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DELEGATION TO ADMINISTRATIVE AGENCIES WITHOUT EXPERTISE AND WITH THIRD-PARTY INFORMATION

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Laurence Tai*

Abstract

For decades, congressional delegation to administrative agencies has been justified at least in part by the fact that they and their employees are repositories of expertise. However, agencies may not fundamentally be able to generate or process information better than Congress, and they frequently depend on information from third parties outside the government, particularly regulated entities. When agencies can make decisions based on superior information, it is often for a different reason: with distinct preferences from both legislators and industrial interests, they can obtain higher quality information from the latter. A skeptical agency can induce more effort in firms' information gathering, while a moderate agency can elicit more reliable communication in their information transmission. After explaining these strategic dynamics, this paper explores the reverse of the standard agency control problem: instead of how to constrain agencies with expertise to act as Congress would given their information, it considers how to make agencies act differently from how Congress would toward regulated parties so that agencies can obtain better information for policymaking.

JEL Classes: D73, D78, K23

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Introduction

Since at least the New Deal, when Congress began to grant federal agencies wide-ranging discretion to make regulatory policies that it previously might have legislated directly,¹ delegation to bureaucracies has been justified at least in part by their expertise²—the ability to generate internal information or to process external information relevant for policy-making.³ Although later models of the administrative state have observed that expertise is insufficient to constrain agency decision-making,⁴ none of them seem to disavow that expertise is an important reason for entrusting agencies with essentially legislative functions.⁵ Instead, studies of delega-

¹ See, e.g., Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399, 403-04 (2007) (describing the Franklin Roosevelt Administration's commitment to "administrative government on an unprecedented scale"); Cass R. Sunstein, *Constitutionalism after the New Deal*, 101 HARV. L. REV. 421, 424-25 (1987) (indicating the New Deal as the period in which the regulatory state with delegated powers arose). *But see* JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF ADMINISTRATIVE LAW* 5 (2012) (observing that "from the earliest days of the Republic, Congress delegated broad authority to administrators"). See generally MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 213-46 (1992) (detailing the development of administrative law in the New Deal period).

² See, e.g., DAVID EPSTEIN & SHARYN O'HALLORAN, *DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS* 27-28 (1999); James O. Freedman, *Expertise and the Administrative Process*, 28 ADMIN. L. REV. 363, 364 (1976); see also JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 23-24, 154 (1938) (describing the need and usefulness of expertise in regulatory agencies).

³ This definition corresponds to the intuition that agencies' informational advantage derives from bureaucrats' "expert training" or "technical learning." See MAX WEBER, *Bureaucracy*, in *FROM MAX WEBER: ESSAYS IN SOCIOLOGY* 196, 198, 232 (H. H. Gerth & C. Wright Mills eds. & trans., 1946). An alternative is to define agency expertise as "knowledge of facts" relating to policy decisions. See SEAN GAILMARD & JOHN W. PATTY, *LEARNING WHILE GOVERNING: EXPERTISE AND ACCOUNTABILITY IN THE EXECUTIVE BRANCH* 32 (2013). However, this paper chooses the more intuitive definition for two reasons. First, having expert training does not automatically provide a bureaucrat with the knowledge she needs to set policy. Instead, she still needs to conduct research or obtain information from others to develop this knowledge. Second, it is more convenient to refer to expertise as the capability of generating or processing information, as distinguished from actual possession of the relevant information. Nothing would be lost in the paper's argument if the terms used to identify this contrast referred to the capacity to be well-informed versus having the relevant facts.

⁴ See generally Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001) (presidential model); Mark Seidenfeld, *A Civic Republican Justification for the Republican State*, 105 HARV. L. REV. 1511 (1992) (civic republican model); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975) (interest representation model).

⁵ See Kagan, *supra* note 4, at 2353 (affirming that "an important place for substantive expertise remains in generating sound regulatory decisions"); Seidenfeld, *supra* note 4, at 1554

tion typically presume agencies' informational advantage over Congress,⁶ and that they can generate this information independently.⁷ A large literature adopts this foundation of expertise and investigates when and how Congress delegates, given that agencies may deviate from legislative intent.⁸

However, there are two difficulties with this understanding of the agency control problem. First, agencies may not institutionally have an expertise advantage over Congress, and even if they do, their advantage may be as much a cause as an effect of lawmakers' decisions to delegate.⁹ Second, an agency may not always or generally be able to produce relevant information for policymaking on its own, regardless of how much it desires to do so.¹⁰ Instead, it must often extract or elicit this information from outside parties, particularly the ones they are charged with regulating.¹¹ Information originating from these kinds of third parties reinforces the possibility that Congress can become well-informed, just like agencies.¹²

(referring to an agency's "professional staff, chosen for its knowledge rather than for its political views or affiliations"); Stewart, *supra* note 4, at 1684 (alluding to "choices [that] clearly do not turn on technical issues that can safely be left to the experts").

⁶ Although the President may be considered another political principal attempting to constrain agency action, this paper treats Congress as the key principal because presidential administration is one mode of delegated decision-making for the administrative state. See generally Kagan, *supra* note 4.

⁷ See Sean Gailmard & John W. Patty, *Formal Models of Bureaucracy*, 15 ANN. REV. POL. SCI. 353, 354 (2012); Matthew Stephenson, *Bureaucratic Decision Costs and Endogenous Agency Expertise*, 23 J.L. ECON. & ORG. 469, 471-72 (2007). But see GAILMARD & PATTY, *supra* note 3, at 240-43 (presenting a political agency model in which the agent has no independent ability to generate policy-relevant information).

⁸ See, e.g., EPSTEIN & O'HALLORAN, *supra* note 2, at 47-48; JOHN D. HUBER & CHARLES R. SHIPAN, *DELIBERATE DISCRETION? THE INSTITUTIONAL FOUNDATIONS OF BUREAUCRATIC AUTONOMY* 32-38 (2002).

⁹ See *infra* Part I-B.

¹⁰ See Nolan McCarty, *Complexity, Capacity, and Capture*, in PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT (Daniel Carpenter & David Moss eds., forthcoming 2013).

¹¹ See GAILMARD & PATTY, *supra* note 3, at 227-28; Cary Coglianese et al., *Seeking Truth for Power: Informational Strategy and Regulatory Policymaking*, 89 MINN. L. REV. 277, 278-89 (2004). For the most part, outside parties in this paper will refer to industrial interests affected by regulation.

¹² See Frederick J. Boehmke et al., *Whose Ear to Bend? Information Sources and Venue Choice in Policy-Making*, 1 Q.J. POL. SCI. 139, 142-43 (2006) (presenting a model in which the legislature can become as well informed as the agency).

Ultimately, those who would justify delegation in industrial regulation with agency expertise¹³ are correct that agencies have better information for policymaking than Congress, but for the wrong reason. Instead of any independent ability to generate information or any capacity to process third-party information that is greater than legislators', agencies can improve policy outcomes simply by virtue of policy preferences, or what is also known in political science as ideology,¹⁴ that differ from both those of Congress and the outside party.¹⁵ Instead of taking the same action that lawmakers or other elected officials would select given the agency's information,¹⁶ delegation can improve policymaking for Congress *merely because* bureaucracies would choose *differently* from how legislators would with any given set of information. The reason is that different viewpoints affect what information regulated parties will provide.

Relying on political economy studies, this paper highlights two important categories of cases in which agents with different preferences and no expertise advantage can be useful. The first, which derives from the author's own work, deals with the challenge of *inducing effort*.¹⁷ When the third party's claims can be verified but information quality depends on its costly effort, an agent who is more skeptical toward the third party than Congress is can beneficially motivate more of it. The reason is that information supporting the outside party's preferred policy needs to be of higher quality to persuade the agent than to persuade Congress to enact that policy. Having to satisfy the agent means that the third party will exert more effort facing the agent than facing Congress directly to increase information quality and improve policy decisions. The second, which deals with

¹³ See, e.g., Freedman, *supra* note 2, at 365 (noting the Supreme Court's willingness to support agency decisions based on their expertise).

¹⁴ See Joshua D. Clinton et al., *Separated Powers in the United States: The Ideology of Agencies, Presidents, and Congress*, 56 AM. J. POL. SCI. 341 (342-43) (2012) (using the terms of agency ideology and agency preferences interchangeably).

¹⁵ Cf. Matthew C. Stephenson, *Optimal Political Control of the Bureaucracy*, 107 MICH. L. REV. 53, 55 (2008) (noting that agencies with any expertise advantage can benefit policymaking because their preferences, while different from voters', are steady). This argument, however, relies substantially on the expectation that elected leaders' preferences will deviate from voters', even though, on average, the two sets of preferences match. See *id.* The reasoning in this paper, however, applies even if the two sets of preferences are always identical.

¹⁶ See Lisa Schultz Bressman, *Chevron's Mistake*, 58 DUKE L.J. 549, 566 (2009); Lloyd N. Cutler & David R. Johnson, *Regulation and the Political Process*, 84 YALE L.J. 1395, 1399 (1975).

¹⁷ See Laurence Tai, *A Reverse Rationale for Reliance on Regulators* 12-13 (Harvard Law Sch. John M. Olin Center, Fellows' Discussion Paper No. 51, 2013). See also Hao Li, *A Theory of Conservatism*, 109 J. POL. ECON. 617 (discussing the value of conservatism in inducing effort, but as an automatic commitment device rather than a property of agents).

the challenge of *eliciting reliable communication*, is better known in studies of delegation but is discussed here with a view that agencies need no expertise advantage.¹⁸ When it is impossible to verify third-party claims, an agent ideologically in between the third party and lawmakers can elicit more candid and precise messages from the third party than they can. If the agent sets policy instead of Congress, it will differ from what legislators would have preferred given the same information, but it will be based on better information, and the latter benefit may exceed the former cost.

These rationales that assume no expertise advantage yield a redefinition of the problem of political control of agencies. With agency expertise, if agencies' information acquisition is automatic, the standard question is how to induce agencies with expertise to select policies closer to what legislators would want given any set of information.¹⁹ If agencies must exert effort to acquire information, then bias, typically in any direction,²⁰ may induce effort by bureaucrats in policy research,²¹ and the standard question is modified to account for the tradeoff between agencies' use and acquisition of information.²² Nonetheless, an expertise advantage is still necessary to justify delegation in these cases.²³ With third-party information, compar-

¹⁸ I am indebted to the work of Sean Gailmard and John Patty for this second rationale for biased agencies, as well as for their application of this rationale to the Securities and Exchange Commission (SEC). See generally GAILMARD & PATTY, *supra* note 3, at 227-74. The characterization of their findings in this paper is somewhat different from their own: the idea that the information elicitation rationale makes any agency expertise advantage unnecessary contrasts with these authors' portrayal of the logic as part of the "'big picture' theoretical problem of developing and sustaining bureaucratic expertise." *Id.* at 16-17.

¹⁹ This formulation corresponds to the idea that "bureaucrats can be considered fully accountable to political principals when they make the same decisions the principals would have made if they held the information that bureaucrats hold." GAILMARD & PATTY, *supra* note 3, at 4.

²⁰ See Gersen & Vermeule, *Delegating to Enemies*, 112 COLUM. L. REV. 2193, 2196 (2012) (describing a continuum ranging from perfect alliance . . . to perfect enmity"); see also *infra* note 199 (discussing the degree to which direction of bias is important).

²¹ See, e.g., Jonathan Bendor & Adam Meirowitz, *Spatial Models of Delegation*, 98 AM. POL. SCI. REV. 293, 293-94 (2004); Steven Callander, *A Theory of Policy Expertise*, 3 Q.J. POL. SCI. 123, 125 (2008); Gersen & Vermeule, *supra* note 20, at 2215-17.

²² See Matthew C. Stephenson, *Information Acquisition and Institutional Design*, 124 HARV. L. REV. 1423, 1426 (2011).

²³ If the agent is not able to obtain any information beyond what the principal starts with, the principal could select the policy herself. See Bendor & Meirowitz, *supra* note 21, at 300 (indicating that delegation to a very incompetent agent, even an ally, is not useful). This statement is not contradicted by two-player situations in which Jacob Gersen and Adrian Vermeule note that "the enemy agent is no more competent than the principal. See Gersen & Vermeule, *supra* note 20, at 2217-18 (2012). The examples given, adding voters with dif-

ative expertise is no longer needed; thus, the key question becomes how to structure bureaucracies with not just any bias, but a particular bias compared to Congress and regulated parties, so as to improve agencies' information gathering from the latter.²⁴ This alternative understanding of the agency control problem should be of interest to those who are concerned about legitimating the bureaucratic state,²⁵ as well as those concerned about how agencies can be directed to better serve the public interest.²⁶

Before proceeding further, it is worth highlighting two important assumptions. First is the idea that, even though the major players—Congress, the agency, and regulated industry—are collectives with potentially diverse interests,²⁷ each acts “as if” it has policy preferences. Admittedly, different structures for Congress and agencies may yield different decisions even when their members' preferences are the same.²⁸ Nonetheless, policy outputs are typically stable and have a meaning.²⁹ Thus, these institutions can be expected to act with some degree of consistency and a fairly predictable posture toward regulated industries. The second assumption, which applies to any theory of delegation, is that Congress can commit to allow an agency to set policy, rather than intervening to impose its own

ferent beliefs about the state of the world to a group and using devil's advocates to criticize the principal's ideas, *see id.*, do not entail delegation in the sense discussed in this paper, which means granting another player the authority to select a policy.

²⁴ Another difference between the scenarios examined in this paper and settings in which agencies become well-informed with effort is that one of the rationales, information inducement, does not present a tradeoff between information acquisition and use.

²⁵ Justifying the bureaucratic state has been a major project in administrative law studies. *See, e.g.*, MASHAW, *supra* note 1, at 4; Cynthia R. Farina, *The “Chief Executive” and the Quiet Constitutional Revolution*, 49 ADMIN. L. REV. 179, 179 (1997); Sidney Shapiro et al., *The Enlightenment of Administrative Law: Looking Inside the Agency for Legitimacy*, 47 WAKE FOREST L. REV. 463, 463 (2012).

²⁶ *See* Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis*, 6 J.L. ECON. & ORG. (SPECIAL ISSUE) 167, 176-77 (1990) (noting that, instead of serving what Congress perceives is the public interest, they may pursue the interests of a special interest group or their own idiosyncratic view of the public interest.)

²⁷ *See* Kenneth A. Shepsle, *Congress is a “They,” not an “It”: Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON 239, 244 (1992) (noting that Congress is a collective); Thomas H. Hammond & Gary J. Miller, *A Social Choice Perspective on Expertise and Authority in Bureaucracy*, 29 AM. J. POL. SCI. 1, 6 (1985) (describing bureaucratic decision-making as an aggregation of individual officials' preferences); Coglianese et al., *supra* note 11, at 297 (observing that firms within an industry may have different interests).

²⁸ *See* Thomas H. Hammond, *Agenda Control, Organizational Structure, and Bureaucratic Politics*, 30 AM J. POL. SCI. 379, 381-82 (1986).

²⁹ *See* McNollgast, *The Use of Positive Political Theory in Statutory Interpretation*, 57 LAW & CONTEMP. PROBS. 3, 19-20 (1994) (noting these properties for legislation).

choice, after firms communicate with bureaucrats.³⁰ The methods for achieving this commitment will be discussed later;³¹ for now, it is sufficient to treat the regulatory process as having a discrete legislative or institutional design stage, followed by a decision-making stage.³²

The remainder of this paper proceeds as follows: Part I shows how agency expertise has been an important justification for delegation but is problematic because bureaucracies may not have an expertise advantage and because they frequently depend on information from regulated entities. Part II, the core of this paper, describes and illustrates logics by which agencies without any expertise advantage over Congress can produce better outcomes for it simply with the right policy biases. Part III shows how Congress, the President, and the courts can ensure the success of this kind of institutional design.

I. Expertise as a Problematic Justification for Delegation

Agency expertise has been a controversial justification for relying on bureaucracies for policymaking that is legislative in nature.³³ This section examines the nature of expertise in an attempt to clarify the informational challenges that are endemic to regulatory policymaking and the nature of any advantage agencies might have in generating the relevant information or obtaining it from elsewhere. Although some commentators have claimed both that expertise is insufficient to legitimate agency policymaking and that bureaucracies do not necessarily have an expertise advantage,³⁴ this section finds that the latter critique is more significant for regulatory policymaking even though the former has been more prominent in recent theories of the bureaucratic state.

A. Importance as a Justification

Expertise was most highly valued in the eponymous model of administration. Though later models have challenged and downplayed the signi-

³⁰ See Callander, *supra* note 21, at 124-25 (remarking on the importance of the commitment assumption and questioning it, particularly in the context of congressional delegation).

³¹ See *infra* Part III.

³² Cf. Stephenson, *supra* note 15, at 66 (describing a two-stage process for policymaking).

³³ But cf. Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369, 391 (1989) (arguing that agencies' "rule-making power cannot be equated with legislation").

³⁴ See Freedman, *supra* note 2, at 370-73; Francis E. Rourke, *Responsiveness and Neutral Competence in American Bureaucracy*, 52 PUB. ADMIN. REV. 539, 540 (1992).

ficance of expertise,³⁵ it nonetheless remains an important element that justifies at least a large part of the bureaucratic state's activity.

1. Expertise in the Expertise Model

Although expertise can be said to have been an argument for administrative policymaking since federal agencies have existed,³⁶ the New Deal is when expertise became the primary rationale in response to concerns that Congress was delegating too much of its legislative authority to bureaucracies.³⁷ The model's foremost expositor was James Landis, who was not only a scholar, but served in both the Federal Trade Commission (FTC) and the Securities Exchange Commission (SEC) in the Franklin Roosevelt Administration.³⁸ William Douglas, who served as President Roosevelt's first SEC chair, and Felix Frankfurter also espoused the view that agencies deserve their policymaking authority because of their expertise.³⁹ Thus, the expertise model was not just an academic theory of administration, but also appears to have been an understanding consciously embraced by some New Deal government officials.⁴⁰

Agency expertise in both the original model and later analyses of bureaucracies appears to derive primarily from two sources. First, policymakers come into government with specialized training in various subject areas. Landis observed the following:

The world of today [i.e., 1938] as distinguished from even a hundred years ago, is one of many professions . . . Economics, political science, sociology, social ethics, labor economics, engineering in its various branches, all are producers of disciplines relating to the arrangement of human affairs. . . . In-

³⁵ See, e.g., Kagan, *supra* note 4, at 2261-64 (cataloguing critiques of expertise justifications for agency control of policymaking).

³⁶ See Freedman, *supra* note 2, at 363 (asserting that "[r]eliance upon expertise as a principal attribute of administrative regulation antedates the New Deal by many decades).

³⁷ See *id.* at 364 (calling expertise a "principal justification"); Kagan, *supra* note 4, at 2261 (calling it the "dominant justification").

³⁸ See GAILMARD & PATTY, *supra* note 3, at 258.

³⁹ See Freedman, *supra* note 2, at 364, 366.

⁴⁰ Other officials in the Roosevelt Administration opposed large-scale delegation to agencies. See Charles H. Koch, Jr., *James Landis: The Administrative Process*, 48 ADMIN. L. REV. 419, 419-20 (1996) (noting that Landis wrote his work (*supra* note 2) "in part [as] a response to a report from Roosevelt's Committee on Administrative Management").

to its service [government] now seeks to bring men of professional attainment in various fields.⁴¹

The employment of individuals in a diverse array of professions continues to be a distinctive feature of the bureaucracy, compared to other parts of the government.⁴² This type of informational advantage can be referred to as *field* expertise.

Second, various features of the institutional position that a bureaucracy holds in policymaking help its policymakers acquire additional expertise. To begin with, agencies are often designed so that their employees can focus exclusively in a single policy area.⁴³ Thus, they obtain unique knowledge that most citizens outside the government cannot.⁴⁴ Also, officials in regulatory agencies are closely aware of the industries they oversee so that they can formulate detailed and flexible policies.⁴⁵ Overall, agencies and their employees develop some significant portion of the expertise in their work over time,⁴⁶ so this component can be called *experiential* expertise.

What most distinguishes the expertise model from later theories is not the fact of agencies' information advantage, but the sufficiency and desirability of expertise for constraining administrative decision-making. The notion is that agency officials would discover the relevant facts and select a policy, as though there is a single optimal policy to which all would agree if only they could access the same information that bureaucrats can.⁴⁷ In Landis' view relying on agencies' expertise is preferable to allowing elected officials to influence executive branch decisions, since bureaucrats have a professionalism that political officials in non-independent agencies can compromise.⁴⁸ Also, non-expert courts are not needed to ensure that agen-

⁴¹ LANDIS, *supra* note 2, at 154. This passage appears in the context of comparing the adjudicative capacities of administrative agencies and courts, but it nonetheless represents an expression of the virtue of agency expertise.

⁴² See Herbert Kaufman, *Major Players: Bureaucracies in American Government*, 61 PUB. ADMIN. REV. 18, 22 (2001).

⁴³ See LANDIS, *supra* note 2, at 23-24, *quoted in* Freedman, *supra* note 2, at 364.

⁴⁴ See Freedman, *supra* note 2, at 364.

⁴⁵ See LANDIS, *supra* note 2, at 23-24; Koch, *supra* note 40, at 427. Koch suggests that a similar principle applies to "social programs, where complex medical, psychological, and behavioral questions dominate," at least in the context of comparison with judicial decision-making, *see id.*, even though information for these latter kinds of questions is more likely to be publicly available.

⁴⁶ See Freedman, *supra* note 2, at 365.

⁴⁷ See Stewart, *supra* note 4, at 1678.

⁴⁸ See LANDIS, *supra* note 2, at 113-14, *quoted in* Koch, *supra* note 40, at 424.

cy decisions are just.⁴⁹ Although proponents of the expertise model acknowledged that the government could end up relying too heavily on bureaucrats' specialized knowledge, they perceived that a modest set of additional constraints, including "public scrutiny" and "informed criticism by the bar," would be adequate to ensure democratically legitimate agency policymaking.⁵⁰

2. Expertise in Later Models

Later theories of the administrative state hold universally that expertise is insufficient to ensure that agencies' policies are legitimate. However, the key works describing each model all acknowledge, implicitly or explicitly, that experts in agencies play an important role in making essentially legislative decisions. It is possible to read these works as indicating that, expertise, while perhaps not essential for all or most decisions, is the source of a large portion of the practical benefits that arise from delegation to bureaucracies.

Interest representation model: The key work that lays out this model is Richard Stewart's *The Reformation of American Administrative Law*.⁵¹ This piece contains modest support for the existence and importance of expertise. Mostly, it indirectly affirms that bureaucrats possess specialized knowledge by criticizing the expertise model in ways other than questioning whether bureaucrats have expertise in the first place.⁵² Perhaps the most explicit statement is a reference to "distributional questions of how the fruits of affluence are to be shared, [which] clearly do not turn on technical issues that can safely be left to the experts."⁵³ This statement seems to distinguish between the factual content and the value questions that pervade regulatory policymaking. This work also suggests that Congress is unwilling to research the complex issues involved in regulatory policy,⁵⁴ which implies that this task falls to bureaucracies. However, the interest represen-

⁴⁹ See *id.* at 154 (noting that courts are not "the only agency moved by the desire for justice").

⁵⁰ See Freedman, *supra* note 2, at 366.

⁵¹ Stewart, *supra* note 4; see Kagan, *supra* note 4, at 2254 n. 15 (referring to "Stewart's seminal article criticizing the interest representation model").

⁵² Compare Stewart, *supra* note 4, at 1681-83 (criticizing traditional models including the expertise model for their lack of attention to certain interests and "failure to carry out legislative mandates"), with Freedman, *supra* note 2, at 370-72 (directly describing skepticism about the existence of expertise as a reason for skepticism about its value).

⁵³ Stewart, *supra* note 4, at 1684.

⁵⁴ See *id.* at 1695.

tation model also relies substantially on non-expertise justifications, such as legislators' desire to avoid blame and their time constraints.⁵⁵

Civic republican model: A key work that explicates this model is Mark Seidenfeld's *A Civic Republican Justification for the Bureaucratic State*,⁵⁶ which describes agencies as unique in their ability to foster deliberative decision-making for policies that better reflect the public interest.⁵⁷ The career civil staff is an important element of the civic republican justification.⁵⁸ Specifically, this work makes the following positive claim: "Career staff members derive their power primarily from their *professional training* and their relationships with interest group representatives who frequently control important information—in other words, from job-specific expertise" (emphasis added).⁵⁹ Also, this piece ascribes value to the circumstance that these employees act on the basis of professional ethics rather than from a political perspective.⁶⁰ Although officials in higher positions within an agency make the ultimate policies, they rely on career civil servants' expertise, which means that the latter substantially influence policymaking.⁶¹ Thus, though unavoidable questions of political values render agency expertise insufficient to legitimate agency's legislative decisions,⁶² an expertise advantage nonetheless seems to be a necessary ingredient of the regulatory process.⁶³

Presidential model: Perhaps the most extensive discussion of how presidential control of the bureaucracy does and should obtain is Justice Elena Kagan's *Presidential Administration*,⁶⁴ which is based in part on her experiences as an official in the Clinton White House.⁶⁵ This work explicitly argues that "[b]ureaucratic expertise . . . cannot alone or even predominantly

⁵⁵ See *id.*; see also Seidenfeld, *supra* note 4, at 1521-22 (discussing inefficiency in terms of time spent in the legislative process).

⁵⁶ Seidenfeld, *supra* note 4.

⁵⁷ See *id.* at 1541-62.

⁵⁸ See *id.* at 1554-59.

⁵⁹ *Id.* at 1554. The first component of expertise in this quote is essentially a description of field expertise. The second component might map on to experiential expertise, but the dependence on interest groups for information hints at the key issue regarding the nature of agency expertise in this paper.

⁶⁰ See *id.* at 1554-55.

⁶¹ See *id.* at 1554.

⁶² See *id.* at 1520.

⁶³ Cf. Freedman, *supra* note 2, at 376-78 (describing how agency heads apply the expertise of career staff).

⁶⁴ Kagan, *supra* note 4.

⁶⁵ See *id.* at 2246 n.*.

drive administrative decisions,”⁶⁶ due to “the value judgments . . . that underlie most administrative policymaking.”⁶⁷ At the same time, there remains “the need to incorporate in administrative decision-making the scientific, technical, and other kinds of professional knowledge and experience that agency officials possess.”⁶⁸ Furthermore, this work’s critique of the expertise model entails the notion that agencies, left to their own devices, may not properly apply expertise, and that presidential control can actually foster expertise.⁶⁹ Thus, the presidential control model of bureaucracy, like the civic republican model, seems to make agency expertise essential, although not adequate on its own, for delegated authority.

B. Questions about the Fact of Agency Expertise

None of the three major justifications for the administrative state deny that agencies have expertise, and they also seem at least implicitly to affirm an important role for these institutions’ use of specialized knowledge. Undoubtedly, there are many individuals within agencies with both field and experiential expertise. However, the presence of such employees within bureaucracies does not alone establish that these institutions have an expertise advantage over Congress, or at least an advantage that is sufficient to justify broad delegations to bureaucracies.

1. Access to External Experts

The notion that agencies are better able to generate or process information better than Congress can by virtue of their expert staff is problematic in two respects. *First*, lawmakers may be able to obtain the necessary information from among themselves or from outside. To begin with, some members of Congress have their own policy expertise, which they can develop over many terms.⁷⁰ Furthermore, lawmakers have institutional means to be able to act as though they have expertise. Individual members and committees can rely on their corps of staffers, which have grown over time.⁷¹ The entire legislature also has the Congressional Research Service,

⁶⁶ *Id.* at 2353.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *See id.* at 2354.

⁷⁰ *See* Kevin M. Esterling, *Buying Expertise: Campaign Contributions and Attention to Policy Analysis in Congressional Committees*, 101 AM. POL. SCI. REV. 93, 93-94 (suggesting the lobbying contributions can induce members of Congress to develop expertise).

⁷¹ *See* Barbara S. Romzek & Jennifer A. Utter, *Congressional Legislative Staff: Political Professionals or Clerks?*, 41 AM. J. POL. SCI. 1251, 1259, 1261 (1997); Rourke, *supra* note 34, at 544.

which provides responses to inquiries in various policy domains.⁷² Although it was defunded in 1995, the Office of Technology Assessment provided information about various reports about scientific issues.⁷³

Legislators can also solicit information and opinions from outside parties who have at least the same field expertise as agency officials. One set of entities, to be discussed in more detail below,⁷⁴ are regulated interests, which can and do communicate with legislators via lobbying, for example, about the consequences of potential policies.⁷⁵ Lobbyists contact lawmakers not only before, but also after they enact legislation.⁷⁶ Though their statements to congresspersons and their staff may be biased, the challenge of dealing with this bias is not qualitatively different from a bureaucrat's.⁷⁷ Aside from those representing industry, there are researchers in think tanks that specialize in a particular policy area, whose employees may have the same field and experiential expertise as agency officials.⁷⁸

Second, agencies, despite having staff with expertise, also rely on outsiders for policymaking. In addition to regulated entities, whose informa-

⁷² See Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 129-30 (2006). The work of the Congressional Research Service (CRS) is significant: in Fiscal Year 2012, it fulfilled 71,204 “[a]nalysis, information, and research requests” and prepared 534 new reports. See 2012 CRS ANN. REP. 2, available at http://www.loc.gov/crsinfo/about/crs12_annrpt.pdf.

⁷³ See generally BRUCE A. BIMBER, *THE POLITICS OF EXPERTISE IN CONGRESS: THE RISE AND FALL OF THE OFFICE OF TECHNOLOGY ASSESSMENT* (1996).

⁷⁴ See *infra* Part I-C.

⁷⁵ Two informational theories of lobbying have emerged in political science research. First, lobbyists may communicate with legislators to persuade them about policy consequences. See, e.g., David Austen-Smith, *Information and Influence: Lobbying for Agendas and Votes*, 37 AM. J. POL. SCI. 799, 799-800 (1993). Second, lobbyists may provide information to help congresspersons influence legislative outcomes. See Richard L. Hall & Alan V. Deardorff, *Lobbying as Legislative Subsidy*, 100 AM. POL. SCI. REV. 69, 74 (2006). Lobbying entails other kinds of information, such as about constituents’ likely responses to decisions, and, beyond information provision, it may also function as a method of exchange between congresspersons and interest groups. See *id.* at 70-71.

⁷⁶ See Hye Young You, *Ex Post Lobbying* 7-11, 28-30 (Mar. 6. 2013) (unpublished manuscript, on file with author).

⁷⁷ For a particular legislator, the bias may not be important, since lobbyists have a tendency to communicate mostly with allies. See Marie Hojnacki & David Kimball, *Organized Interests and the Decision of Whom to Lobby in Congress*, 92 AM. POL. SCI. REV. 775, 778-79 (1998). Furthermore, a more biased messenger can sometimes be more valuable to a decision-maker than a less biased one when she leans toward one option. See Randall L. Calvert, *The Value of Biased Information: A Rational Choice Model of Political Advice*, 47 J. POL. 530, 545-56 (1985).

⁷⁸ See ANDREW RICH, *THINK TANKS, PUBLIC POLICY, AND THE POLITICS OF EXPERTISE* 17 (2004) (noting the prevalence of single-issue think tanks).

tion is a key motivation for this paper, bureaucracies commonly make use of advisory committees to help decide what regulations to pursue.⁷⁹ Individuals who would serve on an advisory committee may be able to match agency officials in terms of field and experiential expertise. Any external experts upon whom an agency might call are also available to members of Congress, making it even more possible for them to be well-informed about policy.

Overall, the fact that some bureaucrats, as individuals, possess a greater ability to generate or process certain kinds of information than legislators does not necessarily imply that, as an institution, a given agency has an expertise advantage over Congress. The extent to which bureaucracies' informational capacities exceed legislative capabilities is an empirical question. However, one study found that, though Congress grants more discretion to agencies with greater policy bias, it does not clearly offer more discretion to agencies with more technical or professional staff.⁸⁰

2. Institutional Capacities to Develop Expertise

More importantly, even if it were shown that agencies are institutionally more expert than Congress, it would not necessarily indicate that expertise is a motivating factor for delegation. As a theoretical matter, if legislators have found that they can achieve better outcomes by granting legislative authority to agencies, even when they have no expertise advantage, then they do not necessarily need to match agency expertise in various fields of regulation. As a practical matter, institutional mechanisms to improve legislators' information capacity like the ones discussed above⁸¹ could be expanded.⁸² Such a structural decision would be constitutionally sound since the additional staff would only be providing research results and not exercising any legal authority.⁸³

In addition, if agencies have an expertise advantage over Congress,⁸⁴ it may follow from lawmakers' decision to delegate in the first place. Exper-

⁷⁹ See Michael H. Cardozo, *The Federal Advisory Committee Act in Operation*, 33 ADMIN. L. REV. 1, 37 (1981); Steven P. Croley & William F. Funk, *The Federal Advisory Committee and Good Government*, 14 Yale J. on Reg. 451, 552 (1997).

⁸⁰ See Clinton et al., *supra* note 14, at 351 (with some coefficients pointing the opposite direction).

⁸¹ See *supra* notes 71-73 and accompanying text.

⁸² Cf. Sean Gailmard, *Expertise, Subversion, and Bureaucratic Discretion*, 18 J.L. ECON. & ORG. 536, 536 (2002) (noting legislative options for obtaining expertise).

⁸³ See Beermann, *supra* note 72, at 130.

⁸⁴ See GAILMARD & PATTY, *supra* note 3, at 55 (arguing that agencies do have expertise).

tise may be even congressionally motivated,⁸⁵ in which case legislators might also be able to stimulate expertise within Congress if they decided not to delegate policymaking in industrial regulation. They are able to induce some level of specialization in knowledge through the committee system.⁸⁶ Congress' options for developing expertise or having agencies develop it suggest that expertise is not an inherent property of agencies that makes delegation desirable. Rather, the ability to generate or process information is a feature that Congress can encourage in the institution of its choice when deciding whether to delegate. Thus, justifying broad grants on the basis of expertise may be somewhat circular.

C. Agencies' Dependence on Third-Party Information

Another significant difficulty with the notion of agency expertise is that, regardless of how motivated they are, they may not be able to produce key items of information for regulation when they are in the hands of regulated parties.⁸⁷ Lack of industry information may generally be serious enough to prevent an agency from devising effective regulations.⁸⁸ Were it always or generally the case that an agency could produce most of the information it needed through internal deliberation or in-house experimentation, then it would plausibly have extra, unique information upon which Congress could rely. This subpart suggests that regulatory policy depends often enough on firms' information for lawmakers and bureaucrats to start in a roughly symmetric position in terms of their ability to obtain information.

All three works describing models since the expertise theory of administration mention that outside interests have relevant information for policymaking,⁸⁹ and Stewart's, in particular, observes that regulated parties are major contributors of the information that agencies need for their decisions.⁹⁰ This circumstance follows naturally from the idea that knowledge

⁸⁵ See *id.* at 25; Sean Gailmard & John W. Patty, *Slackers and Zealots: Civil Service, Policy Discretion, and Bureaucratic Expertise*, 51 AM. J. POL. SCI. 873, 884 (2007).

⁸⁶ See Thomas W. Gilligan & Keith Krehbiel, *Collective Decision-making and Standing Committees: An Information Rationale for Restrictive Amendment Procedures*, 3 J.L. ECON & ORG. 287, 288 (1987).

⁸⁷ See GAILMARD & PATTY, *supra* note 3, at 228.

⁸⁸ See STEPHEN BREYER, REGULATION AND ITS REFORM 109-10 (1982). (deeming the issue of reliance on industry, combined with difficulties surrounding other sources of information, a "central and persistent problem").

⁸⁹ See Kagan, *supra* note 4, at 2265, 2360-61; Seidenfeld, *supra* note 4, at 1554; Stewart, *supra* note 4, at 1686.

⁹⁰ See Stewart, *supra* note 4, at 1713-14.

of an industry is needed to regulate it.⁹¹ Because regulated firms produce and sell goods and services, they are most likely to have policy-relevant information relating to them.⁹² This information includes the presence or absence of a market failure, the causes of identified problems, possible regulatory solutions, and the consequences of proposed actions.⁹³

There are two steps needed for a decision-maker to obtain information from regulated parties: they need to generate information, and then they need to state a claim about any information they have found. Each stage presents potential challenges for a policymaker. At the information generation stage, a firm may have to incur additional costs for higher quality information. If the decision-maker can verify information about the firm's research, then the key challenge is inducing effort from it to increase information quality. At the information transmission stage, the firm may be able make claims about what it has learned that neither Congress nor an agency can verify. In that case, the main challenge is eliciting reliable communication from the firm.⁹⁴ Each of these is discussed in turn.

1. Information Generation Challenges

In certain cases, legislators or bureaucrats may be able to determine the validity of any claims about a firm or industry's research. However, regulated parties might not be willing to do as much research as a government policymaker would like. The following stylized examples suggest that there are important cases in which effort inducement is the key challenge:

- The Food and Drug Administration (FDA) has the authority to decide whether to allow a new drug to be marketed and requires applications for approval.⁹⁵ Although this agency could take samples of a new drug and test its safety and effectiveness, its practice is to review the data and studies that drug sponsors generate from clinical trials.⁹⁶ Apart from the FDA review process, drug companies

⁹¹ See LANDIS, *supra* note 2, at 23-24; Cary Coglianese, *Litigating within Relationships: Disputes and Disturbance in the Regulatory Process*, 30 LAW & SOC'Y REV. 735, 750 (1996).

⁹² See BREYER, *supra* note 88, at 109 (1982).

⁹³ See Coglianese et al., *supra* note 11, at 282-85.

⁹⁴ It turns out to be the case that, if both inducing effort and eliciting reliable communication are issues, the latter one is more important. See *infra* notes 191-192 and accompanying text.

⁹⁵ See 21 U.S.C. § 355 (2006).

⁹⁶ See generally 21 C.F.R. § 314 (2013) (detailing the review process for new drug applications).

might not be willing to invest as much in ascertaining information about their products and might rather just market them.⁹⁷

- The Environmental Protection Agency (EPA) can set emissions standards for motor vehicle pollutants, taking into account technological feasibility and cost.⁹⁸ Though agency scientists may be able to determine the public health benefits of additional abatement, analysts in the auto industry are in the best position to know what kinds of technology are currently feasible, since auto manufacturers, rather than the EPA, would be producing the new cars. On the other hand, since installing new technologies is costly, firms may not be eager to research possibilities for pollution reduction.
- The Department of Defense (DoD) is searching for a new weapons system. In practice, a large proportion of research is done by private firms, at the cost of billions of dollars.⁹⁹ With appropriate testing, procurement officials can decide whether a new technology will work, and they can discern the quality of studies done to assess the technology.¹⁰⁰

These three cases have some commonalities: First, they involve scientific or technical information that can be obtained from experiments that can be trusted.¹⁰¹ Also, though it is generally not feasible to monitor firms' effort directly,¹⁰² the level of effort may be inferable from the quality of supporting data and studies. In addition, these arrangements in which firms are the primary researchers are motivated in part by cost: an agency could do the research itself, but it is much cheaper to have private firms with profit motives conduct research and then to review companies' findings,

⁹⁷ Before the FDA was established, thousands of drugs were marketed without any real research as to their effectiveness. See DANIEL CARPENTER, REPUTATION AND POWER: ORGANIZATIONAL IMAGE AND PHARMACEUTICAL REGULATION AT THE FDA 77-78 (2010).

⁹⁸ See 42 U.S.C. § 7521(a)(1)-(2) (2006).

⁹⁹ See William P. Rogerson, *Economic Incentives and the Defense Procurement Process*, 8 J. ECON. PERSP. 65, 68 (1994).

¹⁰⁰ Though the effort inducement challenge is alleviated somewhat by the Defense Department's ability to purchase successful products, *id.* at 70, this measure is financially costly. With the right preferences, an agency may be able to induce effort without any monetary cost.

¹⁰¹ In practice, the verifiability of information may rely on some probability of detection of falsehood, followed by sanctions. This arrangement still provides more knowledge than is possible in cases in which eliciting reliable information is the key challenge. In the latter set of cases, no punishment for false claims is likely because intrinsically unascertainable.

¹⁰² See Rogerson, *supra* note 97, at 70 (for the case of defense procurement).

particularly if the private sector is better at identifying promising medicines and technologies than the government.

2. Information Transmission Challenges

Whether or not the quality of the firm's information improves with effort, Congress or an agency may face the challenge of eliciting reliable communications when it is not possible to determine whether industry representatives' claims are true. First, firms might remain silent, or they might only selectively provide information that is favorable to them.¹⁰³ They might also exaggerate the cost of proposed policies.¹⁰⁴ Alternatively, they may submit an inordinately large quantity of documents, leaving agency staffers unable to determine what is factual and relevant.¹⁰⁵ When these documents are submitted as comments in rulemaking, an agency may need to respond adequately to all of them to avoid having a court overturn its regulation.¹⁰⁶ The following examples are illustrative:

- The Department of Energy (DOE) is charged with extending loan guarantees to companies attempting to commercialize clean energy technologies.¹⁰⁷ It would like to select projects that are likely to be profitable and avoid the adverse consequences, such as media reports of a company's failure after receiving financial support.¹⁰⁸ Although reviewers at the DOE know how different technologies work, they cannot experimentally replicate manufacturing processes or market conditions for various products. The applicants will naturally have a better understanding of their true chances of success. However, projecting the commercial viability of a technology entails uncertainty that allows firms to make bold claims about the chances for their products.

¹⁰³ See Coglianese, *supra* note 11, at 290 & n.46.

¹⁰⁴ See, e.g., Yoon-Ho Alex Lee, *An Options-Approach to Agency Rulemaking*, 65 ADMIN. L. REV. (forthcoming 2013) (suggesting that industry representatives provided high estimates of the Securities and Exchange Commission's proposed proxy access rule).

¹⁰⁵ See Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1333-34, 1400 (2010) (describing how organized interest groups, especially industrial ones, can strategically flood agencies with documents to their advantage).

¹⁰⁶ See *id.* at 1354-55.

¹⁰⁷ See 42 U.S.C. §§ 16,513, 16516 (2006 & Supp. III 2010).

¹⁰⁸ See Eric Lipton & John M. Broder, *In Rush to Assist a Solar Company, U.S. Missed Signs*, N.Y. TIMES, Sept. 23, 2011, at A1.

- In the wake of the 2008 financial crisis, financial regulators have considered increasing banks' capital requirements.¹⁰⁹ Higher capital requirements would reduce the likelihood of future crises, but they would also restrict lending. Bankers are most familiar with their own operations and thus should have the best knowledge the adverse consequences of higher capital requirements and possibly some additional knowledge about systemic risks. However, banks have incentives to remain highly leveraged.¹¹⁰ Because it is impossible to reliably simulate the magnitude of the effects of increasing capital requirements on banks, banking representatives are free to claim that the adverse consequences would be very serious.¹¹¹
- Perhaps the most traditional form of regulation, setting the price for a public utility, requires an agency to know the costs of production. Economists generally believe that the utility, a monopoly producer, will have better information about these costs than the regulator.¹¹² With intrinsic uncertainty about future profits, the utility can expect to have some leeway in overstating its costs.

In this and the previous set of examples, firms have an incentive to make claims that would yield more favorable policy from the government, such as product approval or less stringent regulation. However, they are able to do so more easily when the key statements cannot be verified with experiments or tests. If experiments cannot be done, then it may also be the case that a firm will learn most of what it needs to know from the regular course of its business, without much additional cost. The scenarios here rely largely on economic facts about the future, whereas the ones for effort inducement involve scientific or technological facts that apply in the present.

The similarities among examples in each category suggest some consistency among policy questions as to which informational challenge is im-

¹⁰⁹ See generally Regulatory Capital Rules, 77 Fed. Reg. 52,792 (proposed Aug. 30, 2012).

¹¹⁰ See Anat R. Admati et al., *Debt Overhang and Capital Regulation* 1-2 (Mar. 23, 2012) (unpublished manuscript, on file with author).

¹¹¹ But see Anat R. Admati et al., *Fallacies, Irrelevant Facts, and Myths in the Discussion of Capital Regulation: Why Bank Equity is Not Expensive* 1 (Stanford Graduate Sch. Bus., Research Paper No. 2063, 2010) (contending that arguments against increasing equity requirements are without merit). Still, there exists some optimal capital requirement below 100 percent, so question of balancing benefits and costs applies.

¹¹² See e.g., David P. Baron & Roger B. Myerson, *Regulating a Monopolist with Unknown Costs*, 50 *ECONOMETRICA* 911, 911 (1982).

portant. For instance, financial regulators may generally expect to have information transmission issues since their policies involve indeterminate economic situations, whereas medical reviewers will typically deal with information generation issues since studies can be analyzed for their veracity and quality. Predictability within policy areas as to the nature of information extraction from regulated entities helps because the optimal agency preferences will depend on whether bureaucrats need to induce research effort or candid communication.

Overall, the examples offered of agencies' challenges in obtaining useful information from regulated entities, as well as the fact firms are so often the targets of bureaucratic policy, suggest that information extraction challenges are quite pervasive.¹¹³ Thus, the standard informational rationale based on agency expertise is arguably insufficient as a justification, suggesting that an alternative rationale would be useful.¹¹⁴ The next part offers two rationales that address the question of how policy can be well-informed but that do not depend on an agency's comparative ability to seek out information.

II. Benefits of Delegation to Biased, Non-expert Agencies Given Third-party Information

¹¹³ See Coglianese et al., *supra* note 11, at 278 ("Government regulators are *usually* poorly positioned to gather information about business operations, or at least to gather it cheaply" (emphasis added)).

¹¹⁴ There are other rationales for bureaucratic policymaking that do not rely on agency expertise; however, they do not adequately address the issue of how delegation to agencies can yield better-informed policy. Perhaps the justification that comes the closest is the notion that agencies can act more quickly than legislators in response to what the Supreme Court has called "our increasingly complex society, replete with ever changing and more technical problems," *Mistretta v. U.S.*, 488 U.S. 361, 372 (1989). This justification, however, is problematic because regulators cannot and do not act so quickly. The Administrative Procedures Act (APA) generally requires an agency to provide at least thirty days' notice before promulgating a rule, *see* 5 U.S.C. § 553(d) (2006). In practice, many regulations take many months to pass: a recent study of rulemaking at the Department of the Interior (DOI) finds that, since 1975, agencies within the DOI promulgate only around forty percent of rules within 200 days after proposing them, and that they require more than a year to finalize about thirty-five percent of rules. *See* Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950-1990*, 80 GEO. WASH. L. REV. 1414, 1456 (2012). This measure does not even account for any regulatory delay that occurs before an agency issues a Notice of Proposed Rulemaking, *see id.* at 1480. Based on these delays, it is unclear whether agencies truly act more expeditiously than Congress could.

Prior literature has generally assumed that agencies have expertise and considers how to constrain them given that they might be biased in the sense that they prefer to enact different policies than Congress would if it had access to the same information as bureaucrats.¹¹⁵ Instead, under a reverse logic, the lawmakers can benefit from delegating to an agency merely because it is biased, even if they are not lacking in expertise compared to the agency or time- or resource-constrained in undertaking the legislative process. These benefits can accrue when Congress' preferred policy depends on information from an interested third party rather than the agency.

The key is for the agent to have the "right" preferences, compared to legislators and regulated entities. One way to begin to understand the potential of a biased agency is that Congress, even as a collective, is limited in the kinds of postures it can have toward industries it seeks to regulate. Thus, difficulties in extracting high-quality information from them can arise in part from Congress' preferences, which determine what it will do with any information it receives. With delegation lawmakers can force regulated parties to work with an agency instead. An agency that, given any information, would select the same policy as the legislature would is of no use apart from some expertise advantage. However, if the agency has different preferences, it will do different things with the information it receives, even without any superior capacity to process information. Then firms may prefer to provide different information because the policy outcomes from any given set of information will be different.

These principles for making use of a biased agent are derivable from game-theoretic models that portray the principal (Congress), agent (agency), and third party or outsider (a regulated firm or industry) as utility maximizers facing a policy decision. Assessing the value of delegation entails comparing the principal's utility when she allows the agent to make the decision versus when she makes the decision herself. The outsider alone has information that it can attempt to convey to the decision-maker before she or he sets policy. The agent has no special expertise or other advantage in processing communications from the third party; instead, the only difference between him and the principal is ideological.

For these principles to apply, the challenge of inducing effort or of eliciting reliable communication should be present. Otherwise, it is likely that the principal will prefer to make the decision herself, or, equivalently, to

¹¹⁵ See, e.g., sources cited at notes 8 and 21-22 *supra*.

delegate to an agent whose policy preferences are the same as hers.¹¹⁶ If it is desirable to obtain information from the firm or infer it from its communications, then the type of bias that is valuable for Congress depends on which of research effort and reliable communication is an issue. If inducing effort is the only goal, then a skeptical agency is desirable—one that strongly opposes the firm when effort is low but acts more favorably toward it when effort is high. If information verifiability is a goal, then legislators will prefer a moderate agency—one with preferences in between Congress and regulated entities—whether or not inducing effort is also important.

Though the rationales for these biases do not exhaust all the possibilities for using biased agents with no expertise advantage, they are important ones that can apply in a broad range of regulatory settings and illustrate the values of different kinds of biases.¹¹⁷ Formal proofs for these rationales are not given here; instead, they are available in the works that lay them out in game-theoretic models.¹¹⁸ Rather, mathematical examples are given to assist with intuition. In addition, concrete examples are offered to suggest that the value of a biased, non-expert agent is not just a theoretical possibility, but one that may have been reflected in actual institutional arrangements. Without claiming that Congress has intentionally sought these

¹¹⁶ The general logic is that, with certifiable and costless information, the receiver can induce the sender to reveal information by assuming the worst about the sender if she does not receive “good” information. See, e.g., Paul R. Milgrom, *Good News and Bad News: Representation Theorems and Applications*, 12 BELL J. ECON. 380 (1981); see also Masahiro Okuno-Fujiwara et al., *Strategic Information Revelation*, 57 REV. ECON. STUD. 25 (1990) (exploring disclosure strategies when multiple players have information). See generally PATRICK BOLTON & MATHIAS DEWATRIPONT, *CONTRACT THEORY* 171-98 (2005) (describing strategies for principals and agents when information can be certified as true). However, such a result does not necessarily hold if there is a chance that the sender lacks any information, in which case non-disclosure does not necessarily indicate unfavorable information. See Ryan Bubb & Patrick L. Warren, *Optimal Agency Bias and Regulatory Review* 18-19 (Mar. 2, 2013) (unpublished manuscript, on file with author).

¹¹⁷ Another important case in which a biased agent is helpful to a political principal is monetary policy. The principal will typically prefer to use a central bank that is more opposed to inflation than she is. See Jonathan Bendor et al., *Theories of Delegation*, 4 ANN. REV. POL. SCI. 235, 261-62 (2001). Here, however, the central bank is responding not to a third party with policy preferences, but to market actors, who in turn are setting prices based on expectations about the bank’s decision-making about inflation in macroeconomic equilibrium. See Kenneth Rogoff, *The Optimal Degree of Commitment to an Intermediate Monetary Target*, 100 Q.J. ECON. 1169, 1174 (1985). Thus, these results are difficult to apply to general policymaking outside the (admittedly) important context of monetary policy.

¹¹⁸ See sources cited at notes 124 and 161 *infra*.

benefits, this section suggests that their underlying logics have operated,¹¹⁹ which means that institutional designers in the future might take them into account.

A. Inducing Effort in Research with a Skeptical Agency

One reason for delegating to a bureaucracy that does not derive from its expertise is when it is more willing than Congress to pursue a policy that the outside party opposes in the face of uncertainty. Under this logic the third party is not compelled to tell the truth, but the decision-maker is able scrutinize any claim it makes and decide whether it is accurate. Also, this logic is easiest to see when the decision is a binary one,¹²⁰ such as whether to accept or reject a firm's application for a license. In addition, depending on the information, it may be possible for all three players to agree on what policy to pursue at least sometimes. This assumption allows the agent to be skeptical—opposed to the third party under uncertainty but persuadable given enough effort—rather than simply hostile.

In addition, the third party does not automatically generate information about the policy question. Instead, the quality of this information depends on how much costly effort it expends. This effort becomes another disclosable and verifiable item of information. In a two-player setting, costly effort for an agent can affect the principal's preferred choice, compared to automatic information generation by him, because the goal of inducing more effort becomes a factor in the principal's payoff.¹²¹ The same is true when the third party is the key generator of information and has a choice of effort levels.

A class of scenarios in which this logic may apply is a decision as to whether to undertake a project, and the principal's preferred decision depends on whether the project will be successful. The third party, which stands to gain from the decision, can generate information as to the likelihood of success, but this information is costly. The principal would like the

¹¹⁹ Cf. GAILMARD & PATTY, *supra* note 3, at 19 (stating their purpose “to analyze the trade-offs that agency organizational structures create for political principals—whether or not they are aware of them, and responsive to them, at the time the organizational structures are created”).

¹²⁰ However, this logic can be extended beyond this setting. Specifically, the principal can benefit from a skeptical agent even when there is a range of choices. To do so, one could represent policy preferences with utilities that are optimized with policies that are close to each other under relative certainty, but for which the relative costs of errors in each direction are different for each player.

¹²¹ See sources cited at note 21-22 *supra*.

outsider to do as much research as possible so that her decision-making is more accurate. However, she may not be able to induce the third party to put as much effort into its research as she would like if she directly selects the policy.

1. Intuition

Regardless of her preferences vis-à-vis the third party, the principal may have difficulty motivating research. First, if she was already inclined to approve the project without any new information, the third party does not need to do any research to persuade her to proceed with the venture. It naturally also wants to the project approved in the absence of new information,¹²² so its optimal strategy may be to do no research and rely on her presumptive willingness to go forward.¹²³ Even if she is somewhat opposed to the project initially, the outsider is likely to want to exert as little effort as necessary for research favorable to the project to convince her to embark on it. The reason the outsider might not expend more effort in this case is that the principal might make the same decision after each signal, and the third party's benefits from better-informed policy might not exceed its cost. Since effort is costly, additional research in this case would not benefit the firm. In both cases, the third party has no problem disclosing its level of effort and the results of its research when they are favorable, since the principal will be able to verify these claims and will want to approve the project, even though she would have desired more research.

Thus, the principal might prefer to delegate to an agent, specifically, one who is initially opposed to the project and needs research pointing to its success to be persuaded to approve it.¹²⁴ If she is initially somewhat against the project, she can benefit from an agent who is even more against it. Because the agent is presumptively more opposed to the venture than the principal, the third party will have to try harder in its research to convince him than to convince her. If it exerts more effort, then the principal will benefit because the decision will be based on more accurate information.

The following mathematical example may help clarify the intuition. Congress is considering whether to adopt a new machine for airport security that will make security checks faster. It can decide on its own or allow

¹²² Without loss of generality, this intuitive assumption will be maintained throughout the discussion.

¹²³ However, it is also possible the third party will prefer to do some research if the benefits of what she learns outweigh the costs of research. See Tai, *supra* note 17, at 12-13.

¹²⁴ See *id.* at 19-21.

the Transportation Security Administration (TSA) to do so. A firm stands to benefit from selling the equipment. Congress, the TSA, and even the firm agree that the technology should be adopted only if it will not increase the likelihood of an attack.¹²⁵ However, they disagree on the relative benefits of making the right call when the device will or will not be as effective as those already in use.¹²⁶ Let zero be the normalized utility of each player from an incorrect decision, one in which the technology is rejected even though it actually is effective or vice versa. If the device is effective and is approved, the net benefits to Congress, TSA, and the firm will be 4, 2, and 6 respectively. Meanwhile, if the device harms airport safety and is properly rejected, the respective net benefits will be 6, 8, and 4. Based on these preferences, the firm is biased toward approval compared to Congress since its net benefits from an accepted, effective machine are higher than legislators' and from a disallowed, ineffective machine are lower than theirs. The TSA, in contrast, is biased toward rejection compared to Congress.

There are two states of the world, which can be understood as sets of facts that determine which policy each player prefers. The two states are that the equipment is and is not effective, and they are assumed to be equally likely. The firm can conduct research about the state to generate a signal pointing to one of the two states. This signal will have some accuracy X , where X is a fraction of at least one-half, which means that, in each state of the world, the signal will correctly point to the state with probability X and incorrectly point to the other state with probability $1-X$. Thus, the more accurate the signal is, the more likely a player will receive net benefits from choosing according to that signal. Since the two states are equally probable, a signal pointing to either state allows any player with whom the firm shares the signal to update beliefs so that that state is the correct one with probability X .¹²⁷

¹²⁵ The firm need not agree that an unsuccessful technology should not be adopted for the logic in this subpart to apply. *See id.* at 5-6.

¹²⁶ One can conceive of any number of reasons that may perceive different benefits from the two kinds of correct decision, or equivalently, different costs from the two kinds of wrong calls. For example, if the device would be effective but is not approved, lawmakers may have to deal with electoral pressures from constituents who desire more convenience, pressures to which the agent is immune. In contrast, if the device is not effective, the agency may receive more blame for inadequate protection.

¹²⁷ This fact can be shown with an application of Bayes' rule. For either state W , the probability that W holds and the signal says so is $0.5X$, while the probability that the signal points to W when W is not the state is $0.5(1-X)$. Thus, the probability that the state of the world is W given that the signal points to W is $0.5X/(0.5X + 0.5(1-X)) = X$.

More accurate signals are more costly for the third party to generate. To keep this example straightforward, its effort level choice will be binary. First, it can choose not to exert effort, which costs nothing and produces a signal with an accuracy of 0.7. Alternatively, it can expend effort that costs 2 units of utility to produce a signal with an accuracy of 0.9. Consistent with the notion that an outside party is the one producing information, only the third party, rather than Congress or the TSA, will incur this cost.

A first step for understanding the impact of delegation is identifying what decision Congress and the TSA would make given different signals from the firm, with and without effort. If the signal indicates that the device does not work, neither of these players will want it approved because the signal merely reinforces their inclination to reject the device.¹²⁸ Even when the signal suggests that the technology will work, whether these players will adopt the new equipment may depend on the amount of effort behind the signal. Table 1 illustrates the payoffs to Congress and the TSA for accepting or rejecting the technology after a favorable signal, depending on the firm's effort.¹²⁹ If Congress makes the decision, it will approve the device with or without effort, whereas if Congress delegates authority to the TSA, the agency will accept the equipment only after effort.

Table 1. Payoffs to Congress and the TSA for decisions after different signals of effectiveness

Player	Congress	TSA
Approval following signal without effort	2.8	1.4
Rejection following signal without effort	1.8	2.4
Approval following signal with effort	3.6	1.8
Rejection following signal with effort	0.6	0.8

Note: Bold entries indicate which decision each player prefers.

¹²⁸ Mathematically, for any signal against the device with accuracy X , Congress, for example, would receive $6X$ for rejecting the device, since X is its updated probability that the technology is ineffective; and $4(1-X)$ for accepting the device, since $1-X$ is its updated probability that the equipment is protective. Then $6X > 4(1-X)$ since $6 > 4$, and $X \geq 1-X$ since, by assumption, $X \geq \frac{1}{2}$. The same logic applies even more strongly for the agent.

¹²⁹ Entries for approval are calculated multiplying a player's net benefit for a correct approval call by the accuracy X corresponding to the effort level, which is the probability that the device works. Entries for rejection are computed by multiplying the net benefits by $1-X$, the probability that the technology is ineffective, given that the signal shows the opposite.

It might seem that, since the firm is generating information, Congress or the TSA might not be able to have the information it needs to decide correctly. However, Congress or the TSA can induce the firm to disclose an effort level and signal that will persuade it to approve the project by credibly threatening to reject the machine unless it receives this kind of information. The decision-maker is essentially adopting an adversarial position toward inadequate disclosures: since the firm can truthfully reveal these aspects of its research, the decision-maker can interpret failure to disclose persuasive information as a sign that the firm lacks such support for an approval decision.¹³⁰ Thus, this problem can be solved as though the firm will reveal everything. The key challenge for the decision-maker is therefore not eliciting information but inducing effort.

The reason that Congress will prefer to delegate to the TSA is that the agency is less inclined to approve the project, which will cause the firm to exert effort. If legislators have authority, then the firm will not prefer to exert any effort, because such effort is not necessary to convince Congress to approve the project when the signal is favorable. Then its payoff derives from the benefits from different decisions. Since the decision will follow the signal, which has accuracy 0.7, it will receive the expected benefit of being correct over the two states, $0.5 \times 6 + 0.5 \times 4 = 5$, multiplied by 0.7, which is 3.5. If the firm exerts effort, the decision after each signal will be the same. The policy payoff will be higher: $5 \times 0.9 = 4.5$. However, the research costs the firm 2, so its net expected utility is 2.5. Thus, the benefits of the additional information do not outweigh the cost.

If, instead, the TSA has authority, a signal without effort can only lead to rejection. Then the firm receives 4 if the technology is in fact ineffective, which is the case with probability 0.5, which means its expected utility is 2. By exerting effort, the firm would be able to persuade TSA to choose policy according to the signal. Its payoff would be the same as if it were facing Congress, 2.5. Since this payoff exceeds its payoff from not expending effort, it will expend effort.

Legislators' payoffs improve as a result of delegation. If they made the decision directly, there would be no effort. They would receive the average benefits of correct decisions over the two states, $0.5 \times 4 + 0.5 \times 6 = 5$, multiplied by 0.7, which is 3.5. If, instead, they delegate to the TSA, these benefits are multiplied by 0.9, for a higher payoff of 4.5. Lawmakers cannot credibly threaten to abandon the technology after a favorable signal after no effort

¹³⁰ This result is in line with the properties of models with costless, verifiable information. See *supra* note 117.

because they prefer to adopt it in that case. In contrast, the TSA is able to secure better-informed policy purely by virtue of its preferences. It can credibly threaten to always reject the proposal when the firm does not expend effort because it really does not want to deploy the device unless a favorable signal is supported by effort.

Two caveats are in order: First, Congress' payoff is higher the more biased the agency is against the firm, but only up to a point. If the agency is too strongly biased against approval, the firm in this example may be unable to persuade it to accept the device, even with effort, in which case the principal loses from delegating to the agent, who would always reject the technology. More generally, with a continuous choice of effort level, an agent with more extreme preferences helps the principal up to a threshold by yielding more effort; however, a bias exceeding that threshold can discourage effort altogether when the principal might have been able to induce some effort.¹³¹

Second, it is important to emphasize that it is a skeptical agent, one who can be persuaded, who is beneficial, rather than a hostile agent who would never approve the project. Thus, the agent's bias, as well as the principal's, must be at least partially mitigated through the third party's research.¹³² The different possible effects of additional information imply that there are functional forms for policy choices and preferences such that the outsider gains more from research effort facing a moderate agent, which the principal may then prefer.¹³³ However, it can be argued that a skeptical agent generally provides a greater scope for the outsider to gain from research, provided that he will come closer to its viewpoint given enough effort.

2. Examples: the FDA and EPA

Two examples of administrative policymaking may illustrate the dynamics of this logic. One prominent case is the FDA's drug approval

¹³¹ See Tai, *supra* note 17, at 15.

¹³² Cf. Stephenson, *supra* note 22, at 1456-57 (suggesting that efforts to incentivize effort are more likely to be successful when policy preferences converge as information about the state of the world improves).

¹³³ See Bubb & Warren, *supra* note 130, at 14. (The "reviewer" and "agent" there are analogous to the "agent" and "third party" here.) The model there focuses on regulatory review and differs from setup for the rationales in this paper in that a status quo obtains unless a regulatory opportunity arises and the third player proposes a regulation, *see id.* at 13. Here, however, the decision-maker is free to select any policy, regardless of what the third party discovers about the state of the world.

process.¹³⁴ Since the questions about a drug's safety and efficacy are experimentally testable, the reviewers at FDA are arguably able to verify the claims made in clinical studies that drug manufacturers submit with their applications. The scope of these applications is significant: Daniel Carpenter has observed that "the Administration's gatekeeping power enacts a system of incentives that induces the production of far more information (and higher quality information) from drug companies and medical researchers than would otherwise have occurred."¹³⁵ Since drug companies were willing to market pharmaceuticals without researching their safety and effectiveness before premarket review requirements were in place,¹³⁶ the fact that the agency has motivated additional research effort from firms is undeniable.

There is also some evidence that the agency's ability to motivate firms to test their products stems from its policy preferences. Compared to the average legislator, the FDA's ideological position appears generally to have fallen on the opposite side of drug companies'. First, the agency, rather than lawmakers, provided much of the initiative for the 1938 law that granted the FDA the power to review pharmaceuticals as a condition of allowing them to be marketed.¹³⁷ Since then, the most prominent criticisms against the agency have had as their premise that it is not approving new drugs quickly enough: it has encountered charges of a "drug lag"¹³⁸ and campaigns by advocacy groups for approval of new cancer and AIDS drugs.¹³⁹ Based on this kind of public opinion, it is plausible that legislators would have had more difficulty denying new treatments market entry than the agency would if they had to decide themselves. Although lawmakers have criticized the FDA for approving drugs both too readily and not readily enough in committee hearings,¹⁴⁰ the theory here suggests that the

¹³⁴ See Tai, *supra* note 17, at 30-37 (applying this logic to the Food and Drug Administration (FDA's) drug approval process). It is possible to argue that Congress is merely overseeing the agency rather than delegating to it, *see id.* at 33, but this possibility does not affect the value of having an oppositely biased agent, *see id.* at 17-19. For simplicity, delegation will be assumed in this discussion.

¹³⁵ See CARPENTER, *supra* note 97, at 751.

¹³⁶ *See id.* at 77-78.

¹³⁷ *See id.* at 80-81 (describing the FDA as "pressing for changes" and "finding able legislative sponsors"); *id.* at 102 (depicting legislative introduction of premarket review provisions as a response to an agency report). Thus, Congress seems to have played a more passive role in granting gatekeeping authority compared to the FDA.

¹³⁸ *See id.* at 374.

¹³⁹ *See id.* at 410-11, 429.

¹⁴⁰ *See id.* at 337.

former criticism could reflect a desire that the agency retain a high standard of proof for approving new drugs, rather than a willingness to reject certain drugs if the full Congress were to vote on them.

In addition, it is plausible that the benefits of FDA's review process do not stem from any unique expertise that its employees have. First, the FDA frequently makes use of advisory committees in reviewing particular drugs, in part to supplement knowledge within the agency.¹⁴¹ Second, former Vice President Dan Quayle's Council on Competitiveness, following the advice of an expert panel, recommended that the agency begin relying on external scientific reviewers to speed up the approval process.¹⁴² The agency's reliance on outsiders and the apparent feasibility of democratizing the review of new drugs suggests that the FDA has no intrinsic expertise advantage that prevents Congress, as an institution, from asserting direct authority over the pharmaceutical industry, at least in the long run. Thus, the policy benefits of delegation to the FDA may stem more from the agency's skeptical stance toward pharmaceuticals than from any special ability to decide which treatments are safe and effective.

A second fit for this logic, albeit an imperfect one, is EPA's implementation of selected provisions of the Hazardous and Solid Waste Amendments (HSWA) of 1984.¹⁴³ Typically, the EPA finds its attempts at regulatory changes from the status quo constrained by judicial review,¹⁴⁴ but HSWA included so-called "hammer provisions" that would prohibit any land disposal of certain wastes if the agency did not promulgate regulations for them.¹⁴⁵ Because inaction would have resulted in great costs for industry, it had a strong incentive to provide information. The result was that regulated firms provided the EPA data in greater quantities than they would have apart from the provisions.¹⁴⁶

It is also plausible that the agency's degree of skepticism toward industry contributed to firms' willingness to cooperate by submitting information. The HSWA was passed the year after a change in EPA leadership

¹⁴¹ See Susan L. Moffitt, *Promoting Agency Reputation through Public Advice: Advisory Committee Use in the FDA*, 72 J. POL. 880, 882 (2010).

¹⁴² See Carpenter, *supra* note 97, at 458.

¹⁴³ For work assessing the implementation of the Act, see Erik H. Corwin, Note, *Congressional Limits on Agency Discretion: A Case Study of the Hazardous and Solid Waste Amendments of 1984*, 29 HARV. J. ON LEGIS. 517 (1992).

¹⁴⁴ See Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1414, 1424-25 (1992).

¹⁴⁵ See Corwin, *supra* note 143, at 534.

¹⁴⁶ See *id.* at 540.

from Anne Gorsuch, who was perceived to be undermining the agency's agenda,¹⁴⁷ to William Ruckelshaus, who had been the agency's first administrator.¹⁴⁸ Less conservative than Gorsuch, he was allowed to choose the remaining appointed positions at the EPA and set his own agenda for the agency rather than having the Reagan White House determine it.¹⁴⁹ These facts indicate at least that the agency's policy preferences were more biased away from the preferences of regulated firms than before. Furthermore, agency careerists generally have an influence on policy outcomes,¹⁵⁰ and the EPA's civil servants, who likely favor environmental initiatives even more than the average legislator, had better relations with Ruckelshaus and his successor Lee Thomas than under Gorsuch.¹⁵¹ In the case of the hammer provisions, they would have had extra power to influence the outcome since they could cause land disposals to stop by doing nothing. Furthermore, it is unlikely that Congress could have directly legislated waste disposal bans given legislators' preferences. Thus, it is plausible that the agency's ideological position promoted the generation of additional information by regulated firms.¹⁵²

B. Eliciting Reliable Communication with a Moderate Agency

Another reason that a principal might want to delegate to a biased agent without any expertise is that he can elicit more precise messages from an outsider that is even more biased than he is. Colloquially, she would rather have a moderate agent with preferences between her and the third party make the decision because the outsider will be more candid to him than it is to her. This rationale applies when neither Congress nor an agency can verify third-party claims, so that the third party can freely

¹⁴⁷ See MARISSA MARTINO GOLDEN, *WHAT MOTIVATES BUREAUCRATS? POLITICS AND ADMINISTRATION DURING THE REAGAN YEARS* 109 (2000) (describing the Environmental Protection Agency (EPA) as "under siege" during Gorsuch's tenure).

¹⁴⁸ See *id.* at 138.

¹⁴⁹ See *id.* at 139.

¹⁵⁰ See Seidenfeld, *supra* note 4, at 1554.

¹⁵¹ See GOLDEN, *supra* note 147, at 143, 146.

¹⁵² One remaining technical point is that the EPA had to be able to verify or trust the treatment data it received. Although both the EPA and OSHA regulate harmful substances, information for EPA purposes is arguably more verifiable because the questions like concentrations and ambient harms of chemicals that escape company boundaries are researchable outside industry, whereas assessing workplace practices and exposure to the same chemicals on the premises of firms for OSHA purposes is a task that employers are likely to perform better because of their experience.

make any statement it likes.¹⁵³ Thus, the question is the degree to which the third party is willing to transmit different *messages* for different states of the world, so that the decision-maker can infer useful *information* from its communications.

For now, the third party is assumed to know its information automatically.¹⁵⁴ For this logic to operate there should also be a variety of levels for the regulation, rather than merely a binary choice.¹⁵⁵ For example, the price of a utility can take many values, whereas the question of whether to ban a toxic substance allows only two options. In addition, Congress and the third party should prefer different policies from each other, so that the latter may have an incentive to misrepresent its information but be more truthful to a moderate agent. Furthermore, all three players should prefer different policies depending on the state of the world. This notion may seem least plausible for the third party, since a regulated industry might seem to want as little regulation as possible. However, firms within an industry may have divergent interests, so that the industry as a whole can be understood as having state-dependent policy preferences.¹⁵⁶

A general category of cases in which this rationale for delegation might operate is that, from the perspective of any player, the optimal level of regulation depends on the cost, but the outsider prefers a lower level than the principal does given any cost level. Only the regulated entity knows the cost. Since she cannot separately obtain this information, and since the industry cannot credibly convey this information to her, the best she can do is to request that the third party make a claim about the cost of regulation. If their preferences are close enough, the outsider may be willing to send a message that at least imperfectly reveals what its costs are; however, it will

¹⁵³ Though it does not use the term, the canonical model featuring cheap talk by a sender to a receiver is Vincent P. Crawford & Joel Sobel, *Strategic Information Transmission*, 50 *ECONOMETRICA* 1431 (1982). See generally Joseph Farrell & Matthew Rabin, *Cheap Talk*, 10 *J. ECON. PERSP.* 103 (1996) for general issues with this kind of messaging.

¹⁵⁴ The possibility that informational quality depends on effort is reincorporated *infra* notes 191-192 and accompanying text.

¹⁵⁵ It is typical to model the policy choice as a real number in a continuous range. See, e.g., Crawford & Sobel, *supra* note 153, at 1433. More generally, having a range of policy options is important so that there is room for an agent with intermediate preferences.

¹⁵⁶ Modeling the outsider as a single player simplifies the analysis of eliciting information. See GAILMARD & PATTY, *supra* note 3, at 240, 266 (modeling the securities industry as a unitary actor while noting a divergence among interests at the New York Stock Exchange). Alternatively, one may think of the third party as the set of firms that are willing to accept different policies based on the state of the world. Then regulators may be able to gather information from these firms. See Coglianese et al., *supra* note 11, at 297-300.

not convey anything from which the principal could learn about the cost if the bias is too great.¹⁵⁷ This kind of messaging represents consistent claims by an industry that the costs are too high to justify any additional regulation.

1. Intuition

The general intuition underlying this problem is that the third party considers how the principal will use the information in setting policy when deciding what message to convey.¹⁵⁸ More precisely, when the bias is too great, a concession that costs are not very high will trigger very strict regulation from the principal, whereas the third party might prefer the less stringent regulation that could follow from the opposite assertion. If, instead, the bias is relatively small, then the outsider, which, by assumption, prefers stricter regulation when costs are low, will prefer the tight regulation that follows from truthfully revealing high costs over the lax regulation that the principal would enact following a claim of low costs. If bias is too large, the principal will select policies that reflect her ideology but not the state of the world.

These errors take away from her policy utility, so she may have room for improvement. One option is to allow the third party to set the level of regulation; however, doing so would result in policy that is always less stringent than she prefers. Her payoff could be better than what she receives if she enacts the policy, but it is limited by the fact that the third party is selecting the level of regulation that it desires.¹⁵⁹

Delegation to an agent whose preferences lie in between those of the other two players can yield further improvements.¹⁶⁰ Whether or not the

¹⁵⁷ See Crawford & Sobel, *supra* note 153, at 1437, 1440 (indicating that, when a sender's bias compared to the receiver is small enough, the sender transmits a message that partially conveys its private information; but that, when the bias is too large, the sender always communicates the same message, yielding no information for the receiver).

¹⁵⁸ See GAILMARD & PATTY, *supra* note 3, at 240 (arguing that regulated parties will not communicate in a way that reveals their information if they expect that the government will use the information against their interests).

¹⁵⁹ See Wouter Dessein, *Authority and Communication in Organizations*, 69 REV. ECON. STUD. 811, 821 (2002).

¹⁶⁰ One arrangement that arises from having the agent receive a cheap talk message from the third party and then convey his own cheap talk message to the principal, who cannot observe the first message before selecting the policy. The results are quite different than with delegation, as the principal may then prefer to have an adversarial agent. See Tao Li, *The Messenger Game: Strategic Information Transmission Through Legislative Committees*, 19 J. THEORETICAL POL. 489, 494 (2007) (indicating that an agent with preferences on the opposite of the third party can convey the same information that the third party would directly);

principal is able to elicit a partially informative message about the outsider's costs, an agent who prefers policies in between those of the other two players can elicit better information and improve the principal's payoff.¹⁶¹ Since the agent's preferences are closer to the third party's than the principal's, the third party is willing to reveal additional information about its cost, since the agent will select a policy that is closer to what it wants. Compared to deciding the level of regulation herself, she benefits from better-informed policy. The countervailing cost is that the agent's bias imbues his decision. Thus, the principal will prefer an intermediately biased agent, one close enough preference-wise to the outsider to extract a more precise message, but not so close that his decisions are too aligned with the third party's preferences.

A mathematical example may help make the above intuition more concrete.¹⁶² Financial regulators have actually been considering whether to increase capital requirements,¹⁶³ and at least hypothetically, the degree to which they, the banking industry, and Congress are willing to have this requirement increased depends on the costs to the banks.¹⁶⁴ As a simplification, it is assumed that the three players know that costs are equally likely to be at one of two levels, either high or low. Suppose that, if costs are low, the banks, financial regulators, and Congress respectively consider the best policy to be increases of three, four, and five percent,¹⁶⁵ whereas if costs are high, these players find optimal increases of zero, one, and two percent. The utilities for policy that correspond to each player's optimum can be normalized to zero. Meanwhile, each player can be assumed to lose one

Atila Ambrus et al., *Hierarchical Cheap Talk*, 8 THEORETICAL ECON. 233, 250 (2013) (showing that, with mixed strategies, an oppositely biased agent may convey more information than an intermediately biased agent). However, the focus of this paper is on delegation, in which Congress commits to allow agencies to make decisions in its place. Given the need for both houses to pass legislation to overrule agencies, congressional attempts to delegate are generally effective.

¹⁶¹ See Dessein, *supra* note 159, at 825-26 (presenting the first model with this result); GAILMARD & PATTY, *supra* note 3, at 243 (applying this model to political agency settings).

¹⁶² This example is quite simplified compared to the original model upon which it is based, see Dessein, *supra* note 159, at 815-17, and other cheap-talk models, see, e.g., Crawford & Sobel, *supra* note 155, at 1433-35, which assume a continuous policy space.

¹⁶³ See generally Regulatory Capital Rules, *supra* note 109.

¹⁶⁴ But see Admati et al., *supra* note 110, at 1 (stating that a firm may oppose a requirement to decrease its leverage even if doing so would increase its value).

¹⁶⁵ Roughly speaking, the Federal Reserve has had a reserve requirement of eight percent for a bank to be considered adequately capitalized, see 12 C.F.R. § 208 app. A (2013), so the policy changes here would correspond respectively to increases to eleven, twelve, and thirteen percent.

unit of utility for each percentage point that the chosen policy differs from the optimal policy. For example, if the capital requirement is increased by three percent when the costs are high, the industry's utility is -3. Finally, if the decision-maker acts without knowledge of the state of the world (i.e., the costs), Congress and the agency's utilities are weighted averages of the utilities in each state.

In this case, Congress is better off delegating to the regulators than directly setting the capital requirement. If Congress makes the decision, it can only make the decision with its original knowledge about the costs. Importantly, lawmakers cannot determine from what the banking industry says how great the costs are. Suppose, by way of contradiction, that the industry honestly reported its cost level. Congress would proceed to increase the reserve requirement by two percent when the costs were high and by five percent when the costs were low. However, in the case of low costs, the industry would prefer a two percent increase, yielding it a utility of -1, over a five percent increase, yielding it a utility of -3. Thus, instead of reporting its actual cost, this third party would always produce the same message so that Congress is as ignorant as before.¹⁶⁶ Thus, an optimal policy for Congress is an increase of 3.5%, the average of the optimal increase in the two states, which will yield it a utility of -1.5.¹⁶⁷

If, however, Congress delegates this decision to the financial regulators, they will be able to learn the true cost of increasing capital requirements from the banks.¹⁶⁸ If the industry reports honestly, the agency will select an

¹⁶⁶ Allowing the industry to randomize over different messages does not change this result. Treating the industry with high and low costs as two different types, one would find that the high-cost industry would always select whatever message induces the lowest increase from Congress, which, based on Bayesian updating, would fall between 2 and 3.5%. If the low-cost industry were ever producing a message other than this one, it would receive an increase of five percent, which means that it would rather produce the high-cost message.

¹⁶⁷ It turns out that Congress' utility would be the same for any increase between two and five percent. This result is an artifact of the linear utility specification and the binary state space. Changing either of these aspects in ways that preserve symmetry would break this indifference. A more common modeling assumption is to assume negative quadratic utilities over a uniform distribution. See Crawford & Sobel, *supra* note 155, at 1440; Dessein, *supra* note 159, at 813 n.2 (calling this specification the "working horse" for cheap talk models). See also EPSTEIN & O'HALLORAN, *supra* note 2, at 54 (using these assumptions in the delegation context); Gailmard, *supra* note 82, at 539-40 (same).

¹⁶⁸ A more precise statement of this result is that there exists an equilibrium in which the industry truthfully reports its costs, as the equilibrium in which the industry always gives the same message also can obtain. However, two-player cheap-talk studies focus on equilibria in which some information is conveyed because both the sender and the receiver re-

increase of one percent for high costs and four percent for low costs to optimize the regulators' policy payoff. If the industry has high costs, it clearly prefers the one percent increase. More significantly, if the industry has low costs, it prefers the four percent increase, which yields it a utility of -1, over the one percent increase, which yields it a payoff of -2. Congress' expected payoff is -1, since the agency always selects an increase that is one percentage point lower than what it would choose. Thus, delegation improves Congress' expected utility by 0.5. Here, the agency's ability to elicit information from the firms outweighs the cost that results from its policy bias.

Meanwhile, delegating the decision to the industry or to an agency with the same ideology as the industry would leave Congress worse off with an expected utility of -2. Also, an agent with the same preferences as Congress would not help lawmakers, since the regulators would not be any better able to induce the banks to reveal their true cost. Finally, an agent with preferences on the opposite side of Congress' compared to the industry's—for example, one that would increase capital requirements by three and six percent given high and low costs—would hurt legislators. The outsider would always claim high costs to such an agent, who would then select a stricter policy than Congress would prefer. Thus, Congress' benefit from having a biased agency applies to a moderate agency, and it is worth highlighting again that the agency's ability to elicit information derives from its bias compared to lawmakers' rather than from any intrinsic informational advantage.¹⁶⁹

2. Examples: The SEC and OSHA

Just like the logic of effort inducement by skeptical agents, the logic of eliciting reliable communication by intermediately biased agents has arguably been observed in administrative policymaking. First, Sean Gailmard and John Patty claim that the logic of information elicitation by a moderate agent operated at the SEC during the New Deal.¹⁷⁰ A specific policy in which the SEC's posture toward industry may have yielded better outcomes was forcing the reorganization of stock exchanges, particularly the New York Stock Exchange (NYSE), to better serve the public interest as a

ceive a higher expected payoff from them. See Crawford & Sobel, *supra* note 155, at 1442-42; Dessein, *supra* note 159, at 818.

¹⁶⁹ In particular, if Congress were assigned the agency's preferences, it would be able to elicit the same information and receive the payoff. However, since Congress is the principal, it cannot select its preferences.

¹⁷⁰ See generally GAILMARD & PATTY, *supra* note 3, at 244-74.

condition for staying registered.¹⁷¹ The optimal stringency of regulations was not whatever most encumbered the securities industry: as Gailmard and Patty put it, “transferring wealth from market insiders to the investing public with no concomitant effect on market efficiency is not as simple as reducing the degree of privilege afforded to market insiders.”¹⁷² They observe that, to decide how to regulate, it would need to gather information from stock market insiders.¹⁷³

Two foundations of the given model seem to apply in this case. First, there existed a regulated interest, which, rather than desiring as little regulation as possible in any state of the world, was willing to accept some regulation if the cost were not too high.¹⁷⁴ Specifically, Gailmard and Patty observe that the NYSE had “[a]n insurgent wing of commission brokerage members [who] stood to gain from a shift of governing power within an otherwise stable, preserved institution,”¹⁷⁵ which can be contrasted with a conservative faction that had no interest in any regulation.¹⁷⁶ Second, the SEC appears to have had an ideological position in between those of elected officials and regulated industry. On the one hand, the Commission did not share the preferences of elected officials: the former “fully accepted the premise of allocating capital in private markets,”¹⁷⁷ whereas the latter would have preferred regulation by the Federal Trade Commission, which “had a reputation as hostile to big business.”¹⁷⁸ On the other hand, the SEC proved that it was willing to pursue policies that no one at the NYSE desired when it unilaterally promulgated a rule on short sales.¹⁷⁹

As a result, the SEC was able to induce the NYSE to adopt a moderate set of reforms in 1935 and 1938.¹⁸⁰ Importantly, it was able to elicit information from the insurgent wing, which publicly endorsed the 1935 proposals

¹⁷¹ See *id.* at 262-72.

¹⁷² See *id.* at 265.

¹⁷³ See *id.* (arguing that “regulated interests were better situated to answer [questions] than the SEC”).

¹⁷⁴ See *id.* at 266.

¹⁷⁵ *Id.*

¹⁷⁶ See *id.*

¹⁷⁷ See *id.* at 262.

¹⁷⁸ See *id.* at 254. Legislative reform attempts supported by President Roosevelt entailing FTC regulations and stronger restrictions on stock market insiders aroused opposition from the entire industry and failed to come to a vote. See *id.* at 251-53.

¹⁷⁹ See *id.* at 270.

¹⁸⁰ See *id.* at 267-68, 269, 271. Although a number of the individual reforms might be seen as binary choices, the overall packages of reforms allow for a variety of levels of stringency.

and devised what became the 1938 reforms in a NYSE report.¹⁸¹ This example is also interesting because one of the chairpersons during this period was James Landis,¹⁸² to whom the expertise model of administrative law is attributed. Thus, even in the heyday of the expertise model, the challenge of gathering third-party information was an important one.

A second policy area in that can be interpreted through the lens of this model is standard setting by the Occupational Health and Safety Administration (OSHA), especially during the agency's early years. OSHA is placed in the position of having to elicit information from regulated firms by the provision that instructs the agency to consider, among other things, "the feasibility of the standards,"¹⁸³ about which industry will have the best knowledge.¹⁸⁴ One source of inspiration for regulations is voluntary standards developed by industrial standard-setting organizations.¹⁸⁵ Such messages provide at least partial information about what sorts of safety and health protections are feasible. According to the theory, such organizations might not be as willing to update their standards as quickly, and possibly not at all, if doing so would trigger even stricter mandatory standards.

Legislative instructions to base standards on industry guidelines can be seen as an attempt to have OSHA adopt a moderate policy position between those of industry and Congress. Turning industry standards into regulations is more stringent than not promulgating regulations because the standards are voluntary, so that not all firms would be complying with them.¹⁸⁶ Further evidence of an intermediate position is OSHA's collabora-

¹⁸¹ See *id.* at 267, 269.

¹⁸² See *id.* at 268.

¹⁸³ 29 U.S.C. § 655(b)(5) (2006).

¹⁸⁴ In addition, any in-house expertise that OSHA might have had was instead assigned to a separate agency, the National Institute of Occupational Safety and Health (NIOSH), which is not even in the same department as OSHA, *compare id.* § 671(a) *with id.* § 651(a)(3), arguably leading to "serious coordination problems." Sidney A. Shapiro & Thomas O. McGarity, *Reorienting OSHA: Regulatory Alternatives and Legislative Reform*, 6 YALE J. ON REG. 1, 7 (1989). In any event, NIOSH is arguably not able to assess questions of feasibility as well as firms can.

¹⁸⁵ See 29 U.S.C. § 655(b) (2006). The statute establishing the Occupational Safety and Health Administration (OSHA) instructed the agency to adopt industry standards or standard of other federal agencies then in place within two years, *see id.* at § 655(a). Also, there is evidence of congressional intent that OSHA continue to update its regulations with these standards. See S. REP. NO. 91-1282, at 6 (1970).

¹⁸⁶ See Sidney A. Shapiro & Randy Rabinowitz, *Voluntary Regulatory Compliance in Theory and Practice: The Case of OSHA*, 52 ADMIN. L. REV. 97, 136-37 (2000) (describing decisions by many firms to comply with OSHA's outdated standard rather than with more recent industry standards). For a historical account suggesting that there were industry complaints fol-

tion with standard-setting organizations, at least during its early years.¹⁸⁷ In contrast, it is easy to conceive of more stringent regulations that exceed current industry standards. Congress' stated intent in the Occupational Health and Safety Act is "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources."¹⁸⁸ However, the phrase "so far as possible" and the law's inclusion of feasibility as a factor for new rules¹⁸⁹ imply only that OSHA should be more stringent toward industries than they would be to themselves. The theory here suggests that lawmakers could prefer stricter regulations given any set of information while suggesting that OSHA should rely on industry standards as a basis for new regulations rather than unilaterally pursuing stronger rules.

Admittedly, OSHA has not been able to operate according to the original design of its authorizing statute since a federal appeals court decided in 1992 that it could not summarily adopt updated industry standards for its regulations.¹⁹⁰ Nonetheless, the strategy of having an agency derive mandatory standards from voluntary ones can be rationalized as a way to limit the extent of regulation at a given time and thereby preserve firms' incentives to reveal what kinds of safety and health improvements are feasible.

For completeness, the remaining case to consider is when effort inducement, as well as elicitation of reliable communication, is at issue.¹⁹¹ Then the principal is still likely to want to delegate to a moderate agent. Specifically, if the third party cannot persuade the principal to select policies significantly more to its liking after its research, then it will still prefer to misrepresent its information to attempt to obtain a more favorable policy. In equilibrium, the principal will not be fooled and will accordingly select policy contrary to the third party's desires, leaving it with no incentive to expend research effort. Facing an agent with intermediate preferences instead, the outsider may be willing to reveal more about its information

lowing OSHA's initial adoption of standards, see Judson McLaury, George Guenther Administration, 1971-1973: A Closely Watched Start Up, <http://www.dol.gov/oasam/programs/history/oshal3guenther.htm> (written 1984, last visited June 26, 2013).

¹⁸⁷ See Robert W. Hamilton, *The Role of Nongovernmental Standards in the Development of Mandatory Federal Standards Affecting Safety or Health*, 56 TEX. L. REV. 1329, 1397-99 (1978).

¹⁸⁸ 29 U.S.C. § 651(b) (2006).

¹⁸⁹ See *id.* at § 655(b)(5).

¹⁹⁰ See *AFL-CIO v. OSHA*, 965 F.2d 962, 986-87 (1992). The agency decided not to seek Supreme Court review, see John Howard, *OSHA Standards-setting: Past Glory, Present Reality and Future Hope*, 14 EMP. RTS. & EMP. POL'Y J. 237, 249 & n.62 (2010).

¹⁹¹ The case in which neither challenge exists is discussed *supra* note 116 and accompanying text.

through its messaging and exert effort to improve the quality of information.¹⁹²

C. Implications for Agency Bias

A major implication of the two rationales for inducing effort and eliciting reliable communication is that Congress may choose to empower agencies not despite, but because of the possibility that they will have different policy preferences from lawmakers. Though Congress can attempt to take advantage of divergent preferences among its own membership, it is limited in the extent to which it can do so. Formally, each house must pass a bill for it to become law, which implies that legislation requires a vote by the entire membership of each chamber.¹⁹³ Legislators can empower a committee that has different preferences from the floor, for example, by agreeing to limit amendments to bills that it reports.¹⁹⁴ However, it cannot delegate to committees the authority to pass laws directly since each house retains veto power over any proposals. An agency, on the other hand, can enact policies without legislative approval. Thus, lawmakers can benefit from additional flexibility in making bureaucracies biased compared to Congress.¹⁹⁵

The role of bias in agency policymaking in the information extraction rationales differs from the role when agencies have an expertise advantage. When agencies are better at obtaining information and do so automatically, bias is an unavoidable byproduct of delegation, and the objective for legislators is to minimize it.¹⁹⁶ If the agent's information quality depends on costly effort, preference divergence can be a desirable side effect in moderate amounts¹⁹⁷ or even a property for Congress to encourage,¹⁹⁸ so that information quality can increase with bureaucrats' research effort. Third-

¹⁹² Cf. Stephenson, *supra* note 22, at 1459-60 (noting in the two-player setting how preference alignment can increase an agent's willingness to reveal information to the principal and to engage in research).

¹⁹³ See U.S. CONST., art. I, § 7, cl. 2.

¹⁹⁴ See, Gilligan & Krehbiel, *supra* note 86, at 287-88.

¹⁹⁵ Cf. Dessein, *supra* note 159, at 829-30 (describing situations in which a principal prefers to delegate to an agent rather than simply granting him proposal power while retaining the ability to veto changes to the status quo).

¹⁹⁶ See Bendor & Meirowitz, *supra* note 21, at 299 (noting that, if delegation to any agent with expertise benefits a principal, she prefers the one with the closest preferences to hers).

¹⁹⁷ See *id.* at 301 (stating a model result in which the principal favors the closest agent who will generate information).

¹⁹⁸ See Stephenson, *supra* note 7, at 479-80 (showing that inducing bias by changing regulatory enactment costs can yield additional research effort).

party information provides another reason for actively instilling bias in an agency: to incentivize regulated parties to gather and transmit more useful information. This purpose is different because not only because of its inclusion of the firms that bear the cost of regulation, but also because it is more specific as to the preferred direction for bias, which depends on which information challenges are present.¹⁹⁹

Deliberately instituting agency bias in a direction that varies with the relevant rationale is somewhat more complicated than trying to induce bureaucrats to decide the way that legislators would decide when agencies collect the information they need automatically. In the latter setting, eliminating bias is useful, and lawmakers can employ any method they like at any time to conform agency's preferences to those of Congress.²⁰⁰ If, however, securing useful information from firms is important, then they need to prevent themselves from influencing bureaucrats to the point that this preference divergence disappears at the policymaking stage. This requirement corresponds to the second assumption from the Introduction that Congress can commit to delegate authority to an agency.²⁰¹ Without the ability to commit, regulated entities will anticipate that their statements will be used to support policies less favorable to them and adjust their information generation and transmission accordingly. In addition, ensuring that bias points in a particular direction requires more work at the institutional design or legislative stage than allowing or promoting bias in general when agencies have expertise but need to incur costs to exercise it.

III. Agency Independence to Achieve Information Extraction Benefits

Setting agency preferences when Congress delegates authority and keeping those preferences in place when bureaucrats set policy require

¹⁹⁹ The direction of bias is sometimes relevant when bureaucrats' knowledge depends on their effort. See Bubb & Warren, *supra* note 116, at 11-12; Stephenson, *supra* note 7, at 479-80. Frequently, however, the direction does not matter. This principle holds under a common assumption that players' utilities decrease as a function of the distance from their ideal policy. See EPSTEIN & O'HALLORAN, *supra* note 2, at 54; HUBER & SHIPAN, *supra* note 8, at 242; Gailmard & Patty, *supra* note 85, at 877).

²⁰⁰ This measure means that Congress affects an agency so that they effectively have the same ideology, which is different from taking the agency's information and directly selecting the policy. The latter technique may present problems, either when it is automatically well-informed, see Dessein, *supra* note 159, at 811 (noting that an agent will attempt to anticipate the principal's attempts to correct for his bias), or when its knowledge derives from its effort, see Callander, *supra* note 21, at 134 (indicating that it would discourage the effort from investing in research effort).

²⁰¹ See *supra* notes 30-32 and accompanying text.

agencies to have a degree of independence or insulation. Before describing specific ways in which legislators, the President, and courts can facilitate this independence, it is worth laying out sketches of a theory of agency independence to frame these methods. A comprehensive enumeration of how to realize better information extraction in practice is beyond the scope of this paper. Instead, this part more modestly attempts to establish what kind of agency independence is important and how to achieve it.

There are three general considerations for how agencies should be independent. First, agencies should have independence not only from the President, but also from Congress. Discussions about the value of independence tend to center on independence from the President because of contrast between independent and executive branch agencies.²⁰² However, the rationales suggest that agencies should also be insulated at least somewhat from legislators, who also have a claim to represent the public interest.²⁰³ Judges have observed that independence from the President may imply dependence on Congress.²⁰⁴ Thus, each elected branch of government must not be allowed to influence agencies to the point at which they select exactly the same policy that it would given the same information.

At the same time, pure freedom for agencies will not intrinsically yield the bureaucratic preferences that yield better information from regulated parties. Because some policy settings require additional skepticism toward firms while others call for a more moderate posture, legislators cannot expect that agencies will have the right preferences.²⁰⁵ Furthermore, since agency policymaking involves many external stakeholders, they may well be influenced by various parties to different degrees, including the elected branches.²⁰⁶ Thus, the second principle is that legislation should serve as a guide for what kinds of influence are desirable at the agency policymaking

²⁰² See, e.g., Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 600 (2010) (discussing independence in terms of agencies “relationship to the President” and “responsive[ness] to presidential preferences”); Kagan, *supra* note 4, at 2376-77 (arguing that “insulation from presidential removal power” and “norms of independence” increases “the gap between the agency and the President”).

²⁰³ Cf. Stephenson, *supra* note 15, at 66 (indicating that Congress, the President, or the two combined are equivalent for the purposes for evaluating bureaucratic insulation).

²⁰⁴ See Fed. Comm’n Comm. v. Fox Television Stations, 556 U.S. 502, 523 (2009); Frank H. Easterbrook, *The State of Madison’s Vision of the State: A Public Choice Perspective*, 107 HARV. L. REV. 1328, 1341 (1994).

²⁰⁵ See Matthew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 439 (1989) (discussing the possibility of agency “policy drift” in the implementation of legislative policies).

²⁰⁶ Cf. *id.* at 443 (discussing agency responsiveness to various constituencies).

stage. Legislation can be understood as a contract that courts are to enforce,²⁰⁷ with favored types of influence inferred from among the terms of the contract. For example, a statute could bias an agency's effective preferences toward an executive branch agency or department, by mandating collaboration with it.²⁰⁸ Courts would look more or less favorably on influences by that executive branch organ depending on whether such a provision was present.

Clearly, ambiguity as to what levels of influence from each stakeholder are intended will remain even after legislation narrows the possibilities. Furthermore, a court will not generally know what policy an agency should implement given any set of factual claims by various parties. The remaining principle follows from the value of independence for the information extraction rationales. At least when third-party information is important, courts should strive to prevent any one institution or interest group from inducing the agency to follow its preferences, unless the statute states or implies otherwise.²⁰⁹ The more outsize influence an actor has, the more scrutiny is warranted. Here, influence refers to a party's direct involvement, rather than the mere fact that a policy outcome appears to favor that party. This principle contrasts with the presidential control model's advocacy of deference to agencies whenever the White House intervenes, even when a statute is silent.²¹⁰ Applying this principle does not guarantee that an agency will act with the right preferences; however, it will provide a starting point from which future legislation can recalibrate the balance of influences. Since agencies would be acting independently, it is quite plausible that Congress and the President would agree to new terms.

²⁰⁷ See McNollgast, *supra* note 29, at 6; see also 5 U.S.C. §§ 702-06 (2006) (allowing judicial review of agency action).

²⁰⁸ See Bressman & Thompson, *supra* note 202, at 605 & n.18.

²⁰⁹ Acting to influence an agency to act according to a statute's text, on the other hand, can be excused. An example that illustrates the contrast is between congressional hearings that examine the FDA's approval of a product due to concerns about safety or effectiveness, which are criteria that imply a skeptical stance. See CARPENTER, *supra* note 97, at 338-39 tbl.5.6 (listing various hearings in which safety or efficacy were concerns, along with a smaller number of hearings in which legislators criticized slow drug approval). In contrast, lobbying by individual legislators for FDA approval implies undue influence by those lawmakers. See, e.g., Gardiner Harris & David Halbfinger, *F.D.A. Reveals It Fell to a Push By Lawmakers*, N.Y. TIMES, Sept. 25, 2009, at A1 (citing "'extreme,' 'unusual' and persistent pressure" from lawmakers).

²¹⁰ See, e.g., Kagan, *supra* note 4, at 2377 (arguing that *Chevron* deference should apply when there is evidence of presidential involvement).

With these three principles, it becomes easier to show how to achieve the benefits of biased agencies, first by constraining their preferences when legislators delegate authority to them, and then by keeping their ideology at approximately the intended location with insulation from political forces that would remove the divergence between bureaucratic and legislative preferences. Congress and the President, in addition to the courts, play a role, as they do in administrative law generally.²¹¹ Many of the methods described below involve more than one branch; in these cases, they are classified under the branch that takes initiative.

A. Congressional Constraints

As the formal initiator of legislation, Congress can influence both the substance and procedure of agency policymaking through statutory provisions. Though these tools are often described as ways to conform agency decisions to legislative preferences, they can also be employed to induce agencies to act independently, making different decisions from the ones that legislators would make given the same information; but predictably, choosing not freely but as if they have a particular ideology.

1. Substantive Legislative Constraints

Substantive constraints can be understood as another way for an agency to act as if it has a different ideological position than it would have apart from such constraints.²¹² If legislators have sufficient information about what policies should follow from different types of information, they could index particular agency actions to what the agency learns about the state of the world.²¹³ Alternatively, legislation may be able to shift an agency's effective ideology by specifying the relative weights of different types of

²¹¹ See MASHAW, *supra* note 1, at 6 (noting the importance of all three branches of government in administrative law).

²¹² Not all substantive constraints serve this function. For example, restricting the agent to a range of permissible policies in a discretionary window, *see* Stephenson, *supra* note 22, at 1440, does not change his preferences because he is only required to change his policy from what he would naturally desire if his information points to a policy outside the range. In contrast, the constraints described here can induce a shift in the agent's preferred policy regardless of what information comes to light.

²¹³ See Sean Gailmard, *Discretion Rather than Rules: Choice of Instruments to Control Bureaucratic Policy Making*, 17 POL. ANALYSIS 25, 26 (2009) (defining "menu laws" in which agencies take specified actions based on observed conditions). In the case of unverifiable claims, the provisions could be formulated in terms of agency findings.

facts in decision-making. For example, an important type of constraint in industrial regulation may be the degree to which an agency can consider costs.²¹⁴ Other things equal, the less that a bureaucracy can account for cost, the more stringent its final regulation should be, even if the same agency officials are making policy. In practice, different environmental statutes specify that costs are not to be accounted for at all,²¹⁵ that they are to be compared to the benefits achieved,²¹⁶ and that they can be considered, but with no explicit reference to benefits.²¹⁷

These kinds of instructions shift an agency's policy choice when it acts by signaling how it should justify its proposed regulations so that they survive judicial review. For example, in *Whitman v. American Trucking Associations, Inc.*, the Supreme Court affirmed that the Clean Air Act precluded the EPA from formally considering costs in its formulation of ozone and particulate matter standards, despite protests by regulated parties.²¹⁸ Informally, the agency is probably still factoring in costs based on the potential political response. If Congress were directly determining pollution control policies, it would likely account for the costs of air pollution reductions. A court would not be able to intervene in that case. Thus, substantive statutory provisions allow both for bias and a judicial means for enforcing that bias.

2. Procedural Constraints

Legislatively imposed constraints how agencies are to go about policymaking might be construed as changing what an agency decides given its preferences. However, since agencies are collective entities, procedures can also be understood as a way for bureaucracies to act as if they have dif-

²¹⁴ These types of costs have also been understood as affecting the type of information to which an agency has access. See Stephenson, *supra* note 22, at 1449-52. However, if most information generation is coming from outside parties, then it is difficult for agencies to avoid messages from regulated parties about costs. Thus, interpreting evidence exclusion as a method preference shifting is a plausible alternative to perceiving it as evidence exclusion.

²¹⁵ See 42 U.S.C. § 7409(b)(1) (2006) (stating that national ambient air quality standards are "to protect the public health" without reference to cost).

²¹⁶ See 33 U.S.C. § 1314(b)(4)(B) (2006) (calling for the "consideration of the reasonableness of the relationship between the costs of attaining a reduction in effluents and the effluent reduction benefits derived" in water pollution).

²¹⁷ See *id.* at § 1316(b)(1)(B) (2006) (instructing the EPA to take "into consideration the cost of achieving such effluent reduction").

²¹⁸ See *Whitman v. Am. Trucking Ass'n, Inc.*, 531 U.S. 457, 465 (2001).

ferent preferences instead of acting with their own preferences.²¹⁹ The notion that Congress uses administrative procedures to influence agency decision-making falls into a well-established “structure and process” theory.²²⁰ One function of such procedures is to empower particular interest groups so that agencies are more responsive to them.²²¹ Beyond the APA, a statute may assign the burden of proof for policymaking either on the agency, to help regulated interests, or on firms, to improve outcomes for beneficiaries of regulation.²²² Another example is that Congress can create an advisory committee, specify interests to be represented in its membership, and instruct an agency to consult with the committee.²²³ Finally, if regulated interests consistently favor action or inaction, a generally applicable technique is to legislatively shift an agency’s preferences toward or away from action by changing the procedural cost of taking action.²²⁴

The traditional motivation for instituting various procedures is “the possibility . . . that bureaucrats will not comply with [elected official’s] policy preferences.”²²⁵ The APA, in this understanding, is supposed to delay an agency’s action so that the coalition of elected officials that enacted a law can prevent the agency from deviating from its preferences.²²⁶ Underlying assumptions are that each player in the legislative process wants an agent, given any information, to select the same policy as she would,²²⁷ and that the primary information asymmetry is between political principals and agencies.²²⁸ However, if regulated parties are the main source of information, then, instead of trying to “assure agency compliance with the policy preferences of the winning coalition,”²²⁹ procedures embedded in

²¹⁹ See McCubbins et al., *supra* note 205, at 444 (describing agency preferences as an amalgamation of the preferences of relevant interest groups).

²²⁰ The seminal work showing how Congress exerts political control over agencies is Matthew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 258 (1987).

²²¹ See *id.* at 244.

²²² See *id.* at 268-69.

²²³ See Steven J. Balla & John R. Wright, *Interest Groups, Advisory Committees, and Congressional Control of the Bureaucracy* 45 AM. J. POL. SCI. 799, 804-05 (2001) (describing the requirements of National Drinking Water Advisory Council).

²²⁴ See Stephenson, *supra* note 7, at 487-88.

²²⁵ McCubbins et al., *supra* note 220, at 243.

²²⁶ See McCubbins et al., *supra* note 205, at 442.

²²⁷ See *id.* at 436.

²²⁸ See McCubbins et al., *supra* note 220, at 255. But see McCubbins et al., *supra* note 205, at 469 (noting that “industries possess much of the information relevant to regulatory decisions”).

²²⁹ McCubbins et al., *supra* note 205, at 433.

the APA or in organic statutes may aim to make policies more or less favorable to industry than what Congress would have desired.²³⁰

To obtain this result, it would make sense to reinterpret the APA to limit congressional influence according to the third principle above in cases where third-party information implies a need for agency independence. Instead, the APA can be construed to provide a default for interest group competition as they navigate the bureaucratic policymaking process. More generally, the structure and process understanding of agency constraints can be refitted to focus mainly on the preferences of coalitions of interest groups rather than on those of coalitions of elected officials. A court would then intervene to prevent outside influence by any actor, unless allowed by an organic statute.

B. Presidential Constraints

Although this paper has focused on Congress as the institution seeking to benefit from delegation, the President can also contribute to agency independence. Scholars have noted that the President, rather than seeking full control of agency action, will at least sometimes have an interest in keeping bureaucracies insulated to some degree.²³¹ However, the notion that the White House should exercise more control over administrative state has gained currency,²³² and the value that the information extraction rationales place on agency independence stands in opposition to presidential control, at least in the area of regulatory policy. Also, the commitment necessary to foster agency independence suggests that the President is more easily able to support independence before specific decisions are under consideration than afterward. In the predecisional stage, there are two tools that the President can plausibly use, either to further independence or to undermine it.

²³⁰ Alternatively, what Matthew McCubbins and coauthors call “the bargain struck by the coalition which create[s] an agency,” McCubbins et al., *supra* 220, at 264, should be reinterpreted not purely as an aggregation of preferences, but as a deal reflecting the need to extract relevant information from regulated firms.

²³¹ See Bressman & Thompson, at 630-31; Kagan, *supra* note 4, at 2355 (referring to “inherent limits on the President’s capacity to control, or even interest in controlling, much administrative action”).

²³² See Farina, *supra* note 25, at 181-82 (documenting the emergence of advocacy of presidential control in the 1980s); Kagan, *supra* note 4, at 2246 (declaring the President’s “primacy in setting the direction and influencing the outcome of administrative process”); Stephenson, *supra* note 15, at 60 (identifying various legal scholars who support presidential control of bureaucracies).

1. Leadership Appointments

The policy preferences of agency leadership undoubtedly affect the organization's policy output. Although the Senate participates in the selection of agency leadership, the President is the one with proposal power.²³³ When agencies have expertise and obtain their information freely, the President will prefer to appoint a leader whose preferences are closest to hers, all other things equal.²³⁴ With third-party information, however, she might rather select someone with a different ideology. Though policy depends on both agency leaders and staffers,²³⁵ choosing a leader this way should result in more independence on net. Because the appointment occurs before the agency head or heads approve any decisions, the President plausibly can select a candidate against her immediate preferences.

Past presidents may have attempted to take advantage of preference bias with the result that agencies were able to obtain better information from their interactions with industry. First, from Gailmard and Patty's account of the New Deal SEC, a potential example for this strategy is the selection of the commission's first chairperson, who was considered a moderate toward the industry.²³⁶ Second, President George H.W. Bush appointed an EPA leader who was more pro-environment than he, but someone who was less protective of the environment for the Department of the Interior (DOI).²³⁷ Although the impact of these choices on information collection is an empirical question, the apparent paradox of opposing ideologies might be rationalized in terms of third-party information needs. Pollution reduction technologies factor significantly into EPA policymaking. Such information is verifiable, but private sector research cannot be taken for granted, suggesting that a leader skeptical toward industry was important. Meanwhile, natural resource extraction is a significant part of DOI's

²³³ See U.S. CONST., art. II, § 2, cl. 2.

²³⁴ See EPSTEIN & O'HALLORAN, *supra* note 2, at 60.

²³⁵ See Seidenfeld, *supra* note 4, at 1554 (noting that, "[a]lthough these appointees generate the agency's policy agenda . . . bureaucrats [can] exert significant influence on public policy even when their role is merely advisory").

²³⁶ See GAILMARD & PATTY, *supra* note 3, at 254-55 (describing Franklin Roosevelt's decision to appoint a moderate rather a candidate not trusted by the industry).

²³⁷ See Anthony Bertelli & Sven E. Feldmann, *Strategic Appointments*, 17 J. PUB. ADMIN. RES. & THEORY 19, 19 (2007). This work, however, attributes deviations in appointees from the President's preferences to the need to have a counterweight against interest groups in policy negotiations. See *id.* at 20.

portfolio, with unprovable economic facts about the value of resources and the difficulty of their extraction suggesting the value of a moderate.²³⁸

2. Organization and Structure

Although the power to determine an agency's organization is one that Congress delegates,²³⁹ the White House seems to have been more important in government reorganization efforts than Congress.²⁴⁰ Since changes in the internal structure of an agency can lead to different final decisions,²⁴¹ the President can use organizational structure either to make a bureaucracy conform more closely to her preferences or to facilitate independence. In general, it has been understood that the President will use reorganization to accomplish the former objective.²⁴²

Though there do not appear to be any instances in which restructuring by presidential initiative has yielded more independence, there is a case of agency self-restructuring that could provide guidance: the FDA's drug approval process. Historically, medical reviewers have had their influence at least confirmed by interpretive rules that allow individual drug review divisions to reject an application.²⁴³ Also, it is at least perceived that these employees are less subject to industry influence than higher officers are.²⁴⁴ To the extent that statutory authority allows the President to do so, she could encourage restructuring of bureaucracies to improve their independence, for example, by decentralizing power away from administration

²³⁸ Even the availability of underground resources, while technically a scientific fact, is unverifiable in the sense that there exists no simulation to verify the quantity that is present.

²³⁹ See Ronald C. Moe, *The President's Reorganization Authority: Review and Analysis* 1-2 (Congressional Research Service RL30876) (March 8, 2001).

²⁴⁰ See James G. March & Johan P. Olson, *Organizing Political Life: What Administrative Reorganization Tells Us about Government*, 77 AM. POL. SCI. REV. 281, 282 (1983) ("Over the years there has been a gradual shift of reorganization initiative away from congress and toward the president" (citations omitted)). But see David E. Lewis, *The Adverse Consequences of the Politics of Agency Design for Presidential Management in the United States: The Relative Durability of Insulated Agencies*, 34 BRIT. J. POL. SCI. 377, 378 (2004) (noting that Congress has limited presidential reorganization authority).

²⁴¹ See Hammond, *supra* note 28, at 387.

²⁴² See Lewis, *supra* note 240, at 377-78 (listing reorganization among other techniques as ways to shape policy toward presidential preferences).

²⁴³ See CARPENTER, *supra* note 97, at 483-84.

²⁴⁴ See *id.* at 490.

loyalists.²⁴⁵ This kind of measure is plausible at least when these kinds of decisions are made before particular policy choices appear to an agency.

C. Judicial Constraints

Finally, judicial review of regulatory decisions can facilitate agency independence with a predictable bias. The general principles for agency independence outlined above are particularly important for the courts' role. They imply that, when the information extraction rationales are relevant, courts should aim for some independence not only from the President, but also from Congress and other stakeholders, so that no one actor effectively dictates agency policy.²⁴⁶ Once legislative provisions for influence, including the APA, are accounted for, what remains of the decision-making process should reflect independent thought, or what Justice Kennedy has called "the duty . . . to find and formulate policies that can be justified by neutral principles and a reasoned explanation."²⁴⁷ The strong version of this test would require better justifications the more intensive the influence activities of a particular party, particularly one or a set of elected officials. A weaker version of this test would simply not defer to an agency because of intervention by any particular party.

1. Constraints for Congress

As it implements legislation, a key issue for agencies is statutory interpretation. This task is challenging, perhaps uniquely so, in the regulatory context.²⁴⁸ The rationales for biased agencies have implications for interpretation: first and foremost, it shows that the legislative intent or purpose for what an agency should do is not necessarily equivalent to what Congress would have done given the same information. In general, it appears to be difficult to tell which of these two notions discussions of intent or purpose

²⁴⁵ Cf. B. Dan Wood & Richard W. Waterman, *The Dynamics of Political Control of the Bureaucracy*, 85 AM. POL. SCI. REV. 801, 805 (1991) (describing "centralizing control to administration loyalists" as a reorganization technique to shape policy).

²⁴⁶ If there happens to be an interest group with exactly the preferences that the agency should have, legislation could attempt to place the agency under that group's influence. As a general matter, however, it is unlikely that such a group will exist.

²⁴⁷ *Fed. Comm'n Comm. v. Fox Television Stations*, 556 U.S. 502, 537 (Kennedy, J., concurring).

²⁴⁸ See generally Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (discussing interpretive challenges in the administrative state and developing a theory of interpretation).

are referring to.²⁴⁹ However, at least two works discussing statutory interpretation have implied that legislative intent for the agency's policymaking and for its own decision-making are equivalent.²⁵⁰ To facilitate agency independence, a court applying an intentionalist or purposivist approach should not assume that these two intents are the same.

Because these intents are distinguishable, these logics for agency bias do not imply that textualism is superior to the other two methods. However, if a textualist approach is favored for other reasons, then the idea that regulators appear to have selected a policy that Congress would not have voted for should not lead a court to reverse their decision. Thus, the textual grounds on which the Supreme Court found in *Whitman* that the EPA could not consider costs in setting ambient air quality standards²⁵¹ can be seen as enforcing congressional intent that the EPA promulgate a policy less favorable to industry than members of Congress would have been able to enact.

Another relevant element of statutory interpretation is the *Chevron* doctrine, according to which courts are supposed to uphold any reasonable interpretation of a statutory question that Congress has not directly spoken to.²⁵² On one hand, the value of agency bias suggests that allowing regulators the freedom to interpret statutory provisions would be appropriate, even if courts could consistently ascertain legislative preferences as to the "best" interpretation. On the other hand, allowing an agency to adopt any *reasonable* interpretation could be problematic if its decision reflects not independence but outsize influence from an actor outside the agency. A court, instead of adopting what it thinks is the best interpretation or deferring to the agency, might examine the process by which the agency arrived at its interpretation.

A similar idea can be adopted in another major area of judicial review of agency action, *State Farm* or "hard look" review²⁵³ as to whether the

²⁴⁹ For example, the question of "how the enacting legislature would have resolved the question, or how it intended that question to be resolved, if it had been presented," *id.* at 429, can mean either how the legislature would have preferred that an agency resolve a question or how it would have answered the question directly given its preferences.

²⁵⁰ See Bressman, *supra* note 16, at 566 (assuming that "members of Congress seek policies that track their preferences"); McNollgast, *supra* note 29, at 31 (equating the goals "to honor the preferences of pivotal members of the enacting coalition" and "to enforce the law as Congress intended").

²⁵¹ See 531 U.S. at 457, 471 (2001).

²⁵² See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984).

²⁵³ See *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

agency's explanation for action is sufficient. One possible departure from current practice would be a doctrine that does not grant deference to agencies when congressional influence is evident and the statute is silent. A concrete application for this standard would be deciding whether agencies should undergo more scrutiny for changes in regulatory policy than for initial regulations, considered in the first disposition of *Federal Communications Commission v. Fox Television Stations, Inc.*²⁵⁴ Justice Scalia, writing for a plurality, seemed to suggest that no additional justification is necessary because congressional influence is always significant.²⁵⁵ Meanwhile, Justice Breyer, dissenting for four justices, urged that independent commissions cannot "make policy choices for purely political reasons nor to rest them primarily upon unexplained policy preferences"²⁵⁶ to say that changed policy requires more explanation than initial policy.²⁵⁷ Working from the dissent, the rationales suggest a third alternative, that whether a revision requires further explanation depends on whether there was an unusually large role for purely political influence by Congress or other outside actors in the old, as well as new, policy.

2. Constraints for the President

The implications for *Chevron* deference and *State Farm* review apply equally to mitigating White House influence. Worth reemphasizing is that they contrast with arguments in the presidential control model that evidence of White House influence should make review under these two doctrines easier,²⁵⁸ and that they entail that legislation, rather than the White House, determines when *Chevron*, in particular, will apply.

Other impacts of the information extraction rationales for judicial review are unique to the President. The first, which also affects how judges engage in hard look review, relates to the issue of her directory authority. Justice Kagan has argued that a bureaucracy should be presumed to be insulated if it is an independent agency but susceptible to more direct White House control if it is an executive agency and its head is named as the decision-maker.²⁵⁹ The logics presented here indicate that, even for an executive agency, independence should be preferred when policy officials depend on

²⁵⁴ 556 U.S. 502, 514 (2009), *overruled by* Fed. Commc'n Comm. v. Fox Television Stations, Inc., 132 S. Ct. 2307 (2012) (on First Amendment grounds not relating to administrative law).

²⁵⁵ *See id.* at 523.

²⁵⁶ *Id.* at 547 (Breyer, J., dissenting)

²⁵⁷ *Id.* at 549.

²⁵⁸ *See Kagan, supra* note 4, at 2377, 2380.

²⁵⁹ *Id.* at 2327.

industry information. Though the President will exert her influence through her appointment power and presence, there remains a distinction between what Peter Strauss has called the “difference between ordinary respect and political deference . . . and law-compelled obedience.”²⁶⁰

Second, it is appropriate for the courts to preserve Congress’ role as a counterweight to the President in personnel selection. For courts the key issue since the twentieth century has been whether Congress can restrict the President’s removal power so that she can only discharge an appointed official for cause. Although *Humphrey’s Executor v. United States*²⁶¹ supposedly settled the constitutionality of independent agencies,²⁶² there are suggestions that the recent case *Free Enterprise Fund v. Public Co. Accounting Oversight Board*²⁶³ theoretically provides the Supreme Court with future opportunities either to further limit Congress’ authority to establish independent agencies or to reaffirm it.²⁶⁴ The rationales imply that additional steps in this direction might be unwise.

3. Constraints for Interest Groups

The same principle of independence applies to any given interest group as it does to Congress and the White House. While this implication is clear, two others relating to outside parties are perhaps less so. First, the degrees to which different groups influence policy should not result in a mirroring of congressional preferences when policymaking depends on third-party information. This notion contrasts with not only “[t]he perceived need for more adequate representation of all persons affected by agency decisions” in the interest representation model,²⁶⁵ but also with the civic republican model’s idea that agencies should be required to facilitate “participation by all facets of society.”²⁶⁶ Courts appear to have attempted to balance interests, at least in the past, through expanding standing rights, extending the right to intervene in agency proceedings to more people, and requiring

²⁶⁰ Peter Strauss, *Overseer or the Decider? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 704 (2007).

²⁶¹ 295 U.S. 602 (1935).

²⁶² See Charles N. Steele & Jeffrey H. Bowman, *The Constitutionality of Independent Regulatory Agencies Under the Necessary and Proper Clause: The Case of the Federal Election Commission*, 4 YALE J. ON REG. 363, 363 (1987).

²⁶³ 130 S.Ct. 3138 (2010).

²⁶⁴ See Richard D. Pildes, *Free Enterprise Fund, Boundary-Enforcing Decisions, and the Unitary Executive Branch Theory of Government Administration*, 6 DUKE J. CONST. L. & PUB. POL’Y (SPECIAL ISSUE) 1, 7-9 (2010).

²⁶⁵ Stewart, *supra* note 4, at 1715.

²⁶⁶ See Seidenfeld, *supra* note 4, at 1571.

regulators to account for all interests.²⁶⁷ Of these three, only the last is consistent with the rationales for independence, and only to the extent that no single interest predominates over all the others. The other measures are not necessary because Congress has exhibited a willingness to experiment with different ways of empowering various interest groups, such as through intervenor programs²⁶⁸ and negotiated rulemaking.²⁶⁹ Because the goal of regulatory policy is not necessarily to have agencies select the same policies that Congress would, legislation and the principles above, more than new judicial doctrines, should define the degree to which different groups are represented.

Second, apart from direct evidence of unusual influence by regulated parties, courts should not view with suspicion policies that merely favor industry. Instead, what is termed regulatory capture, according to which agencies serve the interests of the firms under their jurisdiction,²⁷⁰ might be preferred to some degree so that they are willing to provide information in the first place under the reliable communication rationale. Daniel Carpenter and David Moss distinguish between “strong” and “weak” capture, in that only the former type is so problematic that the policy outcomes are worse than those without delegated policymaking,²⁷¹ and they suggest that capture is generally of the weak form.²⁷² When agencies depend on unverifiable communications from regulated parties about their information, a statute or background administrative procedures that place extra weight on these entities can be a rational design. Instead of measuring the posture of policy output toward regulated parties, it makes more sense to examine whether there is direct influence not envisioned by the statute and whether the agency’s proposal has neutral justifications.

Conclusion

This paper has tried to show, in theory and in practice, that Congress can benefit from delegating legislative authority to agencies merely because they decide questions differently from lawmakers given the same knowledge when policymaking depends on regulated firms’ information. When firms can show that their information is true but incur costs in gene-

²⁶⁷ See Stewart, *supra* note 4, at 1728, 1750, 1757.

²⁶⁸ See McCubbins et al., *supra* note 220

²⁶⁹ See Negotiated Rulemaking Act of 1990, 5 U.S.C. §§ 561-70 (2006).

²⁷⁰ See, e.g., Stewart, *supra* note 4, at 1685.

²⁷¹ See PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 12-14 (Daniel Carpenter & David Moss eds., forthcoming 2013).

²⁷² *Id.* at 14.

rating it, a skeptical agent may be able to induce more research effort. When claims about policy consequences cannot be verified, an intermediate bias can help an agency elicit more precise messages from an industrial interest group. Importantly, these rationales apply even if Congress is able to process any information or communication it receives from industry as well as bureaucrats can.

These logics yield an alternate informational justification for the bureaucratic state, and perhaps a more solid one than the traditional reasoning that agencies possess expertise. Even if agencies contain employees with specialized training, they may not institutionally have any expertise advantage over Congress, and, in any event, it could match any expertise they have. What Congress cannot replicate, as a voting body, is the range of postures toward industry with which it can design an agency. Legislation and other institutional design techniques can constrain agencies, not to act the same as legislators given some set of information, but differently so that the information from firms is of higher quality.

With these rationales this paper makes several other contributions. It provides a different understanding of the role of information in regulatory policymaking that focuses on the interaction between regulated entities and agencies, rather than only on bureaucrats. Also, they yield another argument for agency insulation, which judicial review can foster by searching for independent activity and reasoning by an agency after accounting for statutorily sanctioned influence by other actors. Most fundamentally, however, they entail reconceptualization of the challenge of political control of agencies from one that focuses on minimizing agency bias to deliberating inducing bias in a particular direction for the sake of better information extraction. The historical examples presented in this paper suggest that legislators have at least benefited from these rationales in the past, and that they could more consciously strive to do so in the future.