How the Prospect of Judicial Review Shapes Bureaucratic Decision Making

by

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Abstract

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Many observers view the judiciary as the weakest branch of American government due to its inability to unilaterally create policies and enforce change in domestic politics without the action of Congress and the president. Perhaps for this reason, existing research has often overlooked how federal agencies might strategically anticipate the influence of courts in the policymaking process. This study develops a general theory outlining the incentives that agencies possess to avoid costly litigation and the potential for unfavorable court judgments on the merits. Agencies, as a result, should make regulatory enforcement decisions based, in part, on how they expect relevant courts to view their actions. In order to test this theory, this study examines the regulatory behavior of three separate federal agencies—the Environmental Protection Agency, National Labor Relations Board, and the Occupational Safety & Health Review Commission. Using original data sets measuring each agency’s regulatory enforcement decisions, the empirical analyses demonstrate how the ideological composition of federal courts exhibit a significant impact on bureaucratic decision making. Most notably, the results highlight the U.S. Supreme Court as a consistent political constraint on each agency examined in the study. Thus, the judicial environment exhibits a meaningful impact on a diverse set of regulatory decision making in the American political system. This research provides scholars with new evidence on the extent of judicial influence in the policymaking process and interinstitutional politics more generally.
To my Mom, Connie.
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List of Abbreviations

ALJ Administrative Law Judge
CAA Clean Air Act
CERCLA Comprehensive Environmental Response, Compensation & Liability Act
CWA Clean Water Act
EAB Environmental Appeals Board
EAJA Equal Access to Justice Act
EPA Environmental Protection Agency
EPCRA Emergency Planning & Community Right-to-Know Act
FIFRA Federal Insecticide, Fungicide & Rodenticide Act
GAO Government Accountability Office
IRS Internal Revenue Service
MPRSA Marine Protection, Research & Sanctuaries Act
NIRA National Industrial Recovery Act
NLRA National Labor Relations Act
NLRB National Labor Relations Board
NPDES National Pollutant Discharge Elimination System
OSHA Occupational Safety and Health
OMB Office of Management and Budget
OSHA Occupational Safety & Health Administration
OSHRC Occupational Safety & Health Review Commission
RCRA Resource Conservation & Recovery Act
SDWA Safe Drinking Water Act
TSCA Toxic Substances Control Act
ULP Unfair Labor Practice
Chapter 1

Introduction

LAWMAKING WITHIN THE AMERICAN POLITICAL PROCESS IS A COMPLEX AND DIFFICULT ENDEAVOR. A PROPOSED LAW MUST BYPASS NUMEROUS INSTITUTIONS AND POLITICAL FORCES EXTERNAL TO THESE INSTITUTIONS BEFORE IT MAY BE CAST AS PART OF THE UNITED STATES CODE. NUMEROUS POLITICAL ACTORS, SUCH AS AN INDIVIDUAL MEMBER OF CONGRESS, A WHITE HOUSE OFFICIAL, OR AN INTEREST GROUP LOBBYIST, JOCKEY FOR THE ABILITY TO SHAPE THE SPECIFIC PROVISIONS OF PROPOSED LEGISLATION. IN THE END, A SUCCESSFULLY APPROVED BILL OFTEN REFLECTS THE CUMULATIVE WORK AND BARGAINING OF MANY INDIVIDUALS AND POLITICAL INSTITUTIONS. THIS IS PRECISELY WHY THE LEGISLATIVE PROCESS IS DESIGNED TO STALL THE OVERWHELMING MAJORITY OF BILLS THAT ARE EVER PROPOSED.

Yet, even after elected officials successfully navigate this complex and daunting process, the details and initial promise of that legislative product might never be fully realized. External parties, for example, can challenge legal provisions before federal courts, who have substantial authority to overturn and undermine the legitimacy of any legislation. Furthermore, the tangible policy outcomes that might result are often left up to a host of unelected bureaucrats that serve in numerous federal agencies within the executive branch. Congress and the president may go to great lengths to pass legislation, for example, to improve water quality in the United States. These
elected institutions might spend months or even years hashing out the details of how to better prevent pollutants from entering the country’s major waterways. But, once Congress successfully passes and the president signs that legislation, a federal agency will often receive the responsibility to codify and enact many of the specific details involved with carrying out and applying the legislation.

The implication is that the implementation of public policy allows for the potential that final, tangible policy outcomes might reflect the interests of more actors than the collection of institutions that initially crafted the legislation. As a result, the legislative process does not end following a signing ceremony in the White House rose garden or a press conference at the steps of the Capitol building hailing successful passage of a bill. Congress and the president must work to ensure that policy outcomes following bureaucratic implementation continue to reflect their policy agendas and actually provide the results originally intended.

Such delegation of policy responsibility to federal agencies generally serves the interest of the elected branches. But, it is possible that bureaucrats might act out of their own self-interest, perhaps at the expense of the governing coalition’s goals and the people that it represents. Thus, the way in which federal agencies utilize their policy responsibility to implement legislation carries important implications for representation in American politics. To what degree do regulatory decisions reflect the interests of bureaucrats themselves and how does the separation of powers in American government shape these final policy outcomes? Are federal agencies faithful agents of Congress and the president, or do they also respond to other actors in the political process?

This study considers how the federal judiciary and its power of judicial review can also shape the behavior of federal agencies in the policymaking process. Courts do not
form a part of the governing coalition that delegates policy discretion to the bureaucracy. Yet, the significant role of judicial review in the American separation of powers system suggests that agencies might concern themselves with the potential influence of courts with the power to review and overturn their regulatory decisions. Before a more detailed discussion of how the prospect of judicial review might shape bureaucratic decision making, the following sections first present two illustrative examples of how the political composition of courts might significantly influence regulatory behavior within two prominent federal agencies.

1.1 Two Stories of Regulatory Enforcement

1.1.1 Goodyear Tire & Rubber Company

The Goodyear Tire & Rubber Company is a well-known business that primarily manufactures tires for automotive vehicles. The company’s industrial plants use various raw materials to manufacture and process rubber material. This synthetic rubber is then used to produce the various tires and products that it sells. One byproduct of Goodyear’s manufacturing process is that it creates a significant discharge of wastewater resulting from its use of several types of synthetic fibers and chemical agents. The manufacturing process commonly discharges various metals and other compounds such as zinc, chromium, copper, cyanide, and lead.

Since 1972, the National Pollutant Discharge Elimination System (NPDES), authorized under the Clean Water Act (CWA), has regulated industrial water pollution in the United States. The NPDES program requires that any manufacturing process discharging pollutants that could reach a navigable water, lake, or river in the United States must first obtain a permit. The required permit commonly provides a license for a business and its manufacturing facility to discharge an authorized concentration of
pollutants. But, NPDES permits typically establish maximum thresholds of pollutants that can be present in an industrial waste discharge while also requiring the business facility to regularly monitor the concentration of waste that it emits (United States Environmental Protection Agency, Office of Water, 1996).

In May 1987, the Goodyear company filed an application with EPA Region VI requesting renewal of a NPDES permit for its facility in Beaumont, Texas. The EPA’s regional office responded with a revised draft permit available for public comment and then issued the final approved permit to Goodyear in October 1988. Upon receiving the final permit, Goodyear contested the EPA region’s decision by asking the office for an evidentiary hearing to reconsider the specific permit terms. Following a denial to reconsider by EPA Region VI in February 1992, Goodyear then petitioned the Environmental Appeals Board (EAB) and officially challenged the permit terms promulgated by the EPA’s regional office (Goodyear Tire & Rubber Company (1993), 4 E.A.D. 670).

In the case of Goodyear Tire & Rubber Company (1993), the Goodyear company argued that EPA Region VI established excessively stringent pollutant concentration limits and “burdensome and unnecessary” monitoring requirements. In particular, Goodyear urged the EAB to remand the EPA region’s permit, in part, because it required the company to monitor 63 different pollutants even though the industrial plant in question only discharged four of those highlighted pollutants. The EPA regional office countered that EPA regulations required facilities such as Goodyear’s industrial plant to abide by new, more stringent discharge limits for numerous synthetic and chemical compounds. The EAB issued a final decision in May 1993 that remanded the permit back to EPA Region VI and instructed the regional office to significantly revise its permit terms. In her opinion for the Board, EAB Judge Nancy B. Firestone effectively exempted the Goodyear company from nearly every item of the more stringent pollutant discharge and monitoring requirements. Essentially, the EAB’s decision
overturned the attempt of EPA Region VI to enact more stringent environmental protections and alleviated the environmental and economic burden on the Goodyear Tire & Rubber Company at its Beaumont industrial facility.

1.1.2 Worcester Steel Erectors, Inc.

In December 1988, five construction workers fell four stories off a building after a metal and concrete floor collapsed at a worksite in Worcester, Massachusetts. A local steel company—Worcester Steel Erectors, Inc.—was responsible for erecting metal decking to support construction of concrete flooring on the fourth floor of a building project at Worcester Polytechnic Institute. After construction of the metal decking, a local concrete company followed by layering cement on top of the steel foundation in two installments, which ultimately totaled over nine inches of cement. Yet, before the second installation of concrete could cure, the steel decking foundation could not support the pressure of the cement and thus collapsed.

The Occupational Safety & Health (OSH) Act gives regulatory authority to the Department of Labor to enact and enforce standards of occupational safety as a means to protect employees from health hazards at worksites. In response to the incident, the Occupational Safety & Health Administration (OSHA), with its authority delegated by the OSH Act and Secretary of Labor, conducted an investigation in order to determine if a violation of occupational safety regulations occurred at the construction site. After its investigation, OSHA’s compliance officer determined that the Worcester steel company failed to appropriately build the steel decking and frame to support the subsequent concrete phase of the project. The agency and Secretary of Labor, as a result, issued a four-part citation claiming that Worcester failed to meet industry standards in constructing the steel decking and that its general negligence was the direct cause of the injuries to the cement company personnel. The Worcester steel company countered
that its steel decking was not structurally flawed. Instead, the collapse happened, according to Worcester, because the cement company failed to wait several days between the two installments of pouring cement. Thus, the cement company's failure to allow the first layer of concrete to properly cure (before laying down a second layer) was the primary cause of the collapsed decking (Secretary of Labor v. Worcester Steel Erectors, Inc. (1993), OSHRC No. 89–1206). 

After OSHA and the Secretary of Labor issued the citation and proposed civil penalty, the Worcester company challenged the agency’s decision before an Administrative Law Judge (ALJ). The ALJ largely upheld OSHA’s liability determination on the basis that Worcester’s steel frame deviated from the manufacturer’s specifications and therefore was not structurally sound nor sufficiently strong to support the two layers of concrete, even if the cement had been applied properly. The ALJ issued a civil penalty of $3,040 after determining that Worcester was liable for the accident (Secretary of Labor v. Worcester Steel Erectors, Inc. (1993), OSHRC No. 89–1206). Following the ALJ's decision, the Worcester company then challenged the liability determination and civil penalty before the Occupational Safety & Health Review Commission (OSHRC).

In September 1993, the OSHRC issued a decision in the matter of Secretary of Labor v. Worcester Steel Erectors, Inc. (1993). The review commission reversed the ALJ’s decision, overturned the original citation issued by OSHA, and vacated the civil penalty enforced in the case. Essentially, the commission proclaimed that the ALJ erred in concluding that the steel company was liable for the accident simply because the company did not strictly follow the manufacturer’s recommendations. The OSHRC declared that the Secretary of Labor did not meet a sufficient burden of proof to demonstrate that Worcester’s steel decking was structurally flawed and could not support the subsequent cement construction. Thus, substantively, the OSHRC eased the burden on Worcester Steel and chose not to hold the company liable for an alleged
violation of OSHA’s occupational safety standards.

1.2 Regulatory Enforcement and the Political Environment

The two examples of regulatory enforcement detailed above illustrate common choices inherent in regulatory decision making: (1) to what extent should businesses absorb the burden of increased regulation?; and (2) do the benefits of more stringent regulatory enforcement justify the economic costs that might be imposed on many businesses? Furthermore, the two examples also point to an interesting dynamic in the political environment at the time of each agency’s regulatory decision. In each case, the agency (EPA and OSHRC) made a decision to enforce less stringent regulation of either environmental or occupational safety regulations during a time of Democratic control of both the White House and Congress.

Thus, each agency made a seemingly conservative-minded, anti-regulatory decision in the presence of a presidential administration that was in the midst of taking active steps toward more stringent regulatory reform. The Clinton administration would prove to be especially vigilant in its quest to reform regulatory enforcement of numerous environmental statutes (through EPA Administrator Carol Browner), including the Clean Water Act. Similarly, Democrats, in 1993, controlled both chambers of Congress and the committees responsible for directly overseeing policy implementation by the EPA and OSHRC. What might compel the EPA and OSHRC to issue regulatory decisions that might contradict the general policy agendas of their primary political principals, Congress and the president?

This study proposes a potential answer, arguing that the political composition of relevant federal courts can have a meaningful impact on bureaucratic decision making,
in addition to the political constraints posed by Congress and the president. The federal judiciary in 1993 was increasingly conservative following the Reagan and H.W. Bush administrations, who both had numerous opportunities to place like-minded judges on the federal bench. President Reagan, in particular, appointed four conservative-minded justices to the Supreme Court and filled 83 vacancies in the U.S. Courts of Appeals, which represents nearly half the total number of federal judgeships today in the Supreme Court and federal appellate courts. As a result, it might be possible that an increasingly conservative judiciary compelled the two agencies in question to make relatively conservative regulatory decisions for fear of being challenged and ultimately overturned in federal court.

Scholars of the bureaucracy often focus principally on how the president and Congress seek to constrain agency behavior (e.g., Huber and Shian, 2002; McCubbins, Noll and Weingast, 1989; Moe, 1985). Yet, despite a voluminous body of litigation in the federal courts reviewing the decisions of federal agencies, existing scholarly research has devoted relatively little attention to how the judiciary might actively constrain bureaucratic policymaking. The traditional view of judicial power argues that the impact of courts on federal agencies is rather limited, due in large part to the reactive nature of judicial review. Consequently, scholars often minimize the potential for judicial influence in the bureaucratic policymaking process until courts are presented with cases and issue rulings.

But the scope of judicial authority may extend beyond the simple illustration of judges waiting for cases. If federal agencies anticipate the prospect of facing judicial review and seek to avoid the potential of facing costly litigation, then courts might have a far more significant role in the policymaking process than many scholars generally

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1 For information on appointments to the federal judiciary, see: http://www.uscourts.gov/Home.aspx.
assume. Some prior research has offered valuable insight on the potential role of lower federal courts in the bureaucratic implementation process (e.g., Canes-Wrone, 2003; Howard, 2001; Howard and Nixon, 2002). Most existing studies, however, have devoted limited attention to a more generalized theory outlining bureaucratic incentives to anticipate (and not merely react to) judicial review. Similarly, previous research has not fully examined how the larger judicial hierarchy—the political composition of both the federal Courts of Appeals and the U.S. Supreme Court—might interact to influence bureaucratic decision making.

This study examines judicial influence on bureaucratic decision making absent litigation. I contend that federal agencies continuously operate in the shadow of judicial review. Bureaucrats should anticipate the prospect of judicial review in order to avoid costly litigation, and therefore exhibit regulatory decision making based, in part, on the ideological composition of relevant courts. In order to test this general theory, this study examines the regulatory behavior of multiple federal agencies in the policymaking process. The empirical analyses demonstrate a persistent effect of the political composition of federal courts on bureaucratic decision making. The U.S. Supreme Court, in particular, demonstrates the greatest and most consistent impact on regulatory enforcement. Taken together, the results demonstrate the potential that courts can actively constrain the behavior of federal agencies, as bureaucrats might often have the incentive to make decisions with an eye toward the prospect of judicial review.

1.3 Overview of this Study

The plan of this study proceeds as follows. Chapter 2 reviews the existing literature on the political factors influencing bureaucratic behavior. In particular, it highlights the numerous avenues available to Congress and the president (e.g., audits, budgetary
power, and political appointments) when attempting to constrain the regulatory behavior of federal agencies. Next, the chapter provides an overview of prior studies examining the institutional interactions between courts and the bureaucracy. The common theme is that most existing studies emphasize the factors leading agencies to respond to a judicial ruling and that courts have a rather minor impact on the policymaking process. In contrast to the arguments made by these scholars, I develop a general theory of bureaucratic incentives to anticipate the prospect of judicial review. Thus, an agency should attempt to avoid facing costly litigation and the potential for unfavorable dispositions on the merits. The chapter concludes with a theoretical discussion of how federal agencies anticipate the prospect of judicial review within the larger judicial hierarchy.

Chapter 3 highlights the regulatory behavior of the Environmental Protection Agency (EPA) as an empirical test of the general theory outlined in Chapter 2. It first describes the scope of the EPA’s policy responsibility to administer environmental statutes and the agency’s internal administrative review process. Next, the chapter presents an empirical analysis utilizing an original data set of decisions by the Environmental Appeals Board (EAB) since its inception in 1992 through 2006. The analysis examines how the political composition of the judicial environment—the U.S. Courts of Appeals and the U.S. Supreme Court—significantly influences the EAB’s judgments to enforce more or less stringent regulation of environmental statutes. The results demonstrate that the EAB, which is the agency’s final administrative decision maker before environmental disputes may enter the federal judiciary, issues decisions based, in part, on the political composition of both the federal appellate courts and the Supreme Court.

The following section—Chapter 4—presents an additional empirical analysis using the National Labor Relations Board (NLRB) to evaluate the general theory. The chapter begins with a synopsis of the NLRB’s regulatory and administrative review
process. Chapter 4 then offers an empirical analysis to examine how the political composition of federal courts also shape decisions by the NLRB. Using an original data set of the agency’s decisions in Unfair Labor Practice (ULP) disputes between 1981 and 2005, the results highlight the significant role of the high court as a political constraint on the degree to which the NLRB supports labor over management (or business) interests.

Chapter 5 considers the regulatory behavior of the Occupational Safety & Health Review Commission (OSHRC) as a third empirical test of how the prospect of judicial review shapes bureaucratic decision making. It first details the OSHRC’s role in the regulatory enforcement process of occupational safety standards. The OSHRC is an independent agency that presides over appeals to citations issued by the Occupational Safety & Health Administration (OSHA) and the Secretary of Labor. Next, the chapter presents an empirical analysis investigating how the judicial environment might influence the OSHRC’s decisions to support more stringent regulation of occupational safety standards over business interests. It uses an original data set of judgments issued by the OSHRC between 1985 and 2008 to demonstrate that the political composition of the Supreme Court influences the regulatory enforcement of occupational safety standards. Thus, the data reinforce the conclusions made in the previous chapters and illustrates how the nation’s highest court is a significant political constraint on bureaucratic decision making.

Chapter 6 concludes the study with an overview of the theoretical argument and empirical results from the previous chapters. Additionally, it highlights several important implications for the role of courts in the policymaking process. The impact of the judiciary and court composition on federal agencies presents important implications for the separation of powers in American politics. Most notably, the results suggest
that judicial influence on the bureaucracy highlights the importance of presidential appointments to the federal bench, congressional delegation of policy discretion to federal agencies, and statutory provisions governing judicial review of agency behavior. Chapter 6 concludes with a substantive discussion detailing how bureaucratic anticipation of the political preferences of unelected courts raises normative questions of representation and democratic accountability in the American political system.
Chapter 2

Bureaucratic Decision Making and the Prospect of Judicial Review

Over the course of the past century, the administrative state has become a central component of American democracy. The size and scope of American government has expanded both to support the needs of an enlarged public and confront the increasingly complex challenges inherent in society today. As I argued in the previous chapter, institutional delegation of policymaking authority to federal agencies and the political constraints on how unelected bureaucrats utilize this policy discretion to implement laws both possess important implications for policy outcomes. Most notably, the political motivations underlying the regulatory decisions made by federal agencies can shed considerable light on the nature of representation and the separation of powers in American democracy.

Similarly, the importance of judicial policymaking, including the various avenues available to resolve disputes and create policy through judicial means, has paralleled the rapid expansion in the federal bureaucracy. Courts have steadily become institutionalized actors in American politics, whose judgments regularly shape the substantive

Scholars, in particular, have devoted considerable attention to how judicial decisions can alter bureaucratic policy implementation (e.g., Baum, 1976; Canon, 1991; Johnson, 1979; Johnson and Canon, 1984; Milner, 1971; Rodgers and Bullock, 1972; Shapiro, 1968; Spriggs, 1996; Stover and Brown, 1975). Yet, existing studies have largely confined their examination of judicial influence on the bureaucracy to how court decisions can force agencies to adjust their prior behavior. The potential for unfavorable review by courts might induce federal agencies to avoid facing judicial challenges altogether. The question of whether bureaucratic agencies anticipate, and not merely respond to, judicial review can offer considerable insight into the extent to which courts influence the policymaking process. The institutional interactions between the judiciary and federal agencies, and how courts can constrain bureaucratic behavior even without issuing a decision, present important implications for public policy and the separation of powers more broadly.
In this chapter, I review the existing literature on bureaucratic behavior and the potential political constraints that agencies often face when crafting policy. I then develop a general theory specifying the motives of federal agencies to anticipate (and not merely react to) the prospect of judicial review. I argue that agencies have the incentive, on average, to minimize the probability of facing unfavorable review by courts as a means to avoid costly litigation. Furthermore, agencies must anticipate the prospect of judicial review within the larger judicial hierarchy—the political composition of both the federal Courts of Appeals and the U.S. Supreme Court. Overall, a judiciary that can compel federal agencies to anticipate the prospect of judicial review and attempt to avoid unfavorable litigation suggests that courts can substantially shape the contours of the policymaking process; an impact that is far greater than many conventional portrayals of judicial influence in the American separation of powers system might suggest.

2.1 Delegation and Bureaucratic Decision Making

Federal agencies fulfill an important policymaking role in an ongoing, sequential process of implementing laws. Congress and the president regularly delegate authority to federal agencies to take statutes, promulgate regulations, and enforce these rules within the structured boundaries created by the legislature or based on the policy directives originating from the White House. Congress and the president rarely craft every explicit detail and policy provision necessary to effectively implement laws. The policymaking process, as a result, commonly involves delegation of decision making discretion to federal agencies.

Bureaucrats often receive the responsibility to codify the details necessary to mold congressional statutes into functional regulations and working legal provisions. For example, Congress, in passing the Clean Air Act (CAA), outlined the broader goals
of improving air quality in the United States. Congress even went so far as to specify many details of air quality and emissions standards along with processes governing subsequent enforcement and compliance. Yet, many substantively critical provisions necessary to establish and enforce air quality standards are either subject to change following suitable regulatory action by the Administrator of the Environmental Protection Agency (EPA) or delegated entirely to the agency. Thus, the EPA received considerable authority to craft the details necessary to effectively monitor, enforce, and improve air quality standards in the United States.

The delegation of significant policymaking discretion to federal agencies is the norm in the American political system. Scholars have identified various reasons why the elected branches, namely Congress and the president, regularly assign this responsibility to unelected bureaucrats. One common theme among existing studies is that inadequate resources often compels the elected branches to delegate policymaking authority to numerous federal agencies (e.g., Bawn, 1995; Huber, Shipan and Pfahler, 2001; Shipan, 2004). Successful policy implementation requires substantial time and expertise. Congress, for example, will generally lack the necessary time and policy expertise to explicitly codify the technical details of air quality standards within the Clean Air Act. Few members of Congress, if any, will have the required technical expertise to outline every specific air pollutant and emissions standard that will be both practical and attainable yet will still satisfy the broader goal of improving air quality. This is not to say that Congress is never able to deploy the resources to conduct research and acquire the requisite expertise, but members of Congress are unlikely to want to expend those resources for that purpose. Furthermore, effective policy implementation often requires the need to adapt to and solve unanticipated problems, which the elected branches will not have the policy expertise nor the institutional structure to respond in the most efficient manner.
Another line of research emphasizes the desire to avoid the costs often associated with unpopular policy implementation (e.g., Lowi, 1967; Kiewiet and McCubbins, 1991). Members of Congress care a great deal about creating opportunities to claim credit for policies that appeal to constituents. Successful passage of the Clean Air Act, for example, enabled many members of Congress to extol the virtues and seemingly imminent improvements in the environment and air quality that would result from the new landmark legislation. But, legislators might wish to shield themselves from the details of policy implementation when it could lead to unpopular, costly, and potentially unanticipated results (e.g., Lowi, 1967; Kiewiet and McCubbins, 1991).

Although the elected branches commonly have numerous incentives to delegate policymaking authority to federal agencies, such delegation also carries potential risk. Bureaucrats might utilize their policy discretion to promote their own self-interest, potentially at the expense of the intentions of Congress or the president. Thus, elected politicians who care about the final policy outcomes following bureaucratic policy implementation often employ a variety of mechanisms to constrain agency behavior and prevent significant policy drift.

2.2 Presidential and Congressional Control of the Bureaucracy

Scholars have long examined the potential for political control of bureaucratic decision making. Many studies have contributed to an extensive literature examining how the president and Congress can effectively constrain federal agency promulgation and enforcement of regulations, whether through appointments, budgets, or various monitoring mechanisms (e.g., Bawn, 1995, 1997; Huber, Shapin and Pfahler, 2001; Lewis, 2003, 2008; McCubbins, Noll and Weingast, 1987; Moe, 1985; Shapin, 2004; Weingast
and Moran, 1983; Wood and Waterman, 1994).

The president has the potential to wield considerable control over federal agencies through appointments, budgets, and executive organization (e.g., Arnold, 1998; Lewis, 2003, 2008; Nathan, 1983; Snyder and Weingast, 2000; Waterman, 1989; Wood and Waterman, 1994). The president appoints many top-level bureaucrats to supervise both cabinet departments and independent agencies. These high-ranking agency chiefs will quite often receive their appointments for political purposes and thus share the executive's political orientation. As a result, presidential appointments can serve as an important executive constraint and impose some indirect (or even direct) influence on bureaucratic decision making (e.g., Lewis, 2008). Likewise, the president, through the use of an executive order, can also unilaterally create administrative agencies and structures to promote his or her own policy goals (e.g., Howell and Lewis, 2002; Lewis, 2003; Moe, 1989; Moe and Wilson, 1994). The ability to circumvent Congress when establishing an agency can allow the president to insulate its structure from congressional control. The White House, often through the Office of Management and Budget (OMB), also regularly reviews agency regulations and may substantially impede an agency’s success at promulgating unfavorable policies (e.g., Cooper and West, 1988; Godwin, 2008).

Research highlighting congressional influence on the bureaucratic implementation process commonly examines either \textit{ex ante} or \textit{ex post} influence. A fundamental way in which Congress may affect future agency behavior—\textit{ex ante} control—is to strategically structure the implementation process when creating a law (McCubbins, Noll and Weingast, 1987, 1989; Moe, 1989, 1990\textsuperscript{b, a}). Congress often makes a strategic calculation when delegating policy discretion to agencies as a means to increase the likelihood of securing the most favorable policy outcome in the future (Epstein and OHalloran, 1994, 1999; Huber and Shipan, 2002; Huber, Shipan and Pfahler, 2001). In addition,
the legislature also might seek to minimize the transaction costs involved in writing a statute. Legislators can expend considerable time and resources crafting laws that will produce its ideal outcome. Bureaucrats will have less ability to act contrary to legislative intent if a statute thoroughly prescribes the agency’s subsequent regulatory responsibility. However, doing so comes at a great cost to legislators, especially in terms of acquiring the specific knowledge necessary to write a detailed statute and monitoring subsequent agency behavior. The legislature, as a result, often seeks to craft statutes in the most cost-effective manner, by utilizing an agency’s policy expertise and delegating policy discretion.

Congress should afford bureaucrats with less policy discretion, and more thoroughly specify statutory intent by outlining the specific boundaries for an agency to implement policy, as legislative and agency preferences diverge (Epstein and O'Halloran, 1994, 1999; Huber and Shipan, 2002; Huber, Shipan and Pfahler, 2001). If agency and legislative preferences are similar, the legislature can minimize transaction costs because it has more trust that the agency will craft policy consistent with its ideal policy outcome. Congress may also exert *ex ante* influence by strategically structuring judicial review provisions, thus dictating the terms of challenges to bureaucratic policy in the lower federal courts (Shipan, 1997).

*Ex post* influence, on the other hand, makes agencies responsive to the current legislature (McCubbins and Schwartz, 1984). Congress can directly oversee bureaucratic activity using “police patrols,” such as hearings, investigations, and audits. If Congress suspects that an agency is shirking and making decisions that run counter to its wishes, it can subject agency personnel to direct scrutiny. Likewise, “fire alarms,” or indirect control, can occur as the elected branches rely on potential cues that an agency is acting contrary to their policy priorities. Interest groups, for example, can supply feedback to
legislators and signal potential shirking when they challenge agencies in court. Overall, Congress and the president commonly utilize a variety of means to monitor and constrain bureaucratic behavior.

2.3 Courts and Federal Agencies

Researchers with an interest in bureaucratic politics, however, have devoted limited attention to the judiciary’s role in the policymaking process. Of those studies that have examined judicial influence on federal agencies, most argue that courts will affect bureaucratic implementation only after an agency has already enacted policy (Baum, 1976; Canon, 1991; Johnson, 1979; Johnson and Canon, 1984; Milner, 1971; Rodgers and Bullock, 1972; Shapiro, 1968; Spriggs, 1996; Stover and Brown, 1975). This is consistent with classic accounts of judicial authority claiming that a court’s inability to take unilateral action, and enforce change in domestic politics without the action of Congress and the president, eliminates any bureaucratic necessity to directly accommodate its preferences (Baum, 1976, 1981; Rosenberg, 1991).

Scholars have considered three main factors affecting agency responsiveness to judicial rulings—communication, organization, and utility. Communication theory specifies that the transmission of information between agencies and the Court is necessary for bureaucratic responsiveness. Absent clear policy guidelines established by a judicial decision, the affected agency will be unable to appropriately adjust its previous policy. Thus, ambiguous judicial opinions make it inherently more difficult to accommodate the wishes of those on the bench, thereby decreasing the probability that bureaucrats will conform to their rulings. In this view, increased clarity and specificity of Court opinions translates into greater agency responsiveness (Baum, 1976; Canon, 1991; Milner, 1971; Shapiro, 1968).

Although vague opinions can often inhibit bureaucratic responsiveness, Staton and
Vanberg (2008) present an alternative perspective and argue that courts may hold incentives to issue vague opinions. Essentially, vagueness can enable courts to manage the uncertainty associated with policy outcomes while also preserving institutional stature. Therefore, the specificity of opinion writing may reflect a larger political trade-off. A second perspective on bureaucratic reaction to Court opinions—organizational theory—contends that structural features such as an agency’s intent to protect its policy jurisdiction affects responsiveness (Shapiro, 1968; Johnson, 1979; Johnson and Canon, 1984). Bureaucrats are much more likely to resist succumbing to judicial directives if the agency as a whole is firmly committed to a particular policy.

Finally, Johnson (1979) posits that agencies will act in accordance with judicial wishes in order to avoid potential costs associated with ignoring the Supreme Court. This rationale is consistent with the third main perspective on agency responsiveness, utility theory, which emphasizes that agencies will respond to judicial review if the expected benefits exceed the anticipated costs (Stover and Brown, 1975; Rodgers and Bullock, 1972). Spriggs (1996) offers a comprehensive empirical test of these three theories and concludes that four factors significantly affect agency responsiveness to Supreme Court action—“specificity” of judicial opinions, bureaucratic preferences, agency age, and the degree of amicus curiae endorsement. His general conclusion affirms the belief that agencies determine adherence to Supreme Court judgments based on expected the costs and benefits, including the potential consequences of failing to abide by judicial rulings.

Although most scholars have focused primarily on how litigation outcomes can force agencies to alter their preferred policies, a separate literature portrays agencies as strategic actors that might be cognizant of judicial influence (e.g., Ferejohn and Shapin, 1990; Gely and Spiller, 1990; Spiller and Spitzer, 1992). Other empirical studies examine the effect of lower court litigation on agency decision making (Howard, 2001; Howard
and Nixon, 2002; Moe, 1985; Wood and Waterman, 1993). Howard and Nixon (2002), for example, demonstrate that the ideological composition of the intermediate Courts of Appeals influence Internal Revenue Service (IRS) audit rates in different regions of the country. Canes-Wrone (2003) presents empirical evidence indicating that judicial liberalism and lower court composition affect the likelihood that the Army Corps of Engineers will issue wetlands permits.

Previous empirical studies examining judicial influence on regional regulatory behavior have offered important insights into how courts can influence the bureaucracy. Despite this body of extant research, scholars have devoted little study to the broader institutional relationships involved in the policymaking process. From a theoretical perspective, prevailing scholarship has not developed a general theory that explicitly details bureaucratic incentives to anticipate and avoid judicial review both in the lower federal courts and the U.S. Supreme Court. Likewise, existing empirical applications focus only on a single agency, with little attention devoted to bureaucratic behavior in general, and do not examine how the high court might constrain the influence of the lower federal courts. In the following sections, I outline a general theory of bureaucratic motivations to anticipate the prospect of judicial review.

### 2.4 How the Prospect of Judicial Review Shapes Bureaucratic Decision Making

When utilizing its policy discretion to implement statutes and codify regulatory standards, a federal agency cares about its mission and policy goals above all else. Bureaucrats maintain an institutional desire to craft policy consistent with their own preferences while promoting the agency’s mission (e.g., Niskanen, 1971; Wildavsky, 1992; Wilson, 1989). They constantly seek to utilize their expertise to pursue these
ideal policy outcomes. Yet, the agency may not be able to promote its mission and policy goals without regard for how its multiple political principals are likely to view its actions. If the agency’s ideological preferences and the political nature of its regulatory decisions significantly differ from the policy goals of either the president, Congress, or the courts, then it might be difficult to craft its ideal policy without encountering substantial opposition.

Litigation and the threat of a challenge in court is one potential constraint on bureaucratic behavior, thereby affecting an agency’s decision making calculus when crafting policy. Federal agencies continuously operate in the shadow of judicial review. Agencies are cognizant of the context in which they make decisions and the judicial environment is one primary factor. Given the persistent threat of being challenged in court, agencies should strategically craft policies based on their perceptions about the likelihood of facing litigation. A robust scholarly literature establishes that judges act, at least in part, based on their personal policy preferences (e.g., Segal and Spaeth, 2002). Thus, it is reasonable to expect that judges (through their collective judgments) will review and overturn agency policies that deviate significantly from these ideological preferences. Since agencies should often find it costly to appear in court, especially when faced with the prospect of an unfavorable disposition on the merits, they should, on average, seek to avoid judicial review.

Agencies possess several incentives to craft policies based on the prospect of facing litigation. First, bureaucrats should prefer to utilize resources to continue promoting the agency’s mission with new policies and regulatory enforcement rather than defending previous behavior in court. Litigation can be quite costly. When aggrieved parties subject to enforcement actions and administrative citations (or other external parties such as interest groups) challenge the agency’s regulatory decisions, the time and resources needed to protect policy positions in court, *ceteris paribus*, would be better
spent continuing to fulfill the agency’s goals. Furthermore, if a court overturns an agency’s policy decision, this will often compel bureaucrats to expend further resources to adjust its prior policy. Federal agencies, as a result, have strong incentives to anticipate the prospect of judicial review based on the transaction costs that they are likely to incur if subject to litigation.

In addition to minimizing the transaction costs involved with defending regulations or enforcement in court, an agency also wishes to protect its future institutional interests. The elected branches have their own preferences concerning the final policy outcomes that should result from bureaucratic implementation. The legislature and executive might decrease an agency’s future policy discretion or budget if they observe that an agency is shirking and its decisions are significantly deviating from statutory intent. Judicial rulings against an agency can signal a “fire alarm” that bureaucrats are violating congressional or presidential intent, thus providing indirect feedback to the elected branches about the nature of an agency’s regulatory decisions (McCubbins and Schwartz, 1984).

Most importantly, agencies should seek to anticipate judicial review because of the potential long-term consequences involved with unfavorable litigation outcomes. Judicial decisions regularly establish precedents that clarify or affirm the boundaries for future policy implementation. An unfavorable court disposition might establish precedent in such a way that could constrain an agency’s ability to secure favorable policy outcomes far into the future. In some instances, undesirable precedents could not only limit an agency’s policy agenda, but completely obstruct its ability to promote its preferred policy outcomes. Therefore, litigation losses and unfavorable judicial review could not only affect an agency’s immediate policy behavior, but might continue to constrain the ability to pursue its ideal policy goals.
2.4.1 Bureaucratic Anticipation of Judicial Review: Two Primary Considerations

Agencies should adjust their behavior based on two primary considerations: (1) when parties are likely to appeal a policy decision in federal court; and (2) when the court with appellate jurisdiction is predisposed to overturn the given policy decision. An agency’s first consideration is to make decisions that will avoid litigation altogether. A vast literature documents how interest groups often attempt to utilize the federal judiciary as an arena to shape domestic politics and pursue the interests of their membership (e.g., Caldeira and Wright, 1990; Collins, 2004, 2007, 2008; Epstein, 1993; Hansford, 2004; O’Connor, 1980). Likewise, a party directly subject to a regulatory enforcement action or citation issued by an agency might also challenge that agency’s policy decision in court as a means to absolve itself from liability. Given the persistent threat of facing judicial challenges from both interest groups and parties subject to enforcement, federal agencies should make decisions that will minimize the probability that any party will initiate litigation.

The second primary consideration structuring bureaucratic anticipation of judicial review is the nature of the courts with appellate jurisdiction. In addition to the incentive to attempt to avoid litigation altogether, federal agencies should make regulatory decisions based on how relevant courts are likely to view their actions. An agency should make decisions that will survive judicial review in the event that an external party does challenge a policy decision in federal court. Thus, the agency, on average, should make regulatory decisions that courts with appellate jurisdiction are predisposed to support on the merits.

Arguably the most important guideline structuring these two considerations is the ideological composition of those courts with appellate jurisdiction to preside over appeals. The farther that bureaucratic policy diverges from the political orientation of the
relevant court, the greater probability that both the court will rule against a policy and that the agency will face litigation. External parties should be more inclined to expend their own resources and initiate judicial proceedings as bureaucratic policy increasingly deviates from the relevant court’s ideological orientation (e.g., Caldeira and Wright, 1990; Epstein, 1993). Alternatively, an agency will be able to minimize both the likelihood of facing litigation and the chance of losing on the merits by issuing decisions that conform to the prevailing political orientation of the relevant court. Therefore, an agency possesses the incentive to balance its own preferences and goals against those of relevant courts, both to reduce the likelihood that a court will overturn its policy and that challengers will emerge.

2.4.2 Anticipating Judicial Review Within the Judicial Hierarchy

Agencies also anticipate the prospect of judicial review within the context of the larger judicial hierarchy. Thus, both lower federal appellate courts and the Supreme Court should significantly influence bureaucratic decision making. Most challenges to agency policies appear in the federal Courts of Appeals, both because a case must progress through the judicial system before reaching the high court and due to the Supreme Court’s limited docket size (Howard and Nixon, 2002). Judicial review in the lower federal courts presents the most immediate threat to an agency. Therefore, an agency should take into account the likelihood of review in any given appeals court, based on both the jurisdiction and ideological preferences of those individual courts.

An agency should be cognizant of those Courts of Appeals that are more likely to overturn its policies based on ideological grounds and where private parties have standing to initiate litigation. Bureaucrats, as a result, should condition their behavior in appeals court regions with divergent ideological preferences where challengers are
likely to emerge. Likewise, an agency may feel less threatened by the prospect of judicial review in ideologically-similar circuit regions. I therefore expect that regional variation in the ideological composition of the Courts of Appeals will have a significant impact on bureaucratic behavior. Agencies should craft more conservative (liberal) policy when confronted with the prospect of review by a more conservative (liberal) appellate court.

Yet, the possibility of Supreme Court intervention should also alter an agency’s regulatory behavior. Even though the high court only considers a select number of cases every term, an unfavorable Supreme Court precedent could harm the agency’s ability to pursue its policy goals substantially more than that of a single appeals court. The high court’s opinions establish the precedents that all lower courts are intended to follow. An agency could encounter more widespread and extensive opposition to its mission when the Supreme Court issues a negative ruling that structures the behavior of the lower federal courts in future litigation. Thus, the political complexion of the Supreme Court should also influence bureaucratic decision making, and agencies should enact more liberal (conservative) policies as the Supreme Court becomes more liberal (conservative).

Scholars have also demonstrated that federal appellate courts make decisions, in large part, based on the Supreme Court’s established policies and the expectation of how the high court is likely to rule in the event that it grants *certiorari* (e.g., Songer, Segal and Cameron, 1994). Although existing studies might disagree on the reason for this hierarchical relationship (i.e., the extent to which the federal appellate courts have a desire to avoid being overturned by the Supreme Court), extensive evidence exists to support the general claim that lower courts often do not exercise their ideal preferences if they contradict the prevailing political orientation of the Supreme Court (e.g., Haire, Songer and Lindquist, 2003; Hettinger, Lindquist and Martinek, 2006;
Figure 2.1: Bureaucratic Decision Making Within the Federal Judicial Hierarchy

Klein and Hume, 2003; Scott, 2006; Songer, 1987; Songer, Segal and Cameron, 1994). Consequently, bureaucrats should expect that the Supreme Court largely constrains the relevant appeals court’s decisions, and thus the political relationship between the two courts should influence an agency’s decision making calculus.

Imagine that the judicial environment consists of a Supreme Court that is predominantly liberal or conservative as well as a Court of Appeals that is also either liberal or conservative. Figure 2.1 presents a graphical representation of the four possible configurations of the judicial environment and the nature of the agency’s expected decision (in the center of each box) that should result if anticipating the prospect of judicial
review within this hierarchy. First consider a situation in the upper-left quadrant where a federal agency faces the prospect of review by a Court of Appeals and Supreme Court that are both predominantly liberal. In such a scenario, both courts are likely to view any regulatory decision in the same manner and thus judges serving on the Court of Appeals are free to exercise their ideal preferences. This should lead the agency to exhibit more liberal decisions. The lower-right quadrant, where both the relevant appellate court and high court are predominantly conservative, would yield a similar prediction but in the conservative direction.

Next, consider a scenario where the political composition of the Supreme Court significantly diverges from that of the appellate court. The upper-right quadrant in Figure 2.1, for example, presents a judicial environment consisting of a conservative Supreme Court while the appellate court is predominantly liberal. Judges serving on the Court of Appeals, in this case, will not often be free to pursue their ideal policy outcomes and must frequently hew toward the high court’s preferences. Thus, the agency should be more inclined to anticipate how the Supreme Court is likely to view its actions and thus should exhibit a greater probability of rendering a conservative decision in the presence of this judicial environment. If an agency is faced with a judicial environment characteristic of the lower-left quadrant, it should once again be more likely to anticipate how the Supreme Court is likely to view its actions and thus increasingly make liberal decisions. Overall, I expect that the larger judicial hierarchy will also shape how federal agencies perceive the prospect of judicial review. As the Supreme Court becomes more liberal (conservative), federal agencies should be more likely to craft liberal (conservative) policies even when confronted by a conservative (liberal) Court of Appeals.
2.5 Conclusion

Federal agencies play an integral role in the policymaking process. They regularly make the decisions that the elected branches often find too costly to accomplish themselves, but that are also necessary to transform statutes into functional legal provisions. Numerous federal agencies utilize their delegated policy discretion to construct rules and standards on a host of important policy matters, many of which can affect our lives on a daily basis.

With this policy discretion comes the threat that an agency’s political principals—namely Congress and the president—might actively monitor bureaucratic behavior as a means to prevent policy implementation that contradicts their own goals and preferences. Indeed, numerous scholars have examined the various avenues through which Congress and the president can attempt to constrain bureaucratic behavior. However, in contrast to most existing literature, agencies should also have the incentive to be cognizant of the federal judiciary. Since unfavorable litigation can impose significant costs on an agency and its mission, bureaucrats should also make regulatory decisions based on the prospect of judicial review.

In the following chapters, I evaluate this general theory with three separate empirical tests. Each chapter highlights an important federal agency in domestic politics today and examines how the political composition of federal courts with appellate jurisdiction might influence the nature of that agency’s regulatory decisions. Chapter 3 investigates how courts influence the Environmental Protection Agency and its regulatory decisions to support more stringent regulation of environmental statutes. The analysis in Chapter 4 highlights the National Labor Relations Board and how the judiciary affects regulatory support for the rights of labor unions over management (or business) interests. Lastly, Chapter 5 presents the Occupational Safety & Health Review Commission and how courts shape support for more stringent occupational safety
standards over business interests. On the whole, the three empirical tests illustrate the meaningful role of the judiciary in shaping the bureaucratic policymaking process.
Chapter 3

The Environmental Protection Agency

In 2006, the Government Accountability Office (GAO), which is Congress’s investigative arm that regularly audits government activities, issued a report documenting inconsistencies in the regional enforcement of the Environmental Protection Agency (EPA). Specifically, the GAO reported that significant regional variation existed within the agency’s regulatory enforcement process, including “the number of inspections performed at regulated facilities and the amount of penalties assessed for noncompliance with environmental regulations” (United States Government Accountability Office, 2006). The GAO partly attributed such discrepancies to “differences in philosophy among regional enforcement staff about how best to secure compliance” (United States Government Accountability Office, 2006).

Although the EPA regularly promulgates national environmental standards, attracts headlines related to hearings before Congress, and responds to White House initiatives, the agency’s regulatory enforcement behavior is largely decentralized. The EPA Administrator and the agency’s national headquarters delegate authority to numerous
regional offices and states to enforce environmental regulations. As a result, this fragmentation of regulatory responsibility has the potential to generate irregularities in enforcement across the country. The EPA’s decentralized regulatory system, and lack of uniform enforcement in particular, raises the question of what motivates such seemingly inconsistent behavior. The answer I propose is that the political composition of relevant courts, including regional differences in the federal Courts of Appeals as well as the ideological composition of the U.S. Supreme Court, impose a rather significant constraint on the EPA’s regulatory enforcement decisions.

3.1 Overview

The principal theoretical argument, as articulated in Chapter 2, characterizes federal agencies as strategic actors that make decisions based on how courts with appellate jurisdiction are likely to view their actions. Even though many scholars often characterize courts as rather insignificant actors in the bureaucratic policymaking process, perhaps largely due to the reactive nature of judicial review, the scope of judicial authority may extend beyond the simple illustration of judges waiting for cases. Since agencies should often find it costly to appear in court, especially when faced with the prospect of an unfavorable disposition on the merits, they should seek to avoid judicial review. Thus, if federal agencies anticipate the prospect of facing judicial review and seek to avoid costly litigation, then courts might assume a far more significant role in the policymaking process than many scholars generally assume.

In particular, agencies would prefer to avoid expending the time and resources necessary to protect policy positions in court or having to adjust their ideal policies following an unfavorable court decision on the merits. Similarly, bureaucrats possess the incentive to avoid judgments that might establish unfavorable precedents, which could constrain the ability to pursue their ideal policy goals far into the future. Chapter
2 outlines two primary considerations that structure an agency’s anticipation of the prospect of judicial review: (1) When are parties likely to appeal an agency’s policy decision in federal court?; (2) Is the court with appellate jurisdiction predisposed to overturn the agency’s policy decision?

A robust scholarly literature establishes that judges act, at least in part, based on their personal policy preferences (e.g., Segal and Spaeth, 2002). As a result, we would expect courts to review and overturn agency policy decisions that deviate significantly from their ideological preferences. Additionally, parties are more likely to expend their own resources and appeal agency decisions as the political composition of those courts diverges from the political nature of the agency’s policy decision (when petitioners are more likely to prevail on the merits). Thus, agencies should condition their policy decisions based on the ideological composition of relevant courts.

The theoretical argument detailed in Chapter 2 also claims that both lower federal appellate courts and the U.S. Supreme Court should significantly influence bureaucratic decision making. Judicial review in the lower federal courts presents the most proximate threat to an agency, as most challenges to agency policies appear in the federal Courts of Appeals. Agencies, as a result, should condition their behavior in circuit regions with divergent ideological preferences. Yet, the possibility of Supreme Court intervention should also alter an agency’s regulatory behavior. The high court’s opinions establish the precedents that all lower courts are intended to follow. Agencies should therefore expect that the political composition of the Supreme Court will constrain the relevant lower court’s decisions, and thus the political relationship between the two courts should influence an agency’s decision making calculus.

The purpose of this chapter is to offer an empirical test of whether the political composition of relevant courts affect the regulatory enforcement behavior of the Environmental Protection Agency (EPA). I construct an original data set of regulatory
enforcement decisions by the Environmental Appeals Board (EAB) as an empirical application to test the theory. The EAB has the regulatory responsibility to preside over appeals to regional enforcement decisions by the EPA. The results demonstrate that the EAB, as the final step in the EPA’s administrative review process, conditions its decisions on the ideological composition of both the federal Courts of Appeals and the U.S. Supreme Court. The data also demonstrate that the political complexion of the Supreme Court conditions the impact of the lower federal courts on the EAB’s decisions. Thus, not only do the results highlight the significance of the judiciary’s influence on the EPA’s regulatory enforcement behavior, but this chapter also points to the importance of the high court’s political composition in shaping bureaucratic policymaking.

In the following sections, I outline the administrative review process within the EPA, the EAB’s scope of regulatory authority, and existing research examining EPA enforcement. I then outline the research design and empirical model used to measure the extent of judicial influence on the EAB. Lastly, I conclude with a discussion of the empirical results and some broader substantive implications of the analysis.

3.2 The Environmental Appeals Board and Administrative Review of Environmental Enforcement

Numerous congressional statutes empower the EPA as the primary federal agency entrusted to regulate and protect the environment. The agency regularly monitors environmental conditions by issuing enforcement actions, mostly through its regional offices, to protect against air pollution, water pollution, hazardous wastes, pesticides, and other environmental hazards (Collin, 2006). Many scholars have studied the EPA’s decentralized enforcement of regulations through its regional offices (e.g., Landy, Roberts and
Thomas, 1994; Mintz, 1995; Whitford, 2005). Similarly, previous studies have often utilized the EPA as an empirical application to test theories of political control of the bureaucracy (e.g., Ringquist, 1995; Whitford, 2005, 2007; Wood and Waterman, 1993). Whitford (2005), for example, uses a duration analysis to demonstrate how the president and Congress continuously compete for control of EPA policy implementation. Although many studies investigate factors influencing the behavior of the EPA’s regional offices, scholars have offered little empirical analysis of the political motivations within the agency’s administrative review process.

Figure 3.1 illustrates the multi-stage regulatory enforcement and administrative review process within the EPA before disputes may enter the federal courts. For cases involving violations of environmental regulations or permit conditions, an EPA regional office will first determine the extent of liability, issue an enforcement action, and then impose a civil penalty. The party subject to the enforcement action may then submit an appeal before an Administrative Law Judge (ALJ). Following the ALJ’s decision, the losing party can challenge this decision before the Environmental Appeals Board. A party subject to EPA enforcement can only file an appeal in federal court following a judgment by the EAB (5 U.S.C. §704). In addition to cases involving civil penalties, the Board also hears petitions for reimbursement of cleanup costs (under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980) and direct challenges to the terms of permits issued either by the agency’s regional offices or individual state agencies. For disputes involving cleanup costs or specific permit conditions,

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1It is possible that the EPA’s regional offices might strategically issue citations and civil penalties based on the prospect of judicial review, thus affecting the types of disputes that may ultimately reach the Environmental Appeals Board. Although such strategic behavior might exist, it should not undermine the test of the theory in this chapter. By constructing a data set of every EAB decision (and since every dispute must go before the Board before entering the federal judiciary), the analysis accounts for every EPA enforcement policy that has the potential to reach the federal courts. Thus, the empirical analysis should reflect the extent to which the agency makes policy decisions, in general, to avoid the potential costs of unfavorable judicial review.
Figure 3.1: The Administrative Review Process of the Environmental Protection Agency
the agency utilizes the preceding administrative review process, except that appeals to an EPA regional office’s decision will proceed straight to the EAB (and not be subject to review by an Administrative Law Judge).

The Environmental Appeals Board is the final decision maker in the EPA’s administrative appeals process. Pursuant to the Administrative Procedure Act (5 U.S.C. §704), parties must exhaust all administrative remedies, and therefore appeal disputes to the EAB, before seeking remedy in the federal courts. The Board is an independent body with authority delegated by the EPA Administrator to hear administrative appeals within the agency (United States Environmental Protection Agency, 2004). Challenges to most major environmental statutes appear before the EAB: the Clean Water Act (CWA); Clean Air Act (CAA); Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA); Safe Drinking Water Act (SDWA); Resource Conservation and Recovery Act (RCRA); Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA); and Toxic Substances Control Act (TSCA). The Administrator appoints four judges to serve on the Board, which decides cases using three-member panels.

3.2.1 The EAB and the Prospect of Judicial Review

I utilize the EAB’s behavior to test my theory of how federal agencies anticipate the prospect of judicial review. Previous research demonstrates the political influence on decision making by Administrative Law Judges within the National Labor Relations Board (Taratoot, 2008). As the EPA’s final regulatory decision maker, the EAB is in a unique position to issue decisions that will enable the agency to avoid the potentially negative consequences of judicial review. The U.S. Court of Appeals for the D.C. Circuit retains exclusive jurisdiction to hear appeals to the promulgation of EPA regulations and national environmental standards. However, nearly all of the relevant statutes assign jurisdiction over appeals concerning regional enforcement behavior
to the appropriate regional Courts of Appeals within the federal court system. For example, the Clean Air Act (§307(b)(1)) specifically states that actions by the Administrator, which are regionally applicable, are subject to review by the regional Court of Appeals (based on the geographic origin of the environmental violation) (42 U.S.C. §7607(b)(1)). Therefore, the regional appellate courts, along with the U.S. Supreme Court, should constrain the Environmental Appeals Board’s regulatory decisions.

Although intended as an impartial administrative body, the Board should strategically issue rulings based on the probability of facing litigation. The EAB should be free to enforce more stringent regulation of the environment when confronted with the prospect of review by more liberal courts. Alternatively, I expect the Board to make decisions that impose less rigorous enforcement when subject to review by more conservative courts. Liberal courts are less likely to overturn agency decisions enforcing more stringent regulation, and therefore the EPA should also be, on average, subject to fewer appeals from conservative challengers. However, conservative courts will more likely issue unfavorable rulings and attract more appeals from those subject to enforcement actions and strict permit conditions. Therefore, the ideological composition of relevant courts should influence decisions by the EAB.

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2 See also e.g., 33 U.S.C. §1369(b)(1) for CWA, 42 U.S.C. §6976(b) for RCRA, and 7 U.S.C. §136(b) for FIFRA. One notable exception is that TSCA assigns appellate jurisdiction to both the D.C. Circuit and the appropriate regional circuit. Appeals to enforcement actions under TSCA represent less than seven percent (19 cases) of the observations in the dataset. The substantive results of the analysis do not change if you remove these observations (p< .05; one-tailed). Additionally, two statutes—EPCRA (42 U.S.C. §11045 (f)(1)) and CERCLA (42 U.S.C. §9613(a))—assign initial appellate jurisdiction to the appropriate regional district court. For cases involving these statutes, I utilize the median of the regional Court of Appeals to account for judicial review in the lower federal courts.

3 I assume that, on average, liberal judges will be more supportive of environmental regulation whereas conservative judges should be more hostile to strict enforcement.

4 This statement assumes that the EPA’s mission generally seeks to increase regulatory efforts to improve environmental conditions. It is possible that, especially during Republican control of the White House, the EPA might show less support for this mission. Liberal environmental groups are certainly more apt to challenge the EPA’s decision making before liberal courts when seeking more stringent regulation. However, the EAB’s decision making should still reflect perceptions of encountering these challenges, thus leading to more rigorous enforcement.
3.3 Data & Methodology

I construct a data set consisting of all published decisions by the Environmental Appeals Board since its inception in 1992 through 2006.\(^5\) The unit of analysis is the individual case in which the Board issued a formal, substantive decision. I drop all cases where the Board’s decision does not definitively reflect an outcome either supporting more or less stringent regulation. Essentially, these cases consist of decisions where the Board did not issue a substantive ruling, but rather dismissed an appeal based totally on a lack of jurisdiction or the untimely filing of an appeal. The EAB will automatically dismiss an appeal if a petitioner does not satisfy the relevant procedural requirements: (1) timely filing the petition within 30 days of a permit decision or ALJ judgment; and (2) substantive appeals must have been appropriately recorded as part of the administrative record (e.g., permit appeals may only come from those participating in the public hearing conducted by the relevant EPA region).\(^6\)

Table 3.1 reports the frequencies of disputes, by statute, in which the EAB issued a formal published decision. Most notably, approximately two-thirds of all appeals brought before the Board involve disputes pursuant to the CAA, CWA, or the RCRA. Although the Board regularly presides over disputes related to most environmental laws, the CAA, CWA, and RCRA represent the most publicized and well-known statutes. Based on the theory, the judicial environment should influence the Board’s decision making while controlling for the political preferences of the EAB judges themselves. Therefore, the empirical analysis must include measures of the EAB’s decisions, the political composition of the Courts of Appeals and Supreme Court, and the political


\(^6\)These dropped cases constitute less than 10 percent of the EAB’s published rulings.
predispositions of the EAB judges serving on the decision panel in each case.

### 3.3.1 Measuring the Content of the EAB’s Decisions and the Judicial Environment

The dependent variable is the dichotomous outcome of whether the Board’s decision in an individual case enforces more or less stringent regulation of environmental statutes. Appeals to enforcement actions and civil penalties originate from either the party subject to enforcement or the EPA regional office issuing the original citation. The former appeals generally ask the EAB to reverse liability and reduce or vacate the civil penalty. In these cases, I code the Board’s decision as reflecting more stringent regulation if the ruling denies the appeal while affirming the previous liability determination and resulting civil penalty. Otherwise, I consider judgments following these appeals that reduce civil penalties or reverse liability altogether to represent less stringent enforcement.

Alternatively, an EPA regional office will submit an appeal to the Board if it seeks harsher enforcement and an increased penalty determination. In these latter cases, I code the Board’s decision as reflecting more stringent regulation if the ruling agrees with the regional office and increases the penalty, but case outcomes represent less stringent enforcement if the Board declines to increase liability and the civil penalty.

The second broad category of EAB judgments—appeals in permit cases—may originate either from the party receiving the permit or private individuals and environmental groups. In the former scenario, those parties seeking a permit generally file appeals seeking less stringent monitoring conditions. Thus, EAB decisions that affirm

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7In order to assess reliability, a second coder generated a random sample of 50 EAB decisions and coded both the dependent variable and appellate court jurisdiction in each case. The inter-coder reliability was consistent in over 95 percent of those sample cases.
<table>
<thead>
<tr>
<th>Statute</th>
<th>Number of Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Clean Water Act (CWA)</td>
<td>71 (24.3 %)</td>
</tr>
<tr>
<td>Clean Air Act (CAA)</td>
<td>68 (23.3 %)</td>
</tr>
<tr>
<td>Resource Conservation &amp; Recovery Act (RCRA)</td>
<td>58 (19.9 %)</td>
</tr>
<tr>
<td>Federal Insecticide, Fungicide, &amp; Rodenticide Act (FIFRA)</td>
<td>23 (7.9 %)</td>
</tr>
<tr>
<td>Toxic Substances Control Act (TSCA)</td>
<td>19 (6.5 %)</td>
</tr>
<tr>
<td>Superfund (CERCLA)</td>
<td>17 (5.8 %)</td>
</tr>
<tr>
<td>Safe Drinking Water Act (SDWA)</td>
<td>17 (5.8 %)</td>
</tr>
<tr>
<td>Emergency Planning &amp; Community Right-to-Know Act (EPCRA)</td>
<td>12 (4.1 %)</td>
</tr>
<tr>
<td>Multiple Statutes</td>
<td>4 (1.4 %)</td>
</tr>
<tr>
<td>Equal Access to Justice Act (EAJA)</td>
<td>2 (0.7 %)</td>
</tr>
<tr>
<td>Marine Protection, Research, &amp; Sanctuaries Act (MPRSA)</td>
<td>1 (0.3 %)</td>
</tr>
</tbody>
</table>
the permit conditions issued by the region represent more rigorous environmental restrictions, whereas less stringent regulation reflects a decision granting further review of the permit terms. In the latter scenario, private individuals and groups generally request harsher permit conditions as a means to improve the environment. If the EAB grants further review of any permit challenges by an environmental group, I code the decision as indicating more strenuous enforcement; otherwise the outcome resembles less stringent regulation. Overall, I code a “1” if the decision reflects more rigorous enforcement of environmental standards, and a “0” if not. Due to the binary dependent variable, I implement a logistic regression model predicting whether or not the Board supports more stringent enforcement of environmental regulations in each case.

I include two substantive predictors to assess the degree to which the political composition of the relevant courts affect EAB decisions. The first substantive predictor of interest—Appeals Court Liberalism—measures the ideological tenor of the Court of Appeals with regional jurisdiction to hear challenges to the EAB’s decision. I code the ideological position of the median member of the regional appeals court where the dispute originated. For example, I would use the ideological composition of the U.S. Court of Appeals for the Ninth Circuit to predict a case outcome based on an enforcement action originally issued by EPA Region X in California. I utilize the Judicial Common Space scores to measure the ideological medians of the regional Courts of Appeals (Epstein et al., 2007). Epstein and her colleagues derive these ideological preference measures from those originally created by Giles, Hettinger and Peppers (2001).  

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8I do not distinguish between the EAB’s rulings on individual issues raised within a single case because the Board does not generally exercise discretion to review only selected issues. Instead, the Board considers all issues that a petition raises (assuming that they meet the procedural requirements), regardless of merit. The result is that parties will often appeal on the basis of as many issues as possible within the procedural requirements. Thus, the EAB, even if substantially reversing a permit or ALJ decision, rarely overturns a decision on the basis of every single issue raised in the case (and often does so based on a single issue).

9Giles, Hettinger, and Peppers rely on the NOMINATE Common Space scores (Poole and Rosenthal, 1997; Poole, 1998) as well as the assumption of senatorial courtesy in order to create individual
Although these preference estimates are imperfect indicators of the general ideological orientation of appeals court judges and medians at large, Giles, Hettinger and Peppers (2001) demonstrate that they substantially improve upon alternative existing measures, such as the appointing president’s partisan affiliation. I re-code the Judicial Common Space Scores such that higher values indicate more liberalism and lower values reflect increased conservatism. Therefore, I expect a positive relationship between the probability of the EAB’s decision supporting more stringent environmental enforcement and the appeals court’s ideological composition.

Although the Courts of Appeals preside over the majority of challenges to agency policy, the possibility of Supreme Court intervention should also alter the Board’s decision making calculus. Establishing an unfavorable Supreme Court precedent could harm the agency’s mission substantially more than that of a single appeals court. Thus, I also include a predictor accounting for the high court’s ideological composition. *Supreme Court Liberalism* indicates the ideological rating of the median justice on the Court during each term using the Judicial Common Space scores (Epstein et al., 2007). This measure is a transformed version of the dynamic ideal points created by Martin and Quinn (2002), derived in the same ideological space as the other institutional preference measures. Similar to the expected effect of *Appeals Court Liberalism*, I anticipate a positive relationship between the dependent variable and the high court’s ideological composition. A more conservative (liberal) Supreme Court should induce the EAB to enforce less (more) stringent regulation of the environment, in addition to the immediate prospect of judicial review in the lower courts.

Given the expectation that the Supreme Court constrains decisions by the Courts of

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ideal points for appeals court judges. Each judge receives the NOMINATE Common Space score of his or her home-state Senator if the appointing president and that Senator share the same partisan affiliation (or the average of both home-state Senators if they both belong to the same party as the president). If neither home-state Senator shares the partisan affiliation of the appointing president, then the judge receives the president’s NOMINATE Common Space ideal point.
Appeals, as outlined in Chapter 2, the EAB should also take into account the relative preferences of the two courts. In the case that both courts are predominantly liberal (conservative), the appeals court will be free to exercise its ideal preferences. Thus, I expect the EAB to enforce more (less) stringent regulation consistent with the ideological preferences of the relevant Court of Appeals. However, in a scenario where the Supreme Court and relevant Court of Appeals have divergent political preferences, the EAB’s behavior should hew closer to the high court’s preferences. In other words, when confronted by a liberal (conservative) Supreme Court and conservative (liberal) appeals court, the Board should issue judgments reflecting more (less) stringent enforcement if anticipating that the Court of Appeals will be constrained by the high court and therefore will not be able to make decisions based on its ideal preferences.

3.3.2 Accounting for Additional Influences on the EAB

I also include several control variables accounting for the impact of the EAB panel’s political composition, Congress, presidential administration, and citizen appeals. First, the political inclinations of EAB judges that serve on the panel deciding each case should influence decisions to enforce more stringent environmental regulation. Based on the assumption that Democrats are, on average, more supportive of actively protecting the environment and government regulation in general, I expect that EAB panels with higher concentrations of Democrats will be more likely to enforce more rigorous regulatory enforcement. Therefore, serving as a proxy measure of each decision panel’s political preferences, I measure the proportion of the three-member panel in each case that was originally appointed by a Democratic Administrator.\textsuperscript{10}

Scholars have also demonstrated that the political composition of Congress can

\textsuperscript{10}I classify Democratic Administrators as those that were appointed by a Democratic president. I received information on the appointments of EAB judges from the Clerk of the Board using a Freedom of Information Act (FOIA) request.
significantly affect the EPA’s behavior (e.g., Whitford, 2007). Congress has various monitoring mechanisms (e.g., audits) at its disposal and has considerable authority over an agency’s discretion and budget. Thus, the EAB might intentionally make regulatory decisions that Congress and its committees will view in a favorable light. I include predictors indicating the median member’s ideological position for each committee with primary environmental oversight responsibility—the Senate Committee on Environment and Public Works and the House Committee on Energy and Commerce.\(^{11}\) I utilize the NOMINATE Common Space ideal points to determine the ideological position of the median member of each relevant committee during the year of the Board’s decision (Poole, 1998; Poole and Rosenthal, 1997).\(^{12}\) A positive relationship between either the House or Senate committee’s ideological composition and the EAB’s decision would suggest that the prevailing political orientation of Congress (and its committees) influences the Board’s decision making.

In addition to the influence of congressional committees, I introduce two dummy variables to account for the effect of presidential administrations. Since the president appoints the EPA Administrator, who in turn appoints judges to serve on the Board, it is possible that the president and this appointment process might also have a significant impact. Similarly, the White House often exhibits significant influence over the political direction of bureaucratic policy and an agency’s individual budget. Thus, I include one dummy variable to reflect the years of the George H. W. Bush administration. I code a “1” for observations during 1992 and a “0” for all other case outcomes. In order to

\(^{11}\text{One could also include predictors controlling for the full House and Senate chamber medians. I do not include the general chamber predictors because of severe multicollinearity between the committee and full chamber medians. The House chamber median is correlated with the House committee at 0.91, while Senate chamber and committee medians are correlated at 0.79. However, the results are consistent when including the control variables for the full chambers or substituting them for the committees (p< .05, one-tailed).}\)

\(^{12}\text{I re-code the NOMINATE Common Space scores such that higher values reflect more liberalism.}\)
control for the George W. Bush administration, I create a separate predictor by coding a “1” for all cases from 2001-2006 and a “0” for observations during 1992-2000. Based on the presumption that Republican presidents are generally less supportive of environmental regulation, a significant negative relationship for the George H. W. Bush and George W. Bush administration dummy variables would demonstrate the expected effect of presidential influence on the EAB’s decisions.

Lastly, environmental statutes afford private citizens the ability to pursue litigation on behalf of the environment, thus providing the requisite standing to bring an appeal to federal court. As a result, I include a dummy variable accounting for all EAB case outcomes that result from appeals by private citizens and interest groups. Since environmental interests can often have considerable resources or increased resolve to pursue environmental protection through litigation, the EAB might be more inclined to issue pro-environment rulings in response to these appeals as a means to prevent future litigation. I code a “1” for cases involving citizen suit appeals and a “0” for all other observations. Table 3.2 reports the descriptive statistics, including the mean, standard deviation, and range, for all variables in the empirical model.

### 3.4 Analysis & Results

Table 3.3 reports the logit regression results of a model predicting the probability that the EAB issues a decision supporting more stringent enforcement of environmental regulations. Additionally, I compute predicted probabilities simulating the effects of both

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13 Therefore, case outcomes during the Clinton administration (1993-2000) serve as the baseline category in the expanded categorical variable accounting for presidential administration.

14 Previous decisions made by an ALJ in each case might also affect the EAB’s judgments (see Taratoot (2008), for example, on the impact of Administrative Law Judges on decisions by the National Labor Relations Board). However, I do not include ALJ decisions in the empirical model because only civil penalty cases appear before an ALJ before moving to the EAB, which only constitute approximately half of the EAB’s decisions between 1992 and 2006.
<table>
<thead>
<tr>
<th>Variable</th>
<th>Mean</th>
<th>Std. Deviation</th>
<th>Range</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pro-Environment Decision</td>
<td>.54</td>
<td>.50</td>
<td>[0, 1]</td>
</tr>
<tr>
<td>Appeals Court Liberalism</td>
<td>-.11</td>
<td>.22</td>
<td>[-.50, .32]</td>
</tr>
<tr>
<td>Supreme Court Liberalism</td>
<td>-.06</td>
<td>.06</td>
<td>[-.12, .08]</td>
</tr>
<tr>
<td>Panel Partisanship</td>
<td>.24</td>
<td>.26</td>
<td>[0, 1]</td>
</tr>
<tr>
<td>Senate Committee Liberalism</td>
<td>.04</td>
<td>.17</td>
<td>[-.15, .27]</td>
</tr>
<tr>
<td>House Committee Liberalism</td>
<td>-.14</td>
<td>.22</td>
<td>[-.35, .17]</td>
</tr>
<tr>
<td>George H.W. Administration</td>
<td>.13</td>
<td>.34</td>
<td>[0, 1]</td>
</tr>
<tr>
<td>George W. Bush Administration</td>
<td>.27</td>
<td>.44</td>
<td>[0, 1]</td>
</tr>
<tr>
<td>Citizen Appeals</td>
<td>.26</td>
<td>.44</td>
<td>[0, 1]</td>
</tr>
</tbody>
</table>
**Appeals Court Liberalism** and **Supreme Court Liberalism** due to the logit model’s assumption of non-linearity in the model parameters. Since the Board’s inception in 1992 through 2006, **Appeals Court Liberalism** does exhibit a positive, statistically significant effect on the likelihood of supporting more rigorous environmental enforcement. The EAB is more inclined to issue pro-environment judgments as the relevant appeals court median becomes more liberal.15

Figure 3.2 displays the predicted probability of the EAB issuing a pro-environment decision based on the range of values observed for **Appeals Court Liberalism**.16 The Board is 71 percent likely to support more stringent environmental enforcement when the Court of Appeals with appellate jurisdiction is at its most liberal position during the sample period (0.32). Alternatively, when the appeals court median resides at its most conservative position in the sample (-0.50), the Board supports more rigorous enforcement with only a 38-percent probability. When viewing the relevant Court of Appeals median at its mean level (-0.11), the EAB is 54 percent likely to make a pro-environment decision. Moving the position of the median appeals court judge just one standard deviation away from the mean in the liberal direction demonstrates that the Board is nine percent more likely to promote more stringent environmental enforcement. Consequently, the results demonstrate that the EAB makes its decisions with an eye toward the general ideological tenor of the Court of Appeals with appellate

15Including a predictor that measures the variance of all judges’ ideal points within a given appeals court (using the standard deviation as the indicator) and assessing whether the intra-circuit variance moderates the median member’s effect on the EAB does not yield a significant result. The EAB is arguably more likely to anticipate judicial review based on broader perceptions of an appeals court’s ideological composition (and its political reputation) than based on the preferences of individual judges and the likelihood of drawing a particular panel.

16I calculate predicted probabilities, using results from Table 3.3, for each 0.1 increment in **Appeals Court Liberalism** between the minimum and maximum values observed during the sample period. I hold all remaining variables at their mean values in order to simulate the general effect of appeals court composition on the dependent variable. I compute all predicted probabilities using the “CLARIFY” program in Stata (Tomz, Wittenberg and King, 2003; King, Tomz and Wittenberg, 2000).
Table 3.3: How the Ideological Composition of Federal Courts Shape Decisions by the Environmental Appeals Board, 1992-2006

<table>
<thead>
<tr>
<th>Predictor</th>
<th>Coefficient</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Appeals Court Liberalism</td>
<td>1.70*</td>
<td>(.65)</td>
</tr>
<tr>
<td>Supreme Court Liberalism</td>
<td>13.67*</td>
<td>(6.20)</td>
</tr>
<tr>
<td>Panel Partisanship</td>
<td>1.62*</td>
<td>(.85)</td>
</tr>
<tr>
<td>Senate Committee Liberalism</td>
<td>.10</td>
<td>(3.41)</td>
</tr>
<tr>
<td>House Committee Liberalism</td>
<td>-.06</td>
<td>(3.22)</td>
</tr>
<tr>
<td>George H.W. Administration</td>
<td>-.04</td>
<td>(.52)</td>
</tr>
<tr>
<td>George W. Bush Administration</td>
<td>-1.86*</td>
<td>(1.12)</td>
</tr>
<tr>
<td>Citizen Appeals</td>
<td>-1.80*</td>
<td>(.32)</td>
</tr>
<tr>
<td>Constant</td>
<td>-15.39*</td>
<td>(6.95)</td>
</tr>
</tbody>
</table>

N 292
Log-likelihood -175.91
Pseudo-R² .13

Note: Table entries are MLE logit coefficients with standard errors in parentheses; * = $p < .05$ (one-tailed). The dependent variable represents decisions by the Environmental Appeals Board to enforce more stringent environmental regulation.
In addition to the effect of *Appeals Court Liberalism*, the ideological composition of the Supreme Court also significantly influences the EAB’s decisions. The Board is more likely to issue pro-environment rulings as the high court’s median member becomes more liberal. Figure 3.3 presents the predicted probabilities associated with the effect of *Supreme Court Liberalism*.\(^{17}\) When the Court median is at its most liberal position during the sample period (0.08), the EAB exhibits an 87-percent simulated probability of enforcing more stringent regulation. However, the Board will only support a pro-environment position 36 percent of the time when confronted with a Supreme Court median at its most conservative position (-0.12). When viewing Supreme Court Liberalism at its mean level (-0.06), the EAB is 54 percent likely to issue a more stringent ruling. Importantly, the Board is 20 percent more likely to support more rigorous environmental enforcement when the Supreme Court median is one standard deviation away from the mean in the liberal direction.

Additionally, Figure 3.4 illustrates the degree to which the EAB issues rulings based on the expectation that the political composition of the Supreme Court will constrain decisions by the Courts of Appeals. It presents predicted probabilities for the effect of *Appeals Court Liberalism* on the EAB when holding the ideological position of the median Supreme Court justice at its mean, one standard deviation away from the mean in the liberal direction, and one standard deviation in the conservative direction. When holding both Supreme Court and appeals court ideology at their mean levels, the EAB will enforce more stringent environmental regulation with an estimated 54-percent probability. When both the appeals court and Supreme Court medians are one

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\(^{17}\) I calculate predicted probabilities, using regression results from Table 3.3, for each 0.03 increment in *Supreme Court Liberalism* between the minimum and maximum values observed during the sample period. I hold all remaining variables at their mean values in order to simulate the general effect on the dependent variable. I compute all predicted probabilities using the “CLARIFY” program in Stata (Tomz, Wittenberg and King, 2003; King, Tomz and Wittenberg, 2000).
Figure 3.2: The Effect of Appeals Court Liberalism on Decisions by the Environmental Appeals Board, 1992-2006
standard deviation away from their means in the liberal direction (and the Court of Appeals is free to exercise its ideal preferences), the EAB is 80 percent likely to enforce more stringent enforcement. Similarly, the EAB will issue a pro-environment decision only 26 percent of the time when both courts are one standard deviation away from their respective means in the conservative direction.

However, when the Supreme Court median is one standard deviation away from its mean in the liberal direction while the Court of Appeals composition is one standard deviation in the conservative direction (and therefore the appeals court may not have the ability to exercise its ideal preferences), the EAB will enforce more stringent enforcement of environmental regulations with a 66-percent probability. In other words, even when confronted with the immediate prospect of judicial review by a more conservative Court of Appeals, the EAB is still considerably more likely to issue a pro-environment judgment. Similarly, the Board will enforce more stringent regulation only 41 percent of the time when Appeals Court Liberalism is one standard deviation in the liberal direction but Supreme Court Liberalism is one standard deviation away from the mean in the conservative direction.

The data support the conclusion that the ideological compositions of the regional Courts of Appeals and the Supreme Court both generate a meaningful influence on bureaucratic decision making. Furthermore, the political composition of the high court also appears to constrain the influence of the lower federal courts on the Environmental Appeals Board. Most importantly, the data underscore the importance of Supreme Court composition on bureaucratic decision making. In the presence of a liberal Court of Appeals (measured as one standard deviation away from the mean), shifting the Supreme Court from a liberal to a conservative position (measured as one standard deviation away from its mean in each direction) would generate a 39-percent reduction in the likelihood of a pro-environment decision. Yet, a similar change in the appeals
Figure 3.3: The Effect of Supreme Court Liberalism on Decisions by the Environmental Appeals Board, 1992-2006
Figure 3.4: How the Supreme Court Constrains the Environmental Appeals Board’s Responsiveness to the Lower Federal Courts
courts composition (while holding the high court at a liberal position) would generate
only a 14-percent decrease in the probability of more stringent environmental enforce-
ment. Thus, the Supreme Court demonstrates a significantly larger impact on decisions
by the Environmental Appeals Board than the regional Courts of Appeals. Overall,
the results suggest that the EPA’s final administrative decision maker is cognizant of
how courts are likely to view the agency’s actions and therefore makes decisions based
on the prospect of judicial review.

Aside from the substantive variables measuring judicial influence, predictors ac-
counting for panel composition, the George W. Bush Administration, and citizen ap-
peals all exhibit significant impacts on the EAB’s decisions. Panel Partisanship displays
the expected positive relationship with the Board’s behavior. As a greater proportion of
the panel judges in each case were appointed by Democratic Administrators, the Board
is more likely to issue pro-environment judgments. This result supports the notion that
the political inclinations of the EAB judges themselves influence case outcomes. The
dummy variable controlling for the George W. Bush Administration is also statistically
significant and in the expected direction. The Board was more likely to demonstrate
less rigorous environmental enforcement during George W. Bush’s tenure in office com-
pared to those judgments rendered during the Clinton administration. Thus, the data
provide some evidence of presidential influence on the EAB. Lastly, the probability
of the EAB supporting more stringent regulation actually decreases when faced with
appeals from private citizens. The remaining predictors in the model—the control vari-
ables accounting for the median member of each relevant congressional committee and
the George H. W. Bush administration dummy—do not exhibit statistically significant
effects on the content of the EAB’s decisions.\(^\text{18}\)

\(^{18}\)One potential reason that the ideological complexion of Congress and its committees do not exhibit a significant effect is that the EAB’s role in the administrative review process is rather far removed from the initial promulgation and enforcement of environmental regulations. I would expect
3.5 Discussion & Conclusions

Many scholars and observers commonly view the judiciary as the weakest branch of American government due to its lack of formal enforcement powers and its inability to take unilateral action. This theoretical argument has led many scholars of the bureaucracy and judicial politics to miscalculate the potential political influence that courts might impose on federal agencies. Agencies that concern themselves with the costs and potential negative implications associated with unfavorable court judgments on the merits may possess the incentive to account for judicial preferences. The empirical results indicate that the prospect of judicial review, and not solely the political orientation of the president and legislative branch, does shape regulatory decisions by the Environmental Protection Agency.

The data also suggest that future research examining political control of agency policy implementation should account for the political role of courts. Furthermore, presidential appointment of Supreme Court and appeals court judges might serve as an additional avenue for the White House to indirectly influence public policy implementation. A president seeking to establish increased control over bureaucratic policymaking (and regulatory decisions within the Environmental Protection Agency in particular) might effectively promote this goal with the appointment of politically like-minded judges to the federal bench.

The EPA’s decentralized and fragmented enforcement system enables the agency’s constituent parts to exercise regulatory responsibility based on varying motives. In particular, a primary implication of this chapter is that the agency’s regulatory enforcement may not be uniform across all regions of the country, as the GAO report Congress to demonstrate a more prominent effect on the EPA when it creates and establishes national environmental standards.
suggested. Not only does the EAB make decisions with an eye toward regional variation in courts, but the individual EPA regions, in a further attempt to avoid judicial review, may be more or less proactive in issuing enforcement actions. Likewise, judicial influence in the policymaking process might also extend to congressional delegation of policymaking discretion. As Canes-Wrone (2003, 213) notes, “when the president and Congress increase bureaucratic discretion, they may ultimately be granting influence to the judges with jurisdiction over the administrative decisions.” Accordingly, legislators might also be cognizant of how courts can influence agency implementation. Congress, therefore, may incorporate such a factor into its decision making calculus when determining the level of policy responsibility to delegate to an administrative agency.

Based on these data, further investigation is necessary to examine the full extent of judicial influence on the Environmental Protection Agency’s regulatory process. Do the agency and its regional offices also condition their initial behavior on the ideological composition of courts? In other words, judicial influence might extend beyond decisions by the EAB to multiple stages of the Environmental Protection Agency’s administrative review process. The effect might become apparent from initial decisions by the EPA’s regional offices to issue enforcement actions and civil penalties through the EAB’s appellate decisions at the end of the agency’s administrative appeals process. At the very least, this chapter provides evidence that regulatory decisions with the potential to be challenged in the federal judiciary do consistently respond to the political composition of relevant courts. Thus, the judiciary can maintain a significant degree of influence on the EPA’s regulatory enforcement.

In order to demonstrate that the central theoretical argument detailed in Chapter 2 is generalizable beyond the EPA, I examine regulatory decisions by two other prominent federal agencies in subsequent chapters. In Chapter 4, I examine decisions by the National Labor Relations Board (NLRB) and how the prospect of judicial review affects
the degree to which the NLRB issues rulings that support labor versus management (or business) interests over time.
Chapter 4

The National Labor Relations Board

Labor unions and the right for workers to organize peacefully have long been at the heart of many conflicts within American politics. Dating back to the rapid industrialization and economic development of the early 20th century, and then the declining conditions for both the employed and unemployed during the Great Depression in the 1930s, disagreements over such issues as fair wages and benefits for blue-collar workers have persisted within the political system. The Roosevelt administration and a Democratic Congress first responded to the depressed state of the American worker with the official passage of the National Industrial Recovery Act (NIRA) in 1933. This initial attempt to stimulate the depressed economy allocated authority to the president and executive branch, in part, to enforce standards of working conditions and wages within American industries.

In response to the Supreme Court’s decision in *Schechter Poultry Corp. v. United States* (1935), which declared that the NIRA was an unconstitutional exercise of congressional power, Congress passed the National Labor Relations Act (NLRA) in 1935.¹

¹In a unanimous decision, Justice Charles Hughes declared in *Schechter* that Congress’s delegation
The NLRA, often called the “Wagner Act” following its primary sponsor—Senator Robert Wagner (D-NY), first established the roots and regulatory structure for contemporary protections of labor rights in the United States. Labor unions, today, enjoy a range of protections established by the NLRA, including restrictions on business attempts to curb such “concerted activity” as collective bargaining and individual workers’ rights to establish union membership. Unions exist to represent their members and bargain with employers for better wages, benefits, and general working conditions. Thus, labor unions and their relationships with the business community serve as a significant source of conflict in contemporary politics.

Observers of present-day political debates can look to the recently proposed Employee Free Choice Act, commonly referred to as the “card-check” legislation, to illustrate the core of the debate over labor rights. This legislation, which was introduced to Congress and garnered strong support from labor unions and the Obama administration, included a provision that would force employers to recognize the existence of a union (thus affording the union explicit rights and protections to represent workers under the NLRA) if the business’ individual workers simply signed a card stating their desire to join the union. Under current law, unions must first hold a secret-ballot election to gauge if sufficient support exists to establish union representation (National Labor Relations Board, 2007). Labor groups have generally argued that the proposed legislation is necessary to circumvent management pressure on workers that might occur in a campaign leading up to a representation election. Alternatively, business interests have argued that the new provision would not only be an undemocratic practice but also inhibit the ability of workers to learn of the downsides to union membership, such of power to the president to craft industrial codes regulating employee wages, hours, and minimum age requirements was unconstitutional because the legislature itself did not establish standards of industrial conditions. In other words, the Court declared that Congress could not simply delegate total authority to the executive branch without first creating rules to appraise industrial activity.
as the existence of union dues.

The controversy over the “card-check” legislation illustrates the general conflict over labor rights versus business interests in American politics. The National Labor Relations Board (NLRB) stands at the intersection of this political debate, as it regularly makes decisions clarifying the extent of labor protection and union versus business interests. Although numerous studies have examined the NLRB and the constraints on its regulatory behavior, few studies have explicitly taken account of how courts and litigation might affect its decision making. Most importantly, existing studies do not consider the potential that the mere prospect of judicial review might impose a significant constraint on the regulation of labor rights in the United States.

4.1 Overview

This study proposes a general theory of how the judiciary can influence bureaucratic behavior, even in the absence of a court rendering a judgment in a formal dispute. As outlined in Chapter 2, the primary theoretical argument characterizes federal agencies as strategic actors that, on average, seek to avoid the costs associated with unfavorable judicial review. Unfavorable judgments on the merits, in addition to the immediate transaction costs of responding to any given judicial challenge, could constrain or even prevent an agency’s ability to pursue its ideal policy goals far into the future. Agencies, as a result, should attempt to avoid attracting challengers in federal court and minimize the likelihood that the reviewing court will overturn a particular policy decision. Thus, an agency should make decisions based, in part, on how courts with appellate jurisdiction are likely to view its actions.

Chapter 3 established that the ideological complexion of both the intermediate
Courts of Appeals and the U.S. Supreme Court exhibit a significant influence on regulatory enforcement decisions by the Environmental Protection Agency (EPA). In particular, the Supreme Court, which resides at the pinnacle of the federal judiciary and constrains the decision making of the lower appellate courts, maintains the greatest impact on the degree to which the EPA’s internal administrative review supports more or less stringent enforcement of environmental regulations. Yet, the analysis presented in the previous chapter examines the regulatory behavior of only a single agency. As a result, further analysis is necessary to demonstrate how the influence of federal courts extends beyond the policy responsibility of the EPA and to multiple federal agencies.

The purpose of this chapter is to offer an additional empirical test of the degree to which the political composition of relevant courts affect bureaucratic decision making. Specifically, this chapter examines how the prospect of judicial review shapes the regulatory enforcement decisions of the National Labor Relations Board (NLRB). Since the passage of the National Labor Relations Act and the agency’s creation in 1935, the NLRB has retained significant regulatory authority over national labor policy. This has included supervising collective bargaining in the workplace, protecting employee rights to organize peacefully, and resolving disputes concerning labor practices. The NLRB has exerted regulatory control over one of the most important and politically contentious policy areas within American politics over the last 75 years.

In addition to the significance of the NLRB’s policy authority, its administrative structure differs quite substantially from that of the EPA. While the EPA implements its regulatory authority through both extensive rulemaking and enforcement responsibility, the NLRB, on the other hand, is primarily an enforcement agency. It does not frequently promulgate new regulations and national labor standards. Furthermore, the statutory process of judicial review also differs significantly between the two agencies. The statutory authority to hear initial appeals to the EPA’s enforcement behavior rests
almost exclusively with the regional Court of Appeals in the location where an alleged violation occurred. On the other hand, the National Labor Relations Act prescribes a degree of forum shopping when pursuing appeals to the NLRB’s decisions, as parties may initiate appeals in either the appropriate regional Court of Appeals (based on the geographic location of the dispute) or the U.S. Court of Appeals for the D.C. Circuit. Overall, the NLRB provides an effective empirical application to further test the theory based on the agency’s scope of policy authority, the political nature of its regulatory responsibility, and differences in prescribed avenues for judicial review in the federal courts.

In this chapter, I construct an original data set of regulatory enforcement decisions by the National Labor Relations Board from 1981 to 2005. These data measure the degree to which the Board issues decisions that support labor versus management (or business) interests in unfair labor practice (ULP) disputes. In order to measure the content of the agency’s regulatory enforcement decisions over a greater time span, the data set consists of a random sample of disputes presented to the Board during this 25-year period. The results demonstrate that, in the presence of forum shopping before the intermediate appellate courts, the NLRB conditions its decisions largely on the ideological composition of the U.S. Supreme Court. Thus, the results underscore the high court’s significance, and the prospect of judicial review more generally, as a political constraint on bureaucratic decision making.

In the following sections, I provide an overview of the NLRB’s policy responsibility and scope of authority, its internal administrative review process, and existing research examining influences on the Board’s decision making. Next, I describe the research

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2It is important to note that while appeals to the EPA’s regional enforcement decisions almost always proceed to the regional circuit where any violation occurred geographically, the U.S. Court of Appeals for the D.C. Circuit retains exclusive appellate jurisdiction over the agency’s promulgation of regulations and national environmental standards.
design and empirical model used to measure the extent of judicial influence on the NLRB. I conclude the chapter with a discussion of the empirical results and some broader implications.

4.2 The National Labor Relations Board and Administrative Review of Labor Practices

The National Labor Relations Board is an independent agency with the statutory responsibility to protect workers’ rights to organize peacefully and ensure fair collective bargaining between businesses and unions. The National Labor Relations Act governs the NLRB’s authority to regulate the practices of all businesses engaged in interstate commerce, with only few exceptions (National Labor Relations Board, 2002). Specifically, one of the agency’s primary duties is to regulate unfair labor practices (Murphy, Azoff and Grant, 2008). Any private party, whether a union or individual, may file a charge with a regional office of the NLRB claiming that a business is engaging in an unfair labor practice (National Labor Relations Board, 2009). For example, the Act prohibits business attempts to restrain or prevent individuals from forming and participating in unions (and other “protected concerted activities”) by threatening termination, loss of benefits, or other punishment. Alternatively, businesses may also file charges if they believe that unions are subverting an employee’s right to decline union membership (National Labor Relations Board, 2009). Such violations of the Act might include threatening non-union employees with fines or similar pressure for failing to support and join the union.

Figure 4.1 illustrates the general regulatory enforcement and administrative review

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3One notable exception is agricultural workers, who are not protected by the Act.

4Employers can also charge unions for an unfair labor practice.
process of unfair labor practice charges within the NLRB before disputes may proceed
to federal court. First, the agency’s regional offices must receive a charge from an in-
dividual, labor union, or business that outlines the facts and allegations of an unfair
labor practice. The regional office will then conduct an investigation in order to assess
whether the accusation has merit. Upon finishing an investigation, the Regional Di-
rector will make the final determination whether a charge has sufficient merit in order
to proceed with a formal complaint. Any accusation that the Regional Director finds
credible will proceed through the agency’s review process (Murphy, Azoff and Grant,
2008).

As the first step in the resolution of meritorious charges, the parties involved may
work out a settlement as an alternative to administrative litigation.\(^5\) If the parties
fail to reach a settlement, then the agency will file a formal complaint that initiates
administrative review by an Administrative Law Judge (ALJ) (Murphy, Azoff and
Grant, 2008).\(^6\) After a formal hearing, the ALJ will issue a decision in the dispute.
The losing party, following the ALJ’s disposition of the case, may then appeal the
decision to the full Board. Following the Board’s decision, an appeal to the federal
Courts of Appeals is the next step in the appellate litigation process (Murphy, Azoff
and Grant, 2008). The National Labor Relations Board is the final decision maker in
the agency’s administrative appeals process.

Existing scholarship has contributed considerable insight into the internal decision

\(^5\)It is possible that the NLRB’s regional offices might strategically settle cases and avoid adminis-
trative review based on the prospect of judicial review, thus affecting the types of disputes that may
ultimately reach the full Board. Although such strategic behavior might exist, it should not undermine
the test of the theory in this chapter. By constructing a data set of NLRB judgments, the analysis
will reflect decisions made at earlier stages in the agency’s regulatory process. Thus, while an analysis
of only the Board’s decisions might underestimate the full extent of strategic decision making, it will
still capture the degree to which the agency’s final policy outputs (that may be appealed in federal
court) are consistent with avoiding the potential costs of unfavorable judicial review.

\(^6\)In select cases, a joint motion and stipulation of facts involved in the dispute can bypass review
by an ALJ and move the case directly to the Board (National Labor Relations Board, 2009).
NLRB Regional Office Conducts an Investigation to Ascertain a Meritorious Charge

Regional Director Files a Formal Complaint (in the absence of a settlement)

Appeal to an Administrative Law Judge (excluding cases bypassing ALJ by joint stipulation of facts)

Appeal to the National Labor Relations Board

Appeal to the U.S. Courts of Appeals

Figure 4.1: The Administrative Review Process of the National Labor Relations Board
making of the National Labor Relations Board. In particular, prior research has generally focused on how the agency’s regional offices process charges and conduct initial investigations or the primary determinants of decisions by the full Board (e.g., Moe, 1985; Schmidt, 2002). Numerous studies demonstrate that political factors, most notably the political appointment process and external economic factors, can significantly affect the degree to which parties pursue ULP charges and how the NLRB’s regional offices evaluate these initial complaints (Hoyman, Schmidt and McCall, 2008; Schmidt, 1994, 1995, 2002).

Schmidt (1994, 1995), for example, argues that changes in the political composition of the NLRB, specifically the Reagan administration’s appointment of more conservative Board members, led to increased dismissal rates of union charges filed in the agency’s regional offices. Similarly, labor unions and businesses are also likely to pursue charges strategically, based largely on national and regional political factors (e.g., Schmidt, 2002). As the president, Congress, and the NLRB members all become increasingly conservative, labor unions are more likely to withdraw their initial charges and the regional offices are less likely to determine that their charges have sufficient merit. Business complainants demonstrate a similar effect, as they are more apt to pursue charges when national political factors are more conservative and thus favorable to their interests (Schmidt, 2002).

Many previous studies have also demonstrated that political factors shape the NLRB’s decisions at the national level, in addition to the behavior of the agency’s regional offices. Existing scholarship has consistently illustrated how the political priorities of presidential administrations and the preferences of the Board’s appointees structure how the agency disposes of labor disputes (Cooke and III, 1982; Cooke et al., 1995; Delorme and Wood, 1978; Delorme Jr., Hill and Wood, 1981; Gross, 1981; Moe, 1982, 1985; Scher, 1961). In a seminal study on the NLRB, Delorme and Wood (1978)
show that the partisan affiliation of the appointing president influences the votes of Board members in ULP cases, and that these political inclinations continue to affect decisions even after the appointing president vacates the White House.

Later studies argue that external economic factors, such as the unemployment rate, exhibit an additional influence on the behavior of individual NLRB appointees (e.g., Cooke et al., 1995; Delorme Jr., Hill and Wood, 1981). Moe (1985), in his classic study, expands the examination of NLRB decision making to the aggregate level between 1948–1979 and demonstrates how the agency’s general support for labor interests shifts over time in response to prevailing political and economic factors. The author also concludes that the NLRB often responds to feedback from the judiciary. Using a general indicator of litigation outcomes in favor of labor versus business interests, Moe (1985) shows how judicial decisions can compel the NLRB to adjust its behavior in future cases.

Despite an extensive literature analyzing the political determinants of NLRB decision making, most existing studies offer little theoretical or empirical examination of how the political composition of the judiciary can significantly constrain the NLRB’s decision making. Few studies incorporate courts into models of the political constraints on the Board’s behavior (e.g., Moe, 1985; Taratoot, 2008). Moe (1985), as outlined above, examines how litigation outcomes in the lower federal courts provide feedback leading the NLRB to adjust its future behavior. Taratoot (2008) investigates how the political composition of the regional appellate court and Supreme Court (and not the U.S. Court of Appeals for the D.C. Circuit) influence only NLRB decisions that follow action by an Administrative Law Judge. Thus, previous studies either do not analyze the possibility that the NLRB might attempt to anticipate and avoid judicial review, or they fail to examine the Board’s decision making across the full range of its docket. Similarly, scholars have not examined how the NLRB might anticipate the presence of multiple avenues for appeals in federal court along with the larger judicial hierarchy.
4.2.1 The NLRB and the Prospect of Judicial Review

In this chapter, I utilize decisions by the NLRB, and the degree to which they support labor versus management interests, to offer an additional test of the general theory that federal agencies anticipate the prospect of judicial review. As the final administrative decision maker in disputes over labor practices, the NLRB is in an important position to issue decisions that will enable the agency to avoid the potentially negative consequences of judicial review. Pursuant to the Administrative Procedure Act (5 U.S.C. §704), parties must exhaust all administrative remedies, and therefore appeal disputes to the NLRB, before seeking remedy in the federal courts. Thus, the Board members have the ability to alter the scope of labor disputes as a means to minimize the probability of facing appeals and unfavorable decisions by ideologically divergent courts. Additionally, the Board does not have the authority to directly enforce its decisions (Murphy, Azoff and Grant, 2008). Even if a labor union or business group does not directly appeal a decision made by the NLRB, the agency must petition the relevant Court of Appeals if it becomes necessary to actively enforce compliance with its decision.

If the NLRB makes decisions, in part, with the intent to avoid facing judicial review, the agency should issue more liberal (conservative) judgments as the prevailing political composition of courts with appellate jurisdiction are also liberal (conservative). The Board is more likely to face litigation if it issues a conservative (liberal) decision in the presence of a liberal (conservative) court. Similarly, a predominantly conservative (liberal) court is more likely to overturn the NLRB’s judgment if the agency issues a liberal (conservative) judgment. In the specific context of labor disputes, decisions that support labor unions over management (or business) interests should, on average, reflect more liberal values and sentiment. On the other hand, judgments favoring management interests at the expense of labor rights reflect more conservative decisions.
The NLRB, as a result, should show be more likely to favor labor unions at the expense of management (or business) interests as the relevant court becomes more liberal.

4.2.2 Anticipating the Prospect of Judicial Review in the Presence of Forum Shopping Within the U.S. Courts of Appeals

The appellate litigation process involving judgments by the NLRB differs quite significantly from that of the Environmental Protection Agency. Congress has prescribed a degree of forum shopping when appealing the Board’s labor decisions. A party that receives an unfavorable disposition from the NLRB may appeal the decision to either the regional Court of Appeals where the initial complaint originated (and where the management party conducts business) or the U.S. Court of Appeals for the D.C. Circuit (29 U.S.C. §160(f)). Following a decision by one of these two courts, any case may then be appealed to the U.S. Supreme Court. As a result, the theoretical expectations of how the NLRB might anticipate the prospect of judicial review will also differ compared to how the judicial environment shapes the EPA’s decision making.

The NLRB should most consistently make decisions with an eye toward the political composition of the Supreme Court. Two primary considerations structure this theoretical expectation. Consistent with the general theory outlined in Chapter 2, the Board should expect that the Supreme Court will largely constrain the decisions of either relevant Court of Appeals (e.g., Songer, Segal and Cameron, 1994). The Supreme Court, through this hierarchical influence, will consistently direct how the lower federal courts are intended to view the NLRB’s regulatory decisions. Thus, regardless of the political composition of the relevant appellate courts, the NLRB should anticipate that

7Likewise, if it becomes necessary to actively seek compliance with a decision through a judicial injunction, the NLRB must bring its case before one of these two courts.
any lower court hearing an appeal to its decision would often rule consistent with the high court's ideological preferences. By this account, the NLRB can most effectively anticipate the prospect of judicial review and avoid the costs of litigation by issuing judgments that the Supreme Court is likely to view in a favorable light.

In addition to this expectation, the presence of forum shopping in the lower federal courts should also make the NLRB most responsive to the high court's political composition. Irrespective of the Supreme Court's hierarchical influence, the forum shopping available to potential litigants can create a situation where the Board may not be able to effectively anticipate the prospect of judicial review at the appellate court level. Essentially, the NLRB may not receive a clear signal about how its decision is likely to be viewed by a relevant lower court. In a situation where the two relevant appellate courts share the same prevailing ideological orientation, the NLRB will receive a clear signal regarding how either court is likely to view its actions. However, in the more plausible scenario where there is a significant difference between the ideological preferences of those two courts, any decision that the NLRB might make is likely to contrast the prevailing preferences of one of the two Courts of Appeals with appellate jurisdiction.

Imagine a scenario where the regional Court of Appeals and the D.C. Circuit have similar political orientations. In this situation, the NLRB will be able to form an accurate prediction of the ideological preferences of either lower court that would preside over an appeal. If both appellate courts are predominantly conservative, the Board can expect that a conservative (favoring pro-management or business interests) decision is most likely to be viewed favorably by either Court of Appeals because both courts are likely to view its decisions in the same manner. A conservative NLRB decision, in the presence of two predominantly conservative appellate courts, will most effectively avoid judicial review and the potential costs of being overturned.

Alternatively, consider a situation where a party can challenge the NLRB’s policy
decision in either of two appellate courts that have divergent political preferences. The Board, as a result, must attempt to anticipate judicial review in two judicial circuits that are likely to take different views on the nature of any decision that it might make. If the regional Court of Appeals is predominantly liberal yet the D.C. Circuit is much more conservative, a strategic litigant has a greater ability to challenge the agency’s decision and receive a more favorable disposition in a circuit region that is sympathetic to its own agenda. A party receiving an unfavorable, conservative (or pro-management) NLRB decision is able to challenge the agency’s judgment in the liberal Court of Appeals. On the other hand, if the NLRB makes a liberal (or pro-labor) decision, any potential litigant can expect a greater chance of prevailing on the merits (with a judicial decision that overturns the NLRB’s judgment) in the more conservative D.C. Circuit. Thus, even if the NLRB’s decision comports with the preferences of one Court of Appeals, the agency is still prone to challenges and losing on the merits in the second Court of Appeals jurisdiction. As the political composition of the two Courts of Appeals increasingly diverge, the NLRB will have less of an ability to issue a decision that both relevant appellate courts will view favorably.

The judicial environment since 1980 suggests that the NLRB will disproportionately encounter two appellate courts with largely divergent political preferences. Given the relatively extreme ideological composition of the U.S. Court of Appeals for the D.C. Circuit over the last 25 years, the NLRB, the overwhelming majority of the time, will be faced with the prospect of review by two substantively different appellate courts. Based on the Judicial Common Space scores (Epstein et al., 2007), the ideological composition (measured as the median judge’s ideal point within the circuit) of the U.S. Court of Appeals for the D.C. Circuit has the most ideologically extreme ideal point in 24 of the 25 years between 1981 and 2005. Furthermore, the D.C. Circuit’s median judge during those 24 years is the most extreme liberal or conservative ideal point of any
median judge throughout the entire time period. In other words, the D.C. appellate court median is both the most conservative court in any individual year between 1986 and 2005 (with the sole exception of 2002), and is more conservative than any other circuit region’s median across all years since 1981. Similarly, the D.C. Circuit is the most liberal court from 1981 to 1985, and that ideal point is more liberal than any other liberal court’s median judge from 1981 to 2005. Thus, given the existence of forum shopping at the appellate court level, paired with the high court’s hierarchical influence on lower court decisions, the NLRB should demonstrate much less regard for the political composition of the relevant Courts of Appeals. Consequently, the Board should issue more liberal (conservative) decisions (supporting labor over management or business interests) as the Supreme Court becomes more liberal (conservative).

4.3 Data & Methodology

I construct a data set consisting of appeals in unfair labor practice cases (ULP) appearing before the National Labor Relations Board during 1981–2005. This time period offers a useful sample to test the theory since it provides considerable variance in partisan control of the White House, Congress, political appointments to the serve on the Board, and the ideological composition of the federal judiciary. Additionally, this sample period occurs during a time of many ebbs and flows in the state of the macro economy, and thus enables an effective test of the degree to which various economic factors influence the NLRB’s decisions.

Although ULP cases form the vast majority of the NLRB’s docket each year, the analysis excludes several other common types of disputes. Among the ULP disputes, I drop all supplemental decisions and default judgments. The former cases involve disputes that are considered following a remand from federal court. Thus, supplemental decisions involve NLRB decision making after a party has already appealed the Board’s
prior decision in a given case to an appropriate Court of Appeals. These decisions do not provide an effective test of whether the NLRB is anticipating, and therefore attempting to avoid, judicial review in the federal courts. Similarly, I exclude default judgments since these cases involve parties who fail to meet the procedural requirements of filing timely appeals or adequately responding to a ULP charge. As a result, the Board automatically regards these respondents as liable and guilty of violating the National Labor Relations Act. In essence, default judgments do not require the Board to make a substantive decision in the case.

Aside from ULP charges, representation cases represent the second general category of disputes that can appear before the Board. Representation disputes generally involve NLRB supervision of union elections in the workplace. For instance, when seeking to establish or remove their union representation, employees must conduct an election to determine if sufficient support exists to alter their existing representation agreement. Either the union or management may ask the Board to supervise and conduct the election in order to ensure fairness in the process. I exclude these representation cases because the divide between labor versus management interests (and thus the degree to which the NLRB’s decisions might reflect liberal versus conservative values) is often quite ambiguous, especially when compared to the ULP charges.

The unit of analysis is the individual case in which the Board issued a formal decision, among all ULP disputes that do not involve supplementary or default judgments. In order to produce a data sample that spans a greater time period, I generate a random sample of 50 cases per year to include in the data set. The size of the NLRB’s docket has varied quite significantly from year-to-year since 1981. The total population of applicable ULP cases in a single year has ranged from a low of 119 judgments in 2002 to a maximum of 808 cases in 1982. Therefore, in order to account for the shifting size of the sample populations over time, I weight the regression analysis based on the
total number of applicable ULP cases appearing before the Board in each year. The weights reflect the total population size each year from which I draw a random sample of 50 cases.

4.3.1 Measuring the Content of the NLRB’s Decisions and the Judicial Environment

Based on the theory, the judicial environment should influence the Board’s decision making while controlling for the political preferences of the NLRB appointees themselves. Therefore, the empirical analysis must include measures of the content of the NLRB’s decisions, the political composition of the Courts of Appeals and Supreme Court, and the political predispositions of the NLRB members, among other relevant control variables. The dependent variable, measuring the political content of the Board’s behavior, reflects the degree to which the NLRB’s decision supports labor versus management (or business) interests in each case. I create a trichotomous, ordered dependent variable to code the extent to which each judgment favors labor interests across all issues in the case. I code a “1” if the NLRB supported labor interests in all issues presented in the case, a “-1” if the Board ruled on the side of management in every issue, and a “0” for all mixed decisions that reflect some support for both sides. The NLRB resolved an average of approximately four issues within each single dispute during the sample period. Overall, the Board’s entire judgment favored the labor union in 50 percent of the sample cases. Management or business interests prevailed on every issue in 21 percent of the sample while the NLRB offered a mixed decision 29 percent.

8I obtain the text of each NLRB judgment from the printed volumes containing all of the Board’s published decisions—Decisions and Orders of the National Labor Relations Board. These decisions are also accessible online at: http://www.nlrb.gov/.
of the time.\footnote{I drop the few case outcomes (less than one percent of the sample) where the NLRB’s support for labor versus management interests across all issues in a case is ambiguous.}

I include three substantive predictors to assess the degree to which the political composition of the judiciary affects NLRB decisions. First, there are two variables in the empirical model specifying the ideological composition of the Courts of Appeals with appellate jurisdiction in each dispute. The first appellate court predictor—\textit{Regional Appeals Court Liberalism}—measures the ideological tenor of the Court of Appeals with regional jurisdiction to preside over challenges to the NLRB’s decision. This variable measures the ideological position of the median member of the regional appeals court based on the geographic origin of the labor dispute. For instance, I would specify the ideological composition of the U.S. Court of Appeals for the Fourth Circuit to predict a case outcome based on a ULP charge that was originally filed with the NLRB regional office in Winston-Salem, NC. The second appeals court predictor—\textit{D.C. Circuit Liberalism}—reflects the median member of the U.S. Court of Appeals for the D.C. Circuit, which is the alternative forum to appeal any NLRB decision.

Similar to the analysis of the Environmental Protection Agency in Chapter 3, I utilize the Judicial Common Space scores to measure the ideological medians of each relevant Court of Appeals \citep{Epstein2007}. I re-code the Judicial Common Space Scores such that higher values indicate more liberalism and lower values reflect increased conservatism. If the Board anticipates the prospect of review by the intermediate appellate courts, I expect a positive relationship between the probability of the NLRB’s decision supporting labor unions over management (or business) interests and the ideological composition of both relevant Courts of Appeals.

Although the federal appellate courts preside over most appeals to the NLRB’s decisions, the possibility of Supreme Court intervention and the expectation that the high
court will constrain lower court decisions should most consistently influence the Board’s behavior. An unfavorable Supreme Court precedent could constrain the NLRB’s ability to pursue its policy goals substantially more than that of a single appeals court. Furthermore, given the presence of forum shopping, it may be more difficult to effectively anticipate judicial review at the appellate court level, irrespective of the Supreme Court’s influence on the decisions of those courts. This consideration becomes increasingly important as the ideological composition of the two Courts of Appeals diverge. Thus, I also include a predictor accounting for the general ideological tenor of the Supreme Court. *Supreme Court Liberalism* indicates the ideological rating of the median justice on the Court during each term using a transformed version of the Martin-Quinn scores, recoded so that higher values reflect more liberal preferences (Epstein et al., 2007; Martin and Quinn, 2002). Similar to the expected effect of each Court of Appeals predictor, I expect a positive relationship between the dependent variable and the high court’s ideological composition. A more conservative (liberal) Supreme Court should induce the NLRB to increasingly render judgments in support of management (labor) interests.

### 4.3.2 Accounting for Additional Influences on the NLRB

I include several control variables accounting for the impact of the NLRB panel’s political composition, the influence of congressional committees, partisan control of the White House, macroeconomic factors, and the party appealing charges to the NLRB. Similar to the predictor utilized in Chapter 3, I include a proxy measure of the partisanship of the NLRB members participating in each case. The political inclinations of Board members that serve on the panel deciding each case should influence decisions to support labor versus management interests. Based on the assumption that Democrats are, on average, more sympathetic to the interests of organized labor and Republicans
tend to favor business interests, I expect that NLRB panels with higher concentrations of Democrats will be more likely to favor labor unions in each dispute. Therefore, serving as a proxy measure of each decision panel’s political preferences, I measure the proportion of the panel members in each case that were originally appointed by a Democratic president.¹⁰

Numerous scholars have demonstrated how the NLRB (and the bureaucracy in general) responds to political control of Congress and its committees with oversight responsibility on labor issues and legislation (e.g., Moe, 1985). The congressional committees in particular possess considerable authority over legislation concerning the agency’s discretion and budget, as well as other monitoring mechanisms. The NLRB, as a result, might issue decisions based on how it expects the relevant congressional committees to view its actions. I include two predictors reflecting the median member’s ideological position in each relevant committee—the Senate Committee on Health, Education, Labor, and Pensions as well as the House Committee on Education & Labor.¹¹ I measure the congressional committee medians using the NOMINATE Common Space ideal points, recoded so that higher values signify more liberal preferences (Poole, 1998; Poole and Rosenthal, 1997).¹² A positive relationship would indicate that the NLRB responds to changes in the political control of Congress’s labor committees.

¹⁰ Information on political appointments to serve on the NLRB, including each member’s appointing president and partisan affiliation, is available at: http://www.nlrb.gov/about_us/overview/board/board_members_since_1935.aspx.

¹¹ These are the current names of the two relevant committees in the 111th Congress, however they have changed frequently over time. The House committee was called the Committee on Economic and Educational Opportunities in the 104th Congress and the Committee on Education and the Workforce in the 105th–109th Congress. Likewise, the Senate committee was named the Committee on Labor and Human Resources in the 97th–105th Congress.

¹² One could also include predictors controlling for the general ideological composition of each chamber in Congress and the ideal point of each committee chair. I do not include the full chamber medians or predictors accounting for the committee chairs because of severe multicollinearity with each committee median. However, including the control variables for the full chambers or committee chairs does not change the substantive conclusions about the impact of court composition on the NLRB (p< .05; one-tailed).
Partisan control of the White House acts as an additional political constraint on the NLRB. Whether through the appointment of top-level bureaucrats or influence on the budgetary process, the president can often exhibit a considerable degree of control over policymaking by the NLRB (e.g., Delorme and Wood, 1978; Moe, 1982, 1985) and the bureaucracy more generally (e.g., Lewis, 2008). I specify a predictor accounting for the ideological preferences of the president inhabiting the White House each year. This variable reflects the president’s ideal point using the NOMINATE Common Space scores, recoded so that higher values signify more liberal preferences (Poole, 1998; Poole and Rosenthal, 1997).  

In addition to the numerous predictors accounting for institutional influences on the NLRB, existing scholarship has demonstrated how various macroeconomic factors can shape support for labor rights. In particular, much the same way that inflation and unemployment can shape the general tenor of public opinion (e.g., Durr, 1993; Enns and Kellstedt, 2008; Erikson, MacKuen and Stimson, 2002; Stevenson, 2001), these macroeconomic factors can also have a significant impact on the NLRB’s decision making (e.g., Cooke et al., 1995; Moe, 1985). Higher unemployment generally leads to more liberal sentiment and should therefore increase the probability that the Board will support labor interests in each ULP dispute. On the other hand, higher inflation often increases support for government austerity and conservative mood. A greater rate of inflation should also compel the Board to support businesses over labor unions. I include two objective economic indicators in the empirical model, one measuring the percentage change in the unemployment rate (measured as the change from the previous year to the current year) and the level of the consumer price index to account

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13 The results are consistent if you include a dummy for each presidential administration instead of one general predictor measuring the president’s ideological preferences (p < .05; one-tailed).
for inflation each year.\textsuperscript{14}

Lastly, three predictors account for the various parties who appeal charges to the NLRB. The General Counsel is an independent political appointee that supervises the investigation and prosecution of ULP charges. The General Counsel regularly files exceptions (or appeals) to the ALJ’s decisions. Since this office is generally respected for its expertise, it is possible that the NLRB may confer a degree of deference to the General Counsel’s positions. Thus, I create two dummy variables indicating when the General Counsel’s office files an exception, one for Democrat-appointed General Counsels and the other for Republican officials. I code a “1” when the General Counsel files an exception to initiate an appeal to the Board and “0” if not.

Aside from the General Counsel, employers are the most persistent in filing exceptions before the Board, most likely because labor unions, on average, experience more success before the ALJ. Yet they arguably do so with less consideration given to the merit of an appeal. If the Board considers many appeals by business groups as frivolous attempts to undermine union rights and representation, the NLRB should increasingly rule against such claims. These exceptions generally seek decisions that favor management (or business) interests, and so I expect the Board to increasingly support labor interests in the presence of such exceptions. Following Taratoot (2008), I code a “1” if the employer files an exception and “0” if not. Overall, Table 4.1 reports the descriptive statistics, including the mean, standard deviation, and range, for each variable in the empirical model.\textsuperscript{15}

\textsuperscript{14}Data come from the United States Bureau of Labor Statistics.

\textsuperscript{15}Previous decisions made by the ALJ in each case might also affect the NLRB’s decisions (Taratoot, 2008). If you restrict the analysis only to those cases where an Administrative Law Judge previously issued a decision (approximately 90 percent of the sample cases) and control for the outcome of that judgment, the effects of the relevant court variables do not change (p< .05; one-tailed).
Table 4.1: Descriptive Statistics (National Labor Relations Board)

<table>
<thead>
<tr>
<th>Variable</th>
<th>Mean</th>
<th>Std. Deviation</th>
<th>Range</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pro-Labor Decision</td>
<td>.30</td>
<td>.79</td>
<td>[-1, 1]</td>
</tr>
<tr>
<td>(1= 50.56%; 0= 28.78%; -1= 20.66%)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Regional Appeals Court Liberalism</td>
<td>-.04</td>
<td>.23</td>
<td>[-.50, .52]</td>
</tr>
<tr>
<td>D.C. Circuit Liberalism</td>
<td>-.31</td>
<td>.37</td>
<td>[-.56, .52]</td>
</tr>
<tr>
<td>Supreme Court Liberalism</td>
<td>-.07</td>
<td>.08</td>
<td>[-.20, .10]</td>
</tr>
<tr>
<td>Panel Partisanship</td>
<td>.44</td>
<td>.24</td>
<td>[0, 1]</td>
</tr>
<tr>
<td>Senate Committee Liberalism</td>
<td>.06</td>
<td>.19</td>
<td>[-.26, .33]</td>
</tr>
<tr>
<td>House Committee Liberalism</td>
<td>.02</td>
<td>.22</td>
<td>[-.25, .24]</td>
</tr>
<tr>
<td>President Liberalism</td>
<td>-.23</td>
<td>.45</td>
<td>[-.56, .42]</td>
</tr>
<tr>
<td>Inflation</td>
<td>142.56</td>
<td>31.00</td>
<td>[90.93, 195.28]</td>
</tr>
<tr>
<td>Unemployment (% change)</td>
<td>-.01</td>
<td>.12</td>
<td>[-.22, .28]</td>
</tr>
<tr>
<td>Dem. General Counsel Exception</td>
<td>.16</td>
<td>.37</td>
<td>[0, 1]</td>
</tr>
<tr>
<td>Rep. General Counsel Exception</td>
<td>.25</td>
<td>.44</td>
<td>[0, 1]</td>
</tr>
<tr>
<td>Management Exception</td>
<td>.57</td>
<td>.49</td>
<td>[0, 1]</td>
</tr>
</tbody>
</table>
4.4 Analysis & Results

Table 4.2 reports the results from a generalized ordered logit regression, with robust standard errors clustered on each sample year, estimating the degree to which the ideological composition of federal courts shape decisions by the NLRB. A standard ordered logit model specification is inappropriate because the data violate the parallel regression assumption, as several predictors display significantly different effects across the categories of the dependent variable. I utilize a partial proportional odds variety of the generalized ordered logit model using the statistical package developed by Williams (2006). This model specification estimates two separate parameters for each predictor that violates the parallel regression assumption (one parameter estimate for each ordered configuration of the trichotomous dependent variable) while constraining the effect of all other predictors that do not violate the assumption to a single parameter estimate. Thus, the partial proportional odds model offers the most parsimonious model possible in the presence of disproportional odds associated with at least one predictor. Additionally, I compute predicted probabilities simulating the effect of Supreme Court Liberalism across the range of its observed values.

The empirical results demonstrate that the judicial environment does shape decisions by the NLRB. In particular, the ideological composition of the Supreme Court exhibits a positive, statistically significant effect on the degree to which the Board’s decisions support labor versus management interests. The NLRB is more inclined to issue judgments favoring labor unions as the high court becomes more liberal. Figure 4.2 presents the predicted probabilities of the NLRB supporting labor interests across

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16 The results of a Brant test, following estimation of the standard ordered logit model (without the sample weights), confirm this conclusion. Several predictors violate the parallel regression assumption: D.C. Circuit Liberalism, Supreme Court Liberalism, Panel Partisanship, Republican General Counsel Exception, and Management Exception.
Table 4.2: How the Ideological Composition of the U.S. Supreme Court Shapes Decisions by the National Labor Relations Board, 1981-2005

<table>
<thead>
<tr>
<th>Predictor</th>
<th>Pro-Labor/Mixed vs. Pro-Management</th>
<th>Pro-Labor vs. Mixed/Pro-Management</th>
</tr>
</thead>
<tbody>
<tr>
<td>Regional Appeals Court Liberalism</td>
<td>-.36</td>
<td>-.36</td>
</tr>
<tr>
<td>D.C. Circuit Liberalism</td>
<td>-.99*</td>
<td>.25</td>
</tr>
<tr>
<td>Supreme Court Liberalism</td>
<td>4.65*</td>
<td>.64</td>
</tr>
<tr>
<td>Panel Partisanship</td>
<td>.90*</td>
<td>.12</td>
</tr>
<tr>
<td>Senate Committee Liberalism</td>
<td>.77</td>
<td>.77</td>
</tr>
<tr>
<td>House Committee Liberalism</td>
<td>-1.46</td>
<td>-1.46</td>
</tr>
<tr>
<td>President Liberalism</td>
<td>.28</td>
<td>.28</td>
</tr>
<tr>
<td>Inflation</td>
<td>-.012*</td>
<td>-.012*</td>
</tr>
<tr>
<td>Unemployment (% change)</td>
<td>.94*</td>
<td>.94*</td>
</tr>
<tr>
<td>Dem. General Counsel Exception</td>
<td>-.77*</td>
<td>-.77*</td>
</tr>
<tr>
<td>Rep. General Counsel Exception</td>
<td>-.30*</td>
<td>-.89*</td>
</tr>
<tr>
<td>Management Exception</td>
<td>1.56*</td>
<td>1.16*</td>
</tr>
<tr>
<td>Constant</td>
<td>2.37*</td>
<td>1.42*</td>
</tr>
<tr>
<td>N</td>
<td>1244</td>
<td>1244</td>
</tr>
</tbody>
</table>

Note: Table entries are MLE generalized ordered logit coefficients (with partial proportional odds) and robust standard errors, clustered on each sample year, in parentheses; *p < .05 (one-tailed). The dependent variable represents decisions by the NLRB to support labor versus management (or business) interests. The regression results are weighted by the population size each year (to draw a random sample).
the range of observed values for *Supreme Court Liberalism*.\(^\text{17}\)

The Board is 92 percent likely to rule, at least partly, in favor of labor unions when the Supreme Court is at its most liberal position during the sample period (0.1). Alternatively, when the high court’s median justice resides at its most conservative position in the sample (-0.2), labor interests receive at least partial support in ULP cases about 74 percent of the time. When holding *Supreme Court Liberalism* at its mean level (-0.07), the NLRB is 84 percent likely to make a pro-labor decision. Upon shifting the position of the Court’s median justice one standard deviation away from the mean in the liberal direction, labor interests are five percent more likely to prevail on at least one issue in a given dispute. Consequently, the results demonstrate that the Supreme Court does act to some degree as a political constraint on the NLRB’s decision making.

Although the Supreme Court’s political composition significantly affects the NLRB’s decisions, the lower federal appellate courts present a different result. The predictor measuring the median of the regional Court of Appeals does not influence the Board while the U.S. Court of Appeals for the D.C. Circuit exhibits a significant impact but in the opposite direction than expected. The data suggest that the NLRB is more likely to support the labor position on at least one issue in a given case as the D.C. Circuit’s median member becomes more conservative.

This anomalous result is perhaps merely an artifact of the data. Consistent with the theoretical expectations outlined above, it is reasonable to argue that the NLRB should not be responsive to the political composition of the intermediate Courts of Appeals, irrespective of how the Supreme Court guides lower court decision making. Given

\(^{17}\text{I calculate predicted probabilities, using regression results from Table 4.2, for each 0.03 increment in }\text{*Supreme Court Liberalism* between the minimum and maximum values observed during the sample period. I hold all remaining variables at their mean values in order to simulate the general effect on the dependent variable. I compute all predicted probabilities using the “SPOST” program in Stata (Long and Freese, 2005).}
Figure 4.2: The Effect of Supreme Court Liberalism on Decisions by the National Labor Relations Board, 1981-2005
the presence of forum shopping in the National Labor Relations Act’s judicial review provisions, the Board will often be unable to make a decision that both appellate courts are likely to view favorably. Strategic litigants, as a result, will generally have the ability to challenge the NLRB in a circuit jurisdiction that is predisposed to rule in their favor and against the Board’s position. Furthermore, the great degree of intra-circuit variance and polarization of the D.C. Circuit judges’ political preferences makes it inherently more difficult to accurately anticipate the court’s probable panel composition.

Aside from the substantive predictors measuring the judicial environment, the political predispositions of the decision panel’s composition, economic factors, and the sources of appeals to the Board all demonstrate significant impacts on the NLRB. Panel Partisanship displays the expected positive relationship with the Board’s behavior. As the proportion of panel members affiliated with the Democratic Party increases, the NLRB is more likely to support labor interests in at least one issue within a given case. This result supports the notion that the political inclinations of the NLRB members themselves influence case outcomes. Economic factors also shape the agency’s decision making. Both objective indicators measuring macroeconomic forces are statistically significant and in the expected direction. As the level of inflation increases, the Board is more likely to rule in favor of management (or business) interests at the expense of labor unions. Similarly, changes in unemployment yields a positive relationship with the agency’s behavior. Greater unemployment leads to increased success for labor unions in ULP disputes.

The sources of exceptions filed in each case also influence the NLRB’s decision making. As expected, when employers file exceptions and appeal cases to the Board, labor unions are more likely to prevail on the merits. This result is perhaps due to the Board’s view that many employer exceptions are often frivolous and do not merit overturning the ALJ’s prior decision. Yet when the General Counsel submits appeals to the NLRB,
the Board is more likely to favor management, regardless of the General Counsel’s partisan affiliation. The remaining control variables—Senate Committee Liberalism, House Committee Liberalism, and President Liberalism—do no exhibit statistically significant effects on the way in which the NLRB disposes of cases.

On the whole, the data reveal that the Supreme Court is the most significant political constraint on the Board’s decision making. Supreme Court Liberalism displays an effect on the NLRB that is equal to the influence of inflation and greater than the impacts of the president, Congress, changes in unemployment, and the partisan composition of the Board. Although the absolute magnitude of the Supreme Court’s effect on the NLRB is somewhat modest, it still demonstrates one of the most substantively important constraints on the agency’s decision making. Consequently, the data demonstrate that the NLRB makes decisions with an eye toward the political composition of the nation’s highest court.

4.5 Discussion & Conclusions

Much like the analysis of decisions by the Environmental Protection Agency reported in Chapter 3, the judicial environment functions as a significant political constraint on the regulatory enforcement behavior of the National Labor Relations Board. The empirical results indicate that the prospect of judicial review, and not solely the political orientation of the president and legislative branch, shapes regulatory decisions. Although it appears that the judiciary has a more modest effect on the NLRB compared to the EPA, the data underscore the importance of the U.S. Supreme Court’s membership and ideological complexion as a meaningful factor affecting bureaucratic behavior. This result contrasts the prevailing arguments in existing literature, which often minimize the significance of the high court in shaping the policymaking process.
The data also suggest that future research examining political control of agency policy implementation should also account for the political role of courts, as the judiciary serves as a consequential constraint on bureaucratic behavior. Furthermore, presidential appointment of justices to the Supreme Court might serve as an additional avenue for the White House to indirectly influence public policy implementation. A president seeking to establish increased control over bureaucratic policymaking might effectively promote this goal with the appointment of politically like-minded judges to the federal bench. As a result, presidential appointments to the federal bench present the ability to leave a long-lasting impact on the scope of federal policymaking and regulatory enforcement in particular. This opportunity perhaps holds even greater significance than previously thought.

From a democratic perspective, the results also suggest that the political preferences of unelected judges are, at least in part, responsible for altering some of the decisions made by unelected bureaucrats. Federal agencies that actively seek to avoid judicial review are exhibiting behavior that is perhaps farther removed from the influence of popular will. Bureaucrats maintain a rather substantial policy role and are largely responsible for the tangible outcomes involved in executing and implementing federal legislation. Yet the degree to which these policy decisions cater to the political preferences of judges suggests that federal policymaking is significantly responsive to institutions whose membership is more durable and less prone to change. Thus, during stable periods where the Supreme Court’s membership demonstrates little change, the bureaucracy may be less adaptive in conforming to the more fluid, transient changes that are common in public mood across time and the citizens’ most desired policy outcomes.

In order to further illustrate that the central theoretical argument detailed in Chapter 2 contributes to a general understanding of bureaucratic behavior, beyond just the
Environmental Protection Agency and National Labor Relations Board, I examine regulatory decisions by a third prominent federal agency. Chapter 5 examines regulatory decisions by the Occupational Safety & Health Review Commission (OSHRC) and how the prospect of judicial review affects the degree to which this agency actively protects and regulates occupational safety standards.
Following the turn of the 20th century, occupational safety became an increasingly important social problem in the United States. Greater industrialization and a laissez-faire economy at the end of the 19th century brought more prosperity to many businesses and increased opportunities for individual employment. But, in the eyes of many politicians, a lack of regulation and uniform occupational safety standards also enabled greater hazards to develop in many work settings, as blue-collar workers increasingly suffered from suboptimal working conditions. In particular, workplace fatalities accounted for approximately 10 percent of all male deaths in the United States during 1907–1912 (McGarity and Shapiro, 1993). By most accounts, American industrial workers had enjoyed only marginally improved working conditions by the 1960s. According to the National Safe Workplace Institute, the entire death toll of the Vietnam War amounted to only half the total number of deaths in American workplaces between 1964 and 1975 (McGarity and Shapiro, 1993). Furthermore, such figures illustrate only part of the problem, as less severe workplace injuries are significantly more pervasive than incidents causing fatalities.
Many observers argued throughout the 20th century that regulatory reform was necessary to curb the high rates of occupational injuries and fatalities (McCaffrey, 1982; McGarity and Shapiro, 1993). Congress, in response, passed the Occupational Safety and Health (OSH) Act in 1970 as a means to install greater regulation to improve occupational safety in the United States. Most notably, the General Duty Clause of the OSH Act mandates that employers “shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees” (29 U.S.C. §654). The statute established an agency—the Occupational Safety & Health Administration (OSHA)—located within the Department of Labor with the responsibility to regulate occupational safety conditions. Thus, Congress took an active step toward preventing workplace injuries by establishing greater federal control over numerous business practices in the United States.

Yet, OSHA’s regulatory behavior almost immediately provoked a backlash among many in the business community (McGarity and Shapiro, 1993). In what has become an ongoing debate over the effectiveness and benefit of occupational safety regulation, many business interests countered that greater regulation has negatively affected industrial productivity (McCaffrey, 1982). Despite the hazards often posed by many industrial occupations, OSHA’s critics have often argued that extensive regulation has placed an excessive economic burden on many businesses; a cost, according to many, that far outweighs the benefit of active regulation. Furthermore, the ambiguity inherent in the statutory language of the OSH Act and OSHA’s early regulations has contributed to the political conflict (McGarity and Shapiro, 1993; Morey, 1973). The central debate surrounding workplace regulation, as a result, has focused on both the merit and substantive interpretation of OSHA’s regulatory behavior.

Since the agency’s inception, the regulation of occupational safety has been subject
to numerous political influences, including the changing partisan agendas of presidential administrations and political control of Congress. Indeed, OSHA has demonstrated varying levels of commitment to active regulatory reform over time. Observers often contrast the Carter and Reagan administrations, whose different perspectives on government bureaucracy in general led to noticeable changes in leadership of OSHA and the agency’s general regulatory behavior (McGarity and Shapiro, 1993). Scholars, however, have offered little analysis of how the judiciary has shaped the regulation of occupational safety standards and the administrative review process involving OSHA enforcement in particular. To what extent do courts impose a significant constraint on the regulatory enforcement of workers’ rights and occupational safety in the United States?

5.1 Overview

As outlined in Chapter 2, this study proposes a general theory of how courts regularly influence bureaucratic behavior, even in the absence of agencies directly facing formal litigation. The theory posits that federal agencies, as a means to avoid the potential costs inherent in litigation, should strategically adjust their regulatory behavior. Agencies should, on average, make decisions in order to minimize the probability that parties will challenge their regulatory decisions and that the court with appellate jurisdiction will overturn a given policy. Thus, the mere prospect of judicial review should influence regulatory enforcement within the policymaking process.

Chapters 3 and 4 both established the potential for judicial influence on the bureaucratic policymaking process. Chapter 3 illustrated that the ideological complexion of both the intermediate Courts of Appeals and the U.S. Supreme Court significantly constrain regulatory decisions within the Environmental Protection Agency (EPA) to support more stringent environmental enforcement. Similarly, Chapter 4 demonstrated
that, in the presence of forum shopping at the appellate court level, the political composition of the Supreme Court influences decisions by the National Labor Relations Board (NLRB) to support labor rights over management (or business) interests. Most importantly, the common theme across the previous analytical chapters is the meaningful, consistent impact of the nation’s highest court on decision making within the administrative review process of federal agencies.

The purpose of this chapter is to further evaluate the extent to which the theory detailed in Chapter 2 is generalizable across multiple federal agencies. This chapter provides a third empirical test of the degree to which the political composition of relevant courts affect bureaucratic decision making. Specifically, this chapter examines how the prospect of judicial review shapes the regulatory enforcement decisions of the Occupational Safety & Health Review Commission (OSHRC). Since the passage of the OSH Act in 1970, the OSHRC has retained the final authority to hear disputes over occupational safety before parties may initiate litigation in federal court. The review commission regularly presides over disputes between OSHA and businesses regarding the degree to which the Department of Labor can actively enforce the agency’s regulations and impose costs on businesses to improve occupational safety. Thus, the review commission has considerable influence over the extent of federal regulation of workplace conditions in the United States.

Utilizing the OSHRC as a third empirical application to test the general theory also enriches the study by offering additional variety in the administrative structure of federal agencies analyzed across chapters. In contrast to both the EPA and NLRB, the OSHRC is an independent agency with no rulemaking authority and exists only to preside over challenges to OSHA’s regulatory enforcement behavior. Yet similar to the NLRB, the review commission offers an additional empirical test of judicial influence in the presence of forum shopping at the federal appellate court level. Appeals to decisions
by the OSHRC may proceed to either the appropriate regional Court of Appeals (based on the geographic location of the dispute or business location) or the U.S. Court of Appeals for the D.C. Circuit (29 U.S.C. §660). Overall, the OSHRC offers a suitable empirical application based on the significance and scope of the review commission’s regulatory responsibility and its unique administrative structure (compared to the EPA and NLRB).

In this chapter, I construct an original data set of regulatory enforcement decisions by the Occupational Safety & Health Review Commission between 1985 and 2008. These data measure the degree to which the review commission issues judgments supporting workers’ rights and safe working conditions over business interests. The data set includes every commission decision involving a substantive, non-procedural dispute between the Department of Labor and a given business during the sample period. Similar to the analyses of regulatory enforcement by the EPA and NLRB in Chapters 3 and 4 (respectively), the results demonstrate that the OSHRC makes decisions based, in part, on the ideological composition of the Supreme Court. Thus, the empirical analysis underscores the importance of the high court, and the prospect of judicial review in general, as a meaningful political constraint on bureaucratic decision making.

In the following sections, I provide an overview of the OSHRC’s scope of policy authority, its internal administrative review procedures, and existing research examining OSHA and the regulation of occupational safety conditions in the United States. I then outline the research design and empirical model used to measure the extent of judicial influence on the OSHRC. Lastly, I conclude with a discussion of the empirical results and some broader substantive implications of the analysis.
5.2 The Occupational Safety & Health Review Commission and Administrative Review of Occupational Safety Enforcement

The Occupational Safety & Health Review Commission is an independent agency with the statutory responsibility to review OSHA’s enforcement decisions. OSHA, with authority delegated by the OSH Act, enacts and enforces national occupational safety standards. The agency’s regulatory mission includes protecting workers against an extensive range of potential hazards, from chemicals, explosives, and other toxic substances to fire hazards and general accident prevention (Occupational Safety and Health Administration, 2006). In addition to conducting regular inspections of work sites, the agency’s regional offices receive and respond to complaints from individual workers. So long as a worker provides sufficient detail about an alleged occupational hazard in order to establish credibility, OSHA regional offices will respond to all complaints with a subsequent investigation of the claim.\(^1\) OSHA will then issue citations, that often carry civil penalties, to businesses in response to investigations that uncover working conditions violating the OSH Act or any OSHA regulation.

Figure 5.1 illustrates the general administrative review process in adjudicating occupational safety disputes before they may enter the federal court system. Following an OSHA investigation and subsequent liability determination, the Secretary of Labor’s Office and the business charged with a violation may work out a settlement as an alternative to administrative litigation. If the parties fail to reach a settlement, the business

\(^1\)Information on complaints is available at OSHA’s website: [http://www.osha.gov](http://www.osha.gov). In some cases, usually involving hazards perceived to be very minor that do not present a threat of imminent danger, OSHA will conduct an off-site investigation over the phone.
Figure 5.1: The Administrative Review Process of OSHA and the Occupational Safety & Health Review Commission
may then appeal the Secretary of Labor’s citation and civil penalty to an Administrative Law Judge (ALJ) (McCaffrey, 1982). Following a formal hearing and decision by an ALJ, either party may submit an appeal of the ALJ’s judgment and request review by the Occupational Safety & Health Review Commission. Alternatively, the review commission also has the authority to initiate review of an ALJ’s decision even when neither party submits an appeal. Following a judgment by the OSHRC, an appeal to a federal Court of Appeals is the next step in the appellate litigation process.

Previous research on occupational safety regulation has often focused on several main themes. First, existing studies have attempted to analyze the effectiveness of OSHA inspections and regulation (Gray and Scholz, 1993; Scholz, 1991; Scholz and Gray, 1997). For example, Gray and Scholz (1993) argue that more OSHA inspections lead to a significant decrease in incidents of injuries in the workplace. Similarly, Scholz

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2 An employer must submit a formal appeal—a “Notice of Contest”—in writing within 15 days of receiving a citation. The business will be ineligible to contest a citation and proposed penalty if it fails to timely file a formal appeal (Occupational Safety and Health Review Commission, 1981).

3 The OSHRC does have discretionary authority over its docket. Thus, it is possible that the judicial environment might also influence decisions to grant (or deny) appeals. The OSHRC’s final decisions should automatically incorporate any potential strategic behavior at the agenda-setting stage when the commission grants appeals. However, potential strategic behavior to deny review is not included in the following analysis. For example, an appeal to a pro-worker (or liberal) ALJ decision in the presence of a liberal court with appellate jurisdiction might compel the OSHRC to deny review since the ALJ’s ruling is already consistent with the preferences of the relevant court. Yet, it is also possible that the OSHRC might deny appeals regardless of the prevailing ideological composition of the relevant court. In such a scenario, it is less clear how the OSHRC as an independent agency (that is not internal to OSHA’s administrative hierarchy) might be faced with potential costs for failing to anticipate judicial review (since the OSHRC did not issue a formal decision). Thus, decisions to deny appeals represent an additional important avenue for future research regarding the extent to which the prospect of judicial review influences the regulation of occupational safety in general. The inferences and conclusions drawn from the results in this chapter are confined to the OSHRC’s formal decisions.

4 The ALJ’s judgment becomes final if neither party (or the commission itself) initiates an appeal within 30 days of the OSHRC’s receipt of the ALJ’s disposition (Occupational Safety and Health Review Commission, 1981). Importantly, a party that does not submit an appeal to the OSHRC will not be able to demonstrate that it has exhausted all administrative remedies and thus will not have the requisite standing to initiate litigation in federal court (pursuant to the Administrative Procedures Act (5 U.S.C. §704)). As a result, decisions by the OSHRC to not review an ALJ decision when neither party in a dispute submits an appeal should not affect inferences about the degree to which the agency anticipates judicial review.
and Gray (1997) utilize data on complaints submitted to OSHA and the agency’s subsequent inspections between 1979 and 1985 to conclude that both regular inspections and those initiated by worker complaints can minimize occupational injuries. Thus, numerous studies have demonstrated the substantive importance of OSHA regulation as a means to decrease occupational hazards.

In a separate line of inquiry, existing studies have often examined localized OSHA enforcement from the perspectives of both state and federal governments. In other words, scholars commonly argue that both federal and state-level factors can influence the agency’s localized behavior (Kim, 2008; Scholz and Wei, 1986; Scholz, Twombly and Headrick, 1991; Thompson, 1983; Thompson and Scicchitano, 1985). Thompson and Scicchitano (1985) examine the extent to which states actively regulate occupational safety standards and choose to join OSHA’s implementation by establishing a state enforcement plan. Likewise, previous scholars have demonstrated that county, state, and federal officials all have a significant impact on OSHA’s localized enforcement behavior (Scholz, Twombly and Headrick, 1991). Most importantly, these scholars show that more active enforcement of occupational safety regulations occurs in the presence of greater concentrations of Democratic legislators.

A third prominent theme of existing research on OSHA’s regulatory behavior focuses on institutional constraints. OSHA’s regional enforcement of occupational safety regularly responds to numerous political institutions and constraints at the national level (Headrick, Serra and Twombly, 2002; Kim, 2008; Scholz and Wei, 1986). In a seminal empirical study, Scholz and Wei (1986) construct a panel data set of aggregate citations and penalties issued within individual states each year to demonstrate that presidential administrations, Congress, and unemployment all affect regional enforcement. In particular, the probability of citations and penalties significantly decreased
during the Reagan administration. Alternatively, states that are represented by members of Congress who show a greater concern for labor rights also exhibit increased levels of OSHA regulation. Later studies have focused more explicitly on the influence and potential for congressional oversight with data on district-level enforcement (Headrick, Serra and Twombly, 2002). Lastly, Kim (2008) presents a formal model accompanied by an empirical analysis that demonstrates how the relative political preferences of various veto players—namely the president, Congress, and the relevant labor committees in each congressional chamber—combine to constrain OSHA’s enforcement behavior. Essentially, the author argues that the preferences of these players create institutional boundaries that induce OSHA to exhibit behavior consistent with those preferences and constraints (Kim, 2008).

Despite a vast number of studies that examine numerous potential constraints on OSHA’s behavior, scholars have largely ignored the extent to which courts can influence the enforcement of occupational safety standards. Furthermore, to my knowledge, no prior empirical research investigates the influence of political constraints on administrative review of OSHA’s enforcement and the decisions made by the Occupational Safety & Health Review Commission in particular.

5.2.1 The OSHRC and the Prospect of Judicial Review

In this chapter, I utilize the decisions made by the OSHRC as an additional empirical application to examine the degree to which the federal appellate courts and the U.S. Supreme Court shape bureaucratic decision making. The review commission regularly issues judgments that determine the degree to which businesses are liable for occupational hazards at their work sites. Furthermore, the agency’s decisions also dictate the costs (through civil penalties and related costs associated with future prevention of
accidents) that employers must incur in order to improve occupational safety. Essentially, the OSHRC conducts a cost-benefit analysis when reviewing occupational safety enforcement. The agency must balance the interest of improving workplace safety conditions against the burden imposed on numerous businesses as a result of heightened regulation.

The OSHRC makes decisions with its own preferences and mission in mind. Whether to ensure that occupational safety enforcement reflects the interest of the sitting presidential administration, potential oversight by congressional committees, or the commission members’ own unique preferences, the agency makes decisions to promote its numerous goals. However, if a judicial decision overturns the OSHRC’s interpretation of an occupational safety regulation, it could create an unfavorable precedent and establish undesirable policy boundaries that will constrain the review commission’s future judgments. Such adverse policy restrictions created by negative precedents could prevent the OSHRC from issuing judgments reflecting the review commission’s ideal preferences. Unfavorable judicial review, as a result, could obstruct the agency’s ability to pursue its policy goals far into the future. In order to avoid the potential for negative precedents, the OSHRC should issue judgments that anticipate how courts are likely to view its actions. Thus, the review commission should also make decisions based on the prospect of judicial review.

If the OSHRC makes decisions, in part, with the intent to avoid facing judicial review, the agency should issue more liberal (conservative) judgments as the prevailing political composition of courts with appellate jurisdiction are also liberal (conservative). The review commission is more likely to face litigation if it issues a conservative (liberal) decision in the presence of a liberal (conservative) court. Similarly, a predominantly conservative (liberal) court is more likely to overturn the OSHRC’s judgment if the agency issues a liberal (conservative) judgment. In the specific context of the
review commission’s decisions, judgments that support more active regulation and penalize businesses for occupational safety hazards should, on average, reflect more liberal decisions. Alternatively, judgments supporting business interests and less regulation represent more conservative decisions. The review commission, as a result, should demonstrate increased support for workers’ rights and occupational safety standards as the relevant court becomes more liberal.\(^5\)

Parties that wish to challenge the review commission’s decisions have the discretion to submit an appeal to either the regional Court of Appeals where the investigation originated (or where the employer conducts business) or the U.S. Court of Appeals for the D.C. Circuit (29 U.S.C. §660). Following a decision by one of these two courts, the losing party may then appeal the appellate court’s judgment to the U.S. Supreme Court. Consistent with the theoretical expectations detailed in Chapter 4’s analysis on the National Labor Relations Board, the OSHRC should most consistently make decisions with an eye toward the political composition of the Supreme Court. Essentially, the presence of forum shopping at the appellate court level creates a situation where the OSHRC may not receive a clear signal regarding the preferences of the Court of Appeals with jurisdiction to hear appeals to its decisions.

Imagine a scenario where the two regional Courts of Appeals with appellate jurisdiction largely share the same political composition. In this situation, the review commission will be able to form an accurate prediction of the ideological preferences of

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\(^5\)The OSHRC’s judgments generally involve both decisions to rule in favor (or against) workers’ rights and the degree of support for increased occupational safety regulation. The ideal indicator of the review commission’s degree of support for occupational safety would reflect a continuous measure incorporating the precise amount of a civil penalty levied on a business. However, I utilize an ordinal indicator of the OSHRC’s support for occupational safety regulation due to the inability to conclusively determine the dollar amount of the civil penalty in every case. The agency’s published case files do not consistently report the amount of the final civil penalties levied in every decision included in the data set.
the court that would preside over any appeal. The OSHRC can expect that both appellate courts are likely to view its decisions in the same manner. If both appellate courts are predominantly liberal, the commission can expect that a liberal decision supporting more stringent regulation of occupational safety will most effectively anticipate the prospect of judicial review. Alternatively, consider a situation where the review commission is confronted by two appellate courts with divergent political preferences. The OSHRC, as a result, will be faced with courts that are likely to take different views on the nature of any decision that it might make. Even if the review commission’s decision comports with one appellate court’s preferences, the agency is still prone to challenges and unfavorable dispositions on the merits in the second Court of Appeals jurisdiction. As the political composition of the two Courts of Appeals increasingly diverge, the OSHRC will have less of an ability to issue a decision that both relevant appellate courts will view favorably.

Due to the relatively extreme ideological composition of the U.S. Court of Appeals for the D.C. Circuit over the last 25 years, the review commission will disproportionately encounter two appellate courts with largely divergent political preferences. Thus, given the existence of forum shopping at the appellate court level, paired with the high court’s hierarchical influence on lower court decisions, the OSHRC should issue more liberal (conservative) decisions (supporting more active regulation over business interests) as the Supreme Court becomes more liberal (conservative).

5.3 Data & Methodology

I construct an original data set of all published decisions issued by the Occupational Safety & Health Review Commission from 1985 to 2008. This time period offers considerable variance in the partisan control of the White House, Congress, political appointments to the review commission, and the ideological composition of courts in the
federal judiciary. Thus, the selected time period should provide a suitable sample to test the theory. The unit of analysis is the individual case in which the review commission issued a formal decision, among all substantive disputes that do not involve supplementary or default judgments.

The following analysis excludes several types of cases that the review commission frequently encounters. First, I only include decisions where the OSHRC issued a substantive judgment on the merits of an alleged citation and proposed civil penalty. In other words, I drop default judgments and other procedural decisions where the review commission ruled solely on matters of an admissible appeal or testimony. Default judgments involve parties who fail to meet the procedural requirements of filing timely appeals to the ALJ’s decision. These parties generally ask the OSHRC to grant review despite the untimely filing. But, the review commission rarely grants such requests. An extensive norm exists to dismiss these appeals solely on the grounds that they did not meet the agency’s procedural requirements. Such cases do not represent decision making on the merits of support for occupational safety versus business interests. I also drop all supplemental decisions, which involve disputes that are considered following a remand from federal court. Thus, supplemental decisions involve OSHRC decision making after a party has already appealed a decision to an appropriate Court of Appeals. Since a federal court has already weighed in on the particular matter, these cases do not provide an effective test of whether the OSHRC is anticipating, and therefore attempting to avoid, judicial review in the federal courts.⁶

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⁶The analysis also excludes the few cases concerning disputes over legal fees pursuant to the Equal Access to Justice Act (EAJA).
5.3.1 Measuring the Content of the OSHRC’s Decisions and the Judicial Environment

In order to present an effective test of the theory that the judicial environment constrains the review commission’s judgments, the empirical analysis must include measures of the content of the OSHRC’s decisions (serving as the dependent variable), the political composition of the relevant Courts of Appeals and U.S. Supreme Court (the primary independent variables), as well as other relevant control variables. The dependent variable used in the analysis measures the political content of the OSHRC’s decision making among all substantive cases. I construct the dependent variable to reflect the extent to which each OSHRC judgment supports pro-worker rights and increased regulation of occupational safety at the expense of business interests.\(^7\)

I create a trichotomous, ordered dependent variable to measure the degree of support for pro-worker rights and occupational safety across all issues present in a single case. I code a “1” if the OSHRC supported pro-worker interests in all issues presented in the case, a “-1” if the review commission ruled in favor of the employer or business in every issue, and a “0” for all mixed decisions that reflect some support for both sides. In most instances, each case required the review commission to resolve challenges to civil penalties issued by OSHA and the Secretary of Labor. Pro-worker decisions represent judgments that affirm the entire amount of a civil penalty, pro-business rulings occur when the review commission vacates the total penalty, and mixed decisions reflect the partial reduction of a fine. Overall, the review commission, between 1985 and 2008, issued judgments favoring more stringent occupational safety regulation among

\(^7\)I obtain the text of each OSHRC judgment from the compilation of the agency’s published decisions posted on the following website: http://www.oshrc.gov/decisions/decisions.html. In several cases during the 1980s, the OSHRC presents a case title with no active link to the text of the review commission’s decision. I have dropped these few cases from the analysis since the agency has not posted the text of its decision in what amounts to a lost case file.
all issues in an individual case 49 percent of the time. Business interests, or less stringent regulation of workplace safety, prevailed on every issue in 32 percent of the sample while the OSHRC offered a mixed decision 19 percent of the time.

I include three substantive predictors to examine the impact of the judicial environment (i.e., the political composition of relevant courts with appellate jurisdiction) on OSHRC decisions. These predictors are similar to those used in the previous chapter when analyzing decisions by the National Labor Relations Board. Two variables in the empirical model specify the ideological composition of the U.S. Courts of Appeals with appellate jurisdiction in each case. The first predictor—*D.C. Circuit Liberalism*—reflects the ideological ideal point for the median member of the U.S. Court of Appeals for the D.C. Circuit. The OSH Act declares that any potential litigant may challenge an OSHRC judgment before the D.C. Circuit (29 U.S.C. §660).

The second appellate court variable—*Regional Appeals Court Liberalism*—indicates the ideological tenor of the Court of Appeals with regional jurisdiction to hear appeals to the review commission’s decision. This variable measures the median member’s ideological ideal point for the regional appeals court based on the geographic origin of the workplace incident. For example, I would specify the ideological composition of the U.S. Court of Appeals for the Fifth Circuit to predict a case outcome based on a workplace investigation originating in the state of Texas. The OSH Act also enables a party to initiate an appeal in a judicial circuit where the employer holds its principal place of business. In cases where the review commission’s decision clearly distinguishes that the employer’s principal place of business is located in a different judicial circuit than the origin of the investigation, I include the median ideal point for the Court of Appeals that diverges the most from the political composition of the D.C. Circuit. In such a scenario, this strategy models the greatest variety in forum shopping that is available to a strategic party evaluating the potential probability of prevailing on the
merits.

Similar to the previous analyses, I utilize the Judicial Common Space scores to measure the ideological medians of each relevant Court of Appeals (Epstein et al., 2007). I re-code the Judicial Common Space Scores such that higher values indicate more liberalism and lower values reflect increased conservatism. If the OSHRC anticipates the prospect of review by the intermediate appellate courts, I expect a positive relationship between the probability that the review commission supports pro-worker rights over business interests and the ideological composition of both relevant Courts of Appeals.

Consistent with the theoretical expectation outlined in the previous chapter regarding the presence of forum shopping available to strategic litigants, the Supreme Court should exhibit the greatest impact on the agency’s decisions. Thus, I also include a predictor accounting for the general ideological tenor of the Supreme Court. *Supreme Court Liberalism* indicates the median justice’s ideological position on the Court during each term using a transformed version of the Martin-Quinn scores, recoded so that higher values reflect more liberal preferences (Epstein et al., 2007; Martin and Quinn, 2002). Similar to the expected effect of the Courts of Appeals predictors, I expect a positive relationship between the OSHRC’s support for occupational safety and the high court’s ideological composition. A more conservative (liberal) Supreme Court should induce the OSHRC to increasingly render judgments in support of business (pro-worker) interests.

### 5.3.2 Accounting for Additional Influences on the OSHRC

I include several control variables to account for the potential impact of the political inclinations of the review commission’s members, the influence of congressional committees, partisan control of the White House, and unemployment. First, the variable accounting for the political preferences of the commissioners deciding each case is a
proxy measure reflecting the general partisanship of the OSHRC. Democrats are, on average, more sympathetic to the increased regulation and workers’ rights while Republicans tend to favor business interests. In order to measure the general partisanship of the commission, I measure the proportion of the three-member commission that was originally appointed by a Democratic president. I expect that a commission composed of more Democrats is, on average, more likely to support occupational safety over business interests in each dispute.

Numerous scholars have demonstrated how OSHA responds to changes in the political control of Congress and its committees with oversight responsibility on occupational safety matters (e.g., Headrick, Serra and Twombly, 2002). Furthermore, prior research demonstrates that OSHA issues more citations and greater penalties in the presence of more Democratic legislators (e.g., Scholz, Twombly and Headrick, 1991). The OSHRC, as a result, might also issue decisions based on how it expects the relevant congressional committees to view its actions. I include two predictors reflecting the median member’s ideological position in each relevant committee—the Senate Committee on Health, Education, Labor, and Pensions as well as the House Committee on Education & Labor. I adopt the same measurement strategy as the previous chapter and use the NOMINATE Common Space ideal points for each relevant committee median, recoded so that higher values signify more liberal preferences (Poole, 1998; Poole and Rosenthal, 1997). A positive relationship would indicate that the OSHRC responds to changes

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8 Information on political appointments to the OSHRC is available at: http://www.oshrc.gov/about/agency-chairmen.html.

9 These are the current names of the two relevant committees in the 111th Congress, however they have changed frequently over time. The House committee was called the Committee on Economic and Educational Opportunities in the 104th Congress and the Committee on Education and the Workforce in the 105th–109th Congress. Likewise, the Senate committee was named the Committee on Labor and Human Resources in the 97th–105th Congress.

10 Including control variables for the full chambers or committee chairs does not change the results and substantive conclusions about the impact of court composition on the OSHRC (p< .05; one-tailed).
in the political control of Congress’s labor committees.

The political party controlling the White House and executive branch presents another potential political constraint on the degree to which the agency supports more active regulation of occupational safety. Research on OSHA’s enforcement demonstrates how political control of the presidency can influence the extent of occupational safety regulation (e.g., Scholz and Wei, 1986). Thus, I include a measure of the ideological preferences of the president occupying the White House each year. This variable reflects the president’s ideal point using the NOMINATE Common Space scores, recoded so that higher values signify more liberal preferences (Poole, 1998; Poole and Rosenthal, 1997).11

Lastly, existing scholarship has demonstrated how various macroeconomic factors can shape support for a larger, more active government. Erikson, MacKuen and Stimson (2002) demonstrate that greater changes in unemployment generally lead to more liberal sentiment. Alternatively, research specific to occupational safety enforcement suggests that higher unemployment might actually contribute to less support for increased enforcement efforts, as regulators might be sensitive to placing an increased burden on businesses while experiencing a depressed economy (e.g., Scholz and Wei, 1986). I thus include an objective economic indicator measuring the percentage change in the unemployment rate (measured as the change from the previous year to the current year). This predictor accounts for the impact of perceptions about the direction of the economy on the OSHRC’s judgments.12 Overall, Table 5.1 reports the descriptive statistics, including the mean, standard deviation, and range, for each variable in the empirical model.

11 The results are consistent if you include a dummy for each presidential administration instead of one general predictor measuring the president’s ideological preferences (p < .05; one-tailed).

12 Data come from the United States Bureau of Labor Statistics.
Table 5.1: Descriptive Statistics (Occupational Safety & Health Review Commission)

<table>
<thead>
<tr>
<th>Variable</th>
<th>Mean</th>
<th>Std. Deviation</th>
<th>Range</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pro-Worker Decision</td>
<td>.17</td>
<td>.88</td>
<td>[-1, 1]</td>
</tr>
<tr>
<td>(1= 48.95%; 0= 18.88%; -1= 32.17%)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Regional Appeals Court Liberalism</td>
<td>-.14</td>
<td>.22</td>
<td>[-.56, .32]</td>
</tr>
<tr>
<td>D.C. Circuit Liberalism</td>
<td>-.48</td>
<td>.17</td>
<td>[-.56, .37]</td>
</tr>
<tr>
<td>Supreme Court Liberalism</td>
<td>-.08</td>
<td>.07</td>
<td>[-.20, .08]</td>
</tr>
<tr>
<td>Panel Partisanship</td>
<td>.31</td>
<td>.34</td>
<td>[0, 1]</td>
</tr>
<tr>
<td>Senate Committee Liberalism</td>
<td>.08</td>
<td>.21</td>
<td>[-.26, .33]</td>
</tr>
<tr>
<td>House Committee Liberalism</td>
<td>.01</td>
<td>.23</td>
<td>[-.25, .24]</td>
</tr>
<tr>
<td>President Liberalism</td>
<td>-.12</td>
<td>.47</td>
<td>[-.56, .42]</td>
</tr>
<tr>
<td>Unemployment (% change)</td>
<td>-.01</td>
<td>.11</td>
<td>[-.12, .26]</td>
</tr>
</tbody>
</table>
5.4 Analysis & Results

Table 5.2 reports the results from a generalized ordered logit regression estimating the degree to which the ideological composition of federal courts shape decisions by the OSHRC. Due to the trichotomous, ordered dependent variable, I utilize the same regression technique employed in Chapter 4’s analysis of the National Labor Relations Board. Since several predictors violate the parallel regression assumption, the partial proportional odds variety of the generalized ordered logit model is an appropriate and parsimonious specification (Williams, 2006). Additionally, I compute predicted probabilities simulating the effect of Supreme Court Liberalism across the range of its observed values during the sample period.

Consistent with the empirical results in previous analyses, the judicial environment also shapes decisions by the OSHRC. In particular, the ideological composition of the Supreme Court exhibits a positive, statistically significant effect on the degree to which the review commission supports pro-worker rights over business interests. The OSHRC is more likely to issue judgments favoring more stringent occupational safety standards as the high court becomes more liberal. Figure 5.2 presents the predicted probabilities of supporting pro-worker interests across the range of observed values of Supreme Court Liberalism.

The review commission is approximately 68 percent likely to rule in favor of pro-worker interests across all issues in a case and 83 percent likely to show at least partial

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13The results of a Brant test, following estimation of the standard ordered logit model, confirm this conclusion. Two predictors violate the parallel regression assumption: President Liberalism and Unemployment.

14I calculate predicted probabilities, using regression results from Table 5.2, for each 0.03 increment in Supreme Court Liberalism between the minimum and maximum values observed during the sample period. I hold all remaining variables at their mean values in order to simulate the general effect on the dependent variable. I compute all predicted probabilities using the “SPOST” program in Stata (Long and Freese, 2005).
Table 5.2: How the Ideological Composition of the U.S. Supreme Court Shapes Decisions by the Occupational Safety & Health Review Commission, 1985-2008

<table>
<thead>
<tr>
<th>Predictor</th>
<th>Pro-Worker/Mixed vs. Pro-Business</th>
<th>Pro-Worker vs. Mixed/Pro-Business</th>
</tr>
</thead>
<tbody>
<tr>
<td>Regional Appeals Court Liberalism</td>
<td>.002</td>
<td>.002</td>
</tr>
<tr>
<td></td>
<td>(.46)</td>
<td>(.46)</td>
</tr>
<tr>
<td>D.C. Circuit Liberalism</td>
<td>.18</td>
<td>.18</td>
</tr>
<tr>
<td></td>
<td>(.60)</td>
<td>(.60)</td>
</tr>
<tr>
<td>Supreme Court Liberalism</td>
<td>4.99*</td>
<td>4.99*</td>
</tr>
<tr>
<td></td>
<td>(1.89)</td>
<td>(1.89)</td>
</tr>
<tr>
<td>Panel Partisanship</td>
<td>.41</td>
<td>.41</td>
</tr>
<tr>
<td></td>
<td>(.52)</td>
<td>(.52)</td>
</tr>
<tr>
<td>Senate Committee Liberalism</td>
<td>1.77</td>
<td>1.77</td>
</tr>
<tr>
<td></td>
<td>(1.23)</td>
<td>(1.23)</td>
</tr>
<tr>
<td>House Committee Liberalism</td>
<td>-.35</td>
<td>-.35</td>
</tr>
<tr>
<td></td>
<td>(1.35)</td>
<td>(1.35)</td>
</tr>
<tr>
<td>President Liberalism</td>
<td>.86*</td>
<td>1.72*</td>
</tr>
<tr>
<td></td>
<td>(.35)</td>
<td>(.36)</td>
</tr>
<tr>
<td>Unemployment (% change)</td>
<td>2.01</td>
<td>5.94*</td>
</tr>
<tr>
<td></td>
<td>(1.35)</td>
<td>(1.36)</td>
</tr>
<tr>
<td>Constant</td>
<td>1.13*</td>
<td>.43</td>
</tr>
<tr>
<td></td>
<td>(.39)</td>
<td>(.39)</td>
</tr>
<tr>
<td>N</td>
<td>426</td>
<td>426</td>
</tr>
<tr>
<td>Log-likelihood</td>
<td>-407.94</td>
<td>-407.94</td>
</tr>
<tr>
<td>Pseudo-R^2</td>
<td>.07</td>
<td>.07</td>
</tr>
</tbody>
</table>

*Note:* Table entries are MLE generalized ordered logit coefficients (with partial proportional odds) and standard errors in parentheses; *p < .05 (one-tailed). The dependent variable represents decisions by the Occupational Safety & Health Review Commission to support workplace safety over business interests.
support when the Supreme Court is at its most liberal position in the sample (0.08). Alternatively, when the high court is at its most conservative position during the sample period (-0.2), pro-worker interests are likely to receive full support from the OSHRC just 34 percent of the time and at least partial support with only a 54-percent estimated probability. When holding *Supreme Court Liberalism* at its mean level (-0.08), the OSHRC is 48 percent likely to offer complete support for occupational safety and 68 percent likely to make a partial pro-worker decision. Yet, when shifting the position of the Court’s median justice one standard deviation away from the mean in the liberal direction, pro-worker interests are roughly eight percent more likely to prevail in a given dispute. Consequently, the results demonstrate that the review commission issues judgments in anticipation of the ideological composition of the Supreme Court.

Although the Supreme Court’s political composition significantly affects the OSHRC’s decisions, the lower federal appellate courts present a different result. The impacts of both predictors accounting the political composition of the federal appellate courts with jurisdiction to hear appeals—*D.C. Circuit Liberalism* and *Regional Appeals Court Liberalism*—are not statistically significant. This result is not surprising given the presence of forum shopping for strategic litigants at the appellate court level. It is unlikely that the review commission can effectively anticipate which Court of Appeals it will face if a party appeals its decision. Combined with the expectation that the Supreme Court will constrain, to a large degree, either lower court’s decisions, it is sensible that the high court will exhibit the greatest impact on the regulation of occupational safety.

In addition to the substantive predictors measuring the judicial environment, political control of the White House and unemployment both exhibit a meaningful effect on the review commission’s judgments. The OSHRC is significantly more likely to demonstrate at least partial support for occupational safety standards as the sitting
Figure 5.2: The Effect of Supreme Court Liberalism on Decisions by the Occupational Safety & Health Review Commission, 1985-2008
president’s ideological preferences become more liberal. Furthermore, the partial proportional odds model shows that the president’s ideology illustrates an even greater effect, statistically, when the review commission shows full support for workers’ rights across all issues within an individual dispute.\textsuperscript{15} Not surprisingly, even though Congress created the commission to operate as an independent agency, the data suggest that the political orientation of the person inhabiting the White House has a meaningful impact on how the OSHRC rules in favor (or against) the Secretary of Labor.

Unemployment also shapes decision making by the OSHRC, as the predictor accounting for the rate of change in unemployment is statistically significant and in the expected direction. Greater changes in unemployment yield a positive relationship with the agency’s behavior. The commission is more likely to rule in favor of stringent regulation of occupational safety as the unemployment rate of change increases. Thus, the data contrast previous work on OSHA’s enforcement behavior, suggesting that the review commission shows little regard for the burden placed on businesses based on perceptions of the health and direction of the economy. Rather, it appears that the OSHRC issues more pro-worker decisions in response to unemployment much the same way that the broader public reacts to changes in this objective economic indicator (e.g., Erikson, MacKuen and Stimson, 2002). The remaining control variables—\textit{Panel Partisanship}, \textit{Senate Committee Liberalism}, and \textit{House Committee Liberalism}—do no exhibit statistically significant effects on the review commission’s decision making. Overall, the data suggest that the OSHRC makes decisions based on the prospect of judicial review in general and with an eye toward the political composition of the nation’s highest court in particular.

\textsuperscript{15}This interpretation follows from the fact that the effect of president ideology on the OSHRC’s decisions is statistically greater in one ordered combination of the dependent variable compared to the other.
5.5 Discussion & Conclusions

This chapter provides additional evidence detailing the extent of judicial influence on the bureaucratic policymaking process. Even when considering an independent agency, such as the Occupational Safety & Health Review Commission, that exists solely to settle administrative disputes over occupational safety standards, the judiciary is still an important political constraint. Most importantly, the analysis in this chapter reinforces the broader impact of the U.S. Supreme Court in shaping regulatory enforcement. The nation’s highest court significantly constrains the behavior of the OSHRC in addition to the Environmental Protection Agency and National Labor Relations Board. The Supreme Court, as a result, might have a much more consistent and meaningful impact on policy implementation in the United States than many scholars have often assumed. Furthermore, this judicial constraint is evident among several agencies with varying policy responsibilities, scopes of policymaking authority, and administrative structures. This fact underscores the political significance associated with appointments to the Supreme Court, as the political complexion of the high court has a more significant role within interinstitutional politics than previously thought.

An important implication of the results in this chapter is how congressional choices when creating federal agencies can have substantial consequences for political responsiveness in general and judicial influence in particular. This chapter, paired with the analysis in the previous chapter on the National Labor Relations Board, demonstrates how the presence of forum shopping at the appellate court level might make federal agencies only responsive to the Supreme Court (and not the lower federal courts). Thus, the study suggests that a Congress who wishes to empower courts as significant players in the policymaking process should prescribe specific judicial review provisions by explicitly outlining the path for judicial recourse and appeals. Based on the numerous results of this study, such a decision would ensure that courts have the greatest impact
on bureaucratic policymaking.

Yet, members of Congress, who may want to insulate their policy choices and agency decisions from the indirect influence of courts, might create statutory provisions for forum shopping at the appellate court level. In the presence of choices to initiate litigation in the lower courts, only the Supreme Court demonstrates a meaningful impact on bureaucratic policy. Congress might be better able to anticipate how agencies factor the judiciary into their decision making since membership change on the high court occurs much less frequently than appointments to the lower federal courts. Overall, the political composition of courts is not only an important constraint on bureaucratic policymaking, but it might serve as a resource to fulfill the political ends of other institutional actors in American politics.
Chapter 6

Conclusion

The federal judiciary has gradually become an institutionalized component of American democracy. Not only has the sheer size of the judiciary increased, but the influence of courts on important matters of public policy has expanded quite significantly. A voluminous body of litigation now appears before the federal courts, and judges today regularly make decisions on a host of important policy concerns that shape the contours of American politics over time.

The institutional development of the federal judiciary has also paralleled a dramatic expansion in the federal government and bureaucracy over the course of the 20th century. The bureaucracy now occupies a central position in the American political process. Although federal agencies make regulatory decisions largely away from the public eye, they are essential to a well-functioning government. Today, many federal agencies receive a considerable degree of autonomy to implement congressional laws. They regularly establish standards and rules on a host of important policy concerns. The safety of our drinking water, protection from misleading business advertising, and safeguards against hazards in the workplace are just a few examples of these responsibilities. In some fashion or another, the way in which agencies exercise their regulatory responsibility influences our lives on a daily basis.
Given the significant role of federal agencies in structuring public policy, a primary concern for the elected branches is how to ensure that federal agencies utilize their regulatory authority in a manner consistent with legislative or executive branch policy agendas. Numerous scholars, consequently, have contributed to a vast literature documenting how the president and Congress can monitor and constrain bureaucratic decision making. Yet, despite the increasingly prominent role of federal courts in American politics, existing studies have not devoted sufficient attention to how the judiciary can actively constrain bureaucratic decision making.

This study set out to determine the extent of judicial influence in the bureaucratic policymaking process. Most existing studies have either argued that judges can only have an impact on bureaucratic policy following actual litigation outcomes or they entirely discount any potential influence of courts. I have argued, in contrast, that agencies have the incentive to prevent facing litigation and thus should anticipate how courts are likely to view their actions. This would enable agencies to more effectively promote their own policy goals without incurring the costs often associated with unfavorable judicial review. If the political composition of courts can compel federal agencies to adjust their behavior in order to avoid facing litigation, then perhaps the judiciary has a much more prominent impact on bureaucratic policymaking than most existing scholarly accounts would suggest.

The results of this study show that numerous federal agencies make regulatory decisions with an eye toward the political composition of relevant federal courts. Furthermore, the U.S. Supreme Court exerts the greatest and most consistent impact on bureaucratic policymaking. The high court’s ideological composition exhibits a meaningful effect on the regulatory enforcement of multiple federal agencies with a diverse set of policy responsibilities. Even though some scholars claim that the Supreme Court’s limited docket size offers agencies with little incentive to be concerned with judicial
review before the high court, this study indicates that the nation’s highest court is, in fact, a persistent political constraint on bureaucratic decision making.

To be sure, the analyses offered in this study examine only one critical component of bureaucratic policymaking—the enforcement of statutes and regulations. The initial promulgation of regulatory standards by federal agencies represents an additional, important facet of the policymaking process that is not analyzed in this study. The degree to which courts impose a significant constraint on agency decision making at this earlier stage in the policymaking process is a question open to empirical scrutiny. Yet, even if the prospect of judicial review has little impact on the promulgation of regulations, the way in which agencies apply those general regulatory standards (and thus the final, tangible results of the multi-stage bureaucratic policymaking process) do shift based on the political composition of federal courts. As a result, it appears that the mere prospect of judicial review can shape how federal agencies utilize their policymaking discretion to implement congressional laws.

6.1 Implications for the Separation of Powers

The results of this study present several important implications for institutional behavior and the separation of powers in American politics. First, the impact of court composition on bureaucratic decision making highlights the significance of judicial appointments as an additional avenue for presidential control of the policymaking process. The president, in addition to the other political controls at his or her disposal (such as bureaucratic appointments and budgetary power), can maintain an additional, indirect influence on federal agencies by appointing judges with similar outlooks on the nature of regulatory policy.

A Democratic president committed to strict regulatory reform of environmental standards, for example, would be well suited to appoint a liberal judge who shares
the same interest in improving the environment. Alternatively, a Republican president might reinforce his or her agenda to relieve the regulatory burden on many businesses by appointing a conservative judge to the federal bench. Most importantly, due to the lifetime tenure afforded to members of the federal judiciary, a president who can secure successful confirmation of like-minded judges can ensure that he or she maintains a lasting influence on the regulatory enforcement of federal agencies. Although appointments to the federal bench have long been significant decisions for those that occupy the White House, the results presented here should further accentuate the importance of selecting federal judges.

A second important implication concerns congressional delegation of policy discretion to federal agencies. Given that bureaucrats seemingly make regulatory decisions with an eye toward the political composition of courts, members of Congress might find it prudent to be cognizant of the judiciary when delegating discretion to agencies. This study’s results suggest that an agency possessing a degree of latitude to implement congressional statutes might use such discretion in a manner that will appeal to courts with appellate jurisdiction. The primary implication is that congressional delegations of broad policy authority to federal agencies might actually transfer greater influence on the policymaking process to federal judges.

Thus, contrary to existing studies examining the political determinants of delegation, Congress might assign less policy discretion to agencies in the presence of a politically divergent judiciary, irrespective of the agency’s own preferences. In other cases, Congress might be willing to delegate more discretion to an agency knowing that an ideologically like-minded court presents a threat of judicial review that should reinforce how bureaucratic policy reflects the legislature’s policy agenda. The presence of bureaucratic anticipation of judicial review, as a result, should present an additional consideration for members of Congress when crafting statutes that assign policymaking
authority to federal agencies.

Lastly, this study holds implications for how Congress drafts statutory language and prescribes avenues for judicial review. When parties wish to challenge an agency’s regulatory decision making, the relevant statute defines which courts have jurisdiction to preside over appeals. Chapter 3 of this study demonstrates the potential independent effect of lower court composition on bureaucratic policy implementation. Regulatory enforcement within the Environmental Protection Agency responds to the political composition of both the U.S. Supreme Court and the intermediate Courts of Appeals. This result differs from the subsequent chapters on the National Labor Relations Board and Occupational Safety & Health Review Commission, which only portray the high court as a meaningful influence on each agency. Taken together, these results are consistent with the theoretical argument in Chapter 4 about an agency’s incentives to anticipate the prospect of judicial review in the presence of forum shopping at the appellate court level. When Congress has enabled parties some discretion to pursue litigation in one of two Courts of Appeals, only the Supreme Court appears to influence federal agencies. Yet, in the absence of forum shopping, bureaucrats should also have the incentive to anticipate review by the lower federal courts.

The primary implication of this result is that Congress can strategically structure the judicial review process for its own benefit. If members of Congress seek to minimize the influence of the lower federal courts on subsequent policy implementation, they might prescribe a degree of forum shopping in their statutory language. This strategy might prove to be especially important when Congress and the majority of the Supreme Court share the same political orientation. It should be easier for Congress to forecast the potential membership turnover, and thus changes in political composition, of the high court compared to each of twelve relevant Courts of Appeals. Congress could most likely prevent the potential that an agency might make decisions with an
eye toward an ideologically divergent lower court. As a result, the presence of forum shopping could largely eliminate any independent impact of the lower courts on agency decisions, thus making regulatory policy only responsive to the high court. Overall, such a decision might allow Congress to minimize the likelihood that an agency will shirk and act contrary to legislative wishes. On the whole, this study suggests that the judiciary might play a more prominent role in how the separation of powers shapes the bureaucratic policymaking process.

6.2 Implications for Representation

The results of this study also speak to the nature of representation in American politics. To some degree, the results suggest that bureaucratic policy implementation may not be uniform across the country. Chapter 3, in particular, demonstrates that regulatory enforcement within the Environmental Protection Agency responds, in part, to regional variation in the political composition of the U.S. Courts of Appeals. The EPA, as a result, should demonstrate substantially different degrees of environmental protection across different states and regions of the country.

The U.S. Court of Appeals for the Fifth Circuit, representing Texas, Louisiana, and Mississippi, has long been one of the most conservative appellate courts within the federal judiciary. Based on this study, it is reasonable to expect that the EPA will exhibit far less stringent protection of the environment for fear of facing litigation and being overturned on the merits. On the other hand, one might expect the agency to demonstrate more stringent regulation of environmental standards in the more liberal region of the U.S. Court of Appeals for the Ninth Circuit. The degree to which a business, for example, might have to incur the increased costs associated with taking active steps to avoid EPA citations and civil penalties could depend, in part, on where it operates. Likewise, individual citizens might be more or less subject to environmental
hazards depending on the physical location of their residence. The true extent to which the health of the environment in one region of the country might be significantly different than another region is surely subject to more factors than regional variation in appellate courts. However, the mere potential that regulatory enforcement might differ depending on geographic location raises the question of the presumed equitable nature of many public policies in the United States.

The study also raises a normative question central to democratic politics: to what extent should final policy outcomes following bureaucratic implementation reflect public opinion? Although the elected branches find it most expedient to delegate policy discretion to federal agencies for the purpose of codifying the details and logistics of their statutes, they have created a set of institutions that are one step removed from the public. Top-level administrators and agency leaders are not directly subject to elections and popular will. Those political appointees who direct the general policy agendas of each agency receive their posts based largely on political loyalty and the presumption that they will carry out the designs of the elected branches. Thus, the degree to which bureaucratic policy implementation reflects the broader opinions of the mass public over time reflects, at best, an indirect association.

However, federal agencies and unelected bureaucrats that make decisions based, at least in part, on how they expect courts to view their actions has the potential to further dilute the influence of public opinion on public policy. Federal judges are themselves never directly subject to elections and popular will. An unelected federal bureaucracy that responds to the political predispositions of unelected judges suggests that regulatory enforcement is perhaps another step farther removed from popular will. This concern might be mitigated given the elected branches’ interest to constrain bureaucratic policy decisions to reflect their own agendas. Congress and the president pursue policy goals that remain largely consistent with prevailing public mood because
of their own direct link with public opinion through elections. The influence of courts, however, on the bureaucracy at least raises the question of the degree to which these institutions central to the policymaking process are consistent with the more general notion of democratic accountability in American politics.


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