When Do Agencies Have Agency?
The Limits of Compliance in the EPA

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This paper raises a question that is little-discussed yet central to lawmaking and policy implementation in the American separation-of-powers system: Under what conditions is Congress unable to induce compliance in contemporary statutory implementation by administrative agencies? Unlike a number of existing delegation models, the paper holds that variation in institutional conflict and oversight of agencies fundamentally reshape agencies' latitude as active policymakers. I answer this question in the context of the Environmental Protection Agency from 1973-2010 using an extensive original dataset on noncompliance using the hand-coding of several thousand congressional bill introductions and several hundred DC Circuit court cases. I use these data to test the separation-of-powers theories concerning the effects of legislative-executive conflict and legislative division on agencies' regulatory compliance, as well as the effect of third-party oversight through litigation. The study provides the first systematic empirical analysis of the extent to which Congress is unable to successfully induce compliance when delegating, providing support for the core inter-branch conflict hypotheses.

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At the heart of American political science is the challenge of implementing policies set by members of Congress engaging in dynamics such as logrolling and bargaining to secure resources for their districts, in ways leading to laws becoming highly complex and fractured "barroom brawl[s]" absent a referee (Wilson 1989: 297-301). With the growth of the modern regulatory state, congressional delegation can be seen as inevitable in order for Congress to play a central role in providing sweeping social and economic programs – as well as efficient in capitalizing on agencies' expertise – though some (*e.g.*, Wilson 1989) see delegation as constraining congressional control over the ultimate implementation of the laws it passes. This pattern of regulation and delegation led Lowi to declare law "a series of written instructions to administrators rather than a series of commands to citizens" (2009: 106).

With recent decades' growth of regulatory scope and legal complexity (Schuck 1992), and bureaucracy's vital impact on our daily lives (*e.g.*, Brehm & Gates 1999), it is crucial to evaluate the extent to which congressional delegations and mandates map on to agency actions in practice, a question to which little work thus far has been undertaken. A common justification for bureaucratic policymaking is that bureaucrats possess and utilize greater expertise than one can reasonably find in the president, judges, and legislators, particularly in technically complex realms. If critiques of congressional delegation or "abdication" are centrally about the extent of democratic representation – with legislators electorally accountable while agencies are operated by appointees and civil servants – then what emerges is a dialogue about the important relationship between representation and administration. With much scholarship on delegation assuming some congressional role in oversight (*e.g.*, McCubbins & Schwartz 1984; McNollgast 1987, 1989; Epstein & O'Halloran 1994, 1996, 1999), we must consider the extent of democratic responsiveness in policymaking when Congress is constrained.

How Congress structures administrative procedures impacts both the agency's political accountability and the technical accuracy of its decisionmaking. With perfect bureaucratic accountability, they would choose the "best" result on behalf of the principals if they held that

same information (Gailmard & Patty 2013: 4). While Congress delegates to agencies, it has many tools at its disposal to induce compliance and ensure better representation in implementation, such as the ability to adjust agencies' reauthorization cycles, maintaining the "power of the purse" and thus the ability to reduce agency funding, holding oversight hearings to investigate agency actions, or imposing procedures that limit autonomy in implementation (McNollgast 1987). These tools help to facilitate bureaucratic responsiveness in state-building, but there remain conditions under which agencies cross a boundary – that is, stepping outside of their discretionary windows – in a way that I refer to as *noncompliance*.

The notion that agencies might not efficiently and effectively implement their target policies has not gone entirely unnoticed, with Huber & McCarty (2004) evaluating agencies' implementation errors that make it more difficult for principals to detect whether the agent is choosing an unapproved policy (see also McCarty 2013), falling within the scope of noncompliance. Further, Brehm & Gates (1999) argue that understanding compliance is necessary in order to understand issues of control and oversight, with Congress and the President unable to control policy administration if the implementers (bureaucrats) have discretion to an extent that they cannot be effectively managed.[1]. While coalitions may work to stack the deck against a future administration through ex ante procedural constraints, "if this coalition is replaced, then the new principals will not be able to force the bureaucrats to obey their wishes" (Tsebelis 2002: 237), potentially necessitating the passage of new laws to shift the policy location toward the preferences of the new legislative principal. To do so, however, becomes increasingly costly amid higher levels of legislative conflict and polarization, thus contributing to status quo bias. Thus, bureaucratic independence from the current arrangement of veto players increases with the number and ideological distance among those players (Id), a claim for which I too find support.

[1]Further, adverse selection problems can arise given that Congress not only is constrained in its inability to monitor all agency activities once it has delegated authority, but Congress cannot accurately identify the agency's true type (Brehm & Gates 1999: 191).

In light of the growing scope of bureaucratic policymaking, as well as the changing reach of legislative and judicial checks on agencies, I evaluate potential disconnects between ex ante oversight and the ex post realities of of policymaking amid heightened partisan conflict and coalition drift, by answering the following core question: Under what conditions is Congress *unable* to induce compliance in contemporary statutory implementation? I evaluate this question in the context of the Environmental Protection Agency (EPA) from 1973 to 2010. I begin by discussing the limitations of prior delegation analyses, and relatedly my conceptualization of noncompliance and the conditions under which it should occur. I proceed with discussing my case selection and move on to discuss my core separation-of-powers hypotheses on the prevalence of this phenomenon. I test these hypotheses with original data drawn from several thousand bill introductions and several hundred DC Circuit court cases capturing institutional interventions into bureaucratic implementation. I find strong support for the claim that inter-branch partisan conflict and legislative division powerfully compromise Congress's ability to induce compliance in its administrative agents, *unless* the party opposing the president is well-equipped to punish. While the presence of competing legislative principals powerfully predicts noncompliance, there is less clear support for courts' effectiveness in monitoring this bureaucratic behavior.

The Potential Limits of Compliance

While much separation-of-powers scholarship emphasizes laws' institutional design, there remains a problematic assumption that agencies are effectively constrained by delegating legislation, even though they may be capable of skirting the edges of their discretion, even surpassing those bounds. In his October 21, 2008 letter to then-EPA Administrator Stephen Johnson, Congressman Henry Waxman noted that "[r]epeated losses on plain language grounds suggest a reckless determination to pursue the Administration's policy objectives regardless of legal limits." A typical delegation model might claim that Congress will (1) delegate regulatory authority to an agency but (2) impose procedural controls to constrain that agency, and (3) the agency, rational and with institutional prerogatives for power, will comply to avoid punishment.

However, numerous key conditions reshape the agency's likelihood of suffering consequences for defections, and there is merit in considering when there is *not* a credible threat of punishment for policymaking within my definition of noncompliance.

Moreover, many laws implemented today were passed several Congresses ago, potentially by very different Congresses, potentially leading to substantial coalition drift. This calls into question the appropriate administrative implementation given the preferences of the legislative principal(s). So while extant delegation analyses (*e.g.*, Epstein & O'Halloran 1999; Huber & Shipan 2002) take great strides in explicating the strategies resulting in the nature of the delegating statutes, to understand better the policy outcomes we observe, we must consider not just delegation, but *implementation* in a dynamic political environment.

The many veto players at work in American politics virtually guarantee at least some divergent preferences over policy. The article's emphasis on noncompliance seeks to explain agencies' incentives and their responses to the partisan arrangements in which they operate. I assume that bureaucrats hold preferences about their personal condition – *e.g.*, self-promotion, power, prestige, and financial reward – and about the policy in which they are engaged (*e.g.*, Wilson 1989; Gailmard & Patty 2007). In turn, noncompliance by these agency heads grows out of their combined incentives over both political and policy influence, resulting in agencies carving out greater opportunities to be active policymakers relative to the status quo policy location.

This article departs from the many delegation models assuming faithful agency execution of statutes, rather building on the few models that allow for noncompliance. Gailmard (2002) examines delegation to an imperfectly-controlled bureaucrat who can subvert the legislature by stepping beyond the bounds of explicitly delegated authority. Agencies can choose policies beyond those authorized, but the farther beyond the bounds of delegated authority, the greater the likelihood of exposure, and the higher the potential costs. Similarly, Huber & McCarty (2004) allow that the policy set by the bureaucrat may or may not comply with the statute, though they do not require that such noncompliance be intentional (see also Miller 1977). While

overt punishment for noncompliance may seem rare given anticipation effects among the institutions (see, *e.g.*, Cameron 2000), there is likely to be a plethora of unobserved noncompliance in which agencies *successfully* shift policy consistent with their preferences.[2]

Discussing bureaucratic noncompliance begs the question, noncompliance *with what*? A little-discussed principal agent problem in statutory implementation is that while Congress writes the laws and supervises agency latitude, the authorizing Congress does not engage in much of the ex post monitoring of the agents to whom it delegates because coalitions change every two years.[3] Legislative turnover and drift in turn create *two* legislative principals, one laying out procedural provisions for ex ante bureaucratic control in drafting the authorizing law, and the other engaging in ex post control consistent with their policy preferences, but potentially at the cost of enforcing the precise letter of the law, a tension that I address here.

I thus conceptualize and measure two distinct types of noncompliance. First, it can constitute acts deviating from Congress's statutory implementation preferences. Second, the agency can maximize discretion in ways that deviate from the delegating statutory text. The conventional expectation is that courts expect compliance with the enacting Congress – that is, the statutory text.[4] Yet agencies might see value in implementing in accordance with the preferences of their current principals – the contemporary Congress – rather than upholding outdated statutory provisions. After all, the current Congress can punish an agency for perceived transgressions, and it may not be committed to upholding a past bargain as opposed to pushing policy toward its own preferences. Thus, agencies can fail to comply with either the text written by the authorizing Congress – addressing to what extent we observe the rule of law versus

[2]See also, *e.g.*, Krause (2010), who notes that presidents can circumvent congressional withholding of policymaking authority by issuing executive orders (see also Howell 2003).

[3]This is analogous to Huber & Lupia's (2001: 19) analysis of delegation by cabinet ministers to the bureaucrat in the case of an unstable principal due to turnover.

[4]Landes & Posner (1975) hold that courts "do not enforce the moral law or ideals of neutrality, justice, or fairness; they enforce the 'deals' made by effective interest groups with earlier legislatures."

the substitution of bureaucratic preferences, and to which they will be held accountable in court – or with the contemporary Congress to which it can be held accountable, which is consistent with the more common bureaucratic control studies. To address this tug-of-war between judicial and congressional interpretations of agency latitude, I provide one measure that captures congressional interventions into agency policymaking that is out of concert with its preferences over statutory implementation, and the other that captures judicial interventions into agency policymaking for purported noncompliance with the statutes. For the sake of clarity, I refer to noncompliance with the statutory text – that is, with statutory mandates or windows of discretion – as *statutory noncompliance*.

The concept of statutory noncompliance can be made clearer in a concrete example. In 1986, Congress passed the Superfund Amendments and Reauthorization Act to amend the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980 to regulate the transportation and storage of substances that were potentially harmful to public health and welfare. Enforcement authority was housed largely in the EPA, which among other things was tasked with promulgating by 1988 a rule regarding the provision of notice when substances being transported were harmful. Consistent with the statutory directive, the EPA proposed in January 1988 a rule regarding this notice provision. However, it was not until 1990 that the agency promulgated a final rule, which only applied the notice requirement to a narrower range of conditions. Thus, the regulatory scope was vastly narrowed relative to what the statute had initially provided for. Consequently, in *Hercules, Inc. v. Environmental Protection Agency* (1991), the DC Circuit Court of Appeals determined that the agency had read into the statute a drastic limitation that did not appear in Congress's words and flew in the face of the legislative history. Thus, this case provides a clear example of statutory noncompliance: Congress *requiring* action by the agency, the agency's proper interpretation of its authority and then determination to regulate only a subset of that which Congress compelled, and the judiciary's determination that the agency was not compliant with the delegating statute.

This is precisely the phenomenon that I explore here.

Noncompliance by whom?

Having discussed the nature of noncompliance, it is worth considering *by whom* we are evaluating this noncompliant bureaucratic behavior. While justifications for delegation often emphasize bureaucrats' greater policy expertise and administrative capacity, there is the additional ideology-related consideration that "[i]f agents care about the content of policy, they will value the opportunity to influence it," (Gailmard & Patty 2013: 25), a factor that implicates the driving forces behind agencies' policy adoption in the United States and the ultimate extent of democratic accountability obtained in the process.

While the president nominates cabinet secretaries (*e.g.*, Secretary of Interior, Secretary of Labor) and other high-level posts (*e.g.* Administrator of the EPA), such nominees must be confirmed by the Senate, thus requiring at least some degree of political compromise that may result in an agency head having preferences not wholly consistent with the nominating president. Independent agencies allow for even greater potential for preference disconnects given their insulating features such as bipartisan commissions with fixed terms and insulation against removal. And underneath the level of political appointees is a larger civil service, with some staff serving under multiple executive administrations. Thus, there is the additional complicating potential for ideological heterogeneity within an agency or, in the case of civil servants (careerists), a lack of policy motivation altogether. However, as Gailmard & Patty (2013: 37) note, given the marked wage imbalance between private labor markets and government employment, one can expect that even those in careerist positions will pursue such a career not for the monetary gains, but rather for the potential to influence policy outcomes even from the lower ranks. Such a view is consistent with Carpenter's claim that "[b]ureaucrats are politicians, and bureaucracies are organizations of political actors" (2001: 353).

Thus, while high-level appointees may be the most politicized, the ideological considerations may not be restricted simply to the upper echelons of the agency. Responding to concerns about

rising interest group influence in the EPA, the Union of Concerned Scientists and the Center for Survey Statistics jointly surveyed in 2007 nearly 5,500 EPA scientists on political pressures in their scientific work. The survey results revealed that over half of the scientists had experienced some degree of political interference, and many had seen technical information altered or misrepresented so as to comport with the agency policy preferences. Thus, while there may be heterogeneous preferences among civil servants, their choices appear to be heavily constrained by the preferences of the top political appointees and the White House that appointed them, making more reasonable my evaluation of the EPA as a single entity whose policies mirror that of the Administrator and are closely aligned with the president.

The Strategy of Noncompliance

One can think of an agency's compliance calculus as being a function of 1.) the potential benefits it would reap from shifting the policy location its ideal point (b), 2.) the probability of success in doing so (p) such as given its resources, 3.) the likelihood of the principals' ability to impose those costs (l), and 4.) the potential costs that would be incurred for subverting (c). The agency exercises noncompliance when that expected value is positive – that is, when the benefits outweigh the costs. The factor here that the previous models have largely overlooked is the likelihood of suffering the costs of noncompliance.

To consider the conditions under which the likelihood of punishment varies, Figure 1 presents simple (and admittedly, highly stylized) spatial models of the potential composition of preferences among an administrative agency (A), the legislation (L) passed by the enacting Congress, the contemporary House median (H_m), and the contemporary Senate median (S_m). Case 1 presents a centrist statute, an agency slightly to the left of the statute location, and the House and Senate medians both to the right of the statute. Thus, the contemporary Congress has relatively unified preferences in the opposite direction from the status quo as is the agency's ideal point. Moreover, the agency is relatively close to the statute's location, leaving it relatively satisfied with the enacted policy and with little room to shift it. That is, the agency does

not suffer great policy losses by being faithful in its statutory implementation, and by moving policy away from the status quo, Congress will be both motivated and capable of punishing the agency. This results in not only a low benefit reaped from moving policy at all, but a high likelihood of punishment, which the agency prefers to avoid. Thus, with this political configuration we should observe bureaucratic *compliance*.

Case 2 presents a centrist delegating statute, an agency and House median to the right of the statute, and a Senate median that is to the left of the statute. Because the agency's ideal point in this case is much farther from the location of the legislation, it can gain much by moving policy toward its preferences rather than simply administering the policy as delegated, with preferences (policy and otherwise) shaping the outputs that the agency produces (see, *e.g.*, Brehm & Gates 1999: 75), and the agency acting in a way that I refer to as noncompliance. Moreover, the House and Senate medians are divided in this case, with the Senate dissatisfied with any policy change that the agency would attempt, and the House far more satisfied should the agency pull policy toward its preferences (even achieving its ideal point). Because the American bicameral system requires some threshold degree of preference overlap between the chambers in order to pass legislation, in this configuration it would be highly difficult for the Senate to credibly commit to punishing the agency for its regulatory behavior through the passage of legislation. With Congress's hands effectively tied, the agency is relatively unconstrained and thus has the latitude to shift policy to its preferred location, resulting in *noncompliance*.

Finally, Case 3 presents an agency to the left of the statute as well as both the House and Senate medians. Unlike in Case 1, where we also see the agency on the opposite end of the statute from the House and Senate medians, in Case 3 the agency's preference is far from the statute, giving it incentive to shift policy away from the status quo rather than implementing it faithfully. However, with Congress still in a position of relative strength to punish given that both chambers are to the right of the legislation, the likelihood of suffering costs is escalated, thus inducing agency *compliance*. Thus, this is a case in which the agency will be dissatisfied

with the resulting policy but constrained by the partisan configuration in which it operates. In these different scenarios, as the likelihood of punishment converges to 0 (*e.g.*, amid gridlock), the agency's willingness to step outside of its discretionary bounds increases, but it becomes *highly* risk averse when those overseeing its behavior are well-positioned to punish.

The Case of the Environmental Protection Agency

Environmental policy, implemented largely by the EPA, is highly salient at the local, national, and global levels, and demands both extensive public attention and government resources. The EPA, allocated both mandatory and discretionary regulatory tasks, is in a sense the natural setting in which to evaluate noncompliance in bureaucratic policymaking, though I argue that these findings provide key insights into the broader policy context in separation-of-powers interactions to which this project speaks.[5] Moe calls attention to key inefficiencies built into the structure of the EPA, which he holds was "never designed as a coherent organization. Its presidential creators pulled together disparate programmatic units under one roof, viewing this as a first step toward a coherent organizational structure... Throughout its life, the EPA has been hobbled by its programmatic inheritance" (1989: 317; see also Wood 1992).

Indeed, one can scarcely search EPA records without finding numerous accounts of states and interest groups suing the agency to compel enforcement of environmental standards. Such conflicts reached a notable peak amid President Ronald Reagan's "regulatory relief" efforts, which sought to markedly scale back federal regulatory efforts in this domain. Reagan sought to withdraw the administrative enforcement machinery, dramatically reducing the EPA's budget and staffing as well as seeking to cut back on private environmental lawsuits that could threaten the administration's efforts to more vigorously regulate environmental policy (Farhang 2011, 676). Landy et al observe that administrative turbulence between 1980 and 1982 led to sharp

[5]For example, Carpenter (2010) calls attention to *FDA v. Brown & Willliamson Tobacco Corps.* (2000) finding tobacco regulation to be outside the FDA's authority, and Johnson (2011) addresses racialized agriculture subsidies policies even after the passage of the Civil Rights Act of 1964.

curtailment of environmental enforcement efforts, with a 50% decline in the number of cases that the EPA referred to the Justice Department and approximately a 33% decline in the number of enforcement orders that the EPA issued (1990: 249).[6] In August 1986, the Environmental Protection Agency was charged with violating the Endangered Species Act (ESA) by knowingly failing to protected endangered animals and plants from harmful pesticides, despite the US Department of Interior's Fish and Wild Life Service's provision to the EPA of a formal opinion as to the harm caused by specific insecticides (*Houston Chronicle*). What's more, the Agency openly confessed to its noncompliance with the ESA, with EPA Assistant Administrator for Pesticides and Toxic Substances John A. Moore saying plainly, "There is no question about it, we didn't comply with the requirements of the law... I do not dispute the findings" (Id).

Additionally, in *Natural Resources Defense Council v. Train*[7] (1976), a challenge was brought under Section 108 of the Clean Air Act, which EPA Administrator Russell Train interpreted as discretionary authority to promulgate national ambient air quality standards. As a consequence of this interpretation, he did not establish those standards. The court found no support for Train's argument that the EPA was not obligated to promulgate standards, and that the legislative history of the Clean Air Act was clearly contrary to the EPA's interpretation: "The structure of the Clean Air Act as amended in 1970, its legislative history, and the judicial gloss placed upon the Act leave no room for an interpretation which makes the issuance of air quality standards for lead under [Section]108 discretionary."[8] Thus, the EPA acted contrary to both the statutory text and the legislative history in failing to implement Section 108. Though infrequent relative to the broader swath of regulatory activity that is carried out daily by the EPA, such cases are central to this paper's discussion. But while these deregulatory efforts typify the behavior under my microscope, its enforcement has not perpetually waned, with

[6]See also Waterman & Wood (2007) on EPA responsiveness to external stimuli in setting policy.

[7]545 F.2nd 320.

[8]Section 108 holds that "[f]or the purpose of establishing national primary and secondary ambient air quality standards, the Administrator **shall** within 30 days after December 31, 1970, publish... a list which includes each air pollutant..."

Democratic administrations typically seeking to make the agency less anemic in its regulatory capacity. Consequently, in addition to being highly salient, there is substantial variation in partisan composition and regulatory support for the agency over time, allowing me to assess the effects of inter-branch conflict on implementation choices and to test the core hypotheses.

Challenges of Measuring Noncompliance

While a number of scholars have addressed theoretically the importance of compliance and the strategies at Congress's disposal to ensure compliance with the administrative entities to which it delegates, there do not exist measures that capture over long periods of the dynamic of noncompliance as I have conceptualized it above. An inherent challenge in the measurement of noncompliance – and indeed, much separation-of-powers behavior – is the number of highly salient *unobserved* strategic calculations on the part of the institutional actors. For example, while veto bargaining dynamics are highly important in shaping the laws that emerge through the veto gates, we do not often observe actual instances of vetoes given congressional anticipation of the president's actions, and the president's anticipation of veto overrides (Cameron 2000). Likewise, even when not actually employed, the filibuster importantly shapes the nature of the laws put forward in the Senate given the frequent need for supermajority support (Wawro & Schickler 2006). The same is true of noncompliance, with the agency calculating where its preferred policy location is in relation to Congress's preferences, the extent to which the chambers are hampered by partisan division, and its likelihood of being sanctioned in court. Observed punishment for noncompliance can thus be construed as agency "mistakes."

However, if we observe perfect statutory compliance, we should not expect to observe numerous judicial determinations based on the delegating statutes that the agency was not compliant, even if large numbers of interest groups bring suits over dissatisfaction with the policy being set. Likewise, if we observe perfect compliance with the current Congress's preferences over implementation, we should not expect to observe numerous instances of congressional coalitions working to strip the agency of its capacity or otherwise acting punitively. Yet as in *Hercules,*

Inc. v. Environmental Protection Agency and as I discuss in greater depth below, in approximately one fourth of the cases in which the EPA was sued in the DC Circuit Court of Appeals, the agency loses on substantive grounds based on assertions of violations of clear statutory text, and congressional coalitions act with great frequency to reduce the agency's discretionary authority. This then presents a puzzle as to what explains these instances of agency punishment. Because of the challenges inherent in measuring noncompliance directly amid ample unobserved strategic behavior, I instead address this phenomenon indirectly by evaluating judicial and congressional interventions into bureaucratic policymaking. I argue that by evaluating these off-equilibrium actions in the separation-of-powers system, we can better grasp the limits to effectively inducing compliance in the implementing agency.

Hypotheses about Bureaucratic Noncompliance

A rich literature has called attention to congressional efforts to reduce administrative discretion amid divided government and electoral uncertainty so as to guard against bureaucratic drift (*e.g.*, Moe 1989; Epstein & O'Halloran 1999; Huber & Shipan 2002; Farhang 2010). Beyond ideological differences between Congress and the executive branch, legislators are influenced more by particularistic than national interests and are more subject to interest group pressure, potentially leading to divergent preferences over regulatory implementation even within the same party (Moe 1989). Thus, legislators and the interest groups that influence them strive to create agency structures calculated to implement their policy preferences while tightly constraining discretion so as to better insulate against executive subversion. Given concerns about subversion amid inter-branch disagreement, I expect that agencies will be most inclined to seek to shift policy from the statute toward their preferred implementation under conditions of heightened legislative-executive ideological distance, conditional upon the strength of the opposing legislative coalition. Thus:

H_1*: There will be more noncompliance with the current Congress when there is higher ideological divergence between the legislative and executive branches,* except *when the opposing*

political party holds a large majority of seats in Congress.

Many factors affect the likelihood of identifying and punishing acts of noncompliance. While Gailmard (2002) identifies subversion costs as lawsuits or the loss of budgets or status, this project considers also the statutory adjustment of discretionary windows, which relies upon a congressional coalition eager and able to pass new legislation. A rich literature on Congress has explored the causes and consequences of legislative conflict, which arises given key individual legislators' preferences relative to the location of the status quo (e.g., Brady & Volden 2006; Krehbiel 1998), as well as the use of the filibuster to embolden minorities to block legislation lacking supermajority support in the Senate (Wawro & Schickler 2006). Given the numerous veto points in the legislative process, lawmaking becomes increasingly costly when there are diverse preferences over policy. Thus, amid narrow partisan majorities or greater partisan differences in Congress, it is more difficult to pass legislation to shift policy from the status quo. In these cases, agencies may perceive a reduced threat of statutory punishment given the elevated transaction costs of lawmaking and Congress's inability to credibly threaten to introduce punitive legislation (see also Ferejohn & Shipan 1990). Thus:

H_2: There will be more noncompliance with the current Congress when the transaction costs of lawmaking are raised by ideological disagreement within Congress.

Challenges in oversight can arise from having multiple principals, with information leakages and collective action problems compromising collective control over agents, and leading to the potential under-provision of congressional oversight (Gailmard 2009). Given this limitation in effective oversight, one might expect that having more actors with power or influence over an agency (*e.g.*, congressional committees, the president, interest groups) should reduce subversion costs and thus increase the latitude with which agencies can set policy without a high likelihood of punishment.[9] Such challenges of multiple principals can arise not only within, but also *across*

[9]Having multiple political principals may reduce incentive to deviate, given the increased number of monitors capable of detecting noncompliance. Yet when the principals disagree, the conflicting goals and pressures on

Congresses when there is extensive coalition drift over time.

H_3: There will be more bureaucratic and statutory noncompliance when there are multiple competing political principals seeking to influence the agency.

Just as fragmented congressional oversight of agencies can lead to inefficiency and at times conflicting policy goals, the extent of vigorous judicial oversight should likewise shape the agency's incentive to comply. I expect that noncompliance will increase in the aftermath of the Supreme Court's landmark administrative law decision of *Chevron U.S.A., Inc. vs. National Resources Defense Council* (1984), which broadened the extent of judicial deference to agency decisions (1) where the intent of Congress was ambiguous; and (2) where the interpretation was reasonable or permissible. This limited the legislature's ability to rely upon a third party (the judiciary) to control bureaucracy, which can in turn create new opportunities for agencies to move policy toward their preferences. The deference jurisprudence developed under the *Chevron* doctrine can reshape the ways in which statutes are elaborated and enforced, impacting both delegation and administrative implementation.

While *Chevron* arguably compromised stringent external oversight by the judiciary, the frequent delegation to private litigants within the domain of environmental policy – in particular through citizen suits – may meaningfully check not just the targets of regulation, but also administrative agencies seeking to avoid costly litigation (*e.g.*, Farhang 2011):

H_4: There will be less bureaucratic and statutory noncompliance in the presence of greater third-party oversight provided through the judicial branch.

In addition to considering the political configuration in which the agency is operating, the extent to which the agency will be a faithful implementer of the delegating statutes should be shaped by the extent to which it agrees with the policy location that it sets. An agency should be more inclined toward compliance when its ideological location is more proximate to its own, such that it believes in the policy that it is tasked with implementing. Thus:

the agency should sway the agency's implementation strategy in ways more likely to induce noncompliance.

H_5: There will be more statutory noncompliance when there is greater ideological distance between the statute's location and the agency's ideology.

In sum, the extent of ideological disagreement, the ability of Congress to punish the agency, and the extent of effective oversight by other institutional actors should fundamentally reshape agencies' incentives to pull policy toward their preferences in ways that may manifest as noncompliance rather than engaging in more "rote implementation."

An aspect of the agency's noncompliance calculus is its probability of successfully pulling policy toward its preferences. Congressional dispersing of power across multiple actors should operate as a meaningful constraint on agency behavior, forcing compromise among administrators with different preferences and interests (Farhang & Yaver 2015), as well as creating competition among them. If this legislative strategy is effective, administrative actors will be better constrained rather than leaving marked room for drift in policymaking. I thus expect there to be a negative association between fragmentation of implementation power and agency deviations from legislative dictates.

Empirical Model

Dependent Variable 1: Agency Curbing. Measuring noncompliance as I have conceptualized it is no easy task, and no empirical work to date has sought to capture systematically over time the behavior that I address here. To test the core hypotheses discussed above, I provide two novel and distinct measures of this phenomenon: one to measure congressional intervention in agency actions given its preferred statutory implementation, and one to measure judicial interventions over implementation of the statutory text (with the assumption that it is indicative of statutory noncompliance).

The first measure, *agency curbing*, captures congressional dissatisfaction with the EPA's implementation. Following Clark's (2011) court curbing measure, I conducted THOMAS searches for each of the 26 statutes implemented in whole or in part by the EPA from 1973 to 2010, which returned a total of 11,272 bill introductions. I restrict analysis to the 5,169 bills in-

troduced by members of the president's party, with the expectation that constraints by the president's core supporters will provide the least noisy signal of agency defection from the current Congress's preferences.[10] Such an argument is consistent with Beim, Hirsch & Kastellec's finding in the context of the US Court of Appeals that "whistleblowers who are closer to the panel majority who nevertheless choose to dissent will be much more credible messengers of severe non-compliance" (2014: 10) than are whistleblowers who are the farthest ideologically from the panel median (see also Chiang & Knight (2011) on counter-preference signals). I then hand-coded these 5,169 Congressional Research Service (CRS) summaries to identify the bills that sought to control the EPA's behavior by (1) requiring that the EPA take new mandatory regulatory actions (*e.g.,* issuing new rules or sanctions), (2) prohibiting the EPA from taking certain actions or otherwise withdrawing authority (*e.g.*, rescinding EPA funding), and/or (3) imposing new oversight procedures (*e.g.*, reporting or consultation requirements). If a bill made at least one of these efforts, it was considered an agency curbing bill. 1,361 such bills were introduced by the president's co-partisans over the time series.[11]

Importantly, many bills were introduced over the course of the time series that addressed the powers and responsibilities of the EPA that were *not* counted as agency curbing bills. Among those bills relevant to the EPA that were not considered *agency curbing* were the mere *authorization* that the EPA take regulatory action (that is, discretionary provisions). In fewer than 20% of the agency curbing bills also had discretion-granting provisions, suggesting that such legislation follows a different pattern than does agency curbing behavior. Thus, agency curbing legislation does not merely capture congressional attention to the EPA's behavior, but rather bills specifically aimed at agency constraint.

While there is reason to suspect that requiring an agency to take on new regulatory tasks

[10]However, I also evaluate in the Appendix the relative consistency in the patterns between agency curbing bills by majority party members and by the president's co-partisans.

[11]A random sample of 100 bills were double coded for reliability. 97 were assigned the same codes both times, suggesting both high reliability and a randomness in any errors in the data.

might not necessarily operate as punishment of the administrative agency,[12] Figure 2, which is a lowess plot of the average agency curbing level by Congress (both the composite measure and the individual indicators of curbing activity), confirms that the three agency curbing variables exhibit similar patterns over the sample time series albeit with somewhat different frequencies of occurrence. The performance of principal components factor analysis revealed that the variables loaded on a single factor with an eigenvalue of 2.05 for the first factor, with individual factor loadings of 0.87, 0.79, and 0.80, showing that the three items are highly associated with the underlying factor and at similar levels. This lends credence to my claim that the three variables capture a single core dimension: congressional punishment over perceived transgressions of its preferences over implementation. The pooling of the variables is supported further by averaging the standardized *requirements*, *prohibitions*, and *oversight* variables, which produced a Cronbach's alpha of .80.[13] I created an *agency curbing* factor score, which I then weighted by the average cosponsorship support so as to afford greater weight to those bills garnering widespread support than to bills in which a lone legislator expressed dissatisfaction with agency actions. The average number of cosponsors for curbing bills was 5.8, though I normalized the cosponsorship measure to fall between the values of 0 and 1.

Dependent Variable 2: Lawsuit Losses. Estimating statutory noncompliance requires evaluating the meaning of the delegating statutes and to what extent they create obligations or authority to agencies, an interpretive role often left to judges. Such a measure is not without its limitations given the extensive scholarly attention to judicial ideology, which in turn helps to inform judicial decisionmaking (*e.g.*, Canon & Johnson 1999, Sunstein et. al 2006). Both legal and political science scholars acknowledge the limits of textualism's ability to reliably yield the same interpretation among judges, with Eskridge & Ferejohn (2010) noting that there

[12]That is, Congress may be signaling intentional foot-dragging by the agency, but it may also simply desire that the agency take on greater regulatory responsibility, albeit mandatory rather than discretionary.

[13]The Cronbach's alpha measures a scale's internal consistency, and .8 is considered sufficient for the use of a composite measure (DeVellis 2012).

remains a lack of interpretive closure despite the fact that "the statutory text, its purpose and legislative history, and its context within particularly statutory schemes remain the critical tools for figuring out how to apply statutes" (2010: 465). However, Westerlund et al (2010) find that the ideological makeup of a Court of Appeals panel does not affect its treatment of Supreme Court precedent, even controlling for ideological distance between the levels of the judicial hierarchy, suggesting a smaller role of judicial ideology at the appellate level than others predict. Thus, while there are inconsistent political and legal accounts of the extent of ideological decisionmaking on the Court of Appeals, there is evidence that at least some DC Circuit decisionmaking is based on the content of the text and good-faith efforts to interpret it properly as opposed to ideologically, and it is these DC Circuit opinions on which I rely.

To measure judicial interventions in agency implementation, I identified through Lexis searches of each of the EPA's 26 statutes the 567 DC Circuit cases from 1973 through 2010 in which the EPA was the defendant.[14] I hand-coded each majority opinion to determine whether the agency lost on substantive grounds. While the district courts are typically the first venue of litigation, suits against administrative agencies often go straight to the appellate courts, with the DC Circuit being the main circuit addressing Administrative Procedure Act cases. The predominant reasons for the EPA's loss was the issuing of rules or enforcement that were inconsistent with the delegating statutes, or intentionally causing unreasonable delay in taking mandatory actions.[15] I excluded from analysis cases that were decided on procedural grounds (*e.g.*, standing or notice and comment procedures) so as to focus on matters of substantive policy. The vast majority of these cases were unanimous, as is typically the case at the appellate

[14]Agency settlements were largely over failure to meet deadlines due to insufficient resources, as opposed to active efforts to expand discretionary windows. Thus, such settlements are not of theoretical interest.

[15]Among the language determined to count as noncompliance were "regulation violated Clean Air Act" (*American Corn Growers Association v. EPA*, 2002), "EPA abused its discretion in promulgating Tribe's redesignation" (*Administrator, State of Ariz. v. EPA*, 1998), and "[EPA's rule] was unreasonable and arbitrary" (*Kennecott Corp. v. EPA*, 1979).

level, and there were very few cases that contained dissenting opinions despite a large number of bipartisan panels.[16] In effort to reduce the effect of judicial ideology, I relied on strict textual analyses of the agency's authority and the extent of statutory (non)compliance identified, and relied on the judge to detail the clear statutory obligation that was not met or the clear breach of authority, thus placing a heavy burden on the court to demonstrate noncompliance. Using these criteria, I found that the EPA lost 129 (or approximately 23%) of these cases. This measure *EPA suits lost* is the percentage of EPA losses per law per Congress.

Measures of Institutional Conflict. *Legislative-executive distance* is the NOMINATE distance between the President and the median floor member (Poole & Rosenthal 1997).[17] *Margin of control* is absolute value of the margin by which the majority party controls the seats in Congress, with larger values indicating a wider majority while values closer to zero indicate an even division. With a large margin of control in Congress, a party has lower transaction costs in passing curbing legislation. The value does not alone distinguish between whether or not that majority is of the president's party.[18] I interact *margin of control* with *legislative-executive distance* because I expect that the effect of extensive inter-branch ideological disagreement will be conditioned by the extent to which the majority coalition is in power and positioned (as well as motivated) to pass punitive legislation with respect to the agency. I expect the independent effect of *Legislative-Executive Distance* to be positive conditional upon the level of *margin of control*, but given the higher likelihood of punishment with a large *margin of control* in the majority party of Congress, I expect the interaction effect to be negative.

[16]Exclusion of cases involving dissents did not substantively affect the results.

[17]Using the president's NOMINATE score to proxy agency ideology is the best available measure given the time-invariant nature of the Clinton & Lewis (2008) scores and the limited range of the Chen et al (2014) scores.

[18]Thus, a large *margin of control* value could indicate one of two conditions: divided government with the opposing party in a very strong position of control in Congress, or unified government in which the President commands strength in both the executive and legislative branches. It constrains agency policymaking in the former case of divided government, while it enhances bureaucratic latitude when the branches are united in their preferences over policy.

To estimate legislative division, I include the *chamber distance*, which is the first-dimension Common Space NOMINATE distance between the House and Senate medians.[19] Because successful policy adoption requires some overlap in preferences among key political actors in both of the chambers of Congress, greater distance between the chambers will yield higher transaction costs in passing legislation, creating greater opportunities for the EPA to shift policy toward its preferences. Thus, I expect the effect to be significant and positive.

To estimate the *statute-agency ideological distance*, I computed the absolute value of the NOMINATE distance between the median member voting in favor of the delegating statute and the median floor member of the contemporary Congress.

Other Political Environment Variables. I include from the Policy Agendas Project the annual number of *environmental interest groups*.[20] I expect that interest group prevalence can, whether through direct financial contributions or other lobbying efforts, importantly shape agencies' propensity to comply versus being responsive to these groups.

I account for the *distance between congresses*, which is the absolute value of the distance between the multiple principals of the authorizing Congress's first-dimension NOMINATE median legislator and that of the contemporary Congress. This captures to what extent coalition drift drives the agency to exercise noncompliance with statutes in effort to be responsive to the current Congress, or alternatively defecting from the current Congress in effort to exercise fidelity to the delegating statute. To control for *DC Circuit ideology*, I identified the median judge's ideal point utilizing judges' Giles, Hettinger, and Pepper (2001) ideology scores, which are based on the judge's appointing president and/or home state senators, thus exploiting the norm of senatorial courtesy.[21]

[19]Evaluating instead the party medians performs similarly.

[20]I divided the value by 100 to facilitate easier interpretation.

[21]The main results are consistent when instead using the NOMINATE distance between the median judge and the median floor member, the NOMINATE distance between the median judge and the president, and using the cruder measure of a dummy variable for Democratic or Republican control of the DC Circuit.

Because partisan ideology should predict well the direction in which the agency would opt to push policy (whether higher or lower than the statute), particularly given the Democratic Party's historically strong ties to the environmental policy, I include the dummy variable *Democratic President*. Given the greater ease of punishing an agent seeking to over-enforce rather than seeking to under-enforce, I expect the coefficient to be significant and positive.

To account for the possibility that agency enforcement is driven not by ideological preferences over policy but rather resource constraints on effective implementation, I control for the *EPA budget* for the fiscal year, using data made public by the agency.[22] Given the natural ebbs and flows in the extent of environmental regulation over time in ways that are not relevant to my theory (e.g., an oil spill), I control for the *total EPA legislating*, which is the number of bills introduced that addressed the Environmental Protection Agency in some way, and the *total EPA litigation*, which is the total number of DC Circuit suits pertaining to these laws. To evaluate whether the period following *Chevron v. NRDC* (1984) was associated with greater agency maximizing of discretion, I include the dummy variable *Post*-Chevron, which takes the value of 1 after the 1984 case and 0 otherwise.[23]

Finally, to model the nonlinear pattern of bureaucratic noncompliance over time, I include smooth cubic splines. The procedure, which produces one less variable than there are knots, produces a continuous smooth function that is linear before the first knot, is a piecewise cubic polynomial between successive knots, and is linear after the last knot. Performing sensitivity analysis to vary the number of knots did not meaningfully affect the main results.

Law-Level Measures. For each of the 26 statutes, I determined the extent of administrative *fragmentation*, which is a factor score comprising the numbers of implementing adminis-

[22]I divided this variable by $100,000,000 to ease interpretation. Replacing the *budget* with the size of the EPA *workforce* over time produces slightly weaker, though largely consistent results, and the effect of *Workforce* is insignificant. Simultaneously controlling for budget and workforce induces multicollinearity (correlation of .94).

[23]Also relevant is *I.N.S. v. Chadha* (1983), pertaining to the legislative veto, though it fell within the same Congress as *Chevron* and thus the effects cannot be disentangled using this cutpoint.

trative actors and agencies, and the number of instances of overlapping jurisdiction over policy in each of the laws.[24] Farhang & Yaver (2015) argue that congressional fragmentation of the state constrains the executive branch given the need to coordinate across numerous actors and agencies, in addition to facilitating the legislature's goal of maintaining a "sticky" status quo. Thus, I expect higher levels of fragmentation to be associated with more agency constraint, and in turn greater compliance.

I identified from the text of the delegating statutes whether the law provided for *citizen suits*, which I expect to constrain bureaucratic behavior.[25] I assigned policy codes to each of the 26 laws under the EPA's jurisdiction, falling into the following categories: Air, Water, Public Health and Safety, Public Land and Animals, Energy, and Hazardous Waste. Each of these policy categories was coded as a dummy variable, and I included these as policy fixed effects in the models presented below. Finally, *significant law* is a dummy variable taking the value of 1 if it was identified by Mayhew (2005) as significant, and 0 otherwise.[26].

Estimation Method

The data are organized by statute by Congress, with 26 laws over 19 Congresses (93rd to the 111th), thus enabling me to estimate over time the institutional and law-level characteristics that shape agency implementation behavior. Given this data structure, it is appropriate to use a time series cross-sectional model, whereby the data consist of comparable time series data observed on different units (statutes), allowing one to test theories of both cross-sectional and cross-temporal variation. A challenge in applying this procedure to the EPA data is that

[24]These actors and entities were identified based on the text of the law and whether they were involved in implementing core regulatory functions (rulemaking, sanctions, hearings, and/or lawsuits). Averaging the standardized scores performed equivalently.

[25]Citizen suit and non-citizen suit laws do not vary markedly with respect to their time of passage, policy domains, or levels of statutory significance, thus assuaging some concern about the inclusion of citizen suit provisions due to concerns about agency noncompliance with respect to those laws.

[26]An exception is the Federal Food, Drug, and Cosmetic Act (1938), which was passed before the start of Mayhew's study but is highly significant, as indicated by its Lapinski & Clinton (2006) score of 0.819.

some laws under the EPA's jurisdiction were passed recently, thus leaving fewer observations for those units and giving greater weight to older than to newer laws. Given Beck's (2010) recommendation of cross-validation of units within time-series cross-sectional data, I compared the full dataset to the the data from laws enacted between the 93rd and the 111th Congress, as well as to the laws enacted from the 93rd Congress or earlier (those with balanced panels). I find that the results from the more recent laws closely parallel the results of the full estimation, and while the strength of the specification with older laws is more weakly significant (with results around p=.10), the direction of the effects remain the same. Thus, the results do not appear to be driven simply by a subsample of laws.[27]

The dependent variable *agency curbing* is the factor score weighted by cosponsorship support, ranging from 0 to 0.92 with a mean of 0.22. The dependent variable of *EPA lawsuits lost* is the percentage of DC Circuit cases that the EPA lost on substantive grounds, ranging from 0 to 1 with a mean of 0.16. I estimate the effects using Ordinary Least Squares with panel-corrected standard errors (PCSEs) to account for contemporaneous correlation.[28] To account for variable litigation periods – that is, variation in the time between the agency's action and the DC Circuit's rendering of a decision on that behavior – as a robustness check I present alongside these main results in Table 2 an alternative specification that lags the *EPA lawsuits* measure by one period ($EPA\ lawsuits\ lost_{t-1}$).[29]

Because performing statistical analysis of relationships between nonstationary time series can lead to spurious results, I use a Fisher-type test to confirm whether the dataset contains a unit root. I find overwhelming evidence against the null hypothesis of a unit root with

[27]To address the potential effects of outliers given the relatively small number of units in the sample, I performed the resampling technique of jackknife estimation, and the main substantive findings were consistent.

[28]While the *EPA lawsuits* variable is not technically continuous, it is widely dispersed between 0 and 1. Using a negative binomial model of the count of lawsuits lost does not meaningfully alter the results.

[29]While the cases in the sample overwhelmingly were argued in the same Congress as when the cases were decided, the time between the case's initiation and its being argued is more varied.

respect to all variables except for *environmental groups* and *distance between congresses*, which I first-differenced to render stationary. Performing the Wooldridge test for autocorrelation in panel data produced a highly significant test statistic, indicating the presence of first-order autocorrelation, for which PCSEs do not correct. After examining the autocorrelations across panels, I specify that there is AR(1) correlation within the panels and that the coefficient of the AR(1) process is panel-specific.[30] I begin by discussing conditions that drive agencies to deviate from Congress's preferred implementation, as indicated by the presence of *agency curbing.*

Findings of Noncompliance with Current Congress

The models, presented in Table 1, are OLS and thus the coefficients can be interpreted directly. I focus the discussion here on the main variables of theoretical interest. I find in model 1 that when the *margin of control* is equal to zero (when the parties are evenly divided), the main effect of a unit increase in *legislative-executive distance* is associated with a 0.44-unit increase in agency curbing when the *margin of control* is zero. Rather than focusing on the significant and positive independent effect of *margin of control*, the more meaningful term is the interaction, given that a large partisan majority in the president's party would not be expected to serve as a threat to the agency, whereas under conditions of inter-branch conflict *and* a large majority in Congress, there will be both ideological disagreement and an opposing party well-positioned to punish an agency seeking to move policy toward its preferred location. The interaction is powerful and negative – with a standard deviation increase in the interaction term producing a 0.11-standard deviation decline in curbing – which is consistent with my expectation that amid partisan conflict with the opposing party holding a large majority, the high risk of punishment will make noncompliance unlikely. That is, under this arrangement, Congress appears well-equipped to induce compliance in the agency.

Because of the complexity of interpreting interactions in which both variables are continuous,

[30]Utilizing a lagged dependent variable specification to address autocorrelation produced similar results with repect to a number of the core variables of theoretical interest. However, see Achen (2001) on LDVs.

I present in Figure 3 a plot of the interaction effects at different levels of *margin of control*. Consistent with the effect presented in the regression result, there appears to be a markedly negative slope when the margin of control is at its higher values, and it is not until the Congress is more evenly divided that the slope flattens or moves upward. This is consistent with my expectation that the effect of legislative-executive disagreement over policy will be conditional upon the strength of the coalition in Congress, and thus its ability to pass punitive legislation should it so desire.

Consistent with my expectation that divisions between the chambers of Congress would be associated with increased bureaucratic noncompliance by the EPA, I find a positive effect of *chamber distance*, with a unit increase in chamber distance associated with a .14-unit increase in agency curbing.[31] The effect of *NOMINATE distance between Congresses* is significantly associated with agency curbing from the current Congress: by exercising greater fidelity to the statutory text passed by an ideologically distant Congress and the current Congress expresses greater disapproval of the agency's actions. Increases in the extent of environmental interest group activity appears to be associated with less noncompliance, though the substantive effect is small. Thus, having multiple competing principals appears to produce an inconsistent effect on the agency's implementation and how it is received by other institutional actors.

Congressional provision for citizen suits does not appear to effectively constrain agency actions, despite the theory that the agency may be inclined to seek to avoid costly litigation from this broader pool of potential litigants. Moreover, contrary to my expectations, adjustment to judicial deference in the aftermath of *Chevron* appears to have a modestly significant and *negative* effect on noncompliance, though the substantive effect is small, with a move from the pre-to-post-*Chevron* period associated with only a 0.02-unit decline in agency curbing. The lack of a significant finding with respect to the EPA's budget suggests that these acts of

[31]This effect of legislative division is consistent when looking instead to the NOMINATE distance between the medians of the majority and minority parties.

noncompliance with the current Congress are not driven primarily by the agency's resource constraints as opposed to disagreements over matters of substantive policy.

As a robustness check in Table A3, I estimate additional OLS models with PCSEs combined with Prais Winsten, with the dependent variable of agency curbing weighted instead by the proportion of agency curbing on which some legislative action was taken (model 1), and by the average number of committees to which the agency curbing bills were referred (model 2). Providing these additional specifications enables me to better ensure that my findings do not rely on the assumption that the number of cosponsors per bill is an adequate indication of legislative sincerity or the seriousness with which a bill was considered by congressional coalitions. Consistent with the main findings discussed above, I find in both specifications that there is a significant and positive independent effect of *legislative-executive distance* when the margin of control is set to zero, while the interaction between the two is significant and negative. Greater *chamber distance* is also positively associated with the growth in agency curbing behavior, such that greater legislative divisiveness continues to appear to be associated with the agency's greater propensity to act out of accordance with the current Congress's preferences over implementation. However, the effects of *distance between Congresses* and congressional provision of *citizen suits* do not reach conventional levels of statistical significance.

As a further robustness check in Table A4, I estimate additional OLS models with PCSEs combined with Prais Winsten, weighting by cosponsorship the individual types of curbing bills introduced. I argue that *requirements*, *prohibitions*, and *oversight* are all constraining the agency so that it no longer has free reign in its implementation, a claim supported by the variables all loading heavily on a single factor and exhibiting similar patterns over time. However, there is reason to suppose that different patterns could emerge when compelling as opposed to prohibiting agency actions. However, both the *requirements* and *prohibitions* models – though not *oversight* – display patterns consistent with those found using the composite *agency curbing* measure: an increase in congressional constraints on the agency amid greater

legislative-executive distance, but a significant and negative interaction term. While the effect of *chamber distance* is only sustained in the *prohibitions* model, the effect of greater ideological distance between the enacting and contemporary Congresses remains significant and positive with respect to Congress's introduction of requirements and prohibitions against the agency. Thus, while there is not total consistency across all three variables, the consistency with respect to the *requirements* and *prohibitions* variables bolters support for the main findings on conditions under which congressional coalitions will seek to curb the agency's latitude in regulating.

Findings of Statutory Noncompliance

The above analysis sheds important new light on agency deviations from congressional preferences in statutory implementation, but does not answer clearly the rule of law question regarding the agency's adherence to statutory text. For that, I evaluate the *EPA suits lost*, the results of which are presented in Table 1 alongside the agency curbing specification. I expect that considering these substantive lawsuit losses against the EPA will provide novel insights about adherence to statutory text given variation in political and legal conditions.

In model 2, I find that a unit increase in *statute-agency distance* – that is, the extent of disagreement between the policy set by the enacting coalition and the agency – is associated with a 0.14-unit increase the EPA's loss rate, significant at the .001 level, and remains significant in model 3. This supports my claim that the agency will exercise less fidelity to the statutory text when it is not ideologically aligned with the policy that it sets. Consistent with the finding above, I find that greater ideological distance between the enacting and contemporary Congresses is associated with not just greater legislative constraints on the agency, but also greater loss rates in court. When adjudicating among ideologically distinct legislative principals, the EPA appears to ultimately face greater constraints from both the legislative *and* judicial branches: fidelity to the text results in a contemporary Congress opposed to the policy choice, while responsiveness to the contemporary Congress results in more statutory noncompliance. Thus, amid these dueling political principals, the agency appears to be caught between a rock

and a hard place, highly vulnerable to punishment by both branches. However, this finding's significance is not robust to the lagged lawsuit specification presented in model 3.

In both models 2 and 3, congressional provision for citizen suit litigation against the agency has a statistically significant and negative effect on bureaucratic noncompliance, suggesting that the greater pool of potential plaintiffs induces some degree of constraint on the agency, though the substantive effect is modest. Consistent with the model discussed above, the post-*Chevron* period appears in both models to be associated with *less* noncompliance, a finding that departs from my prediction. Of course, one explanation with respect to the lawsuit measure is that this period may be associated with the court's reduced probability of exercising judicial review of agency actions within the subset of cases on which I base this analysis.

As a robustness check, I replaced the post-*Chevron* variable with a post-*Lujan* dummy variable. *In Lujan v. Defenders of Wildlife* (1992), the Supreme Court narrowed the range of conditions under which plaintiffs have standing to sue, particularly with respect to environmental damage. Thus, the post-*Lujan* period should be associated with a reduced threat of potential plaintiffs having standing to sue the EPA. The *Lujan* specification produces comparable results on the key variables of theoretical interest and a positively-signed and significant coefficient on this dummy variable. Thus, when there is lower probability of getting sued, the agency acts less consistently with the statutory text and more consistently with its own preferences. While the direction of the effect of environmental interest group presence is inconsistent across specifications, the substantive effects remain modest, so the substantive effect of interest group monitoring (as well as influence) is ultimately unclear.

Thus, both lawsuit specifications produced results highly consistent with the hypothesis (5) that the agency's statutory compliance is shaped by its agreement with the policies set, and the main lawsuit specification (model 2) provided further confirmation that multiple legislative principals will propel an agency to act in ways out of compliance with either the current Congress's preferences (as indicated in model 1) and/or with the statutory text enforced by

courts (as indicated in models 2 and 3). While the lawsuit models produce internally consistent findings with respect to the effects of citizen suits and *Chevron*, their small effects and their inconsistency with model 1 provides reason to exercise caution in their interpretation. However, overall the models provide support for the claims that the extent of legislative-executive disagreement, moderated by the strength of congressional opposition, legislative division, and inconsistency between multiple principals importantly reshape the agency's incentives in implementation with respect to the current Congress's preferences, and that agreement with the delegating statute and that same inconsistency among legislative principals produces inconsistency with the letter of the law. Moreover, the inconsistent effects of the agency's budget on congressional and judicial responses to the agency's implementation suggests that while resource constraints on the agency may provide *some* explanation for these acts of noncompliance, it can hardly explain the broader patterns of noncompliance that the data reveal.

Conclusions

This article provides a novel, large-scale examination of agency noncompliance and sheds new light on the extent of the rule of law in a world of bureaucratic governance. It provides robust support for the theory that amid diverging legislative-executive preferences, the EPA takes more actions that deviate from Congress's preferred statutory implementation to pull policy toward its own preferred location, *unless* the likelihood of punishment is perceived as being great. It finds that the agency's own preferences over policy importantly shape the extent to which it is in fact a faithful implementer of that statute, again providing support for the argument that agency ideology plays a crucial – though little-acknowledged – role in the execution of statutes *even with the provision of ex ante constraints* given oversight challenges produced by ongoing coalition drift. It sheds new light on longer-term ramifications of bureaucratic autonomy, suggesting that while there may be a number of reasons why an agency can initially carve out a space for its autonomous policymaking, that autonomy is far from path-dependent if it deviates too far from the preferences of other institutional actors.

Thus, in an era of nearly-constant partisan division as well as marked coalition drift over time, there are clear reasons to rethink the traditional delegation story and look farther downstream at the policy outcomes that we ultimately observe upon implementation.

This paper was motivated by the the desire to capture the limits of Congress's ability to effectively induce compliance in those to whom it delegates, with much theory and little empirical support in extant analyses of the policy effects of congressional oversight and constraint. While compliance may be normatively desirable given better reflection of the preferences of directly elected legislators, the complexities inherent in policymaking, and the changing preferences among the branches over time, reshape agencies' latitude to exercise strict adherence to statutes or to the contemporary Congress. These agency actions call attention to an important distinction between the ideals of ex ante constraints on the agency and the ex post implementation that we ultimately observe, with the magnitude of this disconnect shaped importantly by the partisan configuration in which the institutions operate.

Noncompliance was addressed here only indirectly. The tests above capture congressional and judicial interventions into agency policymaking – interventions that ought not occur if the agency is exercising perfect fidelity to the current Congress or to the statutory text respectively. However, by identifying a set of conditions under which compliance was not induced in the agency, the project provides valuable new insights into the limits of congressional oversight of post-enactment processes, and the conditions under which bureaucratic control breaks down.

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Figure 1: The Calculus of Noncompliance

A: Agency
L: Law
H_m: House median
S_m: Senate median

Case 1: Low benefit, high likelihood of punishment ⇒ compliance

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A L S_m H_m

Case 2: High benefit, low likelihood of punishment ⇒ noncompliance

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S_m L A H_m

Case 3: High benefit, high likelihood of punishment ⇒ compliance

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A L S_m H_m

Table 1: Predictors of Bureaucratic Noncompliance, 1973-2010

	(1) Curbing	(2) Losses	(3) Losses_{t-1}
Legislative-Executive Distance	0.438***		
	(0.129)		
Margin of Control	1.822***		
	(0.370)		
LE Distance x Margin	-3.024***		
	(0.697)		
Chamber Distance	0.137*		
	(0.063)		
Statute-Agency Distance		0.144***	0.077**
		(0.018)	(0.024)
Distance Between Congresses	0.161**	0.243***	0.008
	(0.066)	(0.026)	(0.036)
Citizen Suits	-0.013	-0.011**	-0.025***
	(0.020)	(0.004)	(0.007)
Democratic President	0.017	0.004	0.158***
	(0.011)	(0.005)	(0.006)
Environmental Groups	-0.002*	0.022***	-0.032***
	(0.001)	(0.001)	(0.000)
DC Circuit Ideology	-0.231**	1.406***	-0.445***
	(0.074)	(0.025)	(0.012)
Post-*Chevron*	-0.015†	-0.105***	0.005†
	(0.008)	(0.008)	(0.003)
Significant Law	0.047***	-0.014**	-0.008***
	(0.009)	(0.004)	(0.001)
Statutory Fragmentation	-0.000	0.004**	0.007**
	(0.006)	(0.001)	(0.003)
EPA Budget	0.000	0.006***	0.009***
	(0.000)	(0.000)	(0.000)
Total EPA Legislation	0.001***		
	(0.000)		
Total EPA Lawsuits		-0.010***	0.013***
		(0.001)	(0.000)
Intercept	-2.752***	11.050***	8.479***
	(0.818)	(0.186)	(0.102)
Policy Fixed Effects	✓	✓	✓
Splines	✓	✓	✓
R^2	0.26	0.87	0.87
N	372	372	372

$^{***}p < .001, ^{**}p < .01, ^{*}p < .05, ^{\dagger}p < .10$

Results are Ordinary Least Squares with panel-corrected standard errors combined with Prais Winsten.

Figure 2: Agency Curbing Bills Over Time

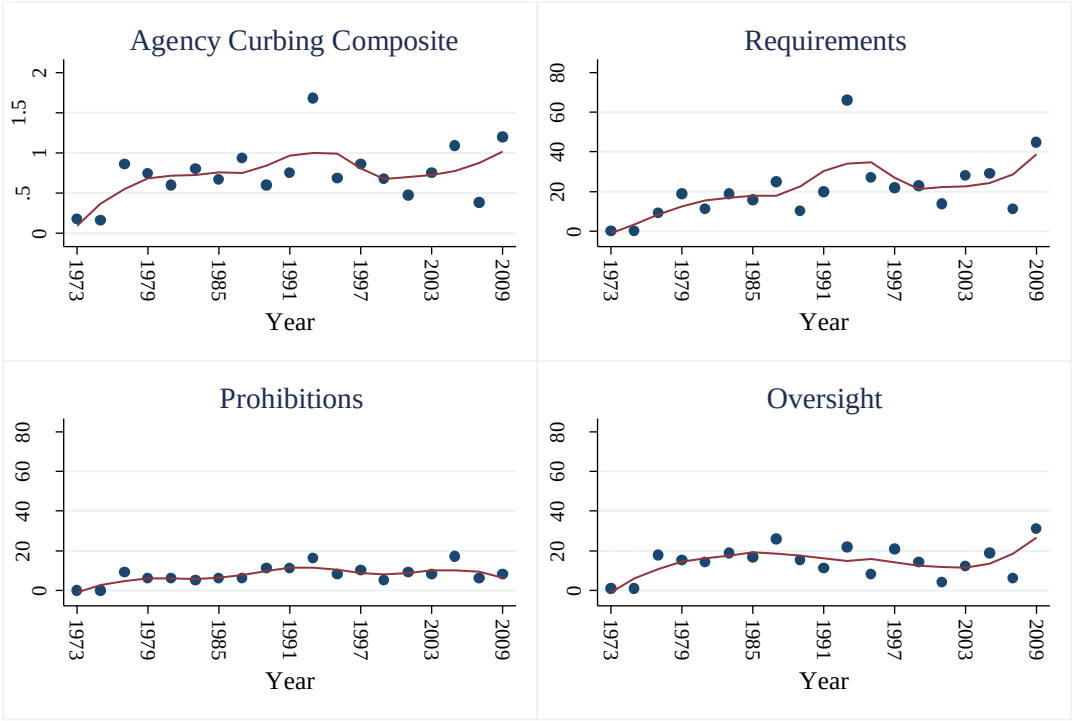
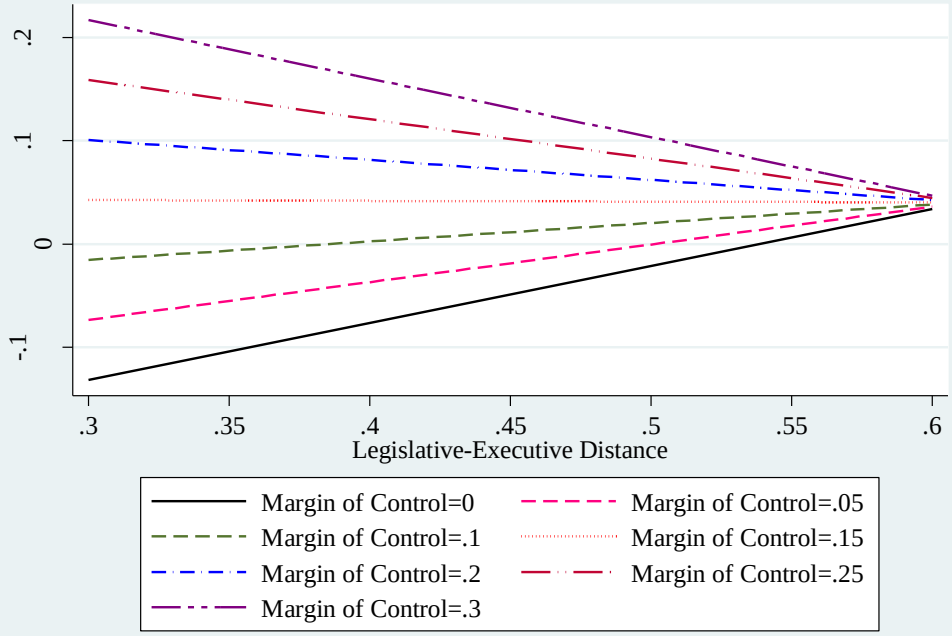


Figure 3: Interactions Between LE Distance and Margin of Control



Appendix

I conducted THOMAS searches for each of the 26 statutes implemented in whole or in part by the EPA. That is, I searched for "Clean Air Act" in the 93rd Congress, 94th Congress, and so on through the 111th Congress. There were no restrictions on whether it eventually became a public law or the committee from which it originated. Assigned to the label "agency curbing" those bills compelling regulatory action (requirements), prohibiting regulatory action or otherwise stripping agency latitude/authority (prohibitions), or increasing oversight over agency actions (oversight). For each bill retrieved, I collected a number of variables as to which types of constraints, if any, Congress imposed on the agency.

Rulemaking: 1 if at least some of the provisions targeting the agency's authority/obligations pertained to acts of rulemaking, 0 otherwise

Enforcement: 1 if at least some of the provisions targeting the agency's authority/obligations pertained to acts of enforcement (e.g., issuing sanctions, compelling compliance of regulated entities), 0 otherwise

Not relevant: 1 if no curbing provisions in the bill, 0 otherwise

Rulemaking or Implementation Requirement: 1 if the bill contained at least one provision that the agency take new regulatory actions, 0 otherwise.

- Ex. 1: "Directs the Administrator of the Environmental Protection Agency, by regulation and after a hearing, to disallow such deduction with respect to any solid waste material."
- Ex. 2: "Directs the Administrator of the Environmental Protection Agency, under the Clean Air Act, to promulgate Federal standards of performance for emission control devices or systems designed to prevent or reduce air pollution emissions from used vehicles."

Grants: 1 if the bill contained at least one provision that the agency issue grants to programs, states, or other regulated sectors, 0 otherwise.

- Ex. 1: "Requires the Administrator of the Environmental Protection Agency (EPA) to establish a grant program for projects to: (1) reduce free-flowing elemental mercury and mercury-added products from the environment; (2) safely dispose of or recycle mercury..."

Prohibition: 1 if the bill contained at least one provision that prohibited the agency from taking some regulatory action (e.g., prohibiting the agency from promulgating certain rules), retracted existing funds/resources/authority (e.g., reducing funds, transferring authority from the agency to another agency), or mobilized others to sue the agency (e.g., adding citizen suit provisions), 0 otherwise

- Ex. 1: "A bill to amend the Clean Air Act to prohibit the Environmental Protection Agency from requiring motor vehicle inspection and maintenance."
- Ex. 2: "Removes authority of the Administrator of the Environmental Protection Agency to waive the reformulated gasoline oxygen content requirement for an ozone nonattainment area."

Oversight: 1 of the bill contained at least one provision that imposed another oversight provision/provisions (e.g., report requirement, consultation requirement), 0 otherwise

- Ex. 1: "Requires the Administrator to report on or before January 1, of each year to the President and to Congress regarding the receipts and expenditures."
- Ex. 2: "Requires the Administrator of the Environmental Protection Agency (EPA) to consult with the Secretary regarding each feature of the proposed new or amended Record of Decision for operable unit 6 of the California Gulch National Priorities List Site that

may require any alteration to, or otherwise affect the operation and maintenance of, the Tunnel or the water treatment plant."

Because of the potential value in understanding the precise factors contributing toward congressional efforts to simply prohibit or further oversee the Environmental Protection Agency, and alongside those choices in no way adding to the Agency's regulatory agenda, I created a dummy variable for whether there were only *prohibitions* and/or oversight provisions, but no *requirements* in the bill, and I summed these bills by law by Congress as before. There were 269 such bills introduced by members of the president's party. However, when looking at the law-Congress level, one finds that they are included in only 114 of the 398 observations, and they are entirely absent from 4 of the 26 laws, thus creating for those cases only a dependent variable of zeros. Thus, there are limitations in what we can glean from such an analysis.

Nonetheless, I used the count variable of *constraints without requirements*, which is widely dispersed and thus more fitting for a negative binomial than for a poisson model specification.[32] Performance of a Wooldridge test ruled out the presence of AR(1) autocorrelation. I thus ran panel negative binomial models with unit (law) random effects. The results are presented in Table 1A, though to interpret the effects one must simulate marginal effects due to the non-linear nature of this model. While these results are thus less consistent with the main models discussed above, and it is worth considering why from a substantive standpoint this variable might in fact produce different results than one obtains when pooling all of the different types of regulatory constraints against the agency, the rather scarce amount of data limits the extent to which we can make meaningful inferences from these findings.

[32] 284 of the observations are 0, there are 50 instances with a count of 1, 32 instances with a count of 2, 12 instances with a count of 3, 9 instances with a count of 4, 6 instances with a count of 5, 1 instance with a count of 6, 1 instance with a count of 8, 1 instance with a count of 10, 1 instance with a count of 13, and 1 instance with a count of 16. Such data naturally produced a very high variance, whereas Poisson dispersion requires that the variance equal the mean.

Table A1: NBREG Model of Constraints without Requirements

	(1)
Legislative-Executive Distance	-17.988†
	(10.343)
Margin of Control	-43.586
	(34.641)
LE Distance x Margin	82.076
	(56.623)
Chamber Distance	7.332**
	(2.682)
Distance Between Congresses	1.958
	(3.070)
Citizen Suits	-0.046
	(0.430)
Democratic President	0.680
	(0.549)
Environmental Groups	-0.044
	(0.038)
DC Circuit Ideology	1.119
	(7.288)
Post-*Chevron*	1.047
	(1.372)
Significant Law	0.250
	(0.424)
Statutory Fragmentation	0.362
	(0.245)
EPA Budget	0.000
	(0.000)
Total EPA Legislating	0.018***
	(0.004)
Electoral Uncertainty	15.300
	(11.580)
Intercept	60.133
	(79.601)
Splines	✓
Total Observations	372

$^{***}p < .001, ^{**}p < .01, ^{*}p < .05, ^{\dagger}p < .10$

Table A2: Summary Statistics

	Mean	SD	Min	Max
Dependent Variables				
Lawsuit Losses	0.16	0.21	0	1
Requirements	0.23	0.59	0	4.39
Prohibitions	0.10	0.38	0	5.03
Oversight	0.12	0.36	0	5
Agency Curbing	0.22	0.09	0	0.92
Political Environment Variables				
Floor-President Distance	0.48	0.08	0.31	0.60
Margin of Control	0.10	0.09	0	0.29
LE Distance x Margin	0.05	0.04	0	0.14
Chamber Distance	0.02	0.02	0.00	0.05
Distance Between Congresses	.06	.04	0	.17
Environmental Groups	-7.45	53.45	-141.25	34.92
Total EPA Legislating	213.57	123.57	0	395
Total EPA Lawsuits	16.39	10.02	1	46
DC Circuit Ideology	0.06	0.14	-0.25	0.25
EPA Budget	61.18	20.83	7.35	89.71
Law Characteristics				
Fragmentation	0	0.88	-1.38	2.97
Significant	0.53	0.50	0	1

Table A3: Predictors of Agency Curbing, Assigning New Weights

	(1) Legislative Action	(2) Avg. No. Committees
Legislative-Executive Distance	2.763***	6.421*
	(0.697)	(2.721)
Margin of Control	16.050***	22.729*
	(3.088)	(9.754)
LE Distance x Margin	-25.251***	-33.438*
	(4.604)	(15.344)
Chamber Distance	1.006***	2.041*
	(0.291)	(0.942)
Distance Between Congresses	1.638	1.555
	(1.232)	(2.004)
Citizen Suits	-0.108	-0.511
	(0.143)	(0.282)
Democratic President	-0.050	0.379
	(0.088)	(0.229)
Environmental Groups	-0.013***	-0.015
	(0.004)	(0.014)
DC Circuit Ideology	-3.791***	-5.765*
	(1.001)	(2.655)
Post-*Chevron*	-0.302*	-0.434
	(0.143)	(0.339)
Significant Law	0.140	0.322
	(0.216)	(0.247)
Statutory Fragmentation	0.058	0.355***
	(0.045)	(0.044)
EPA Budget	-0.000	-0.000
	(0.000)	(0.000)
Total EPA Legislating	0.005*	0.014**
	(0.002)	(0.005)
Electoral Uncertainty	-2.620*	-4.430
	(1.346)	(3.179)
Intercept	0.000	-46.945
	(.)	(28.946)
Policy Fixed Effects	✓	✓
Splines	✓	✓
R^2	0.36	0.39
Total Observations	372	372

$^{***}p < .001, ^{**}p < .01, ^{*}p < .05$

Table A4: Individual Agency Curbing Actions

	(1) Requirements	(2) Prohibitions	(3) Oversight
Legislative-Executive Distance	1.713†	1.329*	0.253
	(1.026)	(0.675)	(0.440)
Margin of Control	10.298***	6.574***	-0.028
	(2.797)	(1.974)	(1.305)
LE Distance x Margin	-17.892***	-10.359**	1.142
	(5.228)	(3.721)	(2.447)
Chamber Distance	0.004	0.508*	-0.014
	(0.486)	(0.232)	(0.215)
Distance Between Congresses	1.425**	1.343***	-0.204
	(0.505)	(0.164)	(0.438)
Citizen Suits	-0.170***	-0.017	-0.071
	(0.052)	(0.049)	(0.084)
Democratic President	0.051	-0.027	0.091*
	(0.083)	(0.061)	(0.040)
Environmental Groups	-0.019**	-0.009*	-0.004
	(0.007)	(0.004)	(0.003)
DC Circuit Ideology	-1.120*	-1.206**	-0.930***
	(0.537)	(0.368)	(0.230)
Post-*Chevron*	-0.057	-0.060	0.052
	(0.085)	(0.084)	(0.042)
Significant Law	0.438***	0.162***	0.379***
	(0.076)	(0.028)	(0.054)
Statutory Fragmentation	-0.038*	-0.071†	-0.028
	(0.019)	(0.041)	(0.040)
EPA Budget	0.005	0.000	-0.000
	(0.000)	(0.000)	(0.000)
Total EPA Legislating	0.003***	0.003***	0.002**
	(0.001)	(0.000)	(0.001)
Intercept	0.000	-13.445**	0.000
	(.)	(4.360)	(.)
Policy Fixed Effects	✓	✓	✓
Splines	✓	✓	✓
R^2	0.34	0.20	0.27
Total Observations	372	372	372

$^{***}p < .001, ^{**}p < .01, ^{*}p < .05, ^{\dagger}p < .10$

Table A5: Environmental Protection Agency-Implemented Statutes

Law Name	Policy Domain	Citizen Suits
Atomic Energy Act	Energy	No
CERCLA	Toxic Substances	No
Clean Air Act	Air	Yes
Clean Water Act	Water	No
Emergency Planning and Community Right-to-Know Act	Toxic Substances	No
Endangered Species Act	Public Land/Animals	Yes
Energy Independence and Security Act	Energy	Yes
Energy Policy Act	Energy	No
Federal Food, Drug, and Cosmetic Act	Public Health/Safety	No
Federal Insecticide, Fungicide, and Rodenticide Act	Public Health/Safety	No
Federal Water Pollution Control Act	Water	Yes
Food Quality Protection Act	Public Health/Safety	No
Marine Protection, Research, and Sanctuaries Act	Water	Yes
National Environmental Policy Act	Public Land/Animals	No
National Technology Transfer and Advancement Act	Energy	No
Noise Control Act	Public Land/Animals	Yes
Nuclear Waste Policy Act	Toxic Substances	No
Ocean Dumping Act	Water	No
Oil Pollution Act	Toxic Substances	No
Occupational Safety and Health Act	Public Health/Safety	Yes
Pesticide Registration Improvement Act	Toxic Substances	No
Pollution Prevention Act	Toxic Substances	No
Resource Conservation and Recovery Act	Toxic Substances	No
Safe Drinking Water Act	Water	Yes
Superfund Amendments and Reauthorization Act	Toxic Substances	Yes
Toxic Substances Control Act	Toxic Substances	Yes