

2011

Beyond Principal-Agent Theories: Law and the Judicial Hierarchy

Pauline Kim

Washington University in St. Louis School of Law, kim@wustl.edu

Follow this and additional works at: https://openscholarship.wustl.edu/law_scholarship



Part of the [Agency Commons](#), [Courts Commons](#), [Judges Commons](#), and the [Legal Studies Commons](#)

Repository Citation

Kim, Pauline, "Beyond Principal-Agent Theories: Law and the Judicial Hierarchy" (2011).

Scholarship@WashULaw. 440.

https://openscholarship.wustl.edu/law_scholarship/440

This Essay is brought to you for free and open access by the Law School at Washington University Open Scholarship. It has been accepted for inclusion in Scholarship@WashULaw by an authorized administrator of Washington University Open Scholarship. For more information, please contact digital@wumail.wustl.edu.

BEYOND PRINCIPAL–AGENT THEORIES: LAW AND THE JUDICIAL HIERARCHY

Pauline T. Kim*

INTRODUCTION	535
I. THE JUDICIAL HIERARCHY	538
II. PRINCIPAL–AGENT RELATIONSHIPS.....	541
A. <i>Common Law Agency</i>	541
B. <i>The Economic Model</i>	544
C. <i>The Political Model</i>	548
III. PRINCIPAL–AGENT THEORY AND THE JUDICIAL HIERARCHY.....	552
A. <i>Assessing Theory Fit</i>	553
B. <i>Limitations of Principal–Agent Theories</i>	561
IV. RECONCEPTUALIZING LAW AND THE JUDICIAL HIERARCHY	571
CONCLUSION.....	575

INTRODUCTION

It is now commonplace for judicial politics scholars to describe the federal judicial hierarchy in terms of a principal–agent relationship.¹ The basic outlines of this model are familiar: the United States Supreme Court is

* Charles Nagel Professor, Washington University School of Law, St. Louis. My thanks to Jarrod Reece and William Osberghaus who provided excellent research assistance. For helpful comments and feedback, thanks to Scott Baker, Matthew Hall, and David Law, as well as participants at the Political Science and Law Conference hosted by Northwestern University School of Law and the Searle Center on Law, Regulation, and Economic Growth at Northwestern University School of Law and participants at workshops at Washington University School of Law and St. Louis University School of Law.

¹ See, e.g., Sara C. Benesh & Malia Reddick, *Overruled: An Event History Analysis of Lower Court Reaction to Supreme Court Alteration of Precedent*, 64 J. POL. 534, 536 (2002); Charles M. Cameron, Jeffrey A. Segal & Donald Songer, *Strategic Auditing in a Political Hierarchy: An Informational Model of the Supreme Court’s Certiorari Decisions*, 94 AM. POL. SCI. REV. 101, 103 (2000); Tom S. Clark, *A Principal-Agent Theory of En Banc Review*, 25 J.L. ECON. & ORG. 55, 76 (2008); Tracey E. George & Michael E. Solimine, *Supreme Court Monitoring of the United States Courts of Appeals En Banc*, 9 SUP. CT. ECON. REV. 171, 175 (2001); Tracey E. George & Albert H. Yoon, *The Federal Court System: A Principal-Agent Perspective*, 47 ST. LOUIS U. L.J. 819, 820–22 (2003); Susan B. Haire, Stefanie A. Lindquist & Donald R. Songer, *Appellate Court Supervision in the Federal Judiciary: A Hierarchical Perspective*, 37 LAW & SOC’Y REV. 143, 162–64 (2003); Tonja Jacobi & Emerson H. Tiller, *Legal Doctrine and Political Control*, 23 J.L. ECON. & ORG. 326, 329 (2007); Stefanie A. Lindquist, Susan B. Haire & Donald R. Songer, *Supreme Court Auditing of the US Courts of Appeals: An Organizational Perspective*, 17 J. PUB. ADMIN. RES. & THEORY 607, 610 (2007); Kirk A. Randazzo, *Strategic Anticipation and the Hierarchy of Justice in U.S. District Courts*, 36 AM. POL. RES. 669, 671–75 (2008); Donald R. Songer, Jeffrey A. Segal & Charles M. Cameron, *The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court–Circuit Court Interactions*, 38 AM. J. POL. SCI. 673 (1994); Matt Spitzer & Eric Talley, *Judicial Auditing*, 29 J. LEGAL STUD. 649, 670 (2000).

conceptualized as the “principal” and the lower federal courts as the “agents.” Given resource constraints, the Supreme Court necessarily delegates some of the work of deciding cases to other courts, but as the principal, it sets the policy that the lower courts should implement.² Lower court judges, however, have their own goals and preferences, which raises the risk that they will pursue their own ends,³ thus creating the classic dilemma of principal–agent relationships: how to ensure that agents act on the principal’s behalf and not in their own self-interest.

Like traditional attitudinal models, which hold that judges’ preferences determine their voting behavior, principal–agent models assume that judges have policy goals that they seek to effectuate through their decisionmaking.⁴ Most commonly, these policy goals are framed in terms of outcomes. For example, conservative judges are assumed to prefer outcomes favoring the government in criminal cases, and liberal judges are assumed to prefer outcomes favoring civil rights plaintiffs. Although principal–agent theories recognize that institutional context affects judges’ decisionmaking, many of these theories simply ignore the role of law. To the extent that they do account for law, they tend to understand it in instrumental terms—as a means of mediating the inevitable conflict between upper and lower courts over policy outcomes. Assuming that policy outcomes are the goal of judges’ decisionmaking, scholars have thus characterized the law as merely a means

² See, e.g., George & Yoon, *supra* note 1, at 822 (explaining that the Supreme Court delegates a great deal of its work to lower courts, which must effectuate the Court’s doctrines); Randazzo, *supra* note 1, at 671 (discussing how the principal, lacking resources, delegates tasks to the agent, who is expected to represent the principal’s interests); Songer, Segal & Cameron, *supra* note 1, at 675 (describing the Supreme Court as the principal and the courts of appeals as agents who should follow the Court’s policy dictates).

³ See, e.g., Benesh & Reddick, *supra* note 1, at 536 (positing that lower courts will not follow Supreme Court policy when they disagree with it); Cameron, Segal & Songer, *supra* note 1, at 104 (assuming that upper and lower courts have different preferences regarding case dispositions); George & Yoon, *supra* note 1, at 822 (noting that when the preferences of Supreme Court and lower court judges diverge, there is “an incentive to make a non-complying ruling”); Lindquist, Haire & Songer, *supra* note 1, at 610 (describing how goal conflicts that arise when upper and lower courts have divergent preferences reduce the ability of the Supreme Court to guide the decisions of the lower courts); McNollgast, *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*, 68 S. CAL. L. REV. 1631, 1633–36 (1995) (pointing out that the Supreme Court and lower courts often differ significantly in their preferences regarding judicial doctrine, creating a risk of noncompliance with Supreme Court precedent); Randazzo, *supra* note 1, at 671 (noting that the agent’s preferences may differ from the principal’s, creating tension in the relationship); Songer, Segal & Cameron, *supra* note 1, at 675 (observing that “utility maximizing appeals court judges also have their own policy preferences, which they may seek to follow to the extent possible”).

⁴ See, e.g., George & Solimine, *supra* note 1, at 175 (theorizing that Justices seek to advance their policy preferences through the certiorari process); Haire, Lindquist & Songer, *supra* note 1, at 163 (suggesting that “federal judges at all levels are guided by their policy preferences”); McNollgast, *supra* note 3, at 1636 (assuming that judges “act rationally to bring policy as close as possible to their own preferred outcome”); Spitzer & Talley, *supra* note 1, at 655 (modeling judges as primarily interested in reaching legal outcomes which are as consistent as possible with their policy preferences).

for upper courts to communicate their policy preferences⁵ or as an instrument for exercising control over lower courts.⁶

The assumption that the lower federal courts are agents of the Supreme Court has become so widely accepted that the applicability of the model to the federal judicial hierarchy is rarely questioned. A few have raised doubts—for example, Judge Richard Posner notes that if federal appellate judges are agents, the identity of their principals is “a matter of some uncertainty.”⁷ Similarly, others have suggested that federal judges could appropriately be viewed as the agents of their appointing President, Congress, or the public.⁸ Nevertheless, many judicial politics scholars readily accept the characterization of the lower federal courts as agents of the Supreme Court. Because the federal judiciary is organized as a hierarchy, with some resemblance to other organizational forms that utilize monitoring and incentives to achieve the principal’s goals, the principal-agent model is assumed to be an apt one.

Upon closer examination, however, the principal-agent model does not map so neatly onto the structure of the judicial hierarchy. For example, the Supreme Court, to a far greater degree than most principals, is highly constrained in its ability to shape the incentives of district and circuit court judges. Moreover, there is no direct contractual relationship between Supreme Court Justices and lower federal court judges, making uncertain the basis for any duty on the part of lower courts to act in the interests of the Supreme Court. The lack of an exact fit should not be a surprise given that

⁵ See, e.g., Ethan Bueno de Mesquita & Matthew Stephenson, *Informative Precedent and Intrajudicial Communication*, 96 AM. POL. SCI. REV. 755, 757 (2002) (suggesting that policy-oriented appellate courts develop lines of cases in order to communicate better with lower courts); Haire, Lindquist & Songer, *supra* note 1, at 143–44 (asserting that appellate courts’ power to affirm or reverse is a means of signaling their preferences to the lower courts); see also, e.g., McNollgast, *supra* note 3, at 1639 (describing a “doctrinal interval” that indicates a range of rules “that are acceptable to the Supreme Court when reviewing decisions by a lower court”).

⁶ See George & Yoon, *supra* note 1, at 823–24; Jacobi & Tiller, *supra* note 1, at 326.

⁷ RICHARD A. POSNER, *HOW JUDGES THINK* 12, 126 (2008).

⁸ See, e.g., CHRISTINE L. NEMACHECK, *STRATEGIC SELECTION: PRESIDENTIAL NOMINATION OF SUPREME COURT JUSTICES FROM HERBERT HOOVER THROUGH GEORGE W. BUSH* 33–34 (2007) (likening the relationship between a president and his Supreme Court nominee to that of a principal and an agent); POSNER, *supra* note 7, at 126 (asking whether a federal judge’s principal is a higher court, Congress, the appointing President, the current President, the American people, the framers of the Constitution, the Constitution itself and statutes and precedents, or “the law”); James C. Brent, *An Agent and Two Principals: U.S. Court of Appeals Responses to Employment Division, Department of Human Resources v. Smith and the Religious Freedom Restoration Act*, 27 AM. POL. Q. 236, 255 (1999) (finding that, in passing the Religious Freedom Restoration Act, “Congress [was] as successful as the Supreme Court in enlisting the Court of Appeals as its agent”); Stephen J. Choi & G. Mitu Gulati, *Which Judges Write Their Opinions (and Should We Care)?*, 32 FLA. ST. U. L. REV. 1077, 1082 (2005) (describing judges as agents of the public); Pauline T. Kim, *Lower Court Discretion*, 82 N.Y.U. L. REV. 383, 435 (2007) (observing that lower court judges could be conceptualized as agents of the President who appointed them or of the Congress that confirmed them and enacted the laws that they interpret); Spitzer & Talley, *supra* note 1, at 650 (noting that the Judicial Branch could be viewed as delegated decisionmaker for the Legislative and Executive Branches).

the concept of agency was developed by the common law to regulate representative relationships and later applied by economists and political scientists to describe institutions such as the private firm or the government agency—all contexts quite different from the judicial hierarchy. The lack of an exact fit alone does not mean the model cannot be useful, as existing theoretical constructs may offer useful insights when applied in new contexts. Models necessarily simplify a complex reality, however, and in doing so, they highlight certain features of the phenomenon under study while eliding others.

The purpose of this Article is to critically examine the use of principal–agent models to describe the federal judicial hierarchy. It explores how reliance on principal–agent theories shapes our understanding of how federal judges make decisions and interact with other actors in the judicial system. As I argue below, agency models are useful in highlighting certain aspects of the interaction between upper and lower courts—specifically, the existence of value conflicts and informational asymmetries. In other ways, however, traditional principal–agent models are a poor fit for the relationship between the lower federal courts and the Supreme Court. As a consequence, reliance on these models may limit our understanding of intercourt interactions. More specifically, these models tend to obscure important normative questions about the relationship between lower and upper courts, as well as to distort the role that law plays in judicial decisionmaking.

Moving beyond principal–agent theories expands the possibilities for modeling and understanding the federal judicial hierarchy. Instead of being viewed as merely a signal or command to lower courts, the law should be understood as the joint product of the Supreme Court and the lower courts. Producing a coherent body of law requires cooperation and coordination between the various levels of the judicial hierarchy at the same time that the law is the ground on which value conflicts between judges are played out. Thus, the interaction between the Supreme Court and lower federal courts might be more productively modeled as a type of mixed-motive coordination game rather than a traditional principal–agent relationship.

I. THE JUDICIAL HIERARCHY

The basic outline of the federal judicial system is familiar. Federal courts are arranged hierarchically, with district courts hearing and disposing of cases in the first instance, subject to review by one of the twelve circuit courts of appeals and ultimately by the Supreme Court. While district judges generally hear and decide cases alone, the appellate courts are collegial courts. Courts of appeals typically hear cases in panels of three judges, and the nine Justices of the Supreme Court decide cases together. Although the interactions among judges on a collegial court are a critical

aspect of the decisionmaking process,⁹ for purposes of this Article, I treat these appellate panels as unitary actors vis à vis the other courts in the hierarchy.

In light of this hierarchical structure, judicial politics scholars have used principal-agent theories to describe the interaction between the Supreme Court and the lower federal courts.¹⁰ Donald Songer, Jeffrey Segal, and Charles Cameron describe the Supreme Court in terms of a “principal, whose subordinates, the courts of appeals, are the agents” and conclude that “the circumstances [of the judicial hierarchy] fit the model well.”¹¹ Similarly, Tracey George and Albert Yoon write that “[s]ince the Supreme Court is formally at the apex of the judicial pyramid, the Court’s decisions can be conceptualized as a principal directing (or attempting to direct) its agents, the lower courts.”¹² Others argue that the “institutional dynamics associated with appellate review in the federal judicial hierarchy are captured by principal-agent theory”¹³ and that “principal-agent theory is a useful device for

⁹ A number of empirical studies have demonstrated that federal appellate court judges’ voting patterns appear to be influenced not only by the judges’ own policy preferences but also by the other judges with whom they sit when deciding a case. See, e.g., CASS R. SUNSTEIN, DAVID SCHKADE, LISA M. ELLMAN & ANDRES SAWICKI, ARE JUDGES POLITICAL?: AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY 11–12 (2006) (finding that “variations in panel composition lead to dramatically different outcomes” in a number of issue areas); Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1, 26 (2008) (finding evidence of panel effects in cases under section 2 of the Voting Rights Act); Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2156 (1998) (concluding that the presence of ideological minorities on judicial panels influences the votes of majority judges); Pauline T. Kim, *Deliberation and Strategy on the United States Courts of Appeals: An Empirical Exploration of Panel Effects*, 157 U. PA. L. REV. 1319, 1374 (2009) (empirically confirming that panel composition affects decisionmaking on circuit courts of appeals and testing competing explanations for panel effects); Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1771–72 (1997) (concluding that the ideology of the other panel members influences a judge’s vote in environmental cases); Joshua B. Fischman, *Interpreting Circuit Court Voting Patterns: A ‘Social Interactions’ Framework* 20 (Va. Pub. Law & Legal Theory, Research Paper No. 2010-27, 2011), available at <http://papers.ssrn.com/abstract=1636002> (finding evidence of panel effects in multiple datasets of circuit judge votes in a variety of issue areas). In addition, a rich academic literature has considered how interactions among judges on multimember courts, such as the United States Supreme Court or the federal courts of appeals, affect their decisionmaking. E.g., FORREST MALTZMAN, JAMES F. SPRIGGS II & PAUL J. WAHLBECK, CRAFTING LAW ON THE SUPREME COURT: THE COLLEGIAL GAME (2000); Evan H. Caminker, *Sincere and Strategic Voting Norms on Multimember Courts*, 97 MICH. L. REV. 2297 (1999); Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639 (2003); Lewis A. Kornhauser & Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 CALIF. L. REV. 1 (1993); Jeffrey R. Lax, *Certiorari and Compliance in the Judicial Hierarchy: Discretion, Reputation and the Rule of Four*, 15 J. THEORETICAL POL. 61 (2003); Jeffrey R. Lax & Charles M. Cameron, *Bargaining and Opinion Assignment on the US Supreme Court*, 23 J.L. ECON. & ORG. 276 (2007).

¹⁰ See *supra* notes 1–6 and accompanying text.

¹¹ Songer, Segal & Cameron, *supra* note 1, at 675.

¹² George & Yoon, *supra* note 1, at 819.

¹³ Haire, Lindquist & Songer, *supra* note 1, at 146.

examining the impact of Supreme Court decisions on lower court behavior.”¹⁴

Scholars invoked principal–agent theories in order to better understand the relationship between upper and lower courts and to explore how the hierarchical structure of the judiciary influences decisionmaking. In many ways, these inquiries represent a real advance. Traditional attitudinal models of judicial decisionmaking emphasized the centrality of judicial attitudes, generally understood as policy preferences, in determining judicial voting behavior.¹⁵ This approach focused on the individual judge and often assumed that case outcomes reflect the sincere policy preferences of the judge or judges voting in the case. Principal–agent theories draw attention to the fact that judges do not decide in isolation but are part of a larger institutional structure and that their interactions with other actors in that system also influence their decisionmaking. Thus, principal–agent theories have led scholars to explore questions such as the extent to which circuit courts obey the dictates of the Supreme Court,¹⁶ how the Supreme Court selects which cases to review,¹⁷ and how the Supreme Court uses doctrine to control outcomes in the lower courts.¹⁸ Principal–agent theories are certainly useful in framing these types of inquiries. However, the use of any heuristic necessarily draws attention to certain features of a situation while ignoring others. In the Parts that follow, I explore the ways in which the assumptions of agency theory have shaped and limited our understanding of the judicial hierarchy.

As a caveat, my focus here is on the vertical relationships within the federal judiciary, specifically between the United States Supreme Court and the lower federal courts. Principal–agent theories have been applied to other interactions in the judicial system as well: for example, the relationships between the United States Supreme Court and state supreme courts,¹⁹ be-

¹⁴ Randazzo, *supra* note 1, at 672.

¹⁵ See JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* 65 (1993) (explaining that the attitudinal model “holds that the Supreme Court decides disputes in light of the facts of the case vis-à-vis the ideological attitudes and values of the justices”); Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 265 (1997) (“[The attitudinal model] suggests that judicial decisionmaking is not based upon reasoned judgment from precedent, but rather upon each judge’s political ideology and the identity of the parties.”).

¹⁶ See Songer, Segal & Cameron, *supra* note 1.

¹⁷ See Cameron, Segal & Songer, *supra* note 1.

¹⁸ See Jacobi & Tiller, *supra* note 1.

¹⁹ See, e.g., Sara C. Benesh & Wendy L. Martinek, *State Supreme Court Decision Making in Confession Cases*, 23 JUST. SYS. J. 109, 125 (2002); Keith Rollin Eakins & Karen Swenson, *An Analysis of the States’ Responses to Republican Party of Minnesota v. White*, 28 JUST. SYS. J. 371, 373–74 (2007); Michael E. Solimine, *The Future of Parity*, 46 WM. & MARY L. REV. 1457, 1476 (2005). *But cf.* John C. Kilwein & Richard A. Brisbin, Jr., *Policy Convergence in a Federal Judicial System: The Application of Intensified Scrutiny Doctrines by State Supreme Courts*, 41 AM. J. POL. SCI. 122, 124–25 (1997) (questioning the application of a principal–agent model to relationships between the United States Supreme Court and the state supreme courts).

tween a circuit sitting en banc and a three-judge panel,²⁰ and between the federal courts of appeals and district courts.²¹ These theories may or may not be apt when applied to those settings, and I do not attempt to address them here. The more general point is that a close examination of the particular circumstances is important in determining when it is useful to draw an analogy to the agency relationship in any context.

II. PRINCIPAL-AGENT RELATIONSHIPS

By applying principal-agent theories to the federal judicial hierarchy, scholars draw on an extensive literature about a particular type of relationship. In this Part, I review three classic conceptions of the agency relationship—from common law, economics, and political science. These conceptions differ in important ways from one another and are deployed for different purposes, yet all share certain core elements that give the theory its power. The scholars who characterize the judicial hierarchy in principal-agent terms are not arguing that it matches these earlier conceptions in all their particulars. Nevertheless, examining the canonical cases, their basic structure, and the insights they generate helps illuminate the ways in which principal-agent theories may enhance or impede understanding of the federal judicial hierarchy.

A. Common Law Agency

Concepts of agency are rooted in the common law and intended to address situations in which one person can be legally bound by the actions of another.²² Although the law recognizes a number of situations in which one person can act on behalf of another, an agency relationship is a particular type of representative relationship with defined legal consequences. According to the *Third Restatement of Agency*,

Agency is the fiduciary relationship that arises when one person (a “principal”) manifests assent to another person (an “agent”) that the agent shall act on the principal’s behalf and subject to the principal’s control, and the agent manifests assent or otherwise consents so to act.²³

²⁰ See Clark, *supra* note 1, at 76; Tracey E. George, *The Dynamics and Determinants of the Decision to Grant En Banc Review*, 74 WASH. L. REV. 213, 245 (1999); Douglas H. Ginsburg & Donald Falk, *The Court En Banc: 1981–1990*, 59 GEO. WASH. L. REV. 1008, 1011–13 (1991); Michael E. Solimine, *Ideology and En Banc Review*, 67 N.C. L. REV. 29, 49 (1988).

²¹ See Chris Guthrie & Tracey E. George, *The Futility of Appeal: Disciplinary Insights into the “Affirmance Effect” on the United States Courts of Appeals*, 32 FLA. ST. U. L. REV. 357, 373 (2005); Haire, Lindquist & Songer, *supra* note 1, at 144–50; Randazzo, *supra* note 1, at 673–75.

²² See Mark McGaw, *Agency: English Common Law*, in 1 OXFORD INTERNATIONAL ENCYCLOPEDIA OF LEGAL HISTORY 108, 108–10 (Stanley N. Katz ed., 2009).

²³ RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006).

Several elements are necessary to establish a legally recognized agency relationship. First, the relationship is based on contract or consent.²⁴ Mutual agreement is necessary not only to establish the existence of the relationship but also to determine the scope of the agency—that is, the areas in which the agent is empowered to act on behalf of the principal.²⁵ The second element is the power of the agent.²⁶ The agency relationship creates authority in the agent to act for the principal—not only to pursue the principal’s interests but to do so in ways that may bind the principal or affect its legal relations with third parties.²⁷ Third, the principal retains the right to control the actions of the agent. This right of control entails the right “to assess the agent’s performance, provide instructions to the agent, and terminate the agency relationship by revoking the agent’s authority.”²⁸ Consent and control are essential elements. In the absence of consent, express or implied, or a right of control and termination, the common law generally does not recognize an agency relationship.²⁹

Much of traditional agency law is concerned with legal relationships with third parties, focusing on questions such as when and under what circumstances the actions of an agent will create binding obligations or give rise to liability on the part of the principal.³⁰ More importantly for the discussion here, agency law also addresses the obligations of the agent to the principal. Specifically, the law imposes on the agent a fiduciary duty to act not only on *behalf* of the principal but also in the *interest* of the principal.³¹ This duty requires the agent not merely to follow instructions but also to act loyally, subordinating her own interests to that of the principal. As explained in the *Restatement*,

An agent’s fiduciary position requires the agent to interpret the principal’s statement of authority, as well as any interim instructions received from the principal, in a reasonable manner to further purposes of the principal that the

²⁴ See *id.* cmt. d (“Under the common-law definition, agency is a consensual relationship. The definition requires that an agent-to-be and a principal-to-be consent to their association with each other.”); Randy E. Barnett, *Squaring Undisclosed Agency Law with Contract Theory*, 75 CALIF. L. REV. 1969, 1981 (1987) (describing a consent theory of agency); Gerard McMeel, *Philosophical Foundations of the Law of Agency*, 116 L.Q. REV. 387, 388–92 (2000) (providing a history and description of the consensual theory of agency doctrine).

²⁵ See RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. e.

²⁶ See *id.* cmt. c.

²⁷ See *id.*

²⁸ *Id.* cmt. f(1).

²⁹ See RESTATEMENT (THIRD) OF AGENCY intro. (“In general, agency does not encompass situations in which an ‘agent’ is not subject to a right of control in the person who benefits from or whose interests are affected by the agent’s acts, who lacks the power to terminate the ‘agent’s’ representation, or who has not consented to the representation.”).

³⁰ See *id.* §§ 6.01–6.11, 7.03–7.08; see also Eric Rasmusen, *Agency Law and Contract Formation*, 6 AM. L. & ECON. REV. 369, 370 (2004) (explaining that traditional agency law is often concerned with what happens when the agent’s effort is mischanneled, causing harm to a third party).

³¹ See RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. e.

agent knows or should know, in light of facts that the agent knows or should know at the time of acting.³²

Although in theory the agent is under the control of the principal, as a practical matter that control will always be incomplete. It is impossible for the principal to give advance instructions precise enough to avoid giving the agent some discretion. That inability to specify comprehensive directions and the agent's authority to act in the absence of the principal mean that the agent will inevitably have opportunities for personal gain as a result of the agency. The law responds to this risk by imposing a duty of loyalty. Thus, "[a]n agent . . . is not free to exploit gaps or arguable ambiguities in the principal's instructions to further the agent's self-interest, or the interest of another, when the agent's interpretation does not serve the principal's purposes or interests known to the agent."³³

The agent's duty of loyalty has been explained in different ways. Some courts and commentators emphasize a moral basis for the duty, citing the vulnerability of the principal as the reason for imposing a higher standard of conduct on the agent.³⁴ This vulnerability is inherent in the relationship because the agent has the power to affect the principal's legal rights and obligations; in many cases, this vulnerability is exacerbated by the agent's superior knowledge, skill, and access to information. On this view, the agent's fiduciary duties are imposed by law based on the character of the relationship.

Others have explained fiduciary duties as a means of simplifying the contracting process.³⁵ As Judge Frank Easterbrook and Daniel Fischel write, "[T]he duty of loyalty is a response to the impossibility of writing contracts completely specifying the parties' obligations."³⁶ Principals typically hire an agent because they cannot perform the work—perhaps due to limited time or lack of expertise—but the conditions making the agency desirable also make it difficult for the principal to direct or to evaluate the

³² *Id.*

³³ *Id.*

³⁴ See *Compagnie de Reassurance d'Ile de France v. New England Reinsurance Corp.*, 944 F. Supp. 986, 996 (D. Mass. 1996) (noting that "fiduciary dut[ies] arise out of a relationship of vulnerability"); Gregory S. Alexander, *A Cognitive Theory of Fiduciary Relationships*, 85 CORNELL L. REV. 767, 776–77 (2000) (arguing that the rationale for the duty of loyalty is a gross imbalance of power between the parties); Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 902 (suggesting that fiduciary obligations are often justified because of one party's vulnerability to the fiduciary's abuse of power).

³⁵ See RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. e ("In the absence of the fiduciary benchmark, the principal would have a greater need to define authority and give interim instructions in more elaborate and specific form to anticipate and eliminate contingencies that an agent might otherwise exploit in a self-interested fashion."); *id.* § 8.01 cmt. b ("The fiduciary principle supplements manifestations that a principal makes to an agent, making it unnecessary for the principal to graft explicit qualifications and prohibitions onto the principal's statements of authorization to the agent.").

³⁶ Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J.L. & ECON. 425, 426 (1993).

agent's efforts. In such a situation, rather than attempting to provide detailed directions, the principal delegates authority to the agent to achieve an objective, subject to the duty of loyalty. The duty thus "replaces detailed contractual terms," and the obligations it imposes should mimic the terms that "the parties themselves would have preferred if bargaining were cheap and all promises fully enforced."³⁷

Common law agency doctrine thus offers one solution to the difficulty of aligning the interests of the agent with the principal: imposing an enforceable duty of loyalty on the agent. Whether this duty is justified as morally required or as efficient contractual gap-filling, it arises because of the existence of a relationship to which the parties have assented and, to that extent, is consensual in origin. The fact that the relationship is established by agreement also creates the possibility that the agency might be structured in a way that mitigates potential conflicts. Thus, as discussed in the next section, economic theories have focused on the question whether or how contractual agreements can be used to better align the interests of the agent with that of the principal.

B. *The Economic Model*

Economists have utilized principal-agent models to analyze a wide variety of private economic relationships, such as that between employer and employee,³⁸ shareholder and manager,³⁹ and landowner and tenant farmer.⁴⁰ These models are related to but distinct from the legal concept of the principal-agent relationship. Like the law of agency, economic theory is concerned with issues of monitoring and control within a consensual relationship. Rather than designing legal rules to address the problem, however, economic theories ask how contractual incentives can be structured in order to induce the agent to act in the principal's interest.⁴¹ In doing so,

³⁷ *Id.* at 427; see also FRANK H. EASTERBROOK & DANIEL R. FISCHER, *ECONOMIC STRUCTURE OF CORPORATE LAW* 92 (1991) ("Socially optimal fiduciary rules approximate the bargain that investors and managers would have reached if they could have bargained (and enforced their agreements) at no cost.").

³⁸ See, e.g., Milton Harris & Artur Raviv, *Some Results on Incentive Contracts with Applications to Education and Employment, Health Insurance, and Law Enforcement*, 68 AM. ECON. REV. 20, 20 (1978) (listing the employer-employee relationship as one that fits the "agency paradigm"); Terry M. Moe, *The New Economics of Organization*, 28 AM. J. POL. SCI. 739, 756 (1984) (same); David E.M. Sappington, *Incentives in Principal-Agent Relationships*, J. ECON. PERSP., Spring 1991, at 45, 46 (same).

³⁹ See Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 309 (1976); Steven Shavell, *Risk Sharing and Incentives in the Principal and Agent Relationship*, 10 BELL J. ECON. 55, 66 (1979).

⁴⁰ See Sappington, *supra* note 38, at 45, 46-49.

⁴¹ See Rasmusen, *supra* note 30, at 370 ("For the economist, the agency problem is how to give the agent incentives for the right action; for the lawyer, it is how to 'mop up' the damage once the agent has taken the wrong action.").

they first identify more formally the structure of the contracting problem in various settings.

The economic models share with the legal concept several core assumptions. The principal-agent relationship is conceived as a contractual one, in which the principal's payoff is affected by the agent's actions and in which the principal delegates decisionmaking authority to the agent.⁴² The agent is hired to achieve the principal's purposes and, by her actions, is able to affect the principal's interests. In economic theories, however, the focus is not limited to actions that create legal obligations on the principal but is instead generalized to any situation in which the agent's activities determine, at least in part, the outcome for the principal.⁴³ Thus, the diligence of the employee will increase the productivity of the firm, the decisions of a manager will affect the return for shareholders, and the level of effort invested by a tenant farmer will influence the crop yield for the landowner. In each of these cases, other factors—technological constraints, market conditions, levels of rainfall—will influence the outcome, but the agent's activities will have an impact as well.

Although the principal enters into the relationship in order to achieve certain purposes, the agent has her own private goals, which may conflict with those of the principal, and thus the problem for the principal is to determine how best to motivate the agent to perform according to the principal's wishes.⁴⁴ If the principal had complete information or if monitoring costs were zero, this problem would be trivial because the principal could effectively observe and punish any deviations. However, because of the existence of private information, two types of problems arise: adverse selection and moral hazard.

The problem of adverse selection affects the contracting process because applicants have hidden information about their true "type"—that is,

⁴² See Jensen & Meckling, *supra* note 39, at 308 (defining an agency relationship as "a contract under which one or more persons (the principal(s)) engage another person (the agent) to perform some service on their behalf which involves delegating some decision making authority to the agent"); Moe, *supra* note 38, at 756 ("The principal-agent model is an analytic expression of the agency relationship, in which one party, the principal, considers entering into a contractual agreement with another, the agent, in the expectation that the agent will subsequently choose actions that produce outcomes desired by the principal.").

⁴³ See Gary J. Miller, *The Political Evolution of Principal-Agent Models*, 8 ANN. REV. POL. SCI. 203, 205 (2005) (identifying as one of the "core assumptions" of principal-agent models that the agent's action determines in part the payoff to the principal); Shavell, *supra* note 39, at 55 (describing the principal-agent relationship as one in which the agent's effort, together with a random element, determines the outcome for the principal).

⁴⁴ See Jensen & Meckling, *supra* note 39, at 308 (discussing how the principal can limit divergences from his interest by establishing appropriate incentives for the agent); Moe, *supra* note 38, at 756 (asserting that the essence of the principal's problem is to design an incentive structure that makes pursuing the principal's objectives advantageous for the agent); Sappington, *supra* note 38, at 45 ("The central concern is how the principal can best motivate the agent to perform as the principal would prefer, taking into account the difficulties in monitoring the agent's activities."); Shavell, *supra* note 39, at 55 (considering optimal fee arrangements to create appropriate incentives for an agent).

their skills, values, and objectives.⁴⁵ The principal knows the type with which it desires to contract but cannot reliably detect the relevant information. For example, an employer may wish to hire someone who has a specialized skill and is highly motivated for a position involving substantial discretion and independent judgment. It cannot know for certain whether any particular applicant has the desired qualities and must rely on proxies such as education and experience to make its hiring decisions. Applicants who lack these qualities will have incentives to misrepresent their abilities, while highly qualified individuals may find it difficult to communicate credibly their true abilities and to distinguish themselves from less qualified applicants.⁴⁶ To address this problem, the principal may attempt to structure the contract in a manner that screens for high-quality agents.

Informational asymmetries plague the agency relationship after it has been formed as well. The principal cannot directly observe the agent's activities, thereby creating a risk of moral hazard.⁴⁷ Without accurate information about the agent's efforts, the principal must rely on proxy measures, which are necessarily imperfect.⁴⁸ As a result, the agent may be tempted to shirk—that is, to pursue her own ends (e.g., taking fewer precautions or expending less effort)—rather than maximize the principal's welfare. The principal might rely on any of a number of mechanisms to discourage shirking, such as monitoring agent activity, requiring a bond on the part of the agent, implementing direct controls, or inducing the agent to share information. Each of these efforts, however, entails costs, and none can completely eliminate the slippage between the agent's and the principal's interests. Agency costs can thus be understood as the sum of the costs of agent shirking (residual loss) and the costs of efforts to control shirking (monitoring costs and bonding costs).⁴⁹ The principal faces a basic optimization problem—how to structure the contract with the agent in a way that minimizes total agency costs.

One common method for more closely aligning the agent's interests with the principal's is to compensate the agent based on outcome, which is observable, rather than effort, which is not.⁵⁰ However, if the agent is risk

⁴⁵ See Kathleen M. Eisenhardt, *Agency Theory: An Assessment and Review*, 14 ACAD. MGMT. REV. 57, 61 (1989); Moe, *supra* note 38, at 754–55. The problem of hidden information also arises after the agency relationship has been formed because the agent will likely have more information than the principal about exogenous conditions that affect output. See JEAN TIROLE, *THE THEORY OF INDUSTRIAL ORGANIZATION* 35 n.63 (1988).

⁴⁶ See Moe, *supra* note 38, at 754–55.

⁴⁷ See Eisenhardt, *supra* note 45, at 61; Moe, *supra* note 38, at 755.

⁴⁸ Moe, *supra* note 38, at 755.

⁴⁹ See EASTERBROOK & FISCHER, *supra* note 37, at 10; Jenson & Meckling, *supra* note 39, at 308.

⁵⁰ See EASTERBROOK & FISCHER, *supra* note 37, at 9 (noting that an alternative to monitoring is to give employees the right to share in the firm's profits); TIROLE, *supra* note 45, at 36 (explaining that if the agent's compensation depends on the outcome, the agent will have an incentive to pick the optimal action); see also Sappington, *supra* note 38, at 47 (explaining that the principal can motivate the agent

averse, as is commonly assumed in these models,⁵¹ she will require additional compensation to bear the risk.⁵² If the principal agrees to share the risk in order to induce her to accept the agency, the full costs of shirking will no longer be borne by the agent and the problem of moral hazard reappears.⁵³ Thus, “[E]fficiency in incentives must be traded off against efficiency in risk-bearing”⁵⁴ Even though agency costs cannot be eliminated entirely, “the principal’s optimal incentive structure for the agent is one in which the latter receives some share of the residual in payment for his efforts, thus giving him a direct stake in the outcome.”⁵⁵

In the above analysis, the concept of the “residual” is central in shaping incentives for the agent. It is the prospect of an economic surplus—one that can be allocated between the principal and the agent—that offers the possibility of reducing the gap between the agent’s private incentives and the principal’s goals, thereby mitigating the problem of moral hazard. In the context of private contracting, it is a reasonable assumption that the goal of the principal is to maximize profit. Thus, the employer wants to maximize the productive output of the firm, the shareholders seek to maximize the value of the firm, and the landowner aims to maximize the crop yield. In each of these settings, the nature of the residual is easily conceptualized. As will be discussed below, however, applying the notion of a residual in the context of a public hierarchy like the court system is neither obvious nor straightforward.

In sum, the economics literature focuses on the optimal contractual arrangements for minimizing agency costs.⁵⁶ This literature highlights the problems that result from informational asymmetries and emphasizes that any mechanisms intended to address these problems necessarily entail other costs. Designing optimal institutional structures therefore requires balancing residual losses against the costs of implementing more stringent instruments to monitor and control the agent. Although contractual incentives and institutional structures can be used to mitigate conflicts of interest, the slippage between the agent’s and the principal’s interests cannot be eliminated entirely.

“by making the agent the residual claimant in the relationship”); Shavell, *supra* note 39, at 59 (positing that for a risk-neutral agent the optimal fee schedule pays the agent the outcome minus a constant).

⁵¹ See Eisenhardt, *supra* note 45, at 60–61 (explaining that agents are assumed to be more risk averse because they cannot diversify their employment).

⁵² See Sappington, *supra* note 38, at 49.

⁵³ See *id.* at 49–50 (noting that when the agent is effectively insured against bad outcomes, he will exert less effort); Shavell, *supra* note 39, at 56.

⁵⁴ Miller, *supra* note 43, at 206.

⁵⁵ Moe, *supra* note 38, at 763.

⁵⁶ See Sappington, *supra* note 38, at 45 (listing “design of individualized contracts” as one of the “major issues that have been examined in the literature on incentives”); Shavell, *supra* note 39 (studying optimal arrangements for payment in agency relationships). *But see* Jensen & Meckling, *supra* note 39, at 305–06 (using agency theory to explain the ownership structure of firms in a positive rather than normative project).

C. The Political Model

Over the past several decades, political scientists have drawn on economic models of agency to describe the relationship between administrative agencies and their political superiors. Earlier work on this bureaucracy emphasized the agencies' apparent independence, noting that Congress paid little attention to their activities and invested few resources in monitoring them.⁵⁷ Oversight hearings were haphazard, infrequent, and often superficial.⁵⁸ Even when they did occur, members of Congress typically lacked the technical expertise and detailed understanding of an agency's operations to effectively evaluate its activities.⁵⁹ These observations led scholars to assume that congressional oversight was ineffectual and to bemoan the lack of accountability of the large federal bureaucracy.⁶⁰

Drawing on insights from principal-agent theory, Barry Weingast and others offered an alternative account of the relationship between Congress and the administrative bureaucracy. They argued that members of Congress "possess sufficient rewards and sanctions to create an incentive system for agencies"⁶¹ and identified several levers of control: authority over appropriations, the threat of ex post sanctioning through the use of oversight hearings, new legislation restricting agency activities, and congressional influence over the appointment and reappointment of agency officials.⁶² To the extent that this incentive system works well, they asserted that "few ac-

⁵⁷ See LAWRENCE C. DODD & RICHARD L. SCHOTT, CONGRESS AND THE ADMINISTRATIVE STATE 170-73 (1979) (asserting that "congressional attention to bureaucratic agencies is haphazard" and that "the committees most responsible for oversight . . . fail to devote the bulk of their hearings to investigations of agencies"); MORRIS S. OGUL, CONGRESS OVERSEES THE BUREAUCRACY: STUDIES IN LEGISLATIVE SUPERVISION 182, 186 (1976) (finding that members of Congress see oversight as less central than other work, and noting that legislative oversight is neither comprehensive nor systematic); James Q. Wilson, *The Politics of Regulation*, in THE POLITICS OF REGULATION 357, 388 (James Q. Wilson ed., 1980) (arguing that neither the White House nor Congress closely scrutinizes agencies).

⁵⁸ See OGUL, *supra* note 57, at 193 (summarizing criticisms that legislative oversight "has been sporadic, atomized, erratic, trivial, ineffective, or some combination of these").

⁵⁹ See DODD & SCHOTT, *supra* note 57, at 2 (explaining that "agencies are staffed by specialists . . . [whose] expertise . . . [and] technical facilities for data collection and analysis . . . allow[] them to bring to policy struggles an authority and knowledge that is difficult for members of Congress, presidents, or political appointees to match").

⁶⁰ See *id.* (describing the administrative state as a "prodigal child . . . [whose] muscle and brawn . . . challeng[e] [Congress and the President] for hegemony in the national political system"); *id.* at 248 (predicting that "[s]o long as Congress attempts to conduct oversight through the current committee and subcommittee system, . . . congressional committees will probably preoccupy themselves with intra-congressional struggles that leave the bureaucracy broad latitude"); OGUL, *supra* note 57, at 185 (concluding that congressional influence over agencies is "scattered and slight"); Wilson, *supra* note 57, at 391 (arguing that administrative agencies "operate with substantial autonomy, at least with respect to congressional or executive direction").

⁶¹ Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765, 768 (1983).

⁶² *Id.* at 769-70; Barry R. Weingast, *The Congressional-Bureaucratic System: A Principal Agent Perspective (with Applications to the SEC)*, 44 PUB. CHOICE 147, 155-57 (1984).

tual punishments need take place for the threat to be effective,”⁶³ and thus low levels of active congressional oversight are consistent with a situation in which congressional preferences effectively control agency behavior.⁶⁴ Moreover, direct monitoring is not necessary because affected constituents will monitor and report problems, thereby sounding a “fire alarm” to alert Congress to noncompliant agency actions.⁶⁵ These theories drew clear lessons from economic models of agency:

[T]he issue of congressional control of the bureaucracy has many of the same issues present in the debate over separation of ownership and control: little ostensible interest on the part of shareholders is consistent with . . . a strong set of incentive mechanisms that obviate the need for direct shareholder monitoring.⁶⁶

Although recognizing that agency costs cannot be eliminated entirely, they argue that institutional forms evolve to mitigate these problems and will persist so long as the benefits of the agency arrangements outweigh any costs.⁶⁷

Subsequent work in this area shifted attention from monitoring and incentives to structural and procedural constraints. Concerned that “a system of rewards and punishments is unlikely to be a completely effective solution

⁶³ Weingast & Moran, *supra* note 61, at 767 n.2.

⁶⁴ *Id.* at 767, 793; *see also* Weingast, *supra* note 62, at 148 (arguing that Congress has developed an effective system for controlling agencies that involves little direct monitoring). Another elaboration of the basic principal-agent model involves recognition that administrative agencies may be subject to the control of multiple principals. Congress is neither a unitary actor nor the lone actor, and thus a number of scholars have incorporated distinct legislative actors—relevant House and Senate committees, House floor, Senate floor—and a chief executive officer into “multiple principal” models. These extensions have led some to argue that competition among principals may create greater room for bureaucratic discretion. *See, e.g.,* Terry M. Moe, *An Assessment of the Positive Theory of “Congressional Dominance,”* 12 LEGIS. STUD. Q. 475, 482 (1987) (“[P]rincipals compete for influence over the agency—which, as a result . . . [is] attracted to strategies that play its principals off against one another.”). Others have found that the degree of control over the bureaucracy depends on the circumstances and that even with multiple principals bureaucratic agencies may implement policies that reflect the preferences of elected officials. *See, e.g.,* Randall L. Calvert, Mathew D. McCubbins & Barry R. Weingast, *A Theory of Political Control and Agency Discretion*, 33 AM. J. POL. SCI. 588, 589, 604–05 (1989) (modeling interactions between the executive and legislature and bureaucratic agents and concluding that under favorable conditions, bureaucrats will follow the policies of elected officials); Thomas H. Hammond & Jack H. Knott, *Who Controls the Bureaucracy?: Presidential Power, Congressional Dominance, Legal Constraints, and Bureaucratic Autonomy in a Model of Multi-Institutional Policy-Making*, 12 J.L. ECON. & ORG. 119, 163 (1996) (arguing that the interactions between the President and Congress can create more or less autonomy for agencies).

⁶⁵ *See* Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 171–76 (1984) (arguing that “direct, centralized surveillance” of agencies analogous to police patrols will be less effective in furthering Congress’s policy goals than will “comparatively decentralized and incentive based” models of oversight analogous to fire alarms).

⁶⁶ Weingast & Moran, *supra* note 61, at 767 n.2.

⁶⁷ *See* Weingast, *supra* note 62, at 153–54.

to the control problem,⁶⁸ Mathew McCubbins and others argued that Congress seeks to control bureaucracies prospectively by creating structural arrangements that constrain an agency's substantive discretion.⁶⁹ For example, Congress prescribes the regulatory scope of an agency and the legal tools or instruments the agency may use to achieve its goals.⁷⁰ Similarly, Congress may impose procedural requirements designed to reflect the competing political interests at the time the legislation was passed⁷¹ or to "stack the deck" to benefit a favored constituency.⁷² In other words, when establishing a regulatory agency, Congress chooses administrative structures and procedural requirements in an attempt to ensure that the agency's policy outputs will be consistent with Congress's preferences at that time, rather than relying primarily on oversight and ex post rewards and punishments to control the agency.⁷³

The theoretical innovation of applying principal-agent models to the public bureaucracy provoked a great deal of empirical work, much of it intended to test the theory of "congressional dominance"—the claim that members of Congress controlled sufficient incentives to effectively influence agency decisionmaking.⁷⁴ The results of this work have been mixed,

⁶⁸ Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 249 (1987).

⁶⁹ See, e.g., Mathew D. McCubbins, *The Legislative Design of Regulatory Structure*, 29 AM. J. POL. SCI. 721, 722 (1985); McCubbins, Noll & Weingast, *supra* note 68, at 254; Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 440 (1989).

⁷⁰ See McCubbins, *supra* note 69, at 725–27.

⁷¹ See McCubbins, Noll & Weingast, *supra* note 69, at 444.

⁷² *Id.*; McCubbins, Noll & Weingast, *supra* note 68, at 261. McCubbins, Noll, and Weingast provide a number of examples of deck-stacking. For example, "cumbersome procedures . . . favor . . . well-organized, well-financed interests." *Id.* at 262. The burden of proof "determin[es] which side will be given the benefit of the doubt." *Id.* Additionally, Congress can limit an agency's ability to set its own rulemaking agenda. *Id.* at 267. Congress may even "subsidize" participation by particular interest groups to ensure their input into agency decisions. *Id.* at 266.

⁷³ See McCubbins, *supra* note 69, at 744 (hypothesizing that "Congress as the principal selects an institutional arrangement with its agent so as to maximize the benefit it derives from the agent's performance"). This emphasis on ex ante structural and procedural controls departs from traditional agency theory, which focuses on monitoring and incentives. As Gary Miller writes:

The directors of a firm clearly specify to the CEO that they expect[] profits—but they do not constrain the CEO by specifying a particular procedure, especially one that may benefit a single subset of investors. Any such procedure would only constrain the profit-maximizing activities of the CEO, and would require constant monitoring either by the board (which is unlikely) or by an external court system (equally unlikely). As a result, the procedural-control argument, although it has been extremely productive of innovative research in political science, represents a discontinuity with PAT, rather than a simple extension of it.

Miller, *supra* note 43, at 215; see also Edgar Kiser, *Comparing Varieties of Agency Theory in Economics, Political Science, and Sociology: An Illustration from State Policy Implementation*, 17 SOC. THEORY 146, 156 (1999) (noting that the role of administrative procedures is largely absent from the economics agency literature).

⁷⁴ Weingast, *supra* note 62, at 148 ("The mechanisms evolved by Congress over the past one hundred years comprise an ingenious system for control of agencies that involves little direct congressional monitoring of decisions but which nonetheless results in policies desired by Congress.").

with some studies finding support for the theory that agency actions are shaped by congressional preferences,⁷⁵ while others have concluded that certain agencies are relatively unconstrained in their ability to pursue their own goals.⁷⁶ Still other empirical studies have focused more specifically on whether particular structural controls or procedural requirements are effective in constraining and guiding agency discretion, again with mixed results.⁷⁷

Although most of the work in this area is ostensibly positive in nature, it is motivated by a deeper normative concern about policymaking by unelected bureaucrats. As Weingast argues, “Voters and citizens are the ultimate principals of the policymaking process, and congressmen are their agents.”⁷⁸ Elected officials face frequent reelection, creating incentives for them to act in the interests of their constituents. In the modern administrative state, however, these elected officials delegate significant authority to bureaucratic agencies to articulate and implement public policy. The bureaucratic officials who staff these agencies thus wield significant power to shape policies that affect the public interest, yet they are not directly answerable to any voting constituency and do not have to face reelection. This situation raises concerns about whether their policy decisions reflect the interests and preferences of the electorate.⁷⁹ Thus, determining whether and how elected officials control agency policymaking is closely related to questions about the legitimacy of bureaucratic actions.

Even though the principal-agent model has become a widely accepted tool for studying Congress-agency relations, some cautionary notes have been raised. In particular, Terry Moe argues that contractual theories of organization, like the principal-agent paradigm, “developed with reference to private organizations, particularly business firms, and that some of its most

⁷⁵ See, e.g., *id.* at 181 (concluding that “[t]he evidence presented shows that Congress played the key role in the change in SEC policy” regarding deregulation); Weingast & Moran, *supra* note 61, at 791 (concluding that Congress has “substantial . . . influence” over the FTC); B. Dan Wood & Richard W. Waterman, *The Dynamics of Political Control of the Bureaucracy*, 85 AM. POL. SCI. REV. 801, 821 (1991) (finding evidence of political control over seven different federal agencies).

⁷⁶ See, e.g., B. Dan Wood, *Principals, Bureaucrats, and Responsiveness in Clean Air Enforcements*, 82 AM. POL. SCI. REV. 213, 229 (1988) (concluding that “a principal-agent model fail[s] to explain the longitudinal variations in EPA clean air outputs” and that bureaucracies “are themselves responsible for much of the variation and substance of public policy through time”).

⁷⁷ Compare Steven J. Balla, *Administrative Procedures and Political Control of the Bureaucracy*, 92 AM. POL. SCI. REV. 663, 670–71 (1998) (failing to find empirical support for the theory that the notice-and-comment process will favor certain constituencies in the manner posited by the deck-stacking thesis), with David B. Spence, *Managing Delegation Ex Ante: Using Law to Steer Administrative Agencies*, 28 J. LEGAL STUD. 413, 445–46 (1999) (finding empirical support for the claim that structural choices and, to a lesser extent, procedural controls affect agency decisionmaking, although the effects were not necessarily foreseen by political officials).

⁷⁸ Weingast, *supra* note 62, at 151.

⁷⁹ See McCubbins, Noll & Weingast, *supra* note 68, at 243 (raising the concern that unelected bureaucrats will not comply with the political preferences of elected officials); Weingast, *supra* note 62, at 151 (asking whether bureaucratic agencies serve congressional constituents or their own interests).

fundamental components must be modified if its application to public organizations is to be meaningful and instructive.⁸⁰ He points out that politicians, whose role is analogized to that of the entrepreneur, are not primarily motivated by productive efficiency but by electoral considerations.⁸¹ Thus, they are not “in the conventional sense, seeking an optimally balanced set of hierarchical controls and monitoring mechanisms.”⁸² Similarly, bureaucratic officials are not primarily seeking to maximize their own profit but may be driven by a number of motivations: “budgets, slack, policy, career opportunities, and security.”⁸³ This “expanded set of motivators” makes it more difficult to predict with confidence the efficacy of various controls and incentives.⁸⁴ Moe notes additional difficulties: public agencies are not subject to the discipline of the market;⁸⁵ they create no economic surplus analogous to the residual in the private firm that can be used to shape incentives;⁸⁶ and political officials are severely constrained in their ability to select agents and design incentive structures, especially compared with the entrepreneur of the economic models.⁸⁷ Thus, he concludes that “there are good reasons for thinking that bureaucratic control is much different for the public sector than the private sector, and that a straightforward application of contractual [principal–agent] theories and their implications is likely to be very misleading.”⁸⁸

III. PRINCIPAL–AGENT THEORY AND THE JUDICIAL HIERARCHY

As Moe argues, the facile analogy between the private and public bureaucracy overlooks important differences between the two, such that applying the principal–agent model in the latter context may be misleading. The risks are even greater when principal–agent theory is applied to the judicial hierarchy, which differs even more significantly from the economic model. In this Part, I first explore the fit between principal–agent theories and the realities of the federal judicial branch. Next, I consider how relying on a principal–agent model may obscure important normative questions and descriptive features of the judicial hierarchy.

⁸⁰ Moe, *supra* note 38, at 761.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *See id.* at 764.

⁸⁴ *See id.*

⁸⁵ *Id.* at 762.

⁸⁶ *Id.* at 763. Moe argues that “slack is not a functional substitute for the economic residual.” *Id.* at 764. Unlike the residual for a firm, which results from greater efficiency, slack, by definition, becomes more available as the operation becomes more inefficient. Thus, utilizing slack to motivate bureaucrats has “its own distinctive consequences for bureaucratic efficiency and control.” *Id.*

⁸⁷ *See id.* at 765. Further difficulties in effectively using control mechanisms arise because Congress cannot foresee the policy issues an agency will face in the future. *See* David B. Spence, *Agency Policy Making and Political Control: Modeling Away the Delegation Problem*, 7 J. PUB. ADMIN. RES. & THEORY 199, 203–04, 206 (1997).

⁸⁸ Moe, *supra* note 38, at 765.

A. Assessing Theory Fit

Each of the three conceptions of agency explored above takes a different perspective on the relationship: legal doctrine focuses on the extent of the legal duty owed by an agent to her principal; economic theories aim to determine what forms of contracting will minimize agency costs; and work in political science asks about the extent of control that political principals in fact exercise over their bureaucratic agents. Though focused on different questions, these conceptions of the principal-agent relationship share certain core elements and offer a number of insights and analytic tools for studying hierarchical relationships. More specifically, they emphasize the difficulty of controlling the actions of the agent given conflicts of interest between agent and principal and highlight the role of informational asymmetries in allowing agents to shirk. In addition, they suggest the significance of monitoring and outcome-based incentives in shaping agent behavior.

In many ways, the federal judicial hierarchy resembles the types of relationships fruitfully analyzed under principal-agent theories. Whether its primary function is understood as dispute resolution or announcing legal principles, the Supreme Court cannot possibly fulfill this role alone. The hundreds of federal district and court of appeals judges are crucial for resolving the hundreds of thousands of disputes brought to federal court annually, and their application of legal doctrines across a wide variety of factual settings is essential to give meaning to the law. Although the Supreme Court does not literally delegate its work to the lower courts, it clearly stands in a hierarchical relationship to them, exercising supervisory authority over them. It is empowered to reverse individual decisions and to establish precedent that the lower courts are obligated to follow.⁸⁹

Analogizing this structure to an agency relationship highlights the challenges confronting the Supreme Court. As judicial politics scholars have emphasized, lower court judges do not necessarily share the goals and policy preferences of the Supreme Court. The resulting value conflicts mean that the Supreme Court faces the classic problem of the principal—ensuring that the lower courts pursue its interests and not their own. As in the traditional contracting situation, the Court cannot provide complete, detailed instructions directing the lower courts how to decide in every instance. Due to some combination of the limitations of language, an inability to anticipate issues, and a need for flexibility in application, Court precedent inevitably allows circuit and district judges some discretion in applying its precedents.⁹⁰

⁸⁹ See Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 823–25 (1994) (explaining the doctrine of hierarchical precedent).

⁹⁰ See Kim, *supra* note 8, at 408–17. Similarly, the need to accommodate differing views among the Justices or uncertainty about the best rule over a broad range of cases may limit the Court's ability to give comprehensive directions to the lower courts through its opinions. See *id.*

The possibility of “moral hazard” arises because lower court judges may have different goals than the Supreme Court and, at the same time, have a great deal more information about their actions than their judicial superiors. Although in theory the Supreme Court can monitor individual decisions and reverse those with which it disagrees, its ability to do so is constrained by its limited resources and the requirement that a party must first petition for certiorari. Due to the sheer volume of lower court activity, the Supreme Court is unlikely to know much about any particular decision unless one of the parties petitions for certiorari. Even then, the Court must sort through thousands of petitions, from which it selects fewer than one hundred to decide on the merits each year.⁹¹ Given these constraints, the lower courts have an informational advantage, which may permit them to pursue their own goals rather than the Supreme Court’s. Thus, principal–agent theory usefully highlights the existence of value conflicts within the judicial hierarchy and the role of informational asymmetries in giving lower court judges opportunities to depart from Supreme Court preferences.

Upon closer examination, however, many of the core elements of the principal–agent relationship apply to the federal judiciary only with some strain. Take, for example, the consensual basis of the agency relationship. In both legal doctrine and economic theory, agency depends upon the parties’ assent to a particular type of relationship.⁹² The lawyer, employee, or manager is an agent because she has agreed to act on behalf of the client, employer, or shareholders. And although elected officials do not enter into explicit contracts with bureaucratic officials, the members of Congress who create an agency, define its mission, and then participate in appointing its leaders have an implicit relational contract with the members of the bureaucracy.

By contrast, the Supreme Court does not contract with federal appellate and trial judges in any meaningful sense. It does not appoint circuit or district judges and cannot structure the terms of their appointments. Instead, the relationships between the various levels of the federal judiciary are structured by Congress, within the bounds set by the Constitution.⁹³ It is Congress that authorizes the creation of the lower federal courts,⁹⁴ funds these courts,⁹⁵ and establishes the initial bounds of their jurisdiction.⁹⁶ And

⁹¹ In recent years, the percentage of petitions granted review by the Supreme Court has hovered around 1% of all cases and 4% of the paid docket. *The Supreme Court, 2008 Term—The Statistics*, 123 HARV. L. REV. 382, 389 tbl.II(B) (2009); *The Supreme Court, 2007 Term—The Statistics*, 122 HARV. L. REV. 516, 523 tbl.II(B) (2008); *The Supreme Court, 2006 Term—The Statistics*, 121 HARV. L. REV. 436, 444 tbl.II(B) (2007).

⁹² See *supra* Part II.A–B.

⁹³ See U.S. CONST. art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”).

⁹⁴ See U.S. CONST. art. III, § 1; 28 U.S.C. §§ 41, 43 (2006); 28 U.S.C. § 132 (2006).

⁹⁵ See John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 984–86 (2002) (describing Congress’s power over the judiciary’s budget).

it is the President, with the approval of the Senate, who selects the individuals who staff them.⁹⁷ Thus, the Supreme Court lacks any direct role in establishing, structuring, or staffing the lower federal courts that is comparable to either the economic principal's contracting power or Congress's ability to create and shape administrative agencies and to participate in the selection of their leaders.

The absence of a consent-based relationship between the Supreme Court and lower federal courts matters for agency theory because many of the usual tools for minimizing agency costs are unavailable. One strategy employed by principals to combat the problem of adverse selection is to choose a form of contract more likely to attract high quality agents, which can reduce monitoring and other costs down the road. Similarly, the Congress-bureaucracy literature highlights the selection of loyal bureaucratic agents as one method of exercising political control over agencies.⁹⁸ In the context of the judicial hierarchy, however, the Supreme Court does not try to ensure the appointment of loyal "agents" because it simply has no direct role in the selection process. To the extent that there *is* an adverse selection problem, it is one that confronts the political branches responsible for selecting and appointing federal judges. And depending upon existing political alignments, the political branches may seek to determine the true "type" of a judicial nominee in an effort to select lower court judges who do *not* share the goals of the sitting Supreme Court.⁹⁹ To the extent that the concept of adverse selection has any relevance to the judicial hierarchy, it suggests that the President and Congress should be regarded as the principals of the lower federal court judges.

The contracting process is also important in traditional principal-agent theories because it enables the principal to structure the relationship in a way that better aligns the agent's incentives with the principal's interests. Principals use a variety of carrots and sticks to reward effort and punish shirking. In the case of the judicial hierarchy, however, the Supreme Court

⁹⁶ See U.S. CONST. art. III, §§ 1–2; see also, e.g., 28 U.S.C. §§ 1291–1292 (2006) (defining the jurisdiction of the courts of appeals); *id.* §§ 1331–1338 (establishing the original jurisdiction of the district courts).

⁹⁷ 28 U.S.C. § 44 (empowering the President, with "the advice and consent of the Senate," to appoint federal circuit judges); *id.* § 133 (prescribing the same for federal district judges).

⁹⁸ See, e.g., Calvert, McCubbins & Weingast, *supra* note 64, at 604–05.

⁹⁹ The President and Senate are likely to seek appointment of federal judges who reflect their *current* preferences. To the extent that those preferences diverge from those of the sitting Supreme Court, they will not be seeking to appoint faithful agents of the Supreme Court but rather lower court judges who are likely to resist pursuing the Supreme Court's preferences. McNollgast has suggested that the political branches might "pack" the lower courts in order to force the Supreme Court to alter doctrine with which the political branches disagree. See McNollgast, *supra* note 3, at 1634. Of course, this analysis assumes that the President and the Senate pursue policy goals in the judicial appointments process, begging the normative question of what "type" they ought to be seeking when appointing federal judges. Other personal characteristics such as integrity, judicial temperament, and legal ability should also be relevant.

has none of the usual levers of control to shape the incentives of lower court judges. It cannot promote, demote, or fire them; raise or lower their compensation; or determine the conditions of their employment. The only sanction available to the Supreme Court is its ability to reverse decisions with which it disagrees.

Many principal-agent models regard reversal as a disciplinary tool.¹⁰⁰ However, reversal alone is insufficient to ensure compliance with the Supreme Court's goals where the lower federal courts have differing goals. In any given case, the actual risk of reversal is quite low. The Supreme Court currently reviews less than 1% of court of appeals decisions,¹⁰¹ and district court decisions have an even lower chance of review by the Supreme Court.¹⁰² Of course, the Court need not actually reverse in order to have an effect on lower court decisionmaking. The threat of reversal may be sufficient to induce lower courts to comply. As Songer, Segal, and Cameron have suggested, "[T]he 'paradox' of (relatively) effective control and rare reversals is more apparent than real" because appeals courts anticipate reversal and therefore comply without the need for the Supreme Court to actually review and reverse.¹⁰³ In order for the threat of sanction to be effective, however, it must be a credible threat, and yet the Supreme Court's capacity for increasing the number of cases it reviews is quite limited relative to the number of lower court decisions issued each year.¹⁰⁴

¹⁰⁰ See, e.g., Benesh & Reddick, *supra* note 1, at 536; Cameron, Segal & Songer, *supra* note 1, at 102; George & Yoon, *supra* note 1, at 822; Randazzo, *supra* note 1, at 673; Songer, Segal & Cameron, *supra* note 1, at 693.

¹⁰¹ For example, in 2008, the United States courts of appeals terminated 28,918 cases on the merits, ADMIN. OFFICE OF THE U.S. COURTS, STATISTICAL TABLES FOR THE FEDERAL JUDICIARY 12 tbl.B-5 (Dec. 2008), available at <http://www.uscourts.gov/uscourts/Statistics/StatisticalTablesForTheFederalJudiciary/2008/dec08/B05Dec08.pdf>, while the Supreme Court accepted only 87 cases for review in the October 2008 term, *The Supreme Court, 2008 Term—The Statistics*, *supra* note 91, at 389 tbl.II(B). Even if all the cases in which certiorari was granted by the Supreme Court came from the federal circuit courts, the rate of review would be about 0.3%. Cf. *id.* (using the Court's 2008 total number of cases granted certiorari to calculate the percentage). Given that some of these cases involved appeals from decisions by state supreme courts, the rate of review of federal circuit court decisions is even lower.

¹⁰² The percentage of United States district court cases ultimately reviewed by the Supreme Court is even lower because of the much higher caseload volume in the district courts. For example, in 2008, the district courts terminated by court action more than 178,000 civil actions, ADMIN. OFFICE OF THE U.S. COURTS, STATISTICAL TABLES FOR THE FEDERAL JUDICIARY 37 tbl.C-4 (Dec. 2008), available at <http://www.uscourts.gov/uscourts/Statistics/StatisticalTablesForTheFederalJudiciary/2008/dec08/C04Dec08.pdf>, and adjudicated nearly 72,000 criminal cases, *id.* at 51 tbl.D-1, available at <http://www.uscourts.gov/uscourts/Statistics/StatisticalTablesForTheFederalJudiciary/2008/dec08/D01CDec08.pdf>. Of these, less than 0.04% are likely to ever be reviewed by the Supreme Court. Cf. *The Supreme Court, 2008 Term—The Statistics*, *supra* note 91, at 389 tbl.II(B) (using the total number of cases to which the Court granted certiorari in 2008 to calculate the percentage).

¹⁰³ Songer, Segal & Cameron, *supra* note 1, at 693.

¹⁰⁴ Commentators have noted the Supreme Court's reduced plenary docket in recent years and debated its causes and consequences. See, e.g., Margaret Meriwether Cordray & Richard Cordray, *The Supreme Court's Plenary Docket*, 58 WASH. & LEE L. REV. 737 (2001); Arthur D. Hellman, *The Shrunk Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403; David M. O'Brien, *Join-3 Votes, the Rule*

Even an infrequent sanction may be effective if the costs it imposes are sufficiently large. In the case of reversal, the primary cost to the lower court judge is the loss of her preferred outcome, which is identical to the loss she would have experienced if she had decided according to the Supreme Court's preference in the first place. Thus, fear of reversal can operate as an effective sanction only if it imposes other costs—such as damaging a judge's reputation or decreasing her chances for promotion.¹⁰⁵ Although judges undoubtedly dislike being reversed, it is unclear that they actually suffer reputational harm or lost opportunities as a result or that the costs of reversal are significant enough to dominate other judicial motivations.¹⁰⁶ The handful of relevant empirical studies have failed to find evidence that fear of reversal drives lower court decisionmaking.¹⁰⁷ Thus, the Supreme Court's reversal power alone is arguably a weak tool for ensuring compliance across the mass of cases decided by the lower federal courts.

When monitoring is difficult in the private contracting situation, one common solution is to compensate the agent in part based on outcome, thereby giving the agent an incentive to work hard in order to share in a larger residual.¹⁰⁸ Moe points out, however, that “[f]or public bureaucra-

of Four, the Cert. Pool, and the Supreme Court's Shrinking Plenary Docket, 13 J.L. & POL. 779 (1997); Kenneth W. Starr, *The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft*, 90 MINN. L. REV. 1363 (2006). Although the Court could likely increase the number of cases it hears each year, it nevertheless faces significant resource constraints given the volume of lower court decisions. Even if the Supreme Court increased its output five-fold—a heroic assumption—it could still only review about 1.5% of federal court of appeals cases decided on the merits. See *supra* note 101.

¹⁰⁵ See, e.g., Cameron, Segal & Songer, *supra* note 1, at 102 (asserting that frequent reversal brings derision of colleagues and decline in professional status); George & Yoon, *supra* note 1, at 822 (arguing that lower court judges believe that their chance of promotion depends upon reversal rates).

¹⁰⁶ See JONATHAN MATTHEW COHEN, *INSIDE APPELLATE COURTS* 44–45 (2002) (concluding, in part based on interviews with circuit judges, that federal appellate judges are not motivated significantly by either a fear of reversal or a desire to be appointed to a higher court); Kim, *supra* note 8, at 401–02 (questioning whether reversals in fact harm judges' reputations or prospects for promotion); Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 14 (1993) (“Judges don't like to be reversed (I speak from experience), but aversion to reversal does not figure largely in the judicial utility function.”).

¹⁰⁷ See, e.g., DAVID E. KLEIN, *MAKING LAW IN THE UNITED STATES COURTS OF APPEALS* 126 (2002) (reporting results of various empirical tests that offered “essentially no evidence that [courts of appeals' deference to Supreme Court preferences] results from fear of reversal”); Richard S. Higgins & Paul H. Rubin, *Judicial Discretion*, 9 J. LEGAL STUD. 129, 130, 137–38 (1980) (finding no evidence that judges who are more likely to be eligible for promotion are more sensitive to the risk of reversal); David E. Klein & Robert J. Hume, *Fear of Reversal as an Explanation of Lower Court Compliance*, 37 LAW & SOC'Y REV. 579, 600–03 (2003) (finding no evidence that circuit courts follow Supreme Court preferences more closely in cases that are more likely to be reviewed and hence pose a greater risk of reversal but concluding that the lower courts generally adhere to Supreme Court preferences despite the low chance of reversal); Donald R. Songer, Martha Humphries Ginn & Tammy A. Sarver, *Do Judges Follow the Law When There Is No Fear of Reversal?*, 24 JUST. SYS. J. 137, 138 (2003) (concluding that circuit judges generally followed the law in diversity cases, even though the risk of review and reversal in these types of cases is negligible).

¹⁰⁸ See *supra* notes 50–55 and accompanying text.

cy . . . there is no residual in the ordinary sense.”¹⁰⁹ Policy outcomes are not functionally equivalent to an economic surplus because they cannot be distributed in the same way, and this observation applies to the judicial hierarchy as well. Judicial politics scholars assume that judges seek to maximize their preferred policies, just as private economic actors try to maximize their wealth. The policy outputs they produce, though, are not the functional equivalent of a firm’s residual. For the lower court judge who disagrees with the Supreme Court’s policy, it is no reward to be allowed to share in any policy surplus created by faithful adherence to the Supreme Court’s wishes. Thus, the usual economic strategy of compensating based on outcome is unlikely to be effective where the agent’s interests do not diverge from the principal’s because the agent wishes to expend less effort but because a fundamental value conflict exists.

In the federal judicial hierarchy, then, almost none of the usual tools for shaping agent incentives are available to the Supreme Court. It cannot influence the compensation or job tenure of lower court judges, and there is no residual with which to reward faithful effort. In some ways this situation reverses the logic of the economic theories. In traditional principal–agent relationships, the principal cannot alter the outcome—which is determined in part by the actions of the agent—and so it uses incentives to induce the agent to produce the desired outcome. In the case of the Supreme Court, the opposite is true—it has the ability to reverse outcomes it dislikes but generally lacks the ability to structure incentives for lower court judges prospectively.

Principal–agent theory proves an awkward fit with the federal judicial hierarchy in another way as well. As discussed above, one of the core aspects of agency relationships is that the agent has the power to impact the interests of the principal. In common law agency relationships, this power consists of the agent’s ability to legally bind the principal, altering its rights and obligations vis-à-vis third parties.¹¹⁰ In economic theories, the concept of impact is much broader, encompassing any situation in which the agent’s actions (together with some exogenous element) will determine the outcome and hence the payoff to the principal.¹¹¹ For example, greater effort on the part of a manager will increase profits for the shareholders, while shirking or self-dealing will reduce the surplus. The Congress–bureaucracy literature departs from the assumption that the parties are wealth-maximizing and assumes instead that elected officials are interested in reelection. On this view, the activities of bureaucratic agents impact the interests of their political principal to the extent that their actions please or displease the principal’s electoral constituency.¹¹² In each of these situa-

¹⁰⁹ See Moe, *supra* note 38, at 763.

¹¹⁰ See *supra* notes 26–27 and accompanying text.

¹¹¹ See *supra* note 43 and accompanying text.

¹¹² See Weingast & Moran, *supra* note 61, at 768 (explaining that members of Congress “gauge the success of [agency] programs through their constituents’ reactions”); Weingast, *supra* note 62, at 151

tions, however, it is the agent's impact on the principal's interests that motivates and justifies the latter's efforts to exercise control.

Applying principal-agent theory to the judicial hierarchy raises a question—in what ways do the actions of lower court judges impact the interests of the Supreme Court? The answer to that question in turn depends upon how one understands the interests of the Court. Certainly, there is no impact on the Justices' individual material interests, for nothing that lower court judges do will affect either the compensation or the tenure of Supreme Court Justices. Judicial politics scholars instead assume that the goal of judges—their true interest—is to enact their policy preferences through their decisions.¹¹³ But this assumption requires further elaboration. Unlike Congress, the Supreme Court is not explicitly cast as a policymaking body. Instead, what the Court does is decide cases, and in doing so, it establishes doctrine—precedent—that often embodies certain policy choices. What, then, does it mean for lower court decisions to impact the Court's interests—i.e., its policy goals? If the Supreme Court has decided a case that establishes a certain doctrine, are its interests adversely affected if a lower court applies the doctrine but reaches a different substantive outcome? Or are its interests harmed only if the lower court refuses to apply the doctrine at all?

To take a concrete example, in *Garcetti v. Ceballos* the Supreme Court rejected the claim of a district attorney who alleged that his First Amendment rights had been violated when he was disciplined for writing a memo critical of the actions of the police during an investigation.¹¹⁴ Although it had previously held that the First Amendment protects public employees when they speak out on matters of public concern,¹¹⁵ the Court in *Garcetti* held that when public employees speak “pursuant to their official duties, [they] are not speaking as citizens for First Amendment purposes,” and therefore, their speech is not constitutionally protected.¹¹⁶ Because the district attorney had prepared the memo as part of his official duties, his claim was dismissed.¹¹⁷ Suppose, in a subsequent case, a lower court rejected the Supreme Court's *Garcetti* holding, or simply ignored it, thereby permitting a public employee to claim retaliation based on speech made pursuant to her

(asking whether agencies benefit congressional constituencies and hence provide electoral benefits to members of Congress). The impact of bureaucratic action on the interests of political officials, however, is indirect; it depends upon whether public attention is focused on the bureaucracy and on the degree to which elected officials are viewed as responsible for agency outputs. See McCubbins & Schwartz, *supra* note 65, at 167–68 (explaining how members of Congress maximize support by remedying violations brought to their attention by supporters rather than by searching out violations that supporters do not know about and thus cannot reward them for remedying).

¹¹³ See *supra* note 4.

¹¹⁴ *Garcetti v. Ceballos*, 547 U.S. 410, 415–17 (2006).

¹¹⁵ See *Connick v. Myers*, 461 U.S. 138, 144–46 (1983); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568–70 (1968).

¹¹⁶ *Garcetti*, 547 U.S. at 421.

¹¹⁷ See *id.* at 421–24.

official duties. Such a decision would clearly have a negative impact on the Supreme Court's interest in establishing its policy, not to mention that it would violate well-established legal norms. But suppose instead that a lower court cites and applies the holding in *Garcetti* and then concludes that the public employee's speech that forms the basis of the claim was *not* made "pursuant to official duties" and allows the claim to proceed.¹¹⁸ Its decision is arguably consistent with *Garcetti*'s reasoning and therefore does not violate legal norms, but by permitting the plaintiff's claim, it reaches an outcome different from that in *Garcetti*. Does such a decision impact the Supreme Court's interests?

If the Supreme Court's interest lies in establishing the general policy, then the answer would seem to be "no." The lower court has affirmed and applied the policy set out by the Court—"no First Amendment protection for speech made pursuant to official duties"—although perhaps its application differs from what the Court would have decided in the same case. The Court's goals, however, might be understood more broadly—that is, its interests might be defined to include not only having its precedents followed but also having *outcomes* in the lower courts coincide with its preferences. On this view, the Supreme Court's interests would be impaired by the lower court that applied the *Garcetti* holding as written but interpreted it to permit a public employee's claim to go forward where the Court would not have allowed it.¹¹⁹

Of course the Supreme Court might have given clearer instructions if it cared only about outcome—for example, establishing a blanket rule that public employee speech is not protected by the First Amendment or is only protected if it does not fall within the employee's written job description. Instead, the *Garcetti* opinion suggested that a mechanical test based on written job descriptions is inappropriate and stated that determining the scope of an employee's official duties is a "practical" inquiry.¹²⁰ By qualifying its holding in this way, the Court deliberately left open some discretionary space in which the exercise of judgment by lower court judges is not only inevitable but expected.¹²¹ Given that the Court created that discretio-

¹¹⁸ See, e.g., *Marable v. Nitchman*, 511 F.3d 924, 932–33 (9th Cir. 2007) (finding that plaintiff's allegations of "corrupt overpayment schemes" were not part of his official job duties as chief engineer); *Lindsey v. City of Orrick*, 491 F.3d 892, 897–98 (8th Cir. 2007) (finding that the plaintiff's speech—complaints that the defendant violated state open meetings law—was not part of his job duties as public works director); cf. *Reilly v. City of Atlantic City*, 532 F.3d 216, 231 (3d Cir. 2008) (concluding that a police officer's testimony at the trial of a fellow officer is speech as a citizen and that his claim of retaliation for that speech therefore was not foreclosed by *Garcetti*).

¹¹⁹ This control over outcomes is what many judicial politics scholars assume represents the Supreme Court's interests, and they therefore characterize divergent outcomes as "shirking." See, e.g., Songer, Segal & Cameron, *supra* note 1, at 692–93; see also George & Yoon, *supra* note 1, at 822 (raising the concern that "lower court judges may make decisions that are different from those that the Court would otherwise have made").

¹²⁰ *Garcetti*, 547 U.S. at 424.

¹²¹ See Kim, *supra* note 8, at 442.

nary space, is the lower court judge who applies the doctrine but reaches a different substantive outcome acting contrary to the Court's policy goals or not? Because the Court, by definition, has not issued a clear policy statement in this area, it is difficult to tell. The point here is that defining the principal's interest as a policy goal—rather than an economic one—complicates the idea that the agent's actions can impact the principal's interests.¹²² In the case of the judicial hierarchy, it becomes more difficult to determine whether a particular lower court decision advances the Supreme Court's interests or constitutes "shirking."

B. Limitations of Principal-Agent Theories

Because the Supreme Court and lower federal courts are not in a direct contractual relationship and because they are presumed to pursue policy goals rather than wealth-maximization, principal-agent theories do not precisely fit the circumstances of the federal judicial hierarchy. Of course, the purpose of using models is to simplify reality, and no model will fully capture the complexity of actual institutions. The usefulness of a model thus depends not on the precise degree of fit with actual circumstances but on whether it advances or impedes our understanding. In many ways, principal-agent theories have pushed forward our understanding of judicial decisionmaking. Attitudinal models tended to focus solely on the preferences of the individual judge. The application of principal-agent theories led to greater attention to institutional context and emphasized the importance of interactions between courts in shaping judicial behavior.

Utilizing a principal-agent framework, scholars have produced important insights about such issues as the role of litigants in influencing monitoring by the Supreme Court,¹²³ the Court's strategies for selecting cases for review,¹²⁴ and how interactions with lower courts might shape the Court's choice of doctrine.¹²⁵ As I argue below, however, relying on a principal-agent model also has some costs because it obscures important normative questions as well as some significant descriptive features of the judicial hierarchy.

1. Normative Questions.—Much of the scholarship on the judicial hierarchy is imbued with an implicit normative cast. Scholars write about lower court judges "shirking,"¹²⁶ "sabotag[ing],"¹²⁷ "running amok,"¹²⁸ or, on the other hand, acting as "faithful agents"¹²⁹ pursuing the policies of their

¹²² Moe raises an analogous question by asking what it means for Congress to control the bureaucracy and arguing that theories of congressional dominance are quite vague about whether control means that agency actions reflect the goals of Congress as a whole, those of the relevant legislative committees, or those of key individual members of Congress. See Moe, *supra* note 64, at 482–83.

¹²³ See Songer, Segal & Cameron, *supra* note 1, at 688–90.

¹²⁴ See Cameron, Segal & Songer, *supra* note 1; Spitzer & Talley, *supra* note 1.

¹²⁵ See Bueno de Mesquita & Stephenson, *supra* note 5; Jacobi & Tiller, *supra* note 1; McNollgast, *supra* note 3.

superiors. These studies of lower court behavior purport to be asking positive questions about how circuit and district court judges decide cases. Nevertheless, the language used to frame them reveals the normative assumption that often underlies them—namely that lower court judges *should* pursue the Supreme Court’s interests rather than their own or some other interests. This assumption follows naturally from the application of principal–agent theories, in which agents have a duty to act on behalf of the principal, but it is never explicitly justified in the context of the judiciary.

Under the common law of agency, the source of the duty is clear—the agent is obligated to advance the principal’s interests because of the contractual agreement between them. The contract not only empowers the agent to act on the principal’s behalf, it also binds her to do so as a fiduciary. Similarly, economic theories of agency assume that the principal has a right to expect the agent to act on its behalf based on the contractual relationship between them. To return to the earlier cited examples, the employee, the manager, and the tenant farmer, having agreed to the agency relationship, should not act in a way that is harmful to the principal’s interest. The main difference between the legal and economic approaches is that the former relies on a legally enforceable standard of behavior, while the latter emphasizes the structure of the contractual relationship itself to promote compliance with this expectation.

When applied to the public bureaucracy, the principal–agent model similarly places normative demands on the agent’s behavior. The extensive bureaucracy, whose officials are unelected, poses a threat to representative democracy unless the actions of the bureaucratic officials are controlled by elected officials. Thus, scholars have debated whether members of Congress or the President in fact control the agencies, thereby making them responsive to the needs of the electorate.¹³⁰ Much of this literature assumes that bureaucrats *should* pursue the policy goals of Congress and that greater political control of the bureaucracy is desirable. Several scholars, however, have questioned this underlying normative premise. David Spence, for example, argues that “the assumption that more political control is better is at least debatable,”¹³¹ while Brian Cook asks whether the status of public bureaucracies “as agents of popularly elected executives and legislatures [should be] the subject of debate rather than the accepted point of departure for theory building.”¹³² Others have questioned whether agencies should be

¹²⁶ See, e.g., Songer, Segal & Cameron, *supra* note 1, at 693.

¹²⁷ Benesh & Reddick, *supra* note 1, at 536.

¹²⁸ Randazzo, *supra* note 1, at 685.

¹²⁹ Songer, Segal & Cameron, *supra* note 1, at 690.

¹³⁰ See *supra* Part II.C.

¹³¹ Spence, *supra* note 87, at 215. Spence raises the question of whether political control may in fact facilitate agency capture. See *id.* at 215–16.

¹³² Brian J. Cook & B. Dan Wood, Debate, *Principal-Agent Models of Political Control of Bureaucracy*, 83 AM. POL. SCI. REV. 965, 970 (1989).

controlled by current political leaders¹³³ or instead should be responsive to *prior* officials—that is, “all of those static coalitions from the past that successfully had their policy ambitions transformed into law.”¹³⁴ Thus, a normative ambiguity underlies the classic Congress–bureaucracy literature: whom should we view as the true principal of the bureaucratic agency? Put differently, to whom does the bureaucratic agent owe a duty of loyalty—current key members of Congress or the enacting political coalition that created and empowered the agency?

The common assumption that the lower federal courts are agents with a duty to act on behalf of the Supreme Court masks a similar normative question: why *should* lower federal court judges pursue the interests of the Supreme Court and not their own goals or some other interest? Perhaps federal judges are better understood as agents (in the normative sense) of Congress, particularly when they are interpreting statutes, or of the President who nominated them.¹³⁵ Or perhaps the principal, whose interest they *should* seek to advance, is the public or, more provocatively, the law.¹³⁶ For each of these hypothetical principals, serious questions exist regarding the extent to which it could or does control the actions of federal district and circuit court judges. However, the normative possibilities that lower court judges *should* pursue these interests deserve consideration.

Positing that the Supreme Court is the appropriate principal, what reasons exist for requiring lower courts to pursue its preferences? Common law agency doctrine and economic theories suggest that the obligation to pursue the principal’s interests stems from the agent’s consent to the agency relationship. As discussed above, however, there is no direct contractual relationship between the Supreme Court and the lower federal courts, eliminating the usual basis for holding the agent to a fiduciary duty to act on behalf of the principal. For the public bureaucracy, political control is justified by the need for representational legitimacy—that is, agency activity should be controlled by Congress because the latter is more directly responsive to the needs and wishes of the public. This argument, however, is insufficient to support a normative claim that lower court judges should pursue the interests of the Supreme Court. Even if one assumes that lower

¹³³ See, e.g., Weingast & Moran, *supra* note 61, at 768.

¹³⁴ See B. Dan Wood, *Principals, Bureaucrats, and Responsiveness in Clean Air Enforcements*, 82 AM. POL. SCI. REV. 213, 231 (1988). On this view, agencies are “agents of the law who, by virtue of delegated authority, are transformed into quasi principals.” *Id.*

¹³⁵ See *supra* note 8 and accompanying text.

¹³⁶ Federal judges must swear their allegiance to the Constitution and the laws of the United States upon taking office:

I, _____, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as _____ under the Constitution and laws of the United States. So help me God.

28 U.S.C. § 453 (2006).

court judges should be responsive to the public in their decisionmaking,¹³⁷ requiring them to pursue the preferences of the Supreme Court, which is also staffed by unelected judges, will not solve the need for representational legitimacy. Although Supreme Court Justices are subject to greater scrutiny during the appointment process than lower court judges, they will not necessarily be better representatives of public views, particularly over time. Supreme Court nominees have become increasingly opaque in their responses during the confirmation process, making it difficult to know their preferences.¹³⁸ Once appointed, life tenure largely insulates the Justices from the influence of shifting democratic majorities.¹³⁹ If anything, Supreme Court Justices may be even less broadly representative in their backgrounds and less responsive to the public than circuit judges and especially district judges, who are both more numerous and more deeply embedded in particular legal communities.

What then is the basis for the common assumption that lower federal court judges should pursue the goals of the Supreme Court? Undoubtedly it relates to the principle of vertical *stare decisis*—the legal rule that courts should follow the precedent of courts with revisory authority over them.¹⁴⁰ Judicial politics scholars who have relied on principal–agent theories, however, have sometimes confused the legal norm—obey the *precedent* of the superior court—with a quite different normative mandate—pursue the *preferences* of the superior court. Of course lower courts must follow the preferences of the Supreme Court to the extent that they are embodied in legally binding precedents, but many judicial politics scholars have suggested that their duty extends further—to pursuing the interests and preferences of the Court even when not fully expressed in doctrine. For example, Songer, Segal, and Cameron argue that “[i]f the circuit courts consisted of faithful agents, they would obediently follow the policy dictates set down by the Supreme Court . . . [rather than] their own policy preferences.”¹⁴¹ Tracey George and Albert Yoon similarly raise as a concern “the possibility . . . that judges will not comply with Supreme Court preferences.”¹⁴² It is only by mistakenly equating precedent and preferences that

¹³⁷ One might just as forcefully argue that the role of the federal courts as a whole is to act as a countermajoritarian institution. See, e.g., Philip B. Kurland, *Toward a Political Supreme Court*, 37 U. CHI. L. REV. 19, 45 (1969) (arguing that the most important function of the Supreme Court is anti-majoritarian in that it is intended to protect minorities against oppression by majorities).

¹³⁸ See, e.g., Richard Brust, *No More Kabuki Confirmations*, ABA J., Oct. 2009, at 38.

¹³⁹ See U.S. CONST. art. III, § 1.

¹⁴⁰ See Caminker, *supra* note 89, at 823–25 (explaining and justifying the doctrine of hierarchical precedent).

¹⁴¹ Songer, Segal & Cameron, *supra* note 1, at 675.

¹⁴² George & Yoon, *supra* note 1, at 819; see also Jacobi & Tiller, *supra* note 1, at 328 (describing “policy errors” as policy outcomes disfavored by the higher court); Lindquist, Haire & Songer, *supra* note 1, at 608 (“[C]ircuit court compliance with Supreme Court justices’ preferences for particular outcomes is far from assured . . .”); cf. Clark, *supra* note 1, at 60 (explaining how an appellate panel, the agent of the circuit, may “follow its own preferences and disregard the Circuit’s” preferences).

the claim that the lower courts should pursue the interests of the Supreme Court appears uncontroversial.

Scholars who make this assumption find evidence of “shirking” when the relative proportion of liberal and conservative outcomes in the lower courts does not mirror Supreme Court outcomes.¹⁴³ As I have argued elsewhere, however, lower courts might reach divergent outcomes while still complying with legal norms.¹⁴⁴ Precedent—legal doctrine—inevitably affords discretion to lower courts in deciding cases, not only because of the indeterminacy of language but also because of choices the Supreme Court makes in framing its decisions.¹⁴⁵ For example, if the Court chooses to issue a narrow rather than broad opinion, or opts for an open-ended standard rather than a rigid rule, it will create discretionary spaces that afford lower courts considerable leeway in deciding subsequent cases. And where legal discretion exists, the exercise of judgment is permissible. The lower courts are under no legal duty to follow Supreme Court preferences that have not been articulated in the form of binding precedent.¹⁴⁶ Recall the example of the *Garcetti* case. If a circuit court finds that a public employee’s speech was not made pursuant to her official duties and permits her First Amendment claim to proceed, it has followed the *Garcetti* decision, even though the Supreme Court might have reached a different conclusion had it considered the same case. In short, a duty to follow precedent does not justify an insistence that lower court judges pursue Supreme Court preferences regarding outcomes.

So far then the assumption that lower courts should pursue the interests of the Supreme Court appears to lack justification. No explicit contract or legal norm requires it, and concerns about democratic legitimacy cannot explain it. Such a duty, however, might be explained on functional grounds. The rule of vertical stare decisis is sometimes justified on grounds of efficiency and uniformity.¹⁴⁷ According to this argument, lower courts should follow Supreme Court precedent, even when they disagree with it, because to do otherwise would waste judicial resources, delay resolution, and result in inconsistent outcomes. A rule of vertical stare decisis advances the goals of efficiency and uniformity by expanding the power of the Supreme Court, whose voice is decisive whenever there is disagreement

¹⁴³ See, e.g., Songer, Segal & Cameron, *supra* note 1, at 692–93 (interpreting divergent patterns of decisions by liberal and conservative appellate judges as evidence that they sometimes “shirk” by advancing their own policy preferences rather than those of the Supreme Court).

¹⁴⁴ See Kim, *supra* note 8, at 410–12.

¹⁴⁵ See *id.* at 414–15. Jacobi and Tiller have explored more formally the conditions under which appellate courts might choose one type of doctrine, or “legal instrument,” rather than another. See Jacobi & Tiller, *supra* note 1.

¹⁴⁶ Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 5 n.20 (1994) (citing sources stating that lower courts should decide cases based on existing precedents, not by predicting how higher courts are likely to decide the issue).

¹⁴⁷ See, e.g., Caminker, *supra* note 89, at 839–56 (explaining consequentialist justifications for the doctrine of hierarchical precedent).

over the best rule to follow. It does not necessarily follow, however, that the interests of efficiency and uniformity demand that lower court judges also advance Supreme Court preferences, not just follow its precedents.¹⁴⁸ I have argued elsewhere that these consequentialist arguments do not support expanding the duties of the lower courts in this way, and the main effect of doing so would be to unduly concentrate power in the hands of the Justices.¹⁴⁹

The latter point is best illustrated by considering the extreme case. If the actions of the lower courts were easily observable and the Supreme Court had infinite resources to monitor and correct their decisions, its agency problem would be solved, enabling it to exercise complete control over the output of the hundreds of circuit and district judges who decide the overwhelming mass of federal cases. In traditional principal-agent relationships, such a situation would generally be viewed as desirable. For example, it would be seen as a good thing if managers faithfully pursued the interests of shareholders without engaging in self-dealing, or if the tenant farmer invested a level of effort that maximized crop yield rather than opting for more leisure. But is it normatively attractive to imagine that the Supreme Court could ensure that all lower federal court judges precisely followed its will? Would it be a good thing if such enormous power were concentrated in the hands of nine unelected individuals?

If the Supreme Court itself were more directly responsive to governing majorities, such a concentration of power might not be troubling.¹⁵⁰ But

¹⁴⁸ Evan H. Caminker makes a normative argument that, at least in some circumstances, lower courts *should* decide cases according to their prediction of how superior courts would decide them. See Caminker, *supra* note 146, at 35–66. More specifically, Caminker argues that lower court judges should try to predict future Supreme Court decisions in cases in which “highly probative predictive data are available—that is, when fragmented dispositional rules or well-considered dicta clearly foreshadow the Supreme Court’s future direction.” *Id.* at 73. These circumstances are “admittedly narrow,” *id.* at 1, and even if persuasive, Caminker’s arguments do not necessarily support a generalized duty to follow superior court preferences.

¹⁴⁹ See Kim, *supra* note 8, at 436–40.

¹⁵⁰ Barry Friedman argues that, throughout American history, the Supreme Court has been influenced by the views of the public because those views can motivate political leaders to follow the Court or to discipline it. BARRY FRIEDMAN, *THE WILL OF THE PEOPLE* 375 (2009) (“The Court has to be attuned to aroused public opinion because it is the public that can save a Court in trouble with political leaders and likewise can motivate political leaders against it.”); see also *id.* at 370–71 (asserting that “[t]he people and their elected representatives have had the ability . . . to assert pressure” on the Justices). While this is undoubtedly true to some degree, the question remains as to how responsive the Court actually is to public opinion. Compare, e.g., *id.* at 375 (claiming that the Supreme Court Justices may be influenced by public opinion because “they care about preserving the Court’s institutional power . . . [and] about not being disciplined by politics”), and POSNER, *supra* note 7, at 375 (asserting that Supreme Court Justices are reined in by awareness “that they cannot go ‘too far’ without inviting reprisals by the other branches of government spurred on by an indignant public”), with JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 424–28 (2002) (arguing that there is no evidence that public opinion directly influences the Supreme Court), and Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 GEO. L.J. 1515 (2010) (asserting that the Supreme Court is responsive to elites, not public opinion). Ri-

currently, the levers that public officials wield over the Supreme Court are quite weak. The combination of life tenure, no mandatory retirement age, and increased longevity means that turnover on the Court has become increasingly infrequent.¹⁵¹ Thus, the opportunities for elected officials to alter the composition of the United States Supreme Court are “fitful and irregular,”¹⁵² and the chance to change its ideological balance is rarer still.¹⁵³ Thus, scholars have noted the risk that “the Court will embody a lagging average of electoral politics and attempt to impose upon today’s governing coalition the views of yesterday’s governing coalition.”¹⁵⁴ Of course the political branches have a variety of tools, such as court-packing and jurisdiction-stripping, to try to influence the decisions of the Court,¹⁵⁵ but the effectiveness of these tools in actually constraining the Justices has been a matter of debate.¹⁵⁶ Given that political control is necessarily limited, some diffusion of power to the lower courts may be a useful antidote to the risk of excessive Supreme Court power, particularly if it turns out that the composition of the lower courts is more fluid and therefore more responsive to shifting political coalitions.

A good deal more analytical and empirical work is required to determine the optimal balance between centralization and diffusion of judicial

chard Pildes not only questions the descriptive claim that political majorities constrain the Supreme Court but also challenges whether the “majoritarian thesis” can answer moral questions about the legitimacy of judicial review or assure that the Court’s judicial review power will be appropriately limited in the future. Richard H. Pildes, *Is the Supreme Court a “Majoritarian” Institution?*, 2010 SUP. CT. REV. 103. Of course, the extent to which the Supreme Court *should* be responsive to public opinion is also a matter of controversy. See FRIEDMAN, *supra*, at 372–74 (worrying that Justices follow public opinion too closely and thus fail to fulfill “the traditional role of judicial review in protecting minority rights”). That latter debate, however, addresses the proper roles of the different branches of government, while my focus here is on the relationship—and the allocation of power—between the Supreme Court and the lower federal courts.

¹⁵¹ See Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL’Y 769, 777–89 (2006); see also Pildes, *supra* note 150, at 139–41 (arguing that the appointments process is a much weaker mechanism for political control over the Supreme Court than it was in the past).

¹⁵² David S. Law, *The Anatomy of a Conservative Court: Judicial Review in Japan*, 87 TEX. L. REV. 1545, 1589 (2009).

¹⁵³ See Keith Krehbiel, *Supreme Court Appointments as a Move-the-Median Game*, 51 AM. J. POL. SCI. 231, 238–39 (2007).

¹⁵⁴ See Law, *supra* note 152, at 1589 & n.266.

¹⁵⁵ See, e.g., John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 981–94 (2002) (reviewing tools available to political branches to try to control the judiciary as a whole, such as the appointment power and Congress’s ability to control the judiciary’s budget and to limit its subject matter jurisdiction).

¹⁵⁶ Compare, e.g., FRIEDMAN, *supra* note 150, at 375 (asserting that the Court has responded to attempts by the political branches to discipline it through actions such as court-packing and jurisdiction-stripping), with SEGAL & SPAETH, *supra* note 150, at 424–25 (arguing that “if Congress has virtually no direct influence on the Court, it is hardly likely that the influence of public opinion will flow indirectly through Congress”), and Pildes, *supra* note 150, at 133–39 (questioning the effectiveness of the tools available to Congress to curb the Supreme Court).

power.¹⁵⁷ The point here is that questions of institutional design require that we first explicate our normative goals—for example, whose interests should district and circuit courts serve?—and then ask how various structures and norms affect those goals. The widespread reliance on principal–agent theories to describe the judicial hierarchy has obscured these normative questions such that they have largely gone unasked.

2. *Descriptive Features.*—The reliance on principal–agent theories has not only obscured important normative questions but also distorted our understanding of certain descriptive features of the judicial hierarchy as well. In particular, the principal–agent perspective and its focus on hierarchical control have reinforced a Supreme Court-centric view of the courts. Susan Haire, Stefanie Lindquist, and Donald Songer write that “the federal judicial hierarchy is designed to enable the Supreme Court, sitting at the system’s apex, to impose its collective will on lower federal judges.”¹⁵⁸ Although they go on to acknowledge that “the Court’s control is far from absolute,”¹⁵⁹ it would be far more accurate to describe the federal judicial hierarchy as a system designed to *limit* the Supreme Court’s ability to impose its collective will on lower courts.

If in fact the goal were to centralize power and strengthen discipline over lower court judges, then the judicial branch would be structured quite differently. For example, it might be designed much like the Japanese judiciary, whose ranks are composed of career judges who have been screened, selected, and trained by a bureaucracy under the control of the Chief Justice of the Japanese Supreme Court and an elite cadre of judges in the Secretariat.¹⁶⁰ This administrative bureaucracy exercises power not only over lower court judges’ pay but over their assignments as well, thereby controlling what type of cases they will hear, where they will live, and ultimately the trajectories of their entire careers.¹⁶¹ These powers are wielded effectively to discourage rulings out of line with the prevailing ideology.¹⁶² Alternatively, centralized control might be strengthened by holding judges personally accountable for their decisions and imposing sanctions for any case

¹⁵⁷ For example, as Judith Resnik has observed, procedural rules of review entail choices to diffuse or concentrate power among different types of judges or decisionmakers. See Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 840, 850–51, 868–89 (1984). The reverse is also true: value choices regarding the allocation of judicial power do and should inform decisions about institutional design, including rules of procedure.

¹⁵⁸ Haire, Lindquist & Songer, *supra* note 1, at 143–44.

¹⁵⁹ *Id.* at 144.

¹⁶⁰ See Law, *supra* note 152, at 1549–64.

¹⁶¹ *Id.* at 1556–58.

¹⁶² See *id.* at 1560–62 (describing the ability of the central bureaucracy to reward and sanction judges for their decisions and explaining that “Japanese judges march out of ideological sync with the bureaucracy at their own peril”).

reversed on appeal, as occurs in China's local courts.¹⁶³ In comparison to these robust tools for controlling subordinate judges in other judicial systems, the United States Supreme Court's ability to control the lower federal courts by reversing a tiny fraction of their decisions appears quite feeble.

Not only does the Supreme Court lack the tools to directly sanction lower court judges, but legal norms further limit its supervisory powers as well. For example, the general rule against permitting new evidence to be considered at the appellate level¹⁶⁴ and the standard of review requiring appellate courts to defer to a trial court's factual findings¹⁶⁵ exacerbate the lower courts' informational advantage. Even the Supreme Court's reversal power cannot be exercised unless the losing party petitions for certiorari. In a system designed to maximize Supreme Court control, one might expect to see rules that permit appellate courts to receive additional evidence, do not require deference to the findings of trial courts, and allow the Justices to select any decision for review. That these features are not part of the federal appellate system suggests that the institutional structure is designed to achieve goals other than enhancing Supreme Court control. Thus, unlike economic theories of agency, in which the need to control agency costs helps explain the structure of the firm,¹⁶⁶ a focus on agency costs cannot explain the existing institutional structure of the federal judiciary.

In addition, principal-agent theories tend to entrench a particular view of the role of law in the judicial hierarchy. The common assumption of these theories is that judges are primarily motivated by policy—that is, their goal in deciding cases is to enact their policy preferences into law. In earlier work, this assumption led judicial politics scholars to dismiss law and doctrine as mere rhetoric or window-dressing, a cover for judges' true intentions.¹⁶⁷ Thus, the study of court decisions at all levels of the judiciary focused on judicial votes—typically examining the political valence of case outcomes rather than analyzing the language of court opinions. This ap-

¹⁶³ See, e.g., Carl F. Minzner, *Riots and Cover-Ups: Counterproductive Control of Local Agents in China*, 31 U. PA. J. INT'L L. 53, 72–74 (2009) (describing “responsibility systems” applied to Chinese courts).

¹⁶⁴ See, e.g., *Tonry v. Sec. Experts, Inc.*, 20 F.3d 967, 974 (9th Cir. 1994) (explaining the “basic tenet of appellate jurisprudence . . . that parties may not unilaterally supplement the record on appeal with evidence not reviewed by the court below”); 16A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & CATHERINE T. STRUVE, *FEDERAL PRACTICE AND PROCEDURE* § 3956.1 (4th ed. 2008) (noting that generally courts of appeals will not consider matter that is not part of the record transmitted by the trial court).

¹⁶⁵ See, e.g., *Anderson v. City of Bessemer City*, 470 U.S. 564, 575 (1985) (“[R]eview of factual findings under the clearly-erroneous standard—with its deference to the trier of fact—is the rule, not the exception.”).

¹⁶⁶ See Jensen & Meckling, *supra* note 39, at 357.

¹⁶⁷ See SEGAL & SPAETH, *supra* note 15, at 34 (arguing that “the legal model serves only to rationalize the Court's decisions and to cloak the reality” that Justices decide cases based on their personal policy preferences); *id.* at 363 (asserting that the legal model “masks the reality of choice based on the individual justices' personal policy preferences”).

proach has been much criticized for failing to take seriously the law and legal institutions.¹⁶⁸

More recently, judicial politics scholars have begun to focus their attention on the role that legal doctrine plays in the interaction between upper and lower courts. Once again, the starting point is the assumption that judges are primarily motivated by their policy goals; however, rather than dismissing law as irrelevant, these scholars theorize that the law plays an important role in communication between different levels of courts. Drawing on traditional principal–agent theories, legal doctrine is conceived as the form in which the Supreme Court as principal gives direction to its agents.¹⁶⁹ Due to legitimacy concerns, the Court is constrained in how it communicates its preferences. It cannot simply instruct the lower courts to pursue certain policy outcomes but must instead direct its agents through written opinions that cite precedent and reason from accepted legal premises.¹⁷⁰ On this view, the law is the means by which the Supreme Court tells lower court judges how they should decide cases.

Scholars utilizing principal–agent theories have generally taken one of two approaches to the question of how doctrine influences lower court judges. Some assume that the law merely operates as a signal. The law does not bind lower court judges in any meaningful way. Rather, they pay attention to Supreme Court doctrine because it informs them of what types of outcomes are likely to provoke a sanction—reversal—and how they can safely avoid negative scrutiny. For example, McNollgast assumes that judicial doctrine “consists of a statement about the range of lower court decisions acceptable to the Court.”¹⁷¹ To the extent that a lower court is observed to follow upper court precedent, it is “not because it considers the higher court decision authoritative (and hence creating an obligation) or persuasive but because of the threat of reversal and a worse outcome from its own perspective.”¹⁷² Apart from its signaling function, the law has no independent influence on judicial decisionmaking.

¹⁶⁸ See, e.g., Barry Friedman, *Taking Law Seriously*, 4 PERSP. ON POL. 261, 262 (2006) (“[R]eflecting an almost pathological skepticism that law matters, positive scholars of courts and judicial behavior simply fail to take law and legal institutions seriously.”); see also Howard Gillman, *What’s Law Got to Do with It? Judicial Behavioralists Test the “Legal Model” of Judicial Decision Making*, 26 LAW & SOC. INQUIRY 465 (2001) (describing criticisms of positive political theorists, or “judicial behavioralists,” for failing to take legal variables into account).

¹⁶⁹ See, e.g., Bueno de Mesquita & Stephenson, *supra* note 5, at 757; Jacobi & Tiller, *supra* note 1, at 328; McNollgast, *supra* note 3, at 1641.

¹⁷⁰ See Jacobi & Tiller, *supra* note 1, at 331 (“Writing doctrines that specify particular policy outcomes in place of reasoned and consistent application of neutral rules and principles would ultimately weaken the legitimacy of judicial power.”).

¹⁷¹ McNollgast, *supra* note 3, at 1641.

¹⁷² Lewis A. Kornhauser, *Adjudication by a Resource-Constrained Team: Hierarchy and Precedent in a Judicial System*, 68 S. CAL. L. REV. 1605, 1611 (1995) (describing lower courts’ motivation in agency models).

Others assume that legal doctrine has some operative force—that is, lower court judges feel obligated to obey Supreme Court doctrine and will do so, even when they do not agree with it.¹⁷³ This approach is agnostic about the reasons these judges follow doctrine. It may be because they have been socialized to respect superior court precedent, because doctrine provides a useful decision heuristic, or for some other reason. Whatever the explanation, it assumes that “lower court judges display legal obedience,”¹⁷⁴ such that the Court can use “the language of its decisions and the structure of doctrine to limit options of lower courts.”¹⁷⁵ And because they feel bound by doctrine, the law can be used as an “instrument of political control by higher courts over lower courts and the case outcomes they produce.”¹⁷⁶

Despite their differing accounts of the effect of doctrine on lower court judges, both of these approaches share the assumption that lower court judges will pursue their own policy preferences to the extent feasible, given the constraints imposed by either the reversal threat or the normative force of legal doctrine. Just like the economic agent who shirks whenever the principal is not watching, lower court judges are depicted as strategic actors who will pursue their own goals to the extent that they can and who therefore seek to evade scrutiny of their actions.¹⁷⁷ Even when the law is assumed to have some normative force, agency theory suggests that lower courts view it as a stricture to be evaded whenever their preferences differ from those of the Supreme Court.

IV. RECONCEPTUALIZING LAW AND THE JUDICIAL HIERARCHY

I have argued above that despite their widespread acceptance, principal-agent theories do not accurately capture the structure of the relationships within the judiciary. While these models have been useful in advancing understanding of Supreme Court–lower court interactions, they are not necessarily the best or only way of analyzing hierarchical relationships. In the absence of the usual contractual tools for shaping the relationship, the Supreme Court’s agency problem begins to look much like the problem confronting any strategic actor when interacting with other parties whose actions can affect outcomes and thus its ultimate payoff. Moreover, there are costs to relying on these theories because models necessarily focus attention on certain features while eliding others. Using a principal-agent

¹⁷³ See, e.g., Bueno de Mesquita & Stephenson, *supra* note 5, at 757; George & Yoon, *supra* note 1, at 824; Jacobi & Tiller, *supra* note 1, at 327.

¹⁷⁴ Jacobi & Tiller, *supra* note 1, at 330.

¹⁷⁵ George & Yoon, *supra* note 1, at 823–24.

¹⁷⁶ Jacobi & Tiller, *supra* note 1, at 326.

¹⁷⁷ Cf. BRIAN Z. TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING 119 (2010) (criticizing the strategic model of judging as “paint[ing] an implausible picture of judges as magnificent Machiavellian calculators pursuing political agendas with hardly any legal integrity”).

lens has obscured important normative questions and distorted significant descriptive features of the federal judicial hierarchy.

Discarding the language of principal–agent theory expands the possibilities for describing the interactions between upper and lower courts. Agency theories tend to caricature the strategies of both the Supreme Court and the lower federal courts. In these accounts, the Supreme Court is singularly focused on controlling the decisional output of the lower courts to ensure that lower court decisions comport with its preferences, while the lower courts are principally concerned with evasion in order to achieve their own policy goals. Law and doctrine are merely tools in this struggle—ways of signaling or commanding obedience on the one hand and of feigning compliance and avoiding detection on the other. What is entirely missing from this account is any sense that courts at the various levels of the hierarchy might be engaged in a common venture—one in which cooperation offers the possibility of a joint payoff.

Taking into account this possibility requires a shift in the basic assumption that animates much of the judicial politics literature—namely, that judges are primarily motivated by their policy preferences. Instead, one might view judges as engaged in an interaction that involves both elements of cooperation and conflict in a type of mixed-motive coordination game.¹⁷⁸ From this perspective, judges share a common goal—the production of a (relatively) coherent body of rules that can govern primary behavior in the real world and is viewed as authoritative. At the same time, their efforts at cooperation are plagued by conflicts over what substantive rules or policies should be instantiated in the law. They struggle over what legal policies to pursue, but if taken too far, this conflict will undermine coordination to the point that the coherence of the system unravels, leaving all worse off.

Notice that this approach reverses the usual understanding among judicial politics scholars of the relationship between law and politics. Under the agency model, judges are assumed to pursue their policy preferences, and they use the law as a means for doing so. Law expresses their preexisting policy preferences and is an instrument for exercising control over policy outcomes. By contrast, in this alternative framework the production of law itself, not policy outcomes, is the primary goal. Law is the joint prod-

¹⁷⁸ As an alternative to the agency model of adjudication, Lewis Kornhauser has proposed a “team model,” which he argues explains the institutional structure of the United States courts—that is, a system with trials and appellate courts arranged hierarchically, strict vertical precedent, and horizontal precedent binding only at the appellate level. See Kornhauser, *supra* note 172, at 1628. While his proposed model usefully highlights the cooperative aspects of judicial decisionmaking, it does so by assuming that judges at all levels seek to maximize the number of correct decisions and that they share a common understanding of what the “correct” answers are. See *id.* at 1612–13. Unfortunately, the model’s failure to take into account value conflicts within the judiciary limits its usefulness in understanding and predicting judicial behavior.

uct of judicial efforts at all levels of the hierarchy, but it is also inevitably the ground for contestation over policy choices.

Law in this sense refers not to a specific case outcome, or even a particular doctrine, but to a body of rules that together govern social interactions. In order to be efficacious, this body of rules must have certain characteristics. For example, it must be reasonably coherent and sufficiently determinate to allow predictions as to its application but also flexible enough to adapt to changing social conditions. I do not attempt to enumerate or justify the necessary characteristics here. What is important is that judicially created law must have certain attributes in order to play its functional role in regulating social interactions and to be viewed as legitimate. And courts at different levels of the judicial hierarchy must coordinate their actions in order to develop a body of rules displaying these attributes. Thus, written opinions are better understood not as window-dressing masking policy decisions, or even as signals commanding obedience, but as crucial tools in coordinating the judicial function of rule creation and development.

In their study of the Supreme Court's certiorari decisions, Charles Cameron, Jeffrey Segal, and Donald Songer acknowledge that their approach focused on the Court's "enforc[ement] [of its] doctrinal preferences . . . throughout the judicial hierarchy but ignore[d] . . . the evolutionary creation of doctrine."¹⁷⁹ Emphasizing the latter—"the incremental, fact-soaked creation of new rules"¹⁸⁰—suggests that controlling lower court outcomes is less important than finding appropriate cases for identifying areas in need of development and for articulating rules to address them. Not only must the Supreme Court rely on the lower courts to provide these vehicles for law development, but it also must procure their cooperation in applying its precedents to create a coherent body of rules. Because of its limited capacity and the infinite variety of factual situations that may arise in the future, the Court necessarily creates incomplete doctrines. These imprecise rules are subsequently elucidated by the lower courts through their application to a broad variety of concrete situations. Thus, the meaning of a particular doctrine cannot be fixed in advance by the Supreme Court but will necessarily evolve through the process of implementation by lower courts.

This depiction of law is in many ways like descriptions of the development of the common law but with a focus on interactions between courts within a hierarchy rather than over time. Intractable value conflicts are ultimately resolved by reference to hierarchical authority, but such resolutions can never be completely final. Thus, if the Supreme Court disagrees with a doctrine established in a circuit court, it can overturn that doctrine and arti-

¹⁷⁹ Cameron, Segal & Songer, *supra* note 1, at 113–14.

¹⁸⁰ *Id.* at 102.

culate its own rule. That rule, however, will in turn be subject to interpretation by the lower courts in subsequent cases.

In struggling over policy, different levels of the judiciary could try to erode the power of the other. For example, the Supreme Court might impose increasingly rigid rules in an effort to limit the discretion of lower court judges, while lower courts might attempt to undermine Supreme Court authority by increasingly distinguishing and limiting its precedent. Taken to an extreme, coordination between the courts could break down, destroying the coherence of legal doctrine and the legitimacy of the system as a whole.¹⁸¹ Thus, although each level of the judiciary has incentives to pursue its own interests, a complete failure of coordination risks an outcome in which all are left worse off. On the other hand, cooperation, even though it necessarily entails some suppression of individual policy preferences, may enhance overall coherence and legitimacy, thereby working to the mutual benefit of both the Supreme Court and lower federal courts.

Viewing the Supreme Court and lower courts as players jointly engaged in the production of law, whose interactions are characterized by both cooperation and conflict, leads to a different view of the function of information. As discussed above, principal-agent theories suggest that informational asymmetries allow agents to avoid scrutiny of their activities and thereby afford them greater discretion. Agents therefore seek to exploit their informational advantage, while the principal will employ mechanisms to force information sharing. If upper and lower court interactions are characterized by both cooperation and conflict, however, then the role of information becomes more complicated. Lower courts may sometimes value transparency in their decisionmaking. For example, publishing detailed written opinions aids upper courts by providing information about developing areas of law or new factual contexts. At the same time, only by making their activities visible can lower court judges hope to influence policymaking in these evolving areas of law. Even when disagreeing with an upper court, a lower court may choose to visibly contest an established doctrine—for example, by arguing that a related factual situation should be distinguished—in an attempt to shape policy by limiting its reach, rather than to “shirk” in the traditional sense by avoiding scrutiny. The Supreme Court, on the other hand, may deliberately tolerate or encourage informational asymmetries—for example, by reviewing certain lower court decisions de-

¹⁸¹ If the Supreme Court’s only lever of control is its reversal power, then it is theoretically possible that lower courts could “riot”—that is, engage in widespread disobedience of a Supreme Court precedent, knowing that the Court would not have the capacity to review all those decisions. Such a reaction would be possible if enough lower courts disagreed strongly enough with a Supreme Court decision and refused to enforce it. In practice, rioting is unlikely because the preferences of lower courts are unlikely to diverge significantly enough from those of the Supreme Court and because lower courts may not be able to coordinate their actions effectively. Nevertheless, massive disobedience by lower courts is theoretically possible. The impact of such actions on the judiciary as a whole could be quite significant, destroying coherence and undermining institutional legitimacy.

ferentially¹⁸²—in order to focus resources on law development rather than on controlling outcomes in particular cases.

Elevating the role of law in this way does not entail formalist conceptions of law as a determinate body of rules or a “brooding omnipresence” waiting to be discovered through legal reason. Nor does it endorse the more recent claim that judges merely act as umpires calling balls and strikes. To the contrary, this view of the judicial hierarchy argues that judges are very much engaged in the project of *making* law. But it argues that in doing so they are engaged in a cooperative venture. No single court has the capacity or the expertise to develop a useful body of rules alone. All have an interest in cooperating in order to enhance the quality of their output and their collective legitimacy. At the same time, articulating legal rules entails choices, and those choices often implicate policy concerns. The existence of varying policy preferences within the judiciary means that value conflicts are unavoidable, and the law is also a ground of contestation over policy. Though inevitable, these policy conflicts are cabined to some extent by the need for cooperation.

CONCLUSION

The concept of agency has proven useful for analyzing a variety of relationships in law, economics, and politics. When applied to the federal judicial hierarchy, however, principal-agent theories fit poorly the characteristics of the judiciary in a number of ways. Although those theories usefully highlight the possibility of value conflicts between the Supreme Court and lower courts, framing the relationship between them as one of agency has tended to obscure important normative questions about whose interests the lower courts *should* pursue and to paint a distorted picture of the role of law in judicial decisionmaking. Given these limitations, alternative models may prove more fruitful in understanding the judicial hierarchy.

The discussion above sketches out an alternative approach to conceptualizing the interactions within the judicial hierarchy and the role that law plays while avoiding the language and assumptions of agency theory. This effort is preliminary, and more work remains to be done. Nevertheless, the effort of developing new theoretical frameworks is important to advance understanding of relationships across the judicial hierarchy. Crucial to this effort is the recognition that the Supreme Court and lower court judges are engaged in an ongoing interaction involving elements of both cooperation and conflict. And rather than seeing the law as a mere tool in their struggle, it might be more productive to view the production of law as the joint goal of upper and lower courts as well as the grounds on which their value conflicts play out.

¹⁸² See, e.g., *supra* notes 164–65 and accompanying text.

