENTAL RELATIONS (OCIR), available at <http://www.epa.gov/ocir/about.html> (last visited Nov. 19, 2013).

a canon of statutory construction that affords an agency additional deference in interpreting ambiguous parts of bills if the agency authored or had a hand in authoring it.²⁴⁶

It is telling that some of the past administrators of the EPA note that their greatest accomplishments came in the form of helping to draft legislation. Such is the case with William Ruckelshaus and the Clean Water Act²⁴⁷ and William Riley with the 1990 Clean Air Act Amendments.²⁴⁸ While sometimes lobbying efforts occur in committee meetings and on the Hill generally, sometimes they are quite focused. Again, consider the example discussed above of Pinchot trying to win over Representative Mondell's support in transferring the forest reserves.²⁴⁹

Similarly, those in agencies lobby the Executive, such as in attempts to influence White House policy and budget proposals, to get the President's attention (and sometimes thereby the nation's attention) on particularly pressing matters, and to gain access to presidential powers like the bully pulpit, executive orders, and the signing of treaties.²⁵⁰

Consider a few examples. After Pinchot and Roosevelt convinced Mondell and others in Congress to transfer the reserves, Roosevelt exercised that power extensively, so much in fact that it began to wear at the patience of many in Congress. As a result, Congress began to debate revoking the power, at least in a number

²⁴⁶ See, e.g., *Aluminum Co. of Am. v. Cent. Lincoln Peoples' Util. Dist.*, 467 U.S. 380, 390 (1984) ("These principles of deference have particular force in the context of this case. The subject under regulation is technical and complex. BPA has longstanding expertise in the area, and was intimately involved in the drafting and consideration of the statute by Congress. Following enactment of the statute, the agency immediately interpreted the statute in the manner now under challenge. Thus, BPA's interpretation represents a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." (citations and internal quotation marks omitted)); *Power Reactor Co. v. Int'l Union of Elec. Radio, & Machine Workers*, 367 U.S. 396, 408 (1961) (giving deference to Atomic Energy Commission's interpretation of its own regulation); *United States v. Zucca*, 351 U.S. 91, 96 (1956) ("In such circumstances, a contemporaneous construction of a statute by the officer charged with its enforcement is entitled to great weight.").

²⁴⁷ Ruckelshaus Interview, *supra* note 154.

²⁴⁸ Interview by Dr. Dennis Williams with William K. Reilly, Former Administrator, U.S. Evtl. Prot. Agency, in Washington, D.C. (July 26, 1993), available at <http://www2.epa.gov/aboutepa/william-k-reilly-oral-history-interview>.

²⁴⁹ See *supra* Part V.B (discussing Pinchot's efforts).

²⁵⁰ See *infra* notes 250–55 and accompanying text.

of Western states.²⁵¹ In the interim period between Congress's proposal and passage of the enactment, Pinchot came to Roosevelt with an idea: designate and transfer as many forests as possible to the forest service before the bill became law.²⁵² Roosevelt happily followed Pinchot's advice.²⁵³ Roosevelt worked together with Pinchot and his staff, and—much to the ire of some of those in Congress—in a week's time designated more than sixteen million acres of public lands as national forests.²⁵⁴

In 1969, Russell Train, then-Under-Secretary of the Department of Interior, was instructed by the Nixon Administration to testify against the passage of the National Environmental Policy Act (NEPA), and complied.²⁵⁵ He complied but disagreed with the Administration's position. After testifying, he spent some time at the White House to support NEPA.²⁵⁶ Ultimately, Nixon supported and signed the bill.²⁵⁷

Probably President Clinton's most notable environmental initiative came in the form of setting aside national monuments (twenty-one of them) under the Antiquities Act.²⁵⁸ While Clinton made many of these designations into high profile political events,

²⁵¹ H.R. 24815, Public Act No. 242, 34 Stat. 2907, 1269–71 (1907) (proposing an amendment to a bill that would revoke the Executive's power to create forest reserves, or make additions to existing ones, in a number of western states); *see also* BRINKLEY, *supra* note 182, at 676 (discussing the proposal of the amendment by Senator Charles Fulton of Oregon).

²⁵² E. LOUISE PEPPER, *THE CLOSING OF THE PUBLIC DOMAIN: DISPOSAL AND RESERVATION POLICIES 1900–50*, at 99 (1951).

²⁵³ *See id.* (“The opponents of the Forest Service turned handsprings in their wrath,’ Roosevelt commented with jubilation.”).

²⁵⁴ *See* BRINKLEY, *supra* note 182, at 678 (“Roosevelt and Pinchot's team had sneakily withdrawn 16 million acres . . .”); EDMUND MORRIS, *THEODORE REX* 487 (2001) (stating that the President “proclaim[ed] twenty-one new forest reserves, and eleven enlarged ones, in the six states specified”).

²⁵⁵ *See* TRAIN, *supra* note 151, at 69 (recalling testifying before the Senate Interior Committee).

²⁵⁶ *See id.* (discussing the arguments he made to the White House); ENVTL. PROT. AGENCY, RUSSELL E. TRAIN: ORAL HISTORY INTERVIEW, *available at* <http://www.epa.gov/aboutepa/history/russet-e-train-oral-history-interview> (“While I testified against some aspects of NEPA in the Senate, by the time the bill was under consideration in the House . . . we managed to turn the Administration around and I was able to support the legislation.”).

²⁵⁷ *See* ENVTL. PROT. AGENCY, *supra* note 256 (noting that he was able to persuade the Nixon Administration to change its mind on NEPA).

²⁵⁸ *See* John D. Leshy, *The Babbitt Legacy at the Department of the Interior: A Preliminary View*, 31 ENVTL. L. 199, 218 (2001) (discussing President Clinton's creation of new monuments under the Act).

the genesis, research, and excitement behind each of the monument designations came from his Secretary of Interior, Bruce Babbitt, and Babbitt's staff.²⁵⁹

3. *Leaking Information.* Agencies are often hubs of information. They collect it, create it, and analyze it. How and when those in agencies choose to share information, and with whom they choose to share it, can create important political consequences.

Leaks in Washington, including in administrative agencies, are commonplace.²⁶⁰ In some instances, the protection of government information has been deemed so important by the elected branches (particularly where national security is at stake) that leaking such information may constitute a criminal action.²⁶¹ However, even when criminal sanctions are a possibility, we still find leaks.²⁶² It is therefore not surprising that we also see leaks playing an important role in other policy areas where leaking is legal, though still perhaps fraught with personal risks (like job security) to those within administrative agencies.²⁶³

Perhaps the most important role leaks played in environmental policy was when those in the EPA gave the public and Congress ammunition to take out the EPA's most controversial Administrator, Anne Gorsuch. Gorsuch worked diligently to reform the agency, often in ways that came under criticism from many of those within the EPA.²⁶⁴ For example, she repeatedly

²⁵⁹ See *id.* (noting that Clinton acted on the recommendations of Babbitt).

²⁶⁰ See, e.g., Linton Week, *In Washington, Leaking As A Way Of Life*, NPR (June 15, 2012, 12:34 PM), <http://www.npr.org/2012/06/15/155068581/in-washington-leaking-as-a-way-of-life> ("In Washington, leaking has long been a way of life."); Leiter, *supra* note 127, at 431 ("The overall volume of information is so large that 'Washington insiders have the sense of participating in a government by leak.'").

²⁶¹ See 18 U.S.C. § 793 (2012) (imposing, in certain circumstances, criminal sanctions for leaking information that is to be used to injure the United States).

²⁶² See, e.g., Adam Liptak, *A High-Tech War on Leaks*, N.Y. TIMES (Feb. 11, 2012), <http://www.nytimes.com/2012/02/12/sunday-review/a-high-tech-war-on-leaks.html> (noting that leaks are continuing even in the face of aggressive prosecution by the Obama Administration); Scott Shane, *Obama Takes a Hard Line Against Leaks to Press*, N.Y. TIMES (June 11, 2010), <http://www.nytimes.com/2010/06/12/us/politics/12leak.html> (discussing leak prosecutions and noting that leaking inquiries are often dropped due to the seemingly impossible task of identifying the source).

²⁶³ Leiter, *supra* note 127, at 442–50 (discussing leaks in the context of employment discrimination).

²⁶⁴ RONALD REAGAN, *THE REAGAN DIARIES* 56 (2009).

tried—with the approval of President Reagan²⁶⁵—to convince Congress to cut the EPA’s budget.²⁶⁶ (Incidentally, this is a notable example of agency lobbying.) While one could expand on the way that Gorsuch alienated those within the EPA with her management tactics, those within the agency undid her administration by leaking information to members of Congress and to the media, ranging from information that painted Gorsuch’s plans as attempts to weaken environmental protection²⁶⁷ to implications of political corruptions.²⁶⁸

4. *Taking the Agency’s Case to the Public and Press.* When agencies face resistance from one of the elected branches to do something that would attract the public’s attention and perhaps its support, agency members at times become public critics of those in the elected branches. Given the many ways those in elected branches could make the lives of those within agencies difficult, this is of course a risky strategy. However, it is still one that those in agencies try from time to time.

Probably because the Executive has the ability to terminate employment of most of the political appointees within the federal bureaucracy and this sort of strategy is best played by those pretty high up in the bureaucracy, it is much more common to see those within agencies act as critics of Congress than critics of the Executive. In fact, it is fairly commonplace for those at the helm of agencies to criticize Congress’s handling of policies and decisions relating to their particular agency.

In a recent example, former EPA Administrator Lisa Jackson faced staunch opposition to a variety of EPA programs from those in Congress, particularly in the House. She did not shy away from criticizing efforts of members of the House to take powers away from the agency or to strip its budget. Perhaps the best example of

²⁶⁵ See *id.* (“Even though I want to save money, I lean toward Ann.”).

²⁶⁶ See, e.g., DANIEL J. FIORINO, MAKING ENVIRONMENTAL POLICY 40 (1995) (noting that Gorsuch “set out to reduce EPA’s budget and programs”).

²⁶⁷ See, e.g., DAVID BORNSTEIN, HOW TO CHANGE THE WORLD: SOCIAL ENTREPRENEURS AND THE POWER OF NEW IDEAS 57–58 (2007) (explaining that the details of Gorsuch’s plan to destroy the effectiveness of the EPA were leaked to a *New York Times* reporter).

²⁶⁸ See, e.g., FRANK ACKERMAN, HAZARDOUS TO OUR WEALTH: ECONOMIC POLICIES IN THE 1980S, at 58–59 (1984) (noting that information about corruption at the EPA began to leak in 1983, including information about “excessive coziness” with Dow Chemical and top agency officials ordering changes in reports to appease Dow).

her actions can be found in an op-ed she penned for the *Los Angeles Times*.²⁶⁹ In the editorial, Administrator Jackson had pointed words for “Republicans in the House,” including labeling their efforts to purportedly stop the EPA from “kill[ing] jobs” as a policy to “protect polluters.”²⁷⁰

Probably the most prominent example of an administrator publically criticizing presidential action is that of Russell Train. While Train’s mild manners did not lead him to make biting characterizations, Train frequently made public statements in opposition to plans and proposals of the White House.²⁷¹ Train’s opposition largely thwarted Nixon’s plans. Train reminisced, “Very possibly, I would have been fired had the president not been badly weakened by the Watergate scandal.”²⁷²

5. *Strategic Administration and Decisionmaking.* The strategies which those in agencies attempt in order to play principal are in many ways situational and, therefore, will vary depending on what is going on in the elected branches, the pressures at work within interest groups and the electorate, and the other events that define the day. For those in agencies looking for opportunities, often they will come through administration of the law.

Consider the political climate in 1995, in which the Republican Party had just won control of the House. One of the aspirations of many of those in Congress, particularly Republicans from the West, was to repeal or at least weaken the Endangered Species Act. The Senate Republican Regulatory Relief Task Force went so far as to “put the Endangered Species Act at the top of its ‘Top Ten Worst-Case Regulations.’”²⁷³ In order to avoid congressional action, Bruce Babbitt, John Leshey, and others within the Department of Interior came up with a number of reforms. One of these gave life to what had previously been virtually ignored

²⁶⁹ Lisa P. Jackson, Op-Ed., *Too Dirty to Fail?*, L.A. TIMES (Oct. 21, 2011), <http://articles.latimes.com/2011/oct/21/opinion/la-oe-jackson-train-act-20111021>.

²⁷⁰ *Id.*

²⁷¹ See TRAIN, *supra* note 151, at 172 (“I made my position clear to the press.”).

²⁷² *Id.* at 173.

²⁷³ JUDITH A. LAYZER, OPEN FOR BUSINESS: CONSERVATIVES’ OPPOSITION TO ENVIRONMENTAL REGULATION 229 (2012).

provisions of the Act that called for habitat conservation plans.²⁷⁴ Under the new readings of that provision of the Act, the Department of Interior began allowing for various forms of flexibility that arose from broader habitat planning by states, local governments, and independent coalitions of land owners.²⁷⁵ While many in Congress still wanted to limit the reach of the Endangered Species Act, these actions took the wind out of the sails of those calling for change.²⁷⁶ The political landscape changed for Congress's consideration of the issue and allowed the Department of Interior to avoid a much more fundamental reform of the law.

While one cannot say for sure, it appears that this sort of strategy was used recently by the EPA after a political firestorm occurred in Congress in the wake of the EPA moving forward on greenhouse gas regulation. While Congress considered revoking the power of the EPA to use the Clean Air Act in this way,²⁷⁷ the EPA put forward what is known as the tailoring rule, which limited the reach of greenhouse gas regulation mainly to large industrial sources of pollution.²⁷⁸

We saw almost the exact opposite strategy when Ruckelshaus proposed to implement gas rationing in Los Angeles with the hope that this would force Congress to act to revisit the Clean Air Act.²⁷⁹ The same could be said of Lisa Jackson to the extent that one buys the notion that she pressed forward on regulating greenhouse gas emissions with the hope that it would cudgel Congress into acting on climate-related legislation.²⁸⁰

²⁷⁴ 16 U.S.C. § 1539(a)(2)(A) (2012) (requiring applicants seeking permits for takings to submit a conservation plan to the Secretary).

²⁷⁵ See J.B. Ruhl, *Past, Present, and Future Trends of the Endangered Species Act*, 25 PUB. LAND & RES. L. REV. 15, 32–33 (2004) (discussing a two-part agenda forged by Babbitt that focused on enhancing species conservation and providing an opportunity for landowners to be heard).

²⁷⁶ See *id.* at 33 (“Many old school environmentalists objected to this kind of regulatory innovation, but Babbitt not only stuck to the HCP program reforms in the face of intense opposition from preservationists, he broadened them.” (citations omitted)).

²⁷⁷ See Brigham Daniels, *Addressing Global Climate Change in an Age of Political Climate Change*, 2011 BYU L. REV. 1899, 1924–28 (outlining Congressional attempts to strip the EPA of its power to regulate greenhouse gases).

²⁷⁸ Prevention of Significant Determination and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010).

²⁷⁹ See *supra* Part V.A.

²⁸⁰ See *supra* Part I.

In the face of opposition from the Executive over a decision that would garner public support, an extreme but not entirely uncommon tactic of those in the upper echelons of the bureaucracy is to threaten to resign. The resigning of agency officials, of course, is not the punishment for the Executive. Rather, it is the public heat that comes along with it, particularly when it was made public that the resignation came as a result of the policy dispute at issue.

Of course, it is hard to know how often this occurs. Generally, such information becomes public only if the threat fails to work. Many have speculated that such a threat was at least contemplated (if not made and later rescinded) when President Obama interfered with Lisa Jackson and the EPA's attempt to make the air pollution standard for ozone more stringent.²⁸¹ We know that former Administrator Christine Todd Whitman left the EPA because of pressure placed on her by the Executive, particularly by Vice President Dick Cheney, to relax environmental protections generally and air pollution standards more specifically.²⁸²

I move on from how agencies play principal to why they do.

VI. PAYOFFS

This Part discusses the payoffs the players receive when they play principal. While it is difficult to generalize about payoffs, this Part provides an overview of the sort of things that might be motivating those in the bureaucracy to play principal and the ways in which the potential downsides of using such strategies lead those in agencies to select some strategies rather than others.

²⁸¹ See Josh Margolin, *EPA Chief on Verge of Quitting after Obama Rejected Pollution Proposal*, N.Y. POST (Sept. 19, 2011, 4:00 AM), http://www.nypost.com/p/news/national/epa_air_rage_at_bam_HB4xP0FSqv2aCNQvzqaFCN (reporting that Jackson "was on the verge of quitting").

²⁸² Jo Becker & Barton Gellman, *Leaving No Tracks*, WASH. POST (June 27, 2007) at A1, available at http://blog.washingtonpost.com/cheney/chapters/leaving_no_tracks/ (stating that Whitman said in an interview that it was Cheney's insistence on the matter that led her to resign).

A. POSSIBLE MOTIVATIONS OF THOSE IN AGENCIES ATTEMPTING TO PLAY PRINCIPAL

Determining what motivates any person is difficult at best. Motivations become all the more difficult to grasp when we attribute them to the motivations of a group. Still, there is a rich literature in which scholars have attempted to diagnose the motivations of bureaucrats in other contexts. Below, I highlight a number of motivations that could contribute to the desire of those in the bureaucracy to attempt to play principal over those in the elected branches.

While sometimes called “faceless bureaucrats,” those in the bureaucracy are just people who have the same needs and wants as anybody else. Pursuit of these desires has the potential to shape the bureaucracy.²⁸³ One can imagine even the most instrumental human needs and wants playing a role in when those in agencies are willing to attempt to play principal. For example, one can imagine the pursuit of job security dissuading some within the bureaucracy from taking risks associated with agency-as-principal strategies. This is consistent with the sort of characteristics often associated with bureaucrats, such as risk aversion, self-maintenance, and the desire to perpetuate the bureaucratic organization.²⁸⁴ At the same time, pursuit of job security may lead others to cultivate relationships with those in the elected branches and within interest groups, which can open the door to agent-as-principal plays. One could tell similar stories related to other personal aspects thought to motivate bureaucrats,

²⁸³ See, e.g., Douglas T. Hall & Khalil E. Nougaim, *An Examination of Maslow's Need Hierarchy in an Organizational Setting*, 3 *ORG. BEHAV. AND HUM. PERFORMANCE* 12 (1968) (using empirical research to examine the validity of Maslow's hierarchical model of motive change in an organizational setting).

²⁸⁴ Philip Selznick, *Foundations of the Theory of Organization*, 13 *AM. SOC. REV.* 25, 29 (1948) (“This means that a given empirical system is deemed to have basic needs, essentially related to self-maintenance; the system develops repetitive means of self-defense; and day-to-day activity is interpreted in terms of the function served by that activity for the maintenance and defense of the system.”); R. Shep Melnick, *Administrative Law and Bureaucratic Reality*, 44 *ADMIN. L. REV.* 245, 247 (1992) (describing bureaucrats—though in the judicial process—as prone to acting “defensively” and willing to “cover[] all their bets”).

including social approval, salary, job satisfaction, the ability to make a difference, and the possibility of promotion.²⁸⁵

Likewise, pursuit for other human needs, like a sense of responsibility and self-actualization, both of which theorists have suggested play an important role within the bureaucracy,²⁸⁶ may act as the motivation for those in agencies to take the lead. Some have argued that these higher-level desires play an important role in motivating many public employees; such assertions take the form of painting those in the federal bureaucracy as more “altruistic or ideological” and with a greater desire to make their work “worthwhile for society” than those in the private sector.²⁸⁷ Others have asserted that bureaucrats tend to want to make their work a “meaningful . . . public, community [or] social service”²⁸⁸ For those so motivated, playing principal may be seen as an appealing option, even if it is done by leaking information to the press or feeding information to a contact within one of the elected branches.

²⁸⁵ See Chester I. Barnard, *The Economy of Incentives*, reprinted in CLASSICS OF ORGANIZATION 101–11 (Jay M. Shafritz & J. Steven Ott eds., 4th ed. 1996) (discussing the process of offering incentives and the effect of incentives in the organizational setting); Max Weber, *Bureaucracy*, *supra* note 39, at 80–85 (describing “the personal position” of the bureaucracy official); Phillip E. Crewson, *Public-Service Motivation: Building Empirical Evidence of Incidence and Effect*, 7 J. PUB. ADMIN. RES. & THEORY 499, 500 (1997) (“[T]he reward motivations of public-sector employees are not representative of the general labor force.”); James L. Perry, *Antecedents of Public Service Motivation*, 7 J. PUB. ADMIN. RES. & THEORY, 181, 183 (1997) (“[T]his article focuses on a few plausible correlates of PSM such as parental socialization, religious socialization, professional identification, political ideology, and individual demographics.”); Bradley E. Wright & Adam M. Grant, *Unanswered Questions about Public Service Motivation: Designing Research to Address Key Issues of Emergence and Effects*, 70 PUB. ADMIN. REV. 691, 691 (2010) (expanding on the topic of public service motivation (PSM) by discussing gaps in the current understanding of PSM).

²⁸⁶ ABRAHAM H. MASLOW, MOTIVATION AND PERSONALITY 22 (3d ed. 1987) (examining the need of self-actualization); DOUGLAS MCGREGOR, THE HUMAN SIDE OF ENTERPRISE 47–48 (1960) (exploring the idea that humans desire and seek responsibility).

²⁸⁷ Phillip E. Crewson, *Public-Service Motivation: Building Empirical Evidence of Incidence and Effect*, 7 J. PUB. ADMIN. RES. & THEORY 499, 500 (1997); see also Le Donaldson, *The Ethereal Hand: Organizational Economics and Management Theory*, 15 ACAD. OF MGMT. REV. 369, 372 (1990) (discussing motives of people inside organizations and arguing that we should consider “needs for achievement, responsibility, and recognition, as well as altruism, belief, respect for authority, and the intrinsic motivation of an inherently satisfying task” (citation omitted)).

²⁸⁸ Gene A. Brewer & Sally Coleman Seldon, *Whistle Blowers in the Federal Civil Service: New Evidence of the Public Service Ethic*, 8 J. PUB. ADMIN. RES. & THEORY 413, 417 (1998).

Beyond human desires, it is also obvious that like most people, those in agencies have political preferences. There is no reason to assume that the various motivations that spur on political action in all of us will not also be found among bureaucrats, even if these preferences are tempered and complimented by various other motivations, ranging from personal values to a bureaucrat's commitment to the organization and its mission.²⁸⁹ Of course, the fact that political preferences can influence those in a bureaucracy is not surprising; it explains, for example, why political operatives attempt to influence appointments and decisions related to which part of the bureaucracy is responsible for which decisions.²⁹⁰ Admittedly, political dynamics hoisted upon those in the bureaucracies can overpower their political preferences,²⁹¹ but still, whatever the political crosswinds, it seems clear that a politically motivated bureaucrat can exploit the situation at times. The logic of this proposition seems to extend to opportunities for those in the bureaucracy to step into the role of political principal as well.

Living up to the standards used within a bureaucrat's profession is another commonly recognized motivation of those within agencies. In this regard, we might think about the professional methods and norms of the wildlife biologists within the Fish and Wildlife Service, engineers within the Army Corps of Engineers, rangeland scientists within the Bureau of Land Management, foresters within the Forest Service, and the many lawyers, economists, and scientists found in many environmental government agencies and, perhaps particularly, the EPA. The pull of professional standards in many cases can be great because professionals "receive[] important occupational rewards from a reference group whose membership is limited to people who have undergone specialized formal education and have accepted a

²⁸⁹ See Herbert A. Simon, *The Proverbs of Administration*, 6 PUB. ADMIN. REV. 53, 64-65 (1946) (describing various motivations that influence individuals in agencies).

²⁹⁰ See Terry Moe, *The Politics of Bureaucratic Structure*, in CAN THE GOVERNMENT GOVERN? 267, 268 (John E. Chubb & Paul E. Peters eds., 1989) (stating that political actors strategically structure agencies).

²⁹¹ See *id.* at 276 (describing how opposing political groups "cripple[]" and control the bureaucracies they create).

group-defined code of proper conduct.”²⁹² The value might cause some to attempt to influence the elected branches.

Preferences embedded in an agency’s hierarchy and mission might also contribute to the motivations of those within the agency. One reason for this case is that the power structure and priorities found within an agency might be used as a screening device when hiring new employees.²⁹³ Still, it is a common mistake to “equat[e] the purposes or goals of organization with the purposes and goals of individual members.”²⁹⁴ In fact, it is well recognized that those within an agency can often thwart agency management by taking matters to the elected branches.²⁹⁵ It is just one more step from this proposition to the notion that those within agencies can also use contact with the elected branches to influence and manipulate those branches.

While it is difficult to characterize all that motivates those within the bureaucracy to attempt to play the role of principal, the literature about bureaucracy provides a snapshot of the things that might drive these attempts. With this as a backdrop, I turn to a discussion about how those who play principal might attempt to reduce the risks of doing so.

B. AGENCY-COST THEORY AND MINIMIZATION OF DOWNSIDE RISKS

Many of the strategies that would allow those in the bureaucracy to play the role of principal come with risks. Those who leak information to those outside the agency might face problems within the bureaucracy or perhaps some backlash from those within the elected branches.²⁹⁶ Criticism of those in the

²⁹² JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 60 (1989).

²⁹³ See Canice Prendergast, *The Motivation and Bias of Bureaucrats*, 97 AM. ECON. REV. 180, 181 (2007) (stating that bureaucrats are hired to fulfill certain objectives; although, bureaucrats tend to perform better if they do not share the same preferences as their principals).

²⁹⁴ Daniel Katz & Robert L. Kahn, *Organization and the System Concept*, in THE SOCIAL PSYCHOLOGY OF ORGANIZATIONS 14 (1966), reprinted in CLASSICS OF ORGANIZATION THEORY 274, 275 (Jay M. Shafritz & J. Steven Ott eds., 4th ed. 1996).

²⁹⁵ See Graham T. Allison, *Public and Private Management: Are They Fundamentally Alike in All Unimportant Respects?*, in CLASSICS OF PUBLIC ADMINISTRATION 387, 395 (Jay M. Shafritz & Albert C. Hyde eds., 6th ed. 2007) (describing the difficulties specific to public management).

²⁹⁶ See *supra* discussion Part V.C.3 (discussing potential effects of leaking information).

ected branches is likely to be remembered by those criticized. For example, when Russell Train, the EPA's second Administrator, began to criticize President Nixon for pushing to roll back environmental laws, particularly the Clean Air Act, as the country faced energy shortages,²⁹⁷ some suspected that if Nixon had survived Watergate, Train would not have.²⁹⁸

To understand how those in the bureaucracy often attempt to limit costs associated with agency-as-principal strategies, it is first necessary to understand the widely adopted agency-cost theory. This theory finds its roots in a much celebrated article by Professors Michael Jensen and William Meckling,²⁹⁹ which, like many other classics of New Institutional Economics, first debuted to help explain economic organization of the business firm.³⁰⁰ Jensen and Meckling build off a noncontroversial assertion that an owner of a firm will recognize that it is often too expensive and difficult for the firm to do everything the firm needs done in-house and will often need to contract for work with those outside the firm, which creates the possibility of the formation of a principal-agent relationship. The nub of Jensen and Meckling's contribution to the literature is their explanation and theorizing surrounding the following assertion: whatever the benefits found in a principal-

²⁹⁷ See *supra* Part V.C.4.

²⁹⁸ TRAIN, *supra* note 151, at 173.

²⁹⁹ Jensen & Meckling, *supra* note 90, at 305, 308.

³⁰⁰ See, e.g., R.H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386 (1937), reprinted in R.H. COASE, *THE FIRM, THE MARKET, AND THE LAW* 33, 37 (1988) (addressing the question of why a firm emerges); Kenneth J. Arrow, *The Organization of Economic Activity: Issues Pertinent to the Choice of Market Versus Nonmarket Allocation*, in *THE ANALYSIS AND EVALUATION OF PUBLIC EXPENDITURE: THE PPB SYSTEM* 47, 48 (1969) (noting the impact of transaction costs of firms' organization and market participation); Armen A. Alchian, *Uncertainty, Evolution, and Economic Theory*, 58 *J. POL. ECON.* 211, 213 (1950) (asserting that economic environment enables accurate prediction of the types of market participants, or firms, which will become successful); Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 *AM. ECON. REV.* 777, 783–85 (1972) (elaborating on Coase's view and discussing other theories of the firm); Harold Demsetz, *The Structure of Ownership and the Theory of the Firm*, 26 *J.L. & ECON.* 375, 377 (1983) (identifying the ownership structure of the firm as a result of process of economic maximizing); Oliver E. Williamson, *The Vertical Integration of Production: Market Failure Considerations*, 61 *AM. ECON. REV.* 112, 113–14 (1971) (describing the properties of the firm that lead to internal organization and the control instruments available within the firm). Note, however, Jensen and Meckling recognize that their model likewise related to "all organizations and . . . all cooperative efforts," including "governmental authorities and bureaus." Jensen & Meckling, *supra* note 90, at 309.

agent relationship, these benefits come at a cost.³⁰¹ Specifically, because the principal-agent relationship introduces the possibility that the agent's interests will not match those of the principal, either keeping the agent in line or failing to do so comes at a cost.³⁰² These are what Jensen and Meckling call agency costs.

Jensen and Meckling identify three sorts of agency costs. First, there are “monitoring costs”—the costs of keeping a watchful eye on the agent in order to keep a potentially wayward agent in line.³⁰³ Indeed, detecting problems and the costs of monitoring is a central theme found in the sort of principal-agent theory typically associated with the elected branches and agencies, where the elected branches are assumed to be principals and agencies play the role of agents. Consider, for example, the clever and insightful article by Professors Matthew McCubbins and Thomas Schwartz called *Congressional Oversight Overlooked: Police Patrols versus Fire Alarms*.³⁰⁴ The central thesis of this article is that contrary to common wisdom, Congress provides a great deal of oversight and monitoring of the bureaucracy, but does so in a way that many have overlooked.³⁰⁵ They argue that rather than holding hearings and initiating inquiries on their own volition (what they refer to as “police patrol oversight”),³⁰⁶ those in Congress wait for interest groups and others interested in an agency's business to come to them to report any problems found in the way an agency conducts its business (what they call “fire alarm oversight”).³⁰⁷ McCubbins and Schwartz's insight, though novel and important, makes sense at a very basic intuitive level. Why is this? They are arguing that

³⁰¹ See Jensen & Meckling, *supra* note 90, at 308–10 (discussing monitoring costs, bonding costs, and residual loss faced by agencies).

³⁰² See *id.* (discussing agency costs). Sometimes this phenomenon of the agent straying from the principal within the government context (where the agency plays agent) is known as “bureaucratic drift.” See, e.g., Epstein & O'Halloran, *supra* note 106, at 957 (calling bureaucratic drift “the basic problem that Congress faces when delegating authority”); Pablo T. Spiller & John Ferejohn, *The Economics and Politics of Administrative Law and Procedures: An Introduction*, 8 J.L. ECON. & ORG. 1, 6–7 (1992) (discussing instruments legislators can use to control administrative agencies and reduce agency deviation from the original intent).

³⁰³ Jensen & Meckling, *supra* note 90, at 308.

³⁰⁴ McCubbins & Schwartz, *supra* note 59, at 165.

³⁰⁵ See *id.* (“What has appeared to scholars to be a neglect of oversight, we argue, really is a preference for one form of oversight over another, less-effective form.”).

³⁰⁶ *Id.* at 166.

³⁰⁷ *Id.* at 165–66.

those in Congress used the resources available to them to reduce the costs of doing their job. Given the choice of doing things the hard way or the easy way, why would rational actors behave any differently?

But, how do monitoring costs relate to attempts of those in agencies to play principal? Consider, for example, that a person within an agency is willing to leak internal agency information to a member of the press or a member of Congress with the hopes that this information will ultimately shape the actions of those within an elected branch.³⁰⁸ Yet, the leaker of information might likewise fear some sort of fallout if her name becomes associated with the leaked information. Particularly if this is a play that the person within the agency intends to attempt more than once, she could choose to leak the information to a single individual. Giving exclusive information to a single reporter or a single staffer makes it easier for the person in the agency to see if the reporter or the staffer divulged her identity. Monitoring costs might also relate to the costs of monitoring those in the elected branches in search of opportunities to influence them. Unlike the previous example, making this sort of investment is likely to pay some dividends for those in an agency even if such opportunities are never exploited.

“Bonding costs” are Jensen and Meckling’s second category of agency costs, which are those costs, beyond watching the agent, taken by the principal to deter behavior that contradicts a principal’s interests.³⁰⁹ A favorite example of bonding costs is found in the Nobel Prize winning work of Oliver Williamson. In his celebrated article, *Credible Commitments: Using Hostages to Support Exchange*, Williamson focuses upon, and extends by analogy, the lessons learned from what many might consider a historical enigma: that centuries ago those involved with trade would at times leave a human hostage as collateral when making deals.³¹⁰ When one thinks about the world before any of the modern communication conveniences and where travel was still

³⁰⁸ See generally Leiter, *supra* note 127 (detailing the practice of “soft whistleblowing,” where agency employees deliberately leak “inside information to generate outside pressure on their agency to shift direction”).

³⁰⁹ Jensen & Meckling, *supra* note 90, at 308.

³¹⁰ See Oliver E. Williamson, *Credible Commitments: Using Hostages to Support Exchange*, 73 AM. ECON. REV. 519, 519 (1983) (“[T]he exchange of hostages served incentive purposes in an earlier age.”).

extraordinarily difficult, those skipping town found it next to impossible to make a credible Terminator-like promise: “I’ll be back!”³¹¹ However, when that promise was modified to, “I’ll be back . . . to get my child,” it was easier to believe. Furthermore, within the literature, we often see discussions of how the elected branches might use the threat of punishing those in an agency through the budgeting process as a way that those in the elected branches secure compliance of a wayward agency.³¹²

How do bonding costs relate to when agencies attempt to play principal? Those in agencies may attempt to build relationships with those in the elected branches or those who serve as a conduit to the elected branches to reduce the downside of agency-as-principal-strategies. Playing off a previous example,³¹³ when leaking information, those in agencies would feel more comfortable doing so if the person in the elected branch or press was a friend or at least someone they trusted. Bonding can also occur when repeat interactions provide the incentive for cooperation. Additionally, when taking a public action that antagonizes one of the elected branches (say criticizing one of the elected branches or constituencies within them), those in agencies may resort to building support with the public or factions within an elected branch (e.g., criticizing Democrats for their inaction in the House), or seeking political refuge within the other elected branch.

The last sort of agency costs introduced by Jensen and Meckling is “residual losses.”³¹⁴ Many times, even with all the monitoring and bonding efforts, there are risks associated with principal-agent relationships that cannot be eliminated. When things go wrong, these are residual losses.³¹⁵

When agencies attempt to play principal, such a strategy is often fraught with the risks of residual losses. Attempts to lobby Congress could go awry and offend a member of Congress. Reports intended to influence policymakers could become a target of

³¹¹ *The Terminator* (Orion Pictures 1984).

³¹² See, e.g., Jonathan R. Macey, *Organization Design and Political Control of Administrative Agencies*, 8 J.L. ECON. & ORG. 93, 95 (1992) (“[M]acrorules, such as congressional control over agency funding, permit political actors to control bureaucratic drift.”).

³¹³ See *supra* Part V.C.3.

³¹⁴ Jensen & Meckling, *supra* note 90, at 308.

³¹⁵ *Id.*

attack. Criticism of those in the elected branches could lead to slashed budgets or perhaps even dismissal.

For the most part, when those in agencies act as political strategists with the elected branches, they must do so in more nuanced ways in order to minimize residual losses; playing games too blatantly is risky to those in the bureaucracy who value job security.³¹⁶ When those in agencies attempt to politically dominate those in the elected branches, any exertion of power is best done with a great deal of caution.

VII. CONCLUSIONS AND IMPLICATIONS

The relationship between administrative agencies and the elected branches is much more complicated than generally assumed. While there is no denying that the elected branches often hold leverage over agencies,³¹⁷ sometimes they do not. In fact, at times, agencies hold so much sway over the elected branches, it is more fitting to think of agencies as principals attempting to control their agents—the elected branches.

While this Article does not resolve how hard those in agencies need to pull on the strings of the elected branches to rightly be considered principals, to accept this Article's thesis all that is required is that we agree that, at some point along the spectrum, agencies are manipulating the elected branches rather than the other way around. Particularly when one uses a situational principal-agent theory model, which paints principals as those capable of exerting control, one is hard pressed to come up with a reason not to include administrative agencies as potential principals over the elected branches. While certainly the wills of those in agencies do not always trump elected branches, it is a mistake to think of agencies always as agents and never as principals.

The argument that agencies can act as principals not only provides a novel way to think about the relationship between those in the bureaucracy and the elected branches, but it also leads us to a number of important research questions.

³¹⁶ For those in independent agencies, job security might not be a motivator. There are many other tools, of course, for the elected branches to try to control those in agencies.

³¹⁷ See *supra* Part II.B (discussing agencies as agents of the elected branches).

First, the agency-as-principal line of thinking raises a host of questions relevant to administrative law. When agencies play the role of principal, what room does the Constitution leave for agencies to operate? Given that the discretion at issue here is so much broader than that reviewable by the Administrative Procedure Act,³¹⁸ we find a whole range of actions that those in agencies can take to alter the political landscape that are also unreviewable by courts.³¹⁹ So, while recognizing that agencies can play principal provides a more realistic view of the relationship between agencies and the elected branches, it also presents fundamental challenges to administrative law.

Second, from a normative perspective, is it a good or bad thing that agencies can act as principals? On one hand, this might be seen as particularly problematic. After all, even putting aside administrative law issues, when the bureaucracy takes control, what happens to political accountability? Where does this leave the public? What sorts of risks of abuse of power does this present? For example, might a captured agency give powerful interests to manipulate the elected branches as well? On the other hand, often the source of agency power comes from the fact that agencies can be more capable than the elected branches in doing the work.³²⁰ Should we prefer those with less expertise to steer the ship instead of those with more expertise? Also, to the extent that those in agencies gain leverage by engaging with the public or by disclosing information to the press,³²¹ perhaps when those in agencies step up to play principal our government becomes more representative rather than less. In this way, should we think of agencies willing to play principal as watchdogs keeping the elected branches in check?

Third, this line of thinking raises a series of questions about how agencies can institutionally play the part of principal. What conditions permit an agency to seize the reins of the elected branches? What third-party conduits can agencies use to influence

³¹⁸ Administrative Procedure Act of 1946, Pub. L. No. 79-404, 60 Stat. 237 (codified as amended in scattered sections of 5 U.S.C.).

³¹⁹ For a very interesting article that grapples with one such problem see Nathan Cortez, *Adverse Publicity by Administrative Agencies in the Internet Era*, 2011 BYU L. REV. 1371 (outlining methods of constraining agency action).

³²⁰ See *supra* Part IV.A.1.

³²¹ See *supra* Part V.B (discussing Gifford Pinchot's effective use of the press).

the elected branches? What affects the ability of those in agencies to hang on to the reigns once they have them in hand? In what contexts do we see agencies play principals? Are there policy areas that are more likely to see such developments? What tools are in agencies' toolbox to get at Congress and the White House and how do the tools differ? What sorts of people within the bureaucracy can step into the role of principal? How should we think about different levels of the bureaucracy having the ability to act as principals?

Fourth, we need to better understand the political economy driving decisions about when and how those in agencies try to act as principals. What are the advantages and the costs driving such decisions? What role does the possibility of retribution and backlash from the elected branches play into this calculation? Additionally, once an agency takes on that role, what sorts of actions can those in the bureaucracy take to reduce the agency costs in their attempt to control their elected branch agents? How can agencies prevent agent-drift, particularly where those implementing their preferences are routinely up for re-election?

Fifth, we need to better understand the role courts play in all this. We have seen that courts can be used by those in agencies for political cover in other contexts. Does that equally apply here? Furthermore, what sorts of roles can and should courts take in monitoring agencies in their role of principal, or preventing agencies from doing so to begin with? How can elected branches and other entities use courts to their advantage in this context?

Lastly, what sorts of actions can those in elected branches take in order to keep agencies as their agents and prevent agents from playing principals? And, should elected branches take such steps? Assuming so, are additional policy and legislative fixes necessary to prevent this from happening? Does this provide yet another reason to reduce agency discretion or to broaden the sorts of discretion monitored?

As these questions suggest, the symbiosis between agencies and the elected branches is remarkable. Even more remarkable is that the literature has ignored this symbiotic relationship for so long. Understanding that agencies can sometimes act as principals serves as an important step to coming to see the relationship

between the bureaucracy and the elected branches in its true complexity.

