
ARTICLE

BUREAUCRACY AT THE BOUNDARY

ANNE JOSEPH O'CONNELL[†]

The traditional view of the federal administrative state imagines a bureaucracy consisting entirely of executive agencies under the control of the President as well as regulatory commissions and boards that are more independent of the White House. Administrative law clings to this image, focusing almost entirely on these conventional agency forms. The classic image, however, is inaccurate. The reality of the administrative state is more complex.

Contrary to the traditional view, a considerable bureaucracy exists outside of executive agencies and independent regulatory commissions: the largest employer of nonmilitary government employees, the U.S. Postal Service; the only major operator of passenger trains in the country, Amtrak; the organization that ended the career of cyclist Lance Armstrong, the U.S. Anti-Doping Agency; the primary responder to domestic emergencies, the National Guard; the major international lender to developing countries, the International Bank for Reconstruction and Development,

[†] Associate Dean for Faculty Development and Research and Professor of Law, University of California, Berkeley. I have benefitted greatly from feedback about this project at Berkeley Law's Faculty Retreat; Berkeley Law's Public Law and Policy Workshop; Columbia Law School's Administrative Law Roundtable; Harvard Law School's Public Law Workshop; New York University School of Law's Colloquium on Law, Economics, and Politics; and the University of California at Davis School of Law's Legal Theory Workshop. I am particularly grateful for discussions with Michelle Wilde Anderson, Rachel Barkow, Eric Biber, Ryan Bubb, Christopher Elmendorf, Daniel Farber, John Ferejohn, Judge William Fletcher, Jody Freeman, Jacob Gersen, Abbe Gluck, Kristin Hickman, Aziz Huq, Lewis Kornhauser, Ronald Levin, Michael Levine, Jon Michaels, Jamie O'Connell, Cristina Rodríguez, Martin Shapiro, Matthew Stephenson, Karen Tani, Adrian Vermeule, and John Yoo. Lauren Maisel Goldsmith, Rachel Schwartz, Mary Tharin, Katie Towt, and Jarett Yan provided excellent research assistance, and my assistant Cynthia Palmerin and the team of amazing reference librarians at Boalt Hall tracked down relevant sources and information. Caitlin Cunningham, Yuri Fuchs, Marisa Kirio, and the editors of the *University of Pennsylvania Law Review* contributed terrific editorial assistance.

a part of the World Bank group; and the federal government's primary oversight agency, the Government Accountability Office, are a few examples.

This bureaucracy lives largely at the boundaries. There are organizations at the border between the federal government and the private sector. There are organizations at the border between the federal government and other governments, including those of states, foreign countries, and Native American tribes. And there are organizations entirely within the federal government that do not fit squarely within the Executive Branch, including but encompassing far more than independent regulatory commissions and boards. The variety, number, and importance of these organizations greatly complicate the structure of the federal bureaucracy as widely perceived.

To widen the lens on the administrative state, while trying to retain some tractability, this Article locates and classifies the missing federal bureaucracy along the borders of more conventional categories and other important boundaries. In addition to placing these missing parts on the bureaucratic map, it also considers movement to and from the center of these categories. The heart of this Article theorizes about these missing components, specifically why political actors would create bureaucracy at the boundary. Under the theory advanced here—and seemingly in reality—these entities are actually the ordinary outcome of the agency design process. This Article also considers whether their creation serves social welfare or democratic legitimacy objectives, suggesting that efficiency may not always trump accountability in these alternative agency structures. Finally, this Article examines important legal issues surrounding these other bureaucracies and how these entities might shape established law and governance of federal agencies.

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INTRODUCTION

The U.S. Postal Service's (USPS) multi-billion dollar losses and its plan to stem them, in part, by ending the delivery of letters on Saturday grabbed newspaper headlines and elicited dismay from politicians.¹ Politicians, in

¹ See, e.g., Ron Nixon, *Trying to Stem Losses, Post Office Seeks to End Saturday Letter Delivery*, N.Y. TIMES, Feb. 7, 2013, at A15. Weeks later, because of Congress's disapproval, the USPS retreated from this proposal. Pauline Jelinek, *Post Office Retreats on Eliminating Saturday Mail*, BIG STORY (Apr. 10, 2013), <http://bigstory.ap.org/article/ap-newsalert-313>.

particular, appreciated that the USPS is “the only federal agency with which most people directly interact almost every day”—at least as recipients of mail.² Even now, with email and other forms of communication having taken over many of the functions once served by the mail, the USPS is the largest governmental employer of civilians and the second largest civilian employer of any kind (after Wal-Mart) in the United States.³ Politicians, economists, and ordinary citizens see the USPS as a major part of American life.

Public law presumes to differ from this central treatment of the USPS, offering virtually no place for the agency as it has been organized since 1971. This was not always the case. The old Post Office still appears in the study of modern administrative law. As the nation’s second oldest agency, after the Army, it predated the Declaration of Independence and continued uninterrupted under the Constitution.⁴ For close to 150 years, the head of the Post Office had Cabinet-level status, as the heads of the Environmental Protection Agency and a few other entities do today. Until 1971, it was a classic executive agency with “purely executive officers,”⁵ whom the President could fire for any reason. Indeed, its pre-1971 form serves as a benchmark in case law from which to measure the Federal Trade Commission (FTC) and other independent regulatory commissions (IRCs).⁶

After millions of pieces of mail became stuck in the Chicago Post Office in October 1966,⁷ the Commission on Postal Reorganization called for the postal service to be refashioned as a government-owned corporation.⁸ The Postal Reorganization Act of 1970 implemented that recommendation, creating

² R. Richard Geddes, *Policy Watch: Reform of the U.S. Postal Service*, 19 J. ECON. PERSP., Summer 2005, at 217, 218. To be sure, with electronic communication, texting, social media, and online bill paying as partial substitutes, we send and receive less mail nowadays. See Ron Nixon, *As Default Looms, Postal Service Sees Deeper Woes*, N.Y. TIMES, Aug. 1, 2012, at A14 (noting a six-year decline in mail volume).

³ Richard R. John, Op-Ed., *How the Post Office Made America*, N.Y. TIMES, Feb. 9, 2013, at A19.

⁴ The Continental Congress named Benjamin Franklin Postmaster General in 1775. He was still in the position when the Declaration of Independence was signed, making him the country’s first head of the posts. U.S. POSTAL SERV., THE UNITED STATES POSTAL SERVICE: AN AMERICAN HISTORY 1775-2006, at 6 (2007), available at <http://about.usps.com/publications/pub100.pdf>.

⁵ *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 628 (1935).

⁶ See *id.* at 627-29 (distinguishing the duties of a postmaster and a commissioner of FTC in assessing removal restrictions on the latter).

⁷ U.S. POSTAL SERV., *supra* note 4, at 38.

⁸ PRESIDENT’S COMM’N ON POSTAL ORG., TOWARDS POSTAL EXCELLENCE: THE REPORT OF THE PRESIDENT’S COMMISSION ON POSTAL ORGANIZATION 1-2 (1968). The Commission was created in response to the Chicago disaster. It rejected both minor modifications to its current Cabinet department form (because of the mission of the agency) as well as complete privatization (because of financial concerns). *Id.* at 2.

the USPS as an organization with public and private sector characteristics.⁹ Accordingly, its staffing and leadership structure combine both.¹⁰ Funding, too, comes from both governmental and private market sources.¹¹ The USPS is running large deficits, and before 2013 had failed, for the second time, to make a legally required, \$5.5 billion pension payment.¹²

The current manifestation of the post office, with both its public and private elements, is largely absent from administrative law. The change in its structure, from a Cabinet department to a government corporation, is also largely absent.¹³ Like a Cabinet agency or independent regulatory commission or board—the two kinds of institutions acknowledged by the classic understanding of the federal regulatory state—the USPS is a state actor under the Constitution and is subject to the Administrative Procedure Act (APA).¹⁴ Fraud against it is considered to be fraud against the federal

⁹ Postal Reorganization Act of 1970, Pub. L. No. 91-375, § 201, 84 Stat. 719, 720.

¹⁰ Postal workers are still federal employees. U.S. POSTAL SERV., *supra* note 4, at 40. A chief executive officer, the Postmaster General, is chosen and overseen by a board of directors, the Board of Governors, much like in the private sector. 39 U.S.C. §§ 202–203 (2006). The Board of Governors, who select the Postmaster General, are themselves selected by the President and subject to Senate confirmation rather than elected by shareholders. *Id.* § 202.

¹¹ Mostly, the USPS relies on private consumers, charging them for its services. It receives direct congressional appropriations only for services for the blind and overseas military personnel. Ben White, Q&A, *Getting the Lowdown on the People Who've Got Mail*, WASH. POST, Aug. 27, 2001, at A13. On the other hand, it can borrow funds from the Treasury Department. *Id.* The USPS's hybrid status includes significant competitive advantages and disadvantages. The USPS has a government-granted monopoly on delivery of first-class letters. *Id.* It “pays no state or federal taxes and does not have to license or tag its huge fleet of trucks.” *Id.* In exchange for these advantages, however, it must provide mail service to every address in the country. *Id.* It also has to meet government-imposed payment schedules for pensions and health benefits that are more onerous than those facing the private sector or other governmental entities. *See, e.g.*, Kevin C. Brown, *Congress Ties Postal Service into Knots*, REMAPPING DEBATE (Nov. 1, 2012), <http://www.remappingdebate.org/article/congress-ties-postal-service-knots> (noting that the 2005 Postal Accountability and Enhancement Act requires the USPS to pay significant retiree health benefits on an aggressive ten-year timeline).

¹² GENE L. DODARO, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-347T, U.S. POSTAL SERVICE: URGENT ACTION NEEDED TO ACHIEVE FINANCIAL SUSTAINABILITY 2 (2013). Since Fiscal Year 2006, the USPS has lost (in net) over \$40 billion. *Id.*

¹³ Some believe that such movement in “the fundamental structures of government departments” does not occur, or at least not frequently. A. Michael Froomkin, *Reinventing the Government Corporation*, 1995 U. ILL. L. REV. 543, 546.

¹⁴ *See City & Cnty. of San Francisco v. U.S. Postal Serv.*, 2013 WL 6212053, at *1-2 (9th Cir. Nov. 27, 2013) (assuming without discussion that the USPS was a state actor and rejecting several constitutional challenges to the USPS's decision to use “single-point delivery rather than centralized delivery” for hotel tenants); *Top Choice Distribs., Inc. v. U.S. Postal Serv.*, 138 F.3d 463, 465 (2d Cir. 1998) (assessing whether USPS action was a “final agency decision” under the APA); *cf. Silver v. U.S. Postal Serv.*, 951 F.2d 1033, 1036-41 (9th Cir. 1991) (per curiam) (analyzing the appointment of USPS officials under the Appointments Clause).

government.¹⁵ Yet unlike almost all of those structures, the USPS has independent litigating authority with regard to its rate-making activities.¹⁶ Its process for appointing leaders also fits somewhat uncomfortably with the requirements of the Appointments Clause, which mandates that a principal officer be selected by the President and confirmed by the Senate and an inferior officer be selected the same way unless Congress chooses one of three alternatives, including to be picked by the head of a department.¹⁷ In addition, it functions in many ways as a corporation; symbolically, its primary web address ends in “.com.”¹⁸ Despite its hybrid qualities, because it remains a critical component of the federal bureaucracy, the modern post office’s absence from the attention of administrative law seems surprising.

This Article examines the considerable bureaucracy, including the USPS, that is neither an executive agency nor an independent regulatory commission, yet is still at least partially federal. Other examples include the only major operator of passenger trains in the country, Amtrak (officially the National Railroad Passenger Corporation); the organization that ended the career of cyclist Lance Armstrong, the U.S. Anti-Doping Agency; the primary responder to domestic emergencies, the National Guard; the major international lender to developing countries, part of the World Bank (officially the International Bank for Reconstruction and Development (IBRD)); and the federal government’s primary oversight agency, the Government Accountability Office (GAO). Most of these entities have significant ties to the federal government, but they reside at the border between the federal government and either the private sector or another government, whether state, foreign, or Native American tribal. And there are organizations entirely within the federal government that do not fit squarely within the Executive Branch, including but encompassing far more than independent regulatory commissions and boards. In short, this Article

¹⁵ See, e.g., False Claims Act, 31 U.S.C. §§ 3729–3733 (2006) (imposing liability on persons who defraud the government); Annys Shin, *Justice Department Joins Whistleblower Lawsuit Against Lance Armstrong*, WASH. POST (Feb. 22, 2013), http://articles.washingtonpost.com/2013-02-22/local/37236356_1_tailwind-sports-armstrong-attorney-robert-luskin-johan-bruynel (describing a suit against former USPS-sponsored cyclist Lance Armstrong under the False Claims Act).

¹⁶ Neal Devins, *Political Will and the Unitary Executive: What Makes an Independent Agency Independent?*, 15 CARDOZO L. REV. 273, 306-10 (1993).

¹⁷ A divided Ninth Circuit panel upheld the USPS in the face of an Appointments Clause challenge by finding the Postmaster General to be an inferior officer and construing the postal service as an executive department with the nine postal governors acting as its head. *Silver*, 951 F.2d at 1036-41.

¹⁸ The USPS also controls <http://www.usps.gov>, but that address redirects the user instantly to <http://www.usps.com>. Cf. *Ass’n of Am. R.Rs. v. U.S. Dep’t of Transp.*, 721 F.3d 666, 675 (D.C. Cir. 2013) (listing Amtrak’s “.com” website as an argument in support of characterizing it as private).

takes what appears to exist on the margins, both in the structure of the administrative state and in scholarship, and makes it more central to the modern bureaucracy.

Legal scholars generally ignore such entities, except for fleeting references or particular categories in isolation.¹⁹ They have paid some attention to government corporations and other quasi-agencies at the public–private border.²⁰ There has also been some writing on interstate compact agencies at the federal–state border²¹ and on international organizations at the

¹⁹ For rare exceptions, see JONATHAN G.S. KOPPELL, *THE POLITICS OF QUASI-GOVERNMENT: HYBRID ORGANIZATIONS AND THE DYNAMICS OF BUREAUCRATIC CONTROL* (2003) (introducing a range of boundary organizations but focusing on public–private entities); DAVID E. LEWIS & JENNIFER L. SELIN, *ADMIN. CONFERENCE OF THE U.S., SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES* (2012) (surveying a wide range of agencies); SENATE COMM. ON GOVERNMENTAL AFFAIRS, 96TH CONG., *THE FEDERAL EXECUTIVE ESTABLISHMENT: EVOLUTION AND TRENDS* 42–58 (Comm. Print 1980) (prepared by Ronald C. Moe, Cong. Research Serv.) [hereinafter MOE] (same); Hari M. Osofsky & Hannah J. Wiseman, *Dynamic Energy Federalism*, 72 MD. L. REV. 773 (2013) (focusing on hybrid entities in energy policy); and Hari M. Osofsky & Hannah J. Wiseman, *Hybrid Energy Governance*, 2014 U. ILL. L. REV. 1 (same).

²⁰ See, e.g., JERRY MITCHELL, *THE AMERICAN EXPERIMENT WITH GOVERNMENT CORPORATIONS* (1999) (evaluating the strengths and weaknesses of government corporations); GAIL RADFORD, *THE RISE OF THE PUBLIC AUTHORITY: STATEBUILDING AND ECONOMIC DEVELOPMENT IN TWENTIETH-CENTURY AMERICA* 9 (2013) (examining the proliferation of the “public authority” as “a result of preexisting institutional arrangements, ad hoc choices, and political conflicts”); Alfred C. Aman, Jr., *Administrative Law for a New Century* (discussing the collapse of the public–private distinction in regulation), in *THE PROVINCE OF ADMINISTRATIVE LAW* 90 (Michael Taggart ed., 1997); Jack M. Beermann, *The Reach of Administrative Law in the United States* (examining administrative law of government corporations), in *THE PROVINCE OF ADMINISTRATIVE LAW*, *supra*, at 171; William A. Birdthistle & M. Todd Henderson, *Becoming a Fifth Branch*, 99 CORNELL L. REV. 1 (2013) (analyzing self-regulatory organizations (SROs)); Froomkin, *supra* note 13 (examining a wide range of issues connected to government corporations); Roberta S. Karmel, *Should Securities Industry Self-Regulatory Organizations Be Considered Government Agencies?*, 14 STAN. J.L. BUS. & FIN. 151 (2008) (analyzing SROs); Paul E. Lund, *Federally Chartered Corporations and Federal Jurisdiction*, 36 FLA. ST. U. L. REV. 317 (2009) (examining jurisdictional issues related to government corporations). For an extended treatment of the legal issues surrounding one organization arguably on the public–private border, see A. Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution*, 50 DUKE L.J. 17 (2000) [hereinafter Froomkin, *Wrong Turn*]. For a fascinating recent paper on classic executive agencies using market devices, see Jon D. Michaels, *Privatization’s Progeny*, 101 GEO. L.J. 1023 (2013). These efforts by classic agencies could be seen as moving those organizations closer to the public–private boundary. There is also comparative work on these public–private entities. See, e.g., Sandra Van Thiel, *Comparing Agencies Across Countries* (highlighting characteristics of such entities across a range of countries), in *GOVERNMENT AGENCIES: PRACTICES AND LESSONS FROM 30 COUNTRIES* 18 (Koen Verhoest et al. eds., 2012).

²¹ See Jill Elaine Hasday, *Interstate Compacts in a Democratic Society: The Problem of Permanency*, 49 FLA. L. REV. 1 (1997) (examining the legality and desirability of interstate compacts).

federal–foreign border.²² To be sure, there is a cottage industry of articles that address independent regulatory commissions and boards—such as the FTC—which exist at the boundary of the Executive Branch (or, according to some, at the boundary between the Executive and Legislative Branches).²³ More recently, there has been an increasing focus on organizations that work across boundaries. For instance, many examine executive agencies and private firms in the new governance literature²⁴ and separate federal and state agencies in federalism work.²⁵ This literature assumes there is a

²² See JULIAN KU & JOHN YOO, *TAMING GLOBALIZATION: INTERNATIONAL LAW, THE U.S. CONSTITUTION, AND THE NEW WORLD ORDER* (2012) (raising concerns with international organizations from a formalist perspective); Kristina Daugirdas, *Congress Underestimated: The Case of the World Bank*, 107 AM. J. INT'L L. 517 (2013) (examining legal issues surrounding the World Bank); Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 MINN. L. REV. 71 (2000) (noting legal issues with international organizations from a formalist perspective).

²³ For a recent treatment, see Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15 (2010) (discussing a range of attributes that make agencies more insulated); Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599 (2010) (discussing, in the financial regulatory context, how independent agencies are still responsive to the President); and Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769 (2013) (challenging the binary view of agencies as either independent or executive). For a classic treatment in law, see Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 592 (1984) (highlighting the blurred nature of political control exercised over independent regulatory commissions like the FTC), and for a classic treatment in political science, see DAVID E. LEWIS, *PRESIDENTS AND THE POLITICS OF AGENCY DESIGN* (2003).

²⁴ See, e.g., Kenneth A. Bamberger, *Regulation as Delegation: Private Firms, Decisionmaking, and Accountability in the Administrative State*, 56 DUKE L.J. 377 (2006) (discussing how agencies use private entities to regulate and considering the legal consequences); Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543 (2000) (same); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004) (praising new governance regimes); Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229 (2003) (noting concerns with new governance regimes); Michael P. Vandenbergh, *The Private Life of Public Law*, 105 COLUM. L. REV. 2029 (2005) (using environmental regulatory regimes to demonstrate the influence of private parties in “second-order agreements” with the federal regulatory state). There is also an older literature on how public agencies and interest groups interact. See, e.g., GRANT MCCONNELL, *PRIVATE POWER & AMERICAN DEMOCRACY* (1966) (noting the role of private interests in public lands policy).

²⁵ See, e.g., Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534 (2011) (examining the role of states implementing the Patient Protection and Affordable Care Act and the larger legal implications); Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698 (2011) (demonstrating how states enforce federal law); Josh Bendor & Miles Farmer, Note, *Curing the Blind Spot in Administrative Law: A Federal Common Law Framework for State Agencies Implementing Cooperative Federalism Statutes*, 122 YALE L.J. 1280 (2013) (analyzing whether deference should be given to state agency interpretations of federal law). Some of this work mentions combined federal–state entities in passing.

dividing line between the various categories and focuses on cooperation across that line. There is little attention, however, more broadly on *organizations* along various boundaries. I examine entities on these lines.

The lack of systematic attention may arise for several reasons. To start, these entities may not be as familiar as other agencies. Some of what they do—for example, guaranteeing mortgages and running airports—does not fall into the classic rulemaking and adjudicating functions spelled out in the APA and major administrative law cases. And their more “conventional” actions might not get as much attention.

In addition, the lack of systematic attention to boundary entities might arise from the difficulty in categorizing them, despite their abundance in the federal bureaucracy. The U.S. Government Manual (the Manual), the official compilation of federal organizations,²⁶ dedicates three of its seven categories to boundary entities: independent agencies and government corporations, quasi-official agencies, and international organizations.²⁷ Aside from classic independent regulatory commissions such as the FTC, the current edition of the Manual lists more than a dozen other independent agencies and government corporations, including the USPS and the Overseas Private Investment Corporation (OPIC).²⁸ The Smithsonian and three other bodies make up the four quasi-official entities; the IBRD and the International Monetary Fund (IMF) are two of the thirteen primary international organizations.²⁹

Even these three categories themselves understate the prevalence of boundary organizations because entities lurk in the remaining four categories as well, such as the GAO in the Legislative Branch grouping and the United States Sentencing Commission in the Judicial Branch section. Finally, the Manual maintains a separate list of “boards, commissions, councils, etc., not listed elsewhere in the Manual . . . whose functions are not strictly limited to the internal operations of a parent department or agency and which are authorized to publish documents in the Federal Register.”³⁰

The inattention may also stem from the mistaken perception that many of these organizations were formed recently. As issues become more

²⁶ William G. Howell & David E. Lewis, *Agencies by Presidential Design*, 64 J. POL. 1095, 1097 n.1 (2002) (“The [Manual], which is put out by the National Archives and Records Administration, catalogues the most important agencies in the federal government.”).

²⁷ OFFICE OF THE FED. REGISTER, NAT’L ARCHIVES & RECORDS ADMIN., THE UNITED STATES GOVERNMENT MANUAL, at v-ix (rev. July 2012) [hereinafter GOVERNMENT MANUAL].

²⁸ *Id.* at viii-ix.

²⁹ *Id.* at ix.

³⁰ *Id.* at 487-91.

complicated and citizens more leery of centralized governmental remedies, such entities presumably will proliferate.³¹ But these organizational forms are not modern creations. The First Bank of the United States, one of the first organizations at the public-private edge, was established in 1791; the Second Bank followed in 1816.³² The National Guard, at the federal-state border, dates to the American colonies;³³ the Smithsonian to 1846;³⁴ and the GAO to 1921.³⁵ In fact, even early purely federal agencies had nonfederal elements.³⁶

Finally, the lack of focus may derive from the mistaken assumption that they contribute in minor ways to modern governance. Not only are these often longstanding organizations numerous and diverse in structure, but many also play critical roles in the administrative state. The wide scope of authority delegated to independent regulatory commissions is well recognized. But the less discussed border agencies also have considerable power. For example, Fannie Mae and Freddie Mac, the two largest government-sponsored enterprises (GSEs), fund “more than 75 percent of U.S. mortgages.”³⁷ This makes GSEs “among the largest financial institutions in the United States.”³⁸ The Export-Import Bank, a government corporation, finances over \$24 billion in loan guarantees and insurance annually, with its authority recently increased to \$120 billion.³⁹ The National Guard staffs response teams to state and

³¹ See MITCHELL, *supra* note 20, at xv, 130; cf. Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1235-36 (2000) (noting a trend toward centralization of the administrative state as well as an increase in public-private entities, to the extent that there is independence).

³² *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738, 860 (1824).

³³ *History*, ARMY NAT'L GUARD, <http://www.arng.army.mil/aboutus/history/Pages/default.aspx> (last visited Feb. 21, 2014).

³⁴ *About Us*, SMITHSONIAN, <http://www.si.edu/About> (last visited Feb. 21, 2014).

³⁵ *GAO at a Glance*, U.S. GOV'T ACCOUNTABILITY OFF., <http://www.gao.gov/about/gg glance.html> (last visited Feb. 21, 2014).

³⁶ See *Filarsky v. Delia*, 132 S. Ct. 1657, 1663 (2012) (noting that until 1853 “the Attorney General of the United States was expected to and did maintain an active private law practice”).

³⁷ Evan Weinberger, *Obama Says US Mortgage Market Still Needs Backstop*, LAW360 (Aug. 6, 2013), <http://www.law360.com/articles/463031/obama-says-us-mortgage-market-still-needs-backstop>; see also Thomas H. Stanton, *Government-Sponsored Enterprises: Reality Catches Up to Public Administration Theory*, 69 PUB. ADMIN. REV. 632, 632 (2009).

³⁸ Ronald C. Moe, *The Emerging Federal Quasi-Government: Issues of Management and Accountability*, 61 PUB. ADMIN. REV. 290, 294 (2001).

³⁹ See SHAYERAH ILIAS, CONG. RESEARCH SERV., R42472, EXPORT-IMPORT BANK: BACKGROUND AND LEGISLATIVE ISSUES 7-8 & tbl.2 (2012) (noting a total of almost \$33 billion authorized for all credit and insurance support); David Nakamura, *Export-Import Bank Charter Extended*, WASH. POST, May 31, 2012, at A10 (noting that the Bank's financing authority will increase further to \$140 billion). Even in 1988, “the outstanding credit assistance and insurance provided by [federal government corporations] . . . [was] about \$5 trillion.” Froomkin, *supra* note 13, at 550.

national emergencies, such as natural disasters, and contributes personnel to armed conflicts overseas. The GAO regularly rules on multi-million dollar government procurement disputes.⁴⁰

The variety, number, and importance of these organizations greatly complicate the classic image of the federal administrative state—that of a bureaucracy consisting almost entirely of executive agencies and independent regulatory commissions. It might be simplest, yet still of interest, to use these cross-border organizations to help us better analyze executive agencies and independent regulatory commissions. After all, we tend to define independent regulatory commissions and boards in opposition to executive agencies. What would happen if we view these agencies in comparison to organizations perceived to be less central to the Executive Branch? This Article takes up that question. It also considers why these boundary entities exist, both as a positive and normative matter.

These inquiries are static. In other words, they assume agencies are of a particular type, neither moving toward the center nor toward the boundary. Agencies, however, do move. This movement is also largely ignored in the literature. It may be most common for agencies to migrate from the center to the boundary over time, as the USPS has done, but movement can also occur toward the Executive Branch. Research that considers agency design dynamically typically examines the creation and destruction of bureaucratic entities⁴¹ or the consolidation of agencies.⁴² This Article targets a related, but distinct, question: Why do agencies shift form? This Article thus examines the centripetal and centrifugal forces on agency design once organizations have been established.

This Article proceeds as follows. In Part I, I explain what unifies this inquiry, classify boundary organizations along three dimensions—between the federal government and the private sector (for-profit and nonprofit), across levels of government, and within the federal government—and provide examples. I also define dynamic categories, corresponding to centralizing and diverging shifts in agency form, and offer some recent cases.

⁴⁰ See KATE M. MANUEL & MOSHE SCHWARTZ, CONG. RESEARCH SERV., R40228, GAO BID PROTESTS: AN OVERVIEW OF TIME FRAMES AND PROCEDURES 1 (2011); *infra* subsection I.D.3.

⁴¹ See, e.g., David E. Lewis, *The Politics of Agency Termination: Confronting the Myth of Agency Immortality*, 64 J. POL. 89 (2002).

⁴² See, e.g., MARIANO-FLORENTINO CUÉLLAR, GOVERNING SECURITY: THE HIDDEN ORIGINS OF AMERICAN SECURITY AGENCIES (2013); Anne Joseph O'Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 CALIF. L. REV. 1655 (2006).

I then turn in Part II to the heart of this Article: positive and normative theories for the creation of boundary organizations and their movement over time. By positive, I mean a theory that explains why politicians create such entities. Political science scholarship has examined the quest for political control as the primary reason politicians create such entities, but political control over an organization is not the only driver of agency design. I then offer two different normative theories behind the creation of boundary agencies: one that analyzes when such organizations promote social welfare and one that examines when these entities foster democratic legitimacy. I suggest that boundary entities, in some cases, might sacrifice the goals of both efficiency and accountability that shape agency design.

In Part III, I consider the legal implications of boundary organizations, both as a matter of constitutional and statutory law. These organizations raise complicated constitutional and statutory issues. In July 2013, the D.C. Circuit struck down part of the Passenger Rail Investment and Improvement Act of 2008, which tasked Amtrak with developing performance measures, as an unconstitutional delegation to a private entity.⁴³ In 1995, however, the Supreme Court had found that Amtrak was a governmental entity for First Amendment purposes.⁴⁴ At best, the legal patchwork suggests exceptional complexity; at worst, it is inconsistent.

In addition, I use boundary entities as a lens to reexamine some classic administrative law doctrines about more centrally located agencies. Those doctrines are premised in part on a fictional administrative state that only considers executive agencies and independent regulatory commissions. These conventional, but not necessarily typical, agencies may have created too much emphasis on particular forms of agency decisionmaking (such as rule-making) and specific rationales for deference (such as political accountability).

I. SCOPE OF INQUIRY AND CLASSIFICATION OF BOUNDARY ORGANIZATIONS

This Article examines boundary organizations, where one piece of the entity is some part of the federal government as a formal matter. Almost all of these organizations look like agencies in some respect. Not all entities that have bureaucratic elements fall under this definition, however. For the purposes of this Article, the organization has to have federal ties; thus, entities at the border of local governments and private business, such as

⁴³ *Ass'n of Am. R.Rs. v. U.S. Dep't of Transp.*, 721 F.3d 666, 676-77 (D.C. Cir. 2013).

⁴⁴ *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 394 (1995).

Business Improvement Districts, do not fit within this Article's framework.⁴⁵ The ties also cannot be entirely contractual or funding based.⁴⁶ Although such organizations raise a number of interesting issues, including some that overlap with the ones this Article tackles, I do not address those types of entities. The organizations this Article addresses need exist at only one border, but they could function at more.⁴⁷

I focus here on formal or structural attributes of organizations, including agency design and assigned functions.⁴⁸ Of course, leaders matter.⁴⁹ History and practice also matter.⁵⁰ I limit my attention to these less subjective and more formalist, structural elements in order to gain some descriptive and predictive traction. Most critically, political scientists have concluded that agency structure has "serious implications for policy outputs."⁵¹

In this Part, I begin by defending the scope of the inquiry. I then describe three categories of federal boundary organizations: (1) those connected to the federal government but operating in the private (including nonprofit) sector; (2) those tied closely to the federal government but spanning another type of government or sovereign, including states, foreign countries, and Native American tribes; and (3) those located entirely within the

⁴⁵ This Article also excludes agencies arguably at the boundary of different state branches of government.

⁴⁶ Thus, purely private entities that have been delegated work by the government, such as privately run prisons for defendants convicted of federal crimes, do not fit within the scope of this Article, even if that work is inherently governmental in nature.

⁴⁷ Cf. Osofsky & Wiseman, *Hybrid Energy Governance*, *supra* note 19 (examining hybrid institutions that typically exist within a regional space between state, local, and federal governance levels and allow stakeholders to meaningfully participate in decisionmaking processes). Some of the boundary organizations described later in this Article operate on multiple borders, such as the GAO and the Federal Reserve, but most exist only on one.

⁴⁸ These characteristics are typically detailed in a statute, or, alternatively, a presidential directive or other founding document.

⁴⁹ See generally DANIEL P. CARPENTER, *THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES, 1862–1928* (2001) (arguing that specific mid-level officials are responsible for certain successes in bureaucratic policy innovation).

⁵⁰ The Federal Reserve's independence derives in large part from history and practice. See Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1166 (2013) ("Contrary to a widespread belief, no rule of written law prevents Presidents from firing the Chair of the Federal Reserve ('Fed Chair'), the nation's independent central bank.").

⁵¹ AMY B. ZEGART, *FLAWED BY DESIGN: THE EVOLUTION OF THE CIA, JCS, AND NSC 1* (1999). Institutional structure of agencies can, for example, "shape the preferences of interest groups." Jonathan G.S. Koppell, *Hybrid Organizations and the Alignment of Interests: The Case of Fannie Mae and Freddie Mac*, 61 PUB. ADMIN. REV. 468, 472 (2001). Other efforts to classify bureaucratic entities therefore also rely on their structure. See MOE, *supra* note 19, at 21 ("[T]here is an underlying assumption motivating this taxonomic exercise; namely, that the organizational behavior of units of Government may be partially explained by their structural characteristics.").

federal government but not fitting squarely in only one of its branches. I also detail two distinct dynamic narratives about changing agency form: moving toward and moving away from these types of boundaries. The initial purpose is descriptive; I take up questions of creation, desirability, and legality in later Parts.

A. *Scope of Inquiry*

We usually think of the federal government as being distinct from private organizations and other governments. In addition, we tend to view the branches of the federal government as separate categories. While we recognize connections between these categories, it is mostly in terms of an organization in one category interacting with an organization in another category (or one branch checking another).⁵² We rarely think of organizations in the interstices of these categories. The approach here to examine the bureaucracy at these boundaries is not without difficulty. While the project's scope could be seen as gathering all organizations that are *not* in the center of these categories, this Article does not construe the scope in purely negative terms. In fact, this project is ultimately a positive exploration into the organizational forms of the federal bureaucracy and the underlying reasons for these structures.⁵³

The dissection along various borders depends on some critical assumptions. To start, the borders are predetermined: between public and private, between federal and foreign, between federal and state, between federal and tribal, and between any two branches of the federal government. They capture the primary edges of the federal government and provide some tractability for dividing entities. Some borders may be more important than others.

In addition, the classification is not precise. One could imagine a list of characteristics that may be relevant to whether an organization is a boundary entity, as opposed to one within a central category. The factors used to assess this might include how the organization's leaders are selected,⁵⁴ how

⁵² See Freeman, *supra* note 24, at 641 (noting that classic agencies “rely significantly on outside experts, advisory panels, and scientific advisors” for internal processes).

⁵³ I do not limit my examination to boundary organizations that perform traditional agency tasks, such as rulemaking and adjudication. Such a limit would not allow reconsideration of the image pervasively drawn of the administrative state, as it assumes that the administrative state primarily engages in those tasks. Rather, my approach is to dissect the federal bureaucracy that we tend to ignore and to examine how it relates to the agencies we pay more attention to, and then to consider the implications for administrative law and governance.

⁵⁴ See David J. Barron, *Foreward: From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization*, 76 GEO. WASH. L. REV. 1095, 1121-33 (2008) (discussing selection processes for various agencies).

the leaders can be removed,⁵⁵ how the organization is financed,⁵⁶ whether the organization has independent litigating authority,⁵⁷ whether the organization has to submit to certain presidential directives⁵⁸ or certain forms of congressional oversight,⁵⁹ whether particular agency statutes apply, and which entities can exercise veto authority over the organization's decisions. If an organization differs from classic executive agencies on a certain number of these characteristics, it would then be labeled a boundary entity. I do not attempt such a detailed exploration here. Rather, these characteristics provide a broad division of entities with some entities closer to the center of a category and others closer to one of the boundaries.⁶⁰

B. *Between the Federal Government and the Private Sector*

The next three subsections detail the three major categories of federal boundary organizations. This Section describes entities on the boundary between the federal government and the nongovernmental sectors, most commonly the private, for-profit sector. These diverse organizations can be divided into two broad categories: purely governmental organizations, including federal corporations, and quasi-governmental agencies encompassing seven different types of organizations: quasi-official agencies, GSEs, federally funded research and development centers, agency-related nonprofit organizations, venture capital vehicles, congressionally chartered nonprofit organizations, and instrumentalities of indeterminate character. Because there is no settled official division of these public-private entities,⁶¹

⁵⁵ See Datla & Revesz, *supra* note 23, at 786-92 (listing various agencies and their removal protection); Aziz Z. Huq, *Removal as a Political Question*, 65 STAN. L. REV. 1, 76 (2013) (concluding that removal questions are best left to the political process).

⁵⁶ See Note, *Independence, Congressional Weakness, and the Importance of Appointment: The Impact of Combining Budgetary Autonomy with Removal Protection*, 125 HARV. L. REV. 1822, 1824 (2012) (examining the effect of congressional and presidential controls on the Securities and Exchange Commission and the Consumer Financial Protection Bureau).

⁵⁷ See Neal Devins, *Unitariness and Independence: Solicitor General Control over Independent Agency Litigation*, 82 CALIF. L. REV. 255, 280 (1994) (noting independent agency authority to litigate matters before the Supreme Court is the exception rather than the rule).

⁵⁸ See Barron, *supra* note 54, at 1105-21 (outlining and describing regulatory review by the Office of Information and Regulatory Affairs).

⁵⁹ See LEWIS & SELIN, *supra* note 19, at 120-25 (discussing Congress's use of hearings and Inspectors General).

⁶⁰ I am also leaving aside the variation within certain "centers," such as the variation among Cabinet departments or among private entities. Cf. HENRY HANSMANN, *THE OWNERSHIP OF ENTERPRISE* (1996) (considering variation within the private sector).

⁶¹ See *infra* note 65 and accompanying text (highlighting that various governmental bodies define these entities differently).

I follow the classification of these agencies by the Congressional Research Service (CRS).⁶²

1. Government at the Private Border

There is no established definition of a government corporation in federal law; sometimes the corporation has to be entirely owned by the United States, but other times a corporation just partially owned by the government will qualify.⁶³ The CRS defines it as “an agency of the federal government, established by Congress to perform a public purpose, which provides a market-oriented product or service and is intended to produce revenue that meets or approximates its expenditures.”⁶⁴ According to the CRS, seventeen organizations met this definition, including the USPS, as of 2011.⁶⁵

Generally, a government corporation is headed by a CEO who is responsible to a full-time board of directors selected by political leaders.⁶⁶ The Government Corporation Control Act, which “standardized budget, auditing, debt management, and depository practices,” applies to many, but not all, of these entities.⁶⁷ Some government corporations, such as Amtrak, take direct government funding.⁶⁸ Others started with congressional appropriations but are now self-sustaining, or have been self-sustaining since their inception.⁶⁹

⁶² KEVIN R. KOSAR, CONG. RESEARCH SERV., RL30533, THE QUASI GOVERNMENT: HYBRID ORGANIZATIONS WITH BOTH GOVERNMENT AND PRIVATE SECTOR LEGAL CHARACTERISTICS (2011) [hereinafter KOSAR, QUASI GOVERNMENT]; KEVIN R. KOSAR, CONG. RESEARCH SERV., RL30365, FEDERAL GOVERNMENT CORPORATIONS: AN OVERVIEW (2011) [hereinafter KOSAR, FEDERAL GOVERNMENT CORPORATIONS].

⁶³ KOSAR, FEDERAL GOVERNMENT CORPORATIONS, *supra* note 62, at 2.

⁶⁴ *Id.*

⁶⁵ *Id.* at 15. In contrast, the GAO relies on self-reports to classify entities as government corporations and consequently arrives at a different total. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/GGD-96-14, GOVERNMENT CORPORATIONS 2, 7-8 (1995). The GAO does not count the USPS as a government corporation. *Id.* at 2 & n.4. Irrespective of the definition, the government corporation is a longstanding agency form dating to the takeover of the Panama Railroad Company in 1903. MITCHELL, *supra* note 20, at 24-25.

⁶⁶ MOE, *supra* note 19, at 44. *But see* KOSAR, FEDERAL GOVERNMENT CORPORATIONS, *supra* note 62, at 9-10 (listing exceptions to this general structure).

⁶⁷ KOSAR, FEDERAL GOVERNMENT CORPORATIONS, *supra* note 62, at 4.

⁶⁸ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-978SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 15-64 (3d ed. 2008).

⁶⁹ The Export-Import Bank, for instance, has returned money to the Treasury since Fiscal Year 2008. ILIAS, *supra* note 39, at 2. Additionally, OPIC must run on a “self-sustaining basis.” SHAYERAH ILIAS AKHTAR, CONG. RESEARCH SERV., 98-567, THE OVERSEAS PRIVATE INVESTMENT CORPORATION: BACKGROUND AND LEGISLATIVE ISSUES 5, 10 (2013).

2. Quasi-Government at the Private Border

The remaining sets of entities that straddle the federal–private boundary are less governmental in nature. Quasi-official agencies, an official category within the U.S. Government Manual and the first category of quasi-government organizations, are arguably the most like completely federal entities. The Manual lists four such entities: the Legal Services Corporation, the Smithsonian Institution, the State Justice Institute, and the United States Institute of Peace.⁷⁰ These organizations have some classic governmental duties. For example, they have to publish information on their activities in the *Federal Register*.⁷¹ Their funding mostly comes from the federal government.⁷² All but the Smithsonian are run by boards of directors made up of Senate-confirmed presidential appointees.⁷³ But these organizations are not considered executive agencies as that term is often defined in federal law.⁷⁴

The second type of quasi-government organizations, GSEs, also lack a settled definition.⁷⁵ Some GSEs, such as the Federal Home Loan Mortgage Corporation (Freddie Mac) and the Federal National Mortgage Association (Fannie Mae) are remarkably powerful entities. While they are privately owned and run by a board of directors, do not have government-paid employees, and cannot exercise government powers or commit the government financially, they make loans or loan guarantees for purposes determined by Congress, and their obligations are implicitly guaranteed by the government.⁷⁶

⁷⁰ GOVERNMENT MANUAL, *supra* note 27, at ix, 493–511.

⁷¹ KOSAR, QUASI GOVERNMENT, *supra* note 62, at 6.

⁷² GOVERNMENT MANUAL, *supra* note 27, at 493, 497, 510, 511. The Smithsonian has faced congressional pressure to raise more of its own funds. Robin Pogrebin, *Smithsonian Chooses a New Director*, N.Y. TIMES, Mar. 16, 2008, at N26.

⁷³ The Smithsonian’s Board of Regents is composed of the Chief Justice of the United States, the Vice President, six members of Congress, and nine members chosen by a joint congressional resolution. GOVERNMENT MANUAL, *supra* note 27, at 493, 497, 509, 511.

⁷⁴ See 5 U.S.C. § 105 (2012) (“For the purpose of [Title 5], ‘Executive agency’ means an Executive department, a Government corporation, and an independent establishment.”). Thus, these quasi-official organizations are not subject to, for example, the Freedom of Information Act (FOIA). *Id.* § 552.

⁷⁵ KOSAR, QUASI GOVERNMENT, *supra* note 62, at 7; see also 2 U.S.C. § 622(8) (2012) (defining GSE for budgetary purposes).

⁷⁶ KOSAR, QUASI GOVERNMENT, *supra* note 62, at 7–8; see also Breger & Edles, *supra* note 31, at 1232 (noting that GSEs operate under federal charters as opposed to articles of incorporation). Until it turned into a private company, Sallie Mae was a sixth GSE. Thomas H. Stanton, *The Life Cycle of the Government-Sponsored Enterprise: Lessons for Design and Accountability*, 67 PUB. ADMIN. REV. 837, 837 (2007).

Federally funded research and development centers (FFRDCs), the third type of quasi-government agency, have fewer governmental connections than quasi-official agencies and GSEs. The Lincoln Laboratory, which is part of the Massachusetts Institute of Technology and is funded by the Defense Department, and Oak Ridge National Laboratory, which is funded by the Energy Department, are two examples.⁷⁷ Rather than sharing a profit motive with GSEs, FFRDCs are nonprofit corporations. They receive federal funds to do work for particular government agencies, mostly defense related, and they typically do not have to compete for federal funding with other research centers.⁷⁸ According to the Federal Acquisition Regulation, agencies can use FFRDCs for “some special long-term research or development need [that] cannot be met as effectively by existing in-house or contractor resources.”⁷⁹ Some FFRDCs are restricted from taking nonfederal money.⁸⁰ In Fiscal Year 2010, the government spent \$16.8 billion on these FFRDCs; this included over \$1 billion from the American Recovery and Reinvestment Act of 2009.⁸¹

Other nonprofit corporations exist at the border of the federal government. The fourth category under quasi-government, agency-related nonprofit corporations, describes these entities. Although these entities have some legal connection to a traditional federal agency, the scope of that connection can vary widely.⁸² The CRS, therefore, breaks this category into three subgroups: (1) adjunct organizations under a federal agency’s control; (2) organizations independent of, but dependent upon, a federal agency; and (3) nonprofit organizations voluntarily affiliated with a federal agency.⁸³ Only the first two fall under the boundary organizations used in this Article.⁸⁴

Congress creates (or permits an agency to create) entities in the first group of agency-related nonprofit corporations—adjunct organizations under a federal agency’s control—to “perform functions that the [agency]

⁷⁷ NAT’L SCIENCE FOUND., MASTER GOVERNMENT LIST OF FEDERALLY FUNDED R&D CENTERS (FFRDCS) (2013), available at <http://www.nsf.gov/statistics/ffrdclist/agency.cfm>.

⁷⁸ KOSAR, QUASI GOVERNMENT, *supra* note 62, at 10-11.

⁷⁹ 48 C.F.R. § 35.017 (2012).

⁸⁰ RONDA BRITT, NAT’L SCIENCE FOUND., 12-315, ARRA FUNDING RAISES R&D EXPENDITURES WITHIN FEDERALLY FUNDED R&D CENTERS 11% TO \$16.8 BILLION IN FY 2010, at 2 n.3 (2012), available at <http://www.nsf.gov/statistics/infbrief/nsf12315/nsf12315.pdf>.

⁸¹ *Id.* at 1. This funding made up 97.3% of these entities’ expenditures in the same period. *Id.*

⁸² KOSAR, QUASI GOVERNMENT, *supra* note 62, at 12.

⁸³ *Id.*

⁸⁴ Unlike the organizations in the other two groups, entities in the third category are not created under federal law. Rather, they are created entirely under state (or D.C.) law. *Id.* at 18. For instance, Congress tasked the National Park Foundation to “assist in the creation of local nonprofit support organizations” but allowed nonprofits to affiliate voluntarily as “Park Partners.” 16 U.S.C. § 190 (2012).

itself finds difficult to integrate into its regular policy and financial processes,” such as accepting charitable donations.⁸⁵ The National Park Foundation is one example.⁸⁶ The Public Company Accounting Oversight Board (PCAOB), incorporated under D.C. law as a nonprofit corporation, is another example.⁸⁷

Congress also creates (or permits an agency to create) members in the second group of agency-related nonprofit corporations: organizations independent of, but dependent upon, a federal agency. Unlike the first group, the relevant federal agency has far less control over these entities. Most notably, there are, across forty-one states, over eighty-five of these organizations tied to the Department of Veterans Affairs, called nonprofit research and education corporations (NPCs).⁸⁸ The government retains some control over NPCs.⁸⁹

Venture capital vehicles, which the federal government funds or supports, compose the fifth of the seven categories of quasi-governmental entities. Enterprise funds, which were established for Poland and Hungary in 1989, are “designated by the President pursuant to law and governed by a Board of Directors, which undertake loans, grants, equity investments, feasibility studies, technical assistance, training, and other forms of assistance to private enterprise activities in the Eastern European country”⁹⁰ The federal government pays for these funds, which were established as private nonprofit corporations under Delaware law.⁹¹ By contrast, the federal

⁸⁵ KOSAR, QUASI GOVERNMENT, *supra* note 62, at 14-15.

⁸⁶ Established by Congress in 1967, the National Park Foundation is “the only national charitable nonprofit whose sole mission is to directly support the National Park Service.” *About Us*, NAT'L PARK FOUND., <http://www.nationalparks.org/about-us> (last visited Feb. 21, 2014). The Secretary of the Interior, the Director of the National Park Service, *ex officio*, and at least six private individuals chosen by the Secretary sit on the Foundation's board. 16 U.S.C. § 19f (2012).

⁸⁷ See 15 U.S.C. § 7211(b) (2012) (“The Board shall not be an agency or establishment of the United States Government, and, except as otherwise provided in this Act, shall be subject to, and have all the powers conferred upon a nonprofit corporation by, the District of Columbia Nonprofit Corporation Act.”).

⁸⁸ KOSAR, QUASI GOVERNMENT, *supra* note 62, at 17. The Secretary of Veterans Affairs, by statute, can “authorize the establishment at any Department medical center” of an NPC “to provide a flexible funding mechanism for the conduct of approved research and education at the medical center.” 38 U.S.C. § 7361(a) (2006).

⁸⁹ The Secretary appoints the NPC's board, which has to include the director of the medical center; the NPC can be investigated by the Department's Inspector General; and the NPC is bound by federal laws, regulations, and executive orders that apply to nonprofits. KOSAR, QUASI GOVERNMENT, *supra* note 62, at 17-18.

⁹⁰ 22 U.S.C. § 5401(c)(5) (2012).

⁹¹ KOSAR, QUASI GOVERNMENT, *supra* note 62, at 19.

government does not pay for investment funds; such funds rely on government guarantees.⁹² These venture capital vehicles involve billions of dollars.⁹³

The sixth category of quasi-government agencies at the federal-private boundary has far less financial and governmental import. Congressionally chartered nonprofit organizations, known as Title 36 entities, are private entities “with a patriotic, charitable, historical, or educational purpose.”⁹⁴ Subtitle II of Title 36 currently lists ninety-four such entities, including the Boy Scouts of America, Little League Baseball, and the National Academy of Sciences.⁹⁵ These entities often operate under federal and state charters.⁹⁶ The federal designation, however, is typically honorific: they “do not receive direct appropriations, they exercise no federal powers, their debts are not covered by the full faith and credit of the United States, and they do not enjoy original jurisdiction in the federal courts.”⁹⁷

The U.S. Anti-Doping Agency (USADA), which received considerable coverage recently in light of Lance Armstrong’s drug use in competitive cycling,⁹⁸ is similar to these entities. The agency began operations in 2000 following the decision of the U.S. Olympic Committee (USOC), a Title 36 entity,⁹⁹ to externalize its anti-doping program.¹⁰⁰ According to its website, the USADA is a “non-profit, non-governmental agency.”¹⁰¹ Although not chartered under Title 36,¹⁰² Congress has recognized the USADA as “the

⁹² Specifically, OPIC guarantees loans made to “private, profit-seeking corporate investment funds” that invest in particular developing countries. *Id.* at 20.

⁹³ *Id.*

⁹⁴ KOSAR, QUASI GOVERNMENT, *supra* note 62, at 22; see also KEVIN R. KOSAR, CONG. RESEARCH SERV., RL30340, CONGRESSIONALLY CHARTERED NONPROFIT ORGANIZATIONS (“TITLE 36 CORPORATIONS”): WHAT THEY ARE AND HOW CONGRESS TREATS THEM (2008) [hereinafter KOSAR, TITLE 36 CORPORATIONS].

⁹⁵ 36 U.S.C. subtit. II (2006 & Supp. V 2012).

⁹⁶ KOSAR, QUASI GOVERNMENT, *supra* note 62, at 23.

⁹⁷ *Id.* Typically, the only federal mandate that these organizations face is an independent annual audit, the results of which must be given to Congress. 36 U.S.C. § 10101 (2006); cf. KOSAR, TITLE 36 CORPORATIONS, *supra* note 94, at 4 (noting that the Red Cross also “fulfill[s] U.S. treaty obligations under the Geneva Conventions and aid[s] in disaster response”).

⁹⁸ See, e.g., Juliet Macur, *Why a Confession by Armstrong Could Benefit Both Sides*, N.Y. TIMES, Jan. 6, 2013, at SP4 (“During his battle with the United States Anti-Doping Agency last year, Lance Armstrong went to extreme lengths to disparage the agency, a quasi-governmental organization charged with policing banned drug use in Olympic sports.”).

⁹⁹ 36 U.S.C. ch. 2205 (2006).

¹⁰⁰ *History*, UNITED STATES ANTI-DOPING AGENCY, <http://www.usada.org/history> (last visited Feb. 21, 2014).

¹⁰¹ *About USADA*, UNITED STATES ANTI-DOPING AGENCY, <http://www.usada.org/about> (last visited Feb. 21, 2014).

¹⁰² The House of Representatives, through a Judiciary Committee resolution, decided in 1994 to stop chartering nonprofits under Title 36. KOSAR, TITLE 36 CORPORATIONS, *supra* note

official anti-doping agency for Olympic, Pan American, and Paralympic sport in the United States”¹⁰³ and provides most of its funding.¹⁰⁴ The USADA is also required to submit an annual report to Congress containing a financial audit and a description of the agency’s activities.¹⁰⁵

Some organizations do not fit into the previous six categories of quasi-governmental entities, even though they operate at the federal–private border. The CRS has a catchall category for them: instrumentalities of indeterminate character.¹⁰⁶ In short, the range of governmental–nongovernmental entities is vast. Government corporations, like the USPS, are just one example of entities at this boundary.

C. *Across Levels of Government*

The previous Section describes organizations at the border of the federal government and the private sector. This Section turns to intergovernmental organizations. Agencies exist at the border of the federal government and the states, at the border of the federal government and foreign countries, and at the border of the federal government and Native American tribes. To be certain, considerable attention in administrative law commentary has been paid to each “pair” of governments, generally focused on members of each pair as separate actors.

1. Federal–State Border

The most significant organizational border, in terms of policy, in this intergovernment category is the one between the federal government and the states. The oldest organization may be the state-level National Guard.¹⁰⁷ Each state (and D.C. and Puerto Rico) has a National Guard, which is

94, at 2, 13. Some organizations have since been chartered without going through the Judiciary Committee. *Id.*

¹⁰³ Treasury and General Government Appropriations Act of 2002, Pub. L. No. 107-67, § 644, 115 Stat. 514, 555 (2001).

¹⁰⁴ 21 U.S.C. § 2003 (2012).

¹⁰⁵ *Id.* § 2002.

¹⁰⁶ Three examples are the American Institute in Taiwan, the National Endowment for Democracy, and the U.S. Investigation Services. KOSAR, QUASI GOVERNMENT, *supra* note 62, at 25-31.

¹⁰⁷ See U.S. CONST. art. I, § 8, cls. 15-16 (reserving the right to the states to train militias and appoint their officers); 10 U.S.C. § 331 (2012) (permitting the President to call into service a state militia to suppress an insurrection within that state); *Gilligan v. Morgan*, 413 U.S. 1, 7 (1973) (noting the National Guard may be federalized). The Army National Guard and the Air National Guard together compose the National Guard. There is also a National Guard of the United States, which is a completely federal entity. John G. Kester, *State Governors and the Federal National Guard*, 11 HARV. J.L. & PUB. POL’Y 177, 182 (1988).

“commanded by [state] governors, except on the rare occasions when it is called into federal service.”¹⁰⁸ Not only does the federal government recognize, regulate, and fund the state National Guard, the President can also press its members into service.¹⁰⁹ Thus, the National Guard has both state and federal missions.

Different organizations at this boundary perform classic governmental functions, such as the distribution of government benefits to citizens. For instance, the Social Security Administration (SSA), the largest dispenser of federal benefits,¹¹⁰ manages federal and state employees.¹¹¹ There are also agencies that have federal and state representatives working together to perform particular tasks, typically in response to some regional issue. For example, the Metropolitan Washington Airports Authority (MWAA) operates Ronald Reagan Washington National Airport and Washington Dulles International Airport.¹¹² The federal government leased these airports to the MWAA two years after it created a compact between the state of Virginia and the District of Columbia.¹¹³ Currently, seventeen members compose the Authority’s board of directors: the Governor of Virginia appoints seven; the Mayor of D.C. selects four; the Governor of Maryland picks three; and the President chooses three.¹¹⁴ There are other hybrid federal–state agencies, such as the Delaware River Basin Commission (DRBC),¹¹⁵ formed by similar compacts.¹¹⁶

¹⁰⁸ Kester, *supra* note 107, at 183.

¹⁰⁹ See 32 U.S.C. § 108 (2006) (permitting the President to withhold aid from a state’s National Guard); Kester, *supra* note 107, at 183 (noting that members of a state National Guard may be federalized on rare occasions).

¹¹⁰ See MARTHA DERTHICK, AGENCY UNDER STRESS: THE SOCIAL SECURITY ADMINISTRATION IN AMERICAN GOVERNMENT 5 (1990) (describing the SSA as a “federal program for supporting the income of needy blind, aged, and disabled persons”).

¹¹¹ SSA disability claims are typically filed in an SSA field office, staffed by federal employees. However, state offices—called Disability Determination Services (DDS), staffed by state employees, and funded by the federal government—determine whether a claimant is disabled. Jeffrey S. Wolfe & Dale D. Glendening, *What We Should Do About Social Security Disability*, REGULATION, Spring 2012, at 16, 16.

¹¹² It leases both airports from the Department of Transportation (DOT). *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Airport Noise, Inc.*, 501 U.S. 252, 261 (1991).

¹¹³ 49 U.S.C. § 49106(a) (2006); 32 D.C. Reg. 7393 (Dec. 20, 1985); 1985 Va. Acts 1095; see also *Hechinger v. Metro. Wash. Airports Auth.*, 36 F.3d 97, 98 (D.C. Cir. 1994) (recounting the history of the MWAA).

¹¹⁴ Lori Aratani, *D.C. Council to Vote on MWAA Bill That Increases Board Member Count*, WASH. POST, Oct. 2, 2012, at B1.

¹¹⁵ The DRBC was founded in 1961 to manage the water resources of the Delaware River Basin with participation from the states of Delaware, New Jersey, New York, and Pennsylvania, as well as the U.S. Army Corps of Engineers. Delaware River Basin Compact, Pub. L. No. 87-328, 75 Stat. 688 (1961). The DRBC recently proposed wide-ranging regulations on gas development, including hydraulic fracturing. Osofsky & Wiseman, *Hybrid Energy Governance*, *supra* note 19, at 21-23.

Finally, there are federal agencies with state representatives in meaningful roles. For example, as part of President Lyndon B. Johnson's War on Poverty, Congress created the Appalachian Regional Commission (ARC).¹¹⁷ The President chooses one member, and the Governors of the thirteen Appalachian states each select another member.¹¹⁸ Any decision that the ARC makes must be supported by the federal member and a majority of the state members.¹¹⁹ Another federal agency, the Endangered Species Act Exemption Committee, has members "from each affected state, who together get one vote to represent all their interests."¹²⁰ A more recent example is the Financial Stability Oversight Council (FSOC), created by the Dodd–Frank Wall Street Reform and Consumer Protection Act.¹²¹ The Council is charged with identifying and addressing risks to financial stability.¹²² Its voting members are the heads of executive and independent financial regulatory agencies, but three of the five nonvoting members are state officials.¹²³

2. Federal–Foreign Border

States are not the only government entities interconnected with the federal government in various agency structures. Foreign countries and Native

¹¹⁶ Interstate compacts have to be approved by Congress. U.S. CONST. art. I, § 10, cl. 3. States cannot withdraw unilaterally from a compact. Hasday, *supra* note 21, at 3. Federal participation in these compacts varies. *See id.* at 15 n.63 (listing examples).

¹¹⁷ MOE, *supra* note 19, at 59; *see also* Public Works and Economic Development Act of 1965, Pub. L. No. 89-136, 79 Stat. 552 (providing for public works and economic development programs in depressed regions); Appalachian Regional Development Act of 1965, Pub. L. No. 89-4, 79 Stat. 5 (establishing such a program in the Appalachian region).

¹¹⁸ 40 U.S.C. § 14301(b)(1)-(2) (2006). The ARC is run by two co-chairmen: the federal member and one elected from the state representatives. *Id.* § 14301(b)(3). Using federal money, the Commission largely funds projects aimed at helping the Appalachian region economically. *Id.* § 14303.

¹¹⁹ *Id.* § 14302(a).

¹²⁰ Jacob E. Gersen, *Administrative Law Goes to Wall Street: The New Administrative Process*, 65 ADMIN L. REV. 689, 699 (2013).

¹²¹ 12 U.S.C. § 5321 (2012); Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of 7, 12, and 15 U.S.C.).

¹²² *See* 12 U.S.C. § 5322(a).

¹²³ The state officials include a state insurance commissioner, a state banking supervisor, and a state securities commissioner, all designated according to state selection processes. 12 U.S.C. § 5321(b)(2); *see also* Gersen, *supra* note 120, at 698 (noting that "it is unclear precisely what the impact on voting member behavior will be"). In some sense, the FSOC also exists on the executive–legislative border. Voting members on the FSOC include leaders of executive agencies, such as the Secretary of the Treasury, and leaders of independent regulatory commissions, such as the chairperson of the CFTC. 12 U.S.C. § 5321(b)(1)(g). It also includes leaders of government corporations, such as the chairperson of the FDIC. *Id.* § 5321(b)(1)(f).

American tribes also interact with the federal bureaucracy in interesting ways. The U.S. Government Manual has a separate category for primary international organizations of which the federal government is a part.¹²⁴ These thirteen organizations are typically made up of member countries, often with some subset wielding more authority than the balance of the membership. For example, the IBRD, part of the World Bank group, has 188 country members.¹²⁵ A board of executive directors manages the Bank for all the members.¹²⁶ Five countries—France, Germany, Japan, the United Kingdom, and the United States—each select an executive director; in particular, the President selects, with Senate confirmation, the U.S. Executive Director for a set term.¹²⁷ These directors officially select the President of the Bank, but in practice, the President of the United States has always chosen the President of the Bank with European acquiescence.¹²⁸ Each of the international organizations listed in the Manual involves a number of countries. There are also bilateral organizations in which the United States works with either Mexico or Canada on topics of mutual interest.¹²⁹

The connections of these boundary organizations to the federal government vary. The U.S. members of these entities are usually presidential appointees and typically receive directions from classic executive agencies.¹³⁰ Yet the Office of Legal Counsel (OLC) views some members as

¹²⁴ The Manual also keeps another list of dozens of “other international organizations in which the United States participates.” GOVERNMENT MANUAL, *supra* note 27, at 523-25. A good number are subsidiaries of primary organizations, such as the World Health Organization, which is a part of the United Nations. *Id.* Classifying these entities as federal boundary institutions may conflict with the standard view that international organizations exist separately from the countries that contribute personnel and funding. Andrew Stumer, *Liability of Member States for Acts of International Organizations: Reconsidering the Policy Objections*, 48 HARV. INT’L L.J. 553, 555 (2007). Notwithstanding the conventional perspective, because the United States contributes in fundamental ways to these organizations, I think of them as boundary organizations between the federal government and the other foreign countries that participate. *See also* KOPPELL, *supra* note 19, at 7 (noting, without examining in detail, that international organizations are an “additional emerging class of hybrid”).

¹²⁵ *Leadership*, WORLD BANK, <http://www.worldbank.org/en/about/leadership> (last visited Feb. 21, 2014).

¹²⁶ *Id.*

¹²⁷ Applicability of the Fed. Vacancies Reform Act to Vacancies at the Int’l Monetary Fund and the World Bank, 24 Op. O.L.C. 58, 58-59 (2000).

¹²⁸ Howard Schneider & Zachary Goldfarb, *World Bank Pick Is Surprise*, WASH. POST, Mar. 24, 2012, at A1.

¹²⁹ For example, the federal government participates in the International Boundary and Water Commission and the Border Environment Cooperation Commission with Mexico, and the International Joint Commission and the Permanent Joint Board on Defense with Canada. GOVERNMENT MANUAL, *supra* note 27, at 527-28.

¹³⁰ The U.S. Director of the World Bank and the IMF “receive their instructions through the Secretary of the Treasury.” *Applicability of the Fed. Vacancies Reform Act*, 24 Op. O.L.C. at 62.

sitting within these classic agencies, such as the U.S. Permanent Representative to the United Nations in the State Department, but not others, such as the U.S. Executive Directors of the IBRD and the International Monetary Fund.¹³¹

3. Federal–Tribal Border

Although the U.S. Government Manual does not place organizations linking the federal government and Native American tribes in a separate category, several such entities exist. For instance, the National Indian Gaming Commission (NIGC), which was established in 1988 within the Department of the Interior, regulates gaming on tribal lands.¹³² The NIGC’s Chairman is appointed by the President and confirmed by the Senate, and the Secretary of the Interior selects the other two commissioners for three-year terms.¹³³ Like many independent regulatory commissions described below, party balancing requirements prevent more than two of the three commissioners from belonging to the same political party. Unlike other commissions, however, at least two of the three leaders of the NIGC must be enrolled members of a federally recognized tribe.¹³⁴

In short, there are a range of entities at the boundary of the federal government and other governments or sovereigns. These intergovernmental bodies perform tasks common to classic administrative agencies as well as less typical duties.

D. *Within the Federal Government*

The final category of boundary organizations includes those located within the federal government but not entirely within one branch. Of all the boundary organizations described in this Article, these are likely the most familiar.

¹³¹ *Id.* at 59, 61.

¹³² 25 U.S.C. § 2706 (2006); Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified as amended at 18 U.S.C. §§ 1166-1168 (2012) and 25 U.S.C. §§ 2701-2721 (2012)).

¹³³ 25 U.S.C. § 2704(b)(1).

¹³⁴ *Id.* § 2704(b)(3); *see also* 16 U.S.C. § 470i(a) (2006) (mandating that one of the twenty-three members making up the Advisory Council on Historic Preservation be a “member of an Indian tribe or Native Hawaiian organization who represents the interests of the tribe or organization of which he or she is a member”).

1. Legislative–Executive Border

Starting with Article I, the legislature’s boundaries house several powerful organizations, particularly at the legislative–executive border.¹³⁵ The GAO is one such key player. Created in 1921 as “an instrumentality of the United States Government independent of the executive departments,”¹³⁶ and strengthened after Watergate, the GAO monitors agency action “on its own initiative, by legislative mandate, and at the request of congressional committees and individual members of Congress.”¹³⁷ At the GAO’s helm is the Comptroller General. The President selects the Comptroller General from a list of at least three names provided by a congressional commission led by, among others, the Speaker of the House and the President pro tempore of the Senate; the Senate then must confirm the nominee for the person to take control.¹³⁸ By contrast, the President does not select the leaders of many other congressional support agencies.¹³⁹ The Comptroller

¹³⁵ Although not a separate agency, Inspectors General (IGs), who are Senate-confirmed presidential appointees supposedly selected for expertise and without regard to partisanship, also function at the boundary between these two branches. See PAUL C. LIGHT, *MONITORING GOVERNMENT* 3 (1993). Most notably, IGs “are among the few presidential officers in government who report to both Congress and the president.” *Id.* In addition to semiannual reports, IGs must report to Congress within seven days of notifying the agency of “serious problems.” Shirin Sinnar, *Protecting Rights from Within? Inspectors General and National Security Oversight*, 65 *STAN. L. REV.* 1027, 1034 (2013). IGs typically operate independently of agency leaders, though some agency heads can block investigations if national security is threatened. *Id.* at 1035. In some sense, IGs move classic executive agencies slightly closer to the legislative–executive border.

¹³⁶ 31 U.S.C. § 702(a) (2006).

¹³⁷ Anne Joseph O’Connell, *Auditing Politics or Political Auditing?* 1 (U.C. Berkeley Public Law Research Paper No. 964656), available at <http://papers.ssrn.com/id=964656>. The GAO can make recommendations to the agencies it is evaluating and to Congress. When working at the request of individual members, it engages in what Mathew McCubbins and Thomas Schwartz term “fire-alarm” oversight, examining projects that have been called to its attention. Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 *AM. J. POL. SCI.* 165 (1984). When performing periodic and legally mandated studies, the GAO functions more as a “police-patrol” of the bureaucracy. *Id.*

¹³⁸ 31 U.S.C. § 703(a)(2). The appointments provision for the GAO’s head (but not the removal provision) thus roughly parallels Executive Branch entities, though the President is generally not restricted to picking officials from a list. *Cf.* Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 1014, 118 Stat. 3638, 3663 (2004) (instructing the Director of National Intelligence to recommend candidates for vacant intelligence agency positions to the President for nomination).

¹³⁹ The Director of the Congressional Budget Office (CBO), for example, is appointed by the Speaker of the House and President pro tempore of the Senate, after receiving recommendations from the House and Senate Budget Committees, and the Librarian of Congress selects the Director of the CRS. James A. Thurber, *The Evolving Role and Effectiveness of the Congressional Research Agencies*, in *THE HOUSE AT WORK* 292, 313 tbl.11.12 (Joseph Cooper & G. Calvin Mackenzie eds., 1981). Additionally, prior to 1995, a special congressional board appointed the Director of the Office of Technology Assessment (OTA). *Id.*

General serves for fifteen years and may not be appointed to a second term; he or she may be removed only for impairment or ineptitude, by a joint resolution of Congress.¹⁴⁰

Additionally, at the edge of the Executive Branch's purview sit the much discussed independent regulatory commissions and boards such as the FTC and National Labor Relations Board. Some commentators place them at the border with the Legislative Branch.¹⁴¹ Others situate them at the outer edge of the Executive Branch without merging them into another branch of the federal government.¹⁴² The most noticed features of these commissions and boards generally include a multi-member leadership structure, removal of those members only for good cause, and protection from certain obligations under executive orders, including centralized regulatory review.¹⁴³ These features contrast with those of a typical executive agency, which is run by a single administrator, who can be removed for any reason, and is subject to more obligations from the White House.¹⁴⁴ In other words, independent regulatory commissions and boards are structurally designed to have more independence from the President than executive agencies. In one view, this independence from the President gives Congress more control because such agencies have less protection from the White House.¹⁴⁵ In another view, this

¹⁴⁰ 31 U.S.C. § 703(e)(1) (2006). To date, no Comptroller General has ever been removed. To be certain, Congress has repeatedly declared that the GAO is "a part of the legislative branch." The Reorganization Act of 1945, Pub. L. No. 70-263, § 7, 59 Stat. 613, 616; Reorganization Act of 1949, Pub. L. No. 81-109, § 7, 63 Stat. 203, 205. In addition, journalists usually refer to it as the "nonpartisan investigative arm of Congress." Eric Lipton, *Investigators Criticize Response to Hurricane*, N.Y. TIMES, Feb. 2, 2006, at A18. But, as noted above, unlike many other congressional agencies, the President chooses its leader. Moreover, the GAO views itself as an independent watchdog agency. There are other organizations at the legislative-executive border, such as the U.S. Commission on Civil Rights, as it is now constituted. 42 U.S.C. § 1975a(a)-(b) (2006).

¹⁴¹ See, e.g., Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 926 (2008) (charting the locations of various agencies between the White House and Congress); see also David E. Lewis, *The Adverse Consequences of the Politics of Agency Design for Presidential Management in the United States: The Relative Durability of Insulated Agencies*, 34 BRIT. J. POL. SCI. 377, 400 (2004) (finding from empirical study that "insulated" agencies, mainly IRCs, are "more responsive to congressional direction than other agencies").

¹⁴² See, e.g., STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* 16 (2008) (arguing that Presidents have never believed they were ceding control to Congress in the creation of IRCs); see also Scott R. Furlong, *Political Influence on the Bureaucracy: The Bureaucracy Speaks*, 8 J. PUB. ADMIN. RES. & THEORY 39, 57-59 (1998) (finding from a survey of agency officials that IRCs are less influenced than executive agencies by the President and Congress).

¹⁴³ See Barkow, *supra* note 23, at 26-41 (summarizing the classic attributes of IRCs).

¹⁴⁴ *Id.*

¹⁴⁵ See *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1815 (2009) (Scalia, J.) ("The independent agencies are sheltered not from politics but from the President, and it has often been

independence does not necessarily shift these agencies toward Congress but rather promotes autonomy from any overseer.¹⁴⁶

2. Executive–Judicial Border

Organizations also exist at the boundary between the Executive and Judicial Branches.¹⁴⁷ Specifically, the United States Sentencing Commission, which was established in 1984 as “an independent commission in the judicial branch of the United States,”¹⁴⁸ performs tasks similar in function to other

observed that their freedom from Presidential oversight (and protection) has simply been replaced by increased subservience to congressional direction.”); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 592 (1984) (“[A]s a former FTC Chairman . . . remarked, the independent agencies ‘have no lifeline to the White House. [They] are naked before Congress, without protection there,’ because of the President’s choice not to risk the political cost that assertion of his interest would entail.” (second alteration in original)).

¹⁴⁶ See Cristina M. Rodríguez, *Constraint Through Delegation: The Case of Executive Control over Immigration Policy*, 59 DUKE L.J. 1787, 1826 (2010) (“In other words, though complete insulation from political control may be unattainable (and probably also undesirable because it would eliminate accountability), the structure of an independent agency at least enables tensions between political actors to keep politically motivated decisionmaking at bay.”). Somewhere between the classic independent regulatory commission, at the border, and the classic executive agency, at the center, are organizations with characteristics of both. The FSOC and the Bureau of Consumer Financial Protection—both created by the Dodd–Frank Wall Street Reform and Consumer Protection Act—are two such examples. The FSOC’s voting members are the heads of executive and independent financial regulatory agencies. 12 U.S.C. § 5321(b) (2012). The Bureau is run by a director who serves a five-year term and can be removed only for cause. *Id.* § 5491. The Independent Payment Advisory Board, created by the Patient Protection and Affordable Care Act, is another example. Its fifteen voting members are Senate-confirmed presidential appointees to staggered six-year terms; they can be removed only for cause. 42 U.S.C. § 1395kkk(g) (Supp. V 2012). The nonvoting members are appointees from classic executive agencies: the Secretary of Health and Human Services, the Administrator of the Center for Medicare and Medicaid Services, and the Administrator of the Health Resources and Services Administration. *Id.*

¹⁴⁷ There are also critical positions at the border between the White House and the courts, notably, administrative law judges (ALJs). Like IGs, many agencies have ALJs. See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3180–81 (2010) (Breyer, J., dissenting) (“My research reflects that the Federal Government relies on 1,584 ALJs to adjudicate administrative matters in over 25 agencies.”); STEPHEN G. BREYER ET AL., *ADMINISTRATIVE LAW AND REGULATORY POLICY* 514 (7th ed. 2011) (noting that approximately thirty agencies have ALJs). About 1400 ALJs work for the Social Security Administration. Richard J. Pierce, Jr., *What Should We Do About Social Security Disability Appeals?*, REGULATION, Fall 2011, at 34, 34. Unlike IGs, ALJs in agencies do not report to both branches. ALJs do perform judicial functions though, particularly in formal proceedings under the Administrative Procedure Act. See 5 U.S.C. § 556(c) (2012) (enumerating a number of duties given to ALJs). Agency adjudicators issue ten times as many decisions in adversarial proceedings as do Article III judges in a given year. Anne Joseph O’Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 936 (2009).

¹⁴⁸ 28 U.S.C. § 991(a) (2006 & Supp. V. 2012).

executive agencies.¹⁴⁹ The Commission issues guidelines for sentencing in the federal criminal system and assesses the efficacy of those guidelines in decreasing criminal sentencing variation.¹⁵⁰ It has an unusual leadership structure. There are seven voting members, selected by the President and confirmed by the Senate to six-year terms, who are removable only for cause.¹⁵¹ At least three have to be federal judges and no more than four can be members of the same political party.¹⁵²

3. Legislative–Judicial Border

The border between the Legislative and Judicial Branches is far less populated with boundary organizations. Nonetheless, there are notable legislative–judicial entities. One prominent example is the GAO, which, in addition to sitting at the border of the Legislative and Executive Branches, also has judicial functions.¹⁵³ The GAO presently adjudicates bidding disputes over the award of *any* procurement contract by a federal agency, whether military or civilian.¹⁵⁴ If the GAO decides that the issuing agency did not comply with federal procurement law and regulations, it will recommend that the agency take appropriate action.¹⁵⁵ The GAO cannot force the agency to comply with its decision; the agency only has to tell the GAO whether it will comply. Thus, the GAO must rely on Congress to take action.¹⁵⁶ Nevertheless, bidders and agencies take the bid protest process seriously for several reasons: any protest filed with the GAO requires an

¹⁴⁹ See William K. Sessions III, *At the Crossroads of the Three Branches: The U.S. Sentencing Commission's Attempts to Achieve Sentencing Reform in the Midst of Inter-Branch Power Struggles*, 26 J.L. & POL. 305, 316-27 (2011) (showing how the Commission has ties to all three branches).

¹⁵⁰ 28 U.S.C. § 991(b).

¹⁵¹ *Id.* § 991(a).

¹⁵² *Id.*

¹⁵³ See Kevin T. Abikoff, Note, *The Role of the Comptroller General in Light of Bowsher v. Synar*, 87 COLUM. L. REV. 1539, 1560 (1987) (noting the GAO's ability to ensure the Executive Branch is complying with the law and to decide the respective rights of specific parties in a bid protest case).

¹⁵⁴ See MANUEL & SCHWARTZ, *supra* note 40, at 1 (describing the GAO's adjudicative power in bid disputes). The GAO's authority has expanded over time. This bid protest work is significant, both in number and scope. In a recent fiscal year, over 2300 cases were filed. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-199SP, BID PROTEST ANNUAL REPORT TO CONGRESS FOR FISCAL YEAR 2011 (2011). The number has been increasing in recent years. *Id.* Some of these disputes involve big-ticket items. In 2008, for instance, the GAO sustained a protest filed by Boeing challenging the award of a \$35 billion contract for the KC-X aerial tanker to a team led by Northrop Grumman. *How the US GAO's Bid Protest Process Works and Why Defense Contractors Abuse It*, DEFENSE INDUSTRY DAILY (Apr. 22, 2010), <http://www.defenseindustrydaily.com/gao-protests-defense-programs-06269>.

¹⁵⁵ 4 C.F.R. § 21.8 (2013).

¹⁵⁶ *Id.*

automatic stay of the contract's implementation; a sizeable number of claims are formally sustained or receive corrective action before a decision; and the cost to filing a protest with the GAO is less than litigating in the Court of Federal Claims.¹⁵⁷ In addition, courts almost always defer to agency action that relies on a GAO decision.¹⁵⁸

In sum, although commentators have remarked that administrative agencies often combine functions of all three branches of government and do not fit easily into the Executive Branch, they have generally ignored the boundary organizations previously mentioned, apart from independent regulatory commissions. This lack of an easy fit for governmental entities on a boundary with a particular branch, therefore, is even more prevalent than commentators typically thought.

Table 1 summarizes the three major types of boundary organizations and provides some key examples.

Table 1: Boundary Organizations

Boundary	Example
Federal–Private	
<i>Purely Governmental–Private</i>	
Government Corporations	Amtrak
<i>Quasi–Governmental–Private</i>	
Quasi–Official	Smithsonian
Government Sponsored Enterprises	Fannie Mae
Federally Funded Research & Development Centers	Lincoln Laboratory
Agency Related Nonprofits	Public Company Accounting Oversight Board
Venture Capital Vehicles	Overseas Private Investment Corporation
Congressionally Chartered Nonprofits	Red Cross
Other Instrumentalities	National Endowment for Democracy
Federal–Other Government	
<i>Federal–State</i>	National Guard

¹⁵⁷ Recent Case, *Federal Circuit Holds That Agency Was Arbitrary and Capricious in Following a Government Accountability Office Recommendation*: *Turner Construction Co. v. United States*, 645 F.3d 1377 (Fed. Cir. 2011), 125 HARV. L. REV. 1266, 1266 (2012); see also U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 154 (showing that in Fiscal Years 2007 to 2011, the lowest annual rate of claims upheld was 16% and the highest was 27% in cases that received a decision on the merits).

¹⁵⁸ *But see* Recent Case, *supra* note 157, at 1270-72 (noting reasons why *Turner* might actually decrease deference to the GAO).

<i>Federal–Foreign</i>	International Bank for Reconstruction and Development (World Bank)
<i>Federal–Tribe</i>	National Indian Gaming Commission
Within Federal Government	
<i>Legislative–Executive</i>	Government Accountability Office, Independent Regulatory Commissions
<i>Executive–Judicial</i>	U.S. Sentencing Commission
<i>Legislative–Judicial</i>	Government Accountability Office

E. Movement

The previous three Sections describe federal boundary entities *statically*. This Section looks at these organizations *dynamically*. Specifically, it describes movement to the boundary as well as movement to the center. As with the previous Sections, this effort is only descriptive, and later parts of this Article consider related explanatory, normative, and legal questions. All agencies are created, some die, and some change form. Some of these changes in structure can shift an agency within a particular category. Because this Article centers on boundary organizations, I describe shifts only from the center to the boundary, or to the center from the boundary.

1. Movement from Center to Boundary

There are centrifugal examples—agencies that started more centrally within the Executive Branch and formally moved to a boundary with the private sector, another governmental entity, or a different federal branch. On the private sector boundary, some classic executive agencies have been restructured to look more like private entities. The most notable such move involves the USPS, which Congress converted into a government corporation in 1971.¹⁵⁹

¹⁵⁹ As described in the Introduction, the USPS is the second oldest agency of the federal government. Its leaders started as purely “executive officers.” *Myers v. United States*, 272 U.S. 52, 106 (1926); see also RICHARD R. JOHN, SPREADING THE NEWS: THE AMERICAN POSTAL SYSTEM FROM FRANKLIN TO MORSE 134 (1995) (describing the role of early leaders of the Post Office). The Postal Reorganization Act of 1970 transformed the longstanding executive agency into an “independent establishment” run by a Board of Governors (akin to a board of directors). Postal Reorganization Act, Pub. L. No. 91-375, §§ 201–202, 84 Stat. 719, 720-21 (1970) (codified as amended at 39 U.S.C. (2006 & Supp. V 2012)).

Congress has also shifted federal entities toward other governments. These moves generally involve sections of federal agencies being moved into newly created mixed-governmental structures. For instance, the Department of Transportation (DOT), through the Federal Aviation Administration (FAA), used to own and operate Ronald Reagan Washington National Airport and Washington Dulles International Airport.¹⁶⁰ Those airports were then transferred to the MWAA, which also took over their operation.¹⁶¹ Thus, in some sense, part of the FAA moved to the border between the federal government and certain state governments. Similarly, nineteen federal agencies gave up their authority over the Delaware River Basin when the DRBC was created.¹⁶²

Finally, movement toward boundaries within the federal government generally transforms an executive agency into an independent regulatory commission or a similar entity. One of the oldest independent regulatory commissions, the Interstate Commerce Commission (ICC), arguably started off as an executive agency because it was under the control of the Secretary of the Interior for two years before Congress made the ICC “functionally independent of the executive branch.”¹⁶³ In the 1990s, the FAA, the Internal Revenue Service (IRS), and the SSA also became more independent. Prior to the late 1990s, each agency largely functioned as a classic executive agency, with a Senate-confirmed administrator who served at the pleasure of the President. At various points in the 1990s, Congress passed legislation to make the top position in each agency a term appointment.¹⁶⁴ Additionally, though the head of the IRS arguably may still be removed at will by the President, the other agencies’ administrators now may be removed only for cause.¹⁶⁵ One could also consider the center of the private sector and think about moves to the public-private boundary. For example, the government’s loan to the American International Group (AIG)

¹⁶⁰ *About the Authority: History*, METROPOLITAN WASHINGTON AIRPORTS AUTHORITY, <http://www.metwashairports.com/263.htm> (last visited Feb. 21, 2014).

¹⁶¹ Metropolitan Washington Airports Act of 1986, Pub. L. No. 99-500, §§ 6003, 6005, 100 Stat. 1783-373, 1783-374 to 378.

¹⁶² Delaware River Basin Compact, Pub. L. No. 87-328, 75 Stat. 688 (1961).

¹⁶³ Breger & Edles, *supra* note 31, at 1128-29.

¹⁶⁴ See, e.g., Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 7802(b)(2)(B), 112 Stat. 685, 691 (establishing a five-year term of office for the IRS head); Federal Aviation Administration Authorization Act of 1994, Pub. L. No. 103-305, § 201, 108 Stat. 1569, 1581 (establishing a five-year term of office for the FAA administrator); Social Security Independence and Program Improvements Act of 1994, Pub. L. No. 103-296, § 702(a)(3), 108 Stat. 1464, 1466 (establishing a six-year term of office for the commissioner of Social Security).

¹⁶⁵ See sources cited *supra* note 164.

in September 2008 in exchange for a 79.9% interest in the company could be seen as transforming a purely private entity into a boundary organization.¹⁶⁶

2. Movement from Boundary to Center

There are centripetal examples as well—agencies that moved from a quasi-governmental space, a boundary with another federal branch, or a boundary with another sovereign toward the center of the Executive Branch—though such moves seem rarer.

The federal government has “nationalized” entities at the public–private border. The Federal Housing Finance Agency (FHFA), an executive agency, recently received regulatory authority over Fannie Mae and Freddie Mac.¹⁶⁷ This move “place[d] Fannie Mae and Freddie Mac back in direct federal control.”¹⁶⁸

Federal agencies have also taken over tasks once managed by a mix of federal and state authorities. At the founding of the United States, the states (and localities) controlled education policy, with increased federal funding over time. The organizational structure “evolved from a ‘layer cake’ into a ‘marble cake,’” with state and federal entities wielding overlapping authority.¹⁶⁹ The federal government then consolidated certain functions when it created the Department of Education in 1980.¹⁷⁰

Within the federal government, shifts toward the center generally happen when agencies are demolished or combined. For instance, by the time the Civil Aeronautics Board (CAB), an independent regulatory commission, ceased to exist in 1984, some of its duties had been transferred to the FAA, which at that time was a classic executive agency.¹⁷¹ Additionally, Congress merged the Office of Federal Housing Enterprise Oversight and the independent Federal Housing Finance Board to create the FHFA, an

¹⁶⁶ See Steven M. Davidoff & David Zaring, *Regulation by Deal: The Government’s Response to the Financial Crisis*, 61 ADMIN. L. REV. 463, 494–96 (2009).

¹⁶⁷ 12 U.S.C. § 4511(b)(2) (2012).

¹⁶⁸ Bressman & Thompson, *supra* note 23, at 608 n.34; see also Davidoff & Zaring, *supra* note 166, at 488–89 (explaining that the Treasury Department was given the power to purchase 79.9% of the entities’ outstanding common shares).

¹⁶⁹ LARY C. RAMPP ET AL., AN ADMINISTRATIVE HISTORY OF THE CREATION OF THE U.S. DEPARTMENT OF EDUCATION, MAY 1980, at 16 (1998).

¹⁷⁰ *Id.* at 20, 43.

¹⁷¹ Edmund Preston, *The Federal Aviation Administration and Its Predecessor Agencies*, U.S. CENTENNIAL OF FLIGHT COMMISSION, http://www.aahs-online.org/centennialofflight.net/essay/Government_Role/FAA_History/POL8.htm (last visited Feb. 21, 2014). The CAB had earlier gained duties from the Civil Aeronautics Authority, a stand-alone executive agency, which even earlier had taken responsibilities from the Department of Commerce. *Id.*

executive agency, in 2008.¹⁷² More recently, President Obama asked Congress for power to consolidate six agencies' assigned business and trade duties into an executive agency: the relevant components of the Commerce Department and all of the Small Business Administration, the Office of the U.S. Trade Representative, the Export-Import Bank, OPIC, and the U.S. Trade and Development Agency.¹⁷³

In sum, bureaucratic organizations do not always stay at the border, or in the center. Thus, it is important to think about border entities statically as well as dynamically. The next Part considers positive and normative theories for their creation and movement.

II. THEORIES OF BOUNDARY ORGANIZATIONS

As the last Part demonstrates, boundary organizations make up substantial swaths of the federal administrative state. They sit in a multitude of forms at different borders. Their prevalence raises critical positive and normative questions about their creation and movement.

This Part attempts to provide some answers. The first Section advances a theory for why politically savvy federal actors—Congress and the White House—establish such boundary entities as opposed to more centrally located agencies. This theory is explanatory and predictive. Under the theory advanced here, boundary entities are the ordinary outcome of the agency creation process. The second Section turns briefly to questions of whether such boundary entities are desirable as a matter of social welfare or democratic legitimacy. The third Section tentatively considers both the positive and normative questions in a more dynamic setting. Although this Part mainly focuses on the political choice between entities on the public-private border and wholly public entities, my analysis generally applies to the choice between the center and entities on any of the borders previously described.¹⁷⁴

¹⁷² Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, 122 Stat. 2654.

¹⁷³ Sean Reilly, *Administration to Push Bill for Fast-Track Reorganization Authority*, FED. TIMES (Jan. 31, 2012), <http://www.federaltimes.com/article/20120131/AGENCY04/201310303>. This proposal would move two government corporations into a larger Cabinet department. *Id.*

¹⁷⁴ Because I focus on the President and Congress, the more difficult applications of the theory advanced herein involve the federal-state and federal-foreign boundaries. In those contexts, there are other players whose agreement is necessary for any such boundary organization. The theory can still apply to these contexts, if one thinks of the preferences of these other actors as shaping what negotiation is possible between the President and Congress. This approach—looking at the choice between the center (either purely federal or purely executive) and a particular boundary (private, other sovereign, or nonexecutive federal branch of government)—does not, however, allow a strategic choice among the boundaries, for instance between federal-state or public-private.

This Part interacts in critical ways with the next Part of this Article, which examines whether the law allows for certain boundary entities. The law shapes what organizations can be created as a positive matter. Although developed further below, I note some of these constraints here. A boundary organization cannot upset the separation of powers. Federal leaders of such an organization, if they exercise significant authority, must be selected by the procedures detailed in the Appointments Clause. Sufficiently governmental entities must comply with constitutional obligations under the Bill of Rights and statutory requirements under the APA. Some issues are not clear—for example, can Congress delegate significant federal authority to a state or private official who is not selected under the Appointments Clause? Therefore, the courts sometimes serve as *ex post* agency designers, modifying agency structure to comply with constitutional and statutory mandates.¹⁷⁵ In addition, the law influences the desirability of particular agency forms. The positive and normative theories, in turn, affect what the law of boundary entities and classic agencies should be.

A. *Why Boundary Organizations Are Created*

I approach the issue of agency design as a political scientist: what types of agencies would rational political actors want to create?¹⁷⁶ Because agencies, including boundary organizations, are created by political actors,¹⁷⁷ this is a relevant question. The rough intuition for why rational political actors would create boundary organizations comes from the standard microeconomics problem where actors have to choose how to allocate resources over multiple goods to maximize utility. Think of a standard two-good consumer choice problem, where each side of the boundary represents a good. In such problems, choosing to invest only in one good is a “corner solution.” Boundary entities therefore would be “interior solutions” where actors invest in goods on both sides of the boundary. Because corner solutions are

¹⁷⁵ See, e.g., *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3154-55 (2010) (severing one layer of for-cause removal from the structure of the PCAOB).

¹⁷⁶ This approach to agency design is a popular one. See, e.g., Jacob E. Gersen, *Designing Agencies* (collecting citations), in *RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW* 333 (Daniel E. Farber & Anne Joseph O’Connell eds., 2010). It is, however, not the only possible approach. Cf. Kirk Emerson et al., *An Integrative Framework for Collaborative Governance*, 22 J. PUB. ADMIN. RES. & THEORY 1, 5 (2011) (using a more systems-based or public-administration approach).

¹⁷⁷ See, e.g., Lee Davison, *Politics and Policy: The Creation of the Resolution Trust Corporation*, 17 *FDIC BANKING REV.*, no. 2, 2005, at 17, 19-20 (describing the effort by President George H.W. Bush’s Administration to create one such boundary organization, the Resolution Trust Corporation).

often less interesting or less common in such problems, it would not be surprising to see many interior solutions.

But what is the maximization problem, as applied to the administrative state? First, we need a few assumptions. I presume that the President and Congress are deciding jointly on the agency's form.¹⁷⁸ I also treat Congress and the President each as a single player. To be sure, Congress (and the President to some degree) is a "they," not an "it."¹⁷⁹ In addition, I assume that these political actors are creating one agency for a particular problem.¹⁸⁰ This means that the actors have already decided to delegate some measure of authority.¹⁸¹ It also means that the actors cannot delegate to multiple organizations.¹⁸²

Assumptions aside, the maximization problem driving the creation of boundary entities might be one of political control. Recent work in political science on agency design, most notably by Terry Moe and David Lewis, reveals that the President and Congress care significantly about political control.¹⁸³ Specifically, Presidents prefer agencies under their direct supervision, such as Cabinet departments.¹⁸⁴ What members of Congress want depends on how similar their interests are to the President's preferences.

¹⁷⁸ To the extent that interest groups, agencies, states, and foreign countries shape design preferences, their influence is being manifested through the White House and the legislature in the framework here. For example, because of how they are elected, members of Congress (directly) and the President (through the electoral college) represent state interests. JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* 178-79 (1980). In addition, although Presidents unilaterally create agencies, they tend not to establish boundary organizations. See Howell & Lewis, *supra* note 26, at 1099 (finding that Presidents created no government corporations in a fifty-year period).

¹⁷⁹ It is helpful to equate Congress in this Section with the median party member in Congress. This Section does touch on some of the intra-institution dynamics.

¹⁸⁰ The task here combines both subject matter and function. Cf. Alejandro E. Camacho & Robert L. Glicksman, *Functional Government in 3-D: A Framework for Evaluating Allocations of Government Authority*, 51 HARV. J. ON LEGIS. 19, 32-33 (2014) (separating the two). The task assumption makes it less likely that the players are choosing between boundaries (e.g., federal-state versus federal-foreign).

¹⁸¹ Thus, I am taking the tasks as fixed and examining institutional design. Many scholars, especially in political science, take this approach. LEWIS, *supra* note 23, at 17. By contrast, most "administrative law theory treats the design and operation of agencies as fixed or exogenous, while asking how legal powers should be allocated between agencies and other institutions." Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032, 1077 (2011).

¹⁸² It is possible, of course, for two entities, one on each side of a particular boundary to function like one organization at the boundary. O'Connell, *supra* note 42, at 1704. The choice this Article examines is what form that one agency will take.

¹⁸³ Terry M. Moe, *The Politics of Bureaucratic Structure*, in *CAN THE GOVERNMENT GOVERN?* 267 (John E. Chubb & Paul E. Peterson eds., 1989); LEWIS, *supra* note 23.

¹⁸⁴ LEWIS, *supra* note 23, at 30-32.

When preferences diverge, they prefer agencies more insulated from the President, such as independent regulatory commissions.¹⁸⁵ This assessment of preferences occurs at the point of agency formation, with members of Congress also assessing expected divergence in the future.¹⁸⁶ If members of Congress have trouble reaching consensus, the President is more likely to get a less insulated agency.¹⁸⁷ Administrative law scholars have taken up this work, largely thinking of agency design as a choice between an executive agency and an independent regulatory commission.¹⁸⁸

Even assuming that these political actors care only about political control, the prevalence of boundary organizations suggests that the choice is not a binary one between executive agencies and independent regulatory commissions. The latter gives members of Congress more control, but the choice appears zero-sum in nature. Boundary organizations may allow both the President and Congress to commit credibly to having the same amount of control.

Other research does not assume political control brings only benefits. B. Dan Wood and John Bohte speculate that “responsive designs also have a higher probability of political holdup and larger potential losses if the holdup occurs.”¹⁸⁹ Stéphane Lavertu posits that the President cares about “the policy risks associated with political changes in either branch.”¹⁹⁰ In other words, the President may want to avoid being blamed for bad policies in certain areas and therefore prefers more insulated agencies in those contexts. The sharing of political control between two political actors can also decrease this risk.¹⁹¹ Matthew Stephenson suggests that political principals may prefer trading off control for expertise.¹⁹² More anecdotally, it

¹⁸⁵ *Id.* Lewis collapses independent regulatory commissions, government corporations, and Judicial Branch agencies into one category. *Id.* at 45.

¹⁸⁶ *Id.* at 30-32.

¹⁸⁷ *Id.*

¹⁸⁸ See, e.g., O’Connell, *supra* note 141, at 898-900 (distinguishing between agencies located fully within the executive and others with more structured independence); Rodríguez, *supra* note 146, at 1822 (describing differences between executive and independent agencies).

¹⁸⁹ B. Dan Wood & John Bohte, *Political Transaction Costs and the Politics of Administrative Design*, 66 J. POL. 176, 184 (2004).

¹⁹⁰ Stéphane Lavertu, *Issue-Specific Political Uncertainty and Policy Insulation in US Federal Agencies*, 29 J.L. ECON. & ORG. 145, 151 (2012).

¹⁹¹ See Jide O. Nzelibe & Matthew C. Stephenson, *Complementary Constraints: Separation of Powers, Rational Voting, and Constitutional Design*, 123 HARV. L. REV. 617, 622 (2010) (contradicting popular opinion that Presidents prefer to act unilaterally); see also Bressman & Thompson, *supra* note 23, at 630 (suggesting that the President is aware of the benefits to cooperating with Congress).

¹⁹² See Matthew C. Stephenson, *Optimal Control of the Bureaucracy*, 107 MICH. L. REV. 53, 79 n.77 (2008) (suggesting that voters’ dislike of policy variance may lead them to prefer more biased policy).

seems that both the President and Congress care about the political repercussions of their agency-design choices. It is more than a dislike for uncertainty and blame if outcomes are poor. These days, it seems politically unwise to propose expanding the size of the federal government. This is a key assumption in the analysis that follows.

To capture some of these complexities in a more systematic fashion, I propose the following informal model to explain the creation and movement of boundary entities. The model predicts that boundary organizations will often be the outcome of negotiation between the President and Congress. The structure of organizations will naturally vary depending on matters such as the party affiliation of the political branches, the presence of divided government, and the task given to the entity. Ultimately though, the President and Congress care about two dimensions in designing boundary entities: political control and competence. Let me explain each in turn.

1. Political Control

Political control of the agency depends partly on form. For example, the President has more control over Cabinet departments than independent regulatory commissions, whose leaders typically have removal protections. Congress has more control over the GAO than a GSE because Congress funds the GAO's budget and plays a substantial role in picking its leader.

Political scientists tend to emphasize the benefits of political control.¹⁹³ Under this view, bureaucracies can help implement policies that generate electoral support. Thus, in a benefit-only or benefit-dominant perspective, Presidents want agencies under their control, and Congress wants agencies under or closer to its control. Divided government exacerbates this tension. What follows, then, is a zero-sum quality to agency creation between the two branches. An agency more under the President's control is necessarily an agency less under Congress's control. This perspective has been applied to government corporations.¹⁹⁴ This zero-sum quality can make both institutions worse off. Congress may provide fewer resources to an agency

¹⁹³ See Terry M. Moe & Scott A. Wilson, *Presidents and the Politics of Structure*, LAW & CONTEMP. PROBS., Spring 1994, at 1, 4; see also Bressman & Thompson, *supra* note 23, at 601 (arguing views contrary to scholarly assumptions). This is similar, but not identical, to the ally principle, "that a principal is willing to delegate more discretion to an agent with expected policy preferences similar to the principal's own." Matthew C. Stephenson, *Information Acquisition and Institutional Design*, 124 HARV. L. REV. 1422, 1440 (2011).

¹⁹⁴ See PAUL C. LIGHT, THE TIDES OF REFORM: MAKING GOVERNMENT WORK, 1945-1995, at 207 tbl.5.4 (1997) (classifying each shift of power to a public corporation as moving either toward the President or toward Congress).

more under the President's control.¹⁹⁵ If the branches could make credible commitments about their ex ante behavior, such as an inability on the part of the White House to replace agency leaders because of removal restrictions, the President and Congress would both benefit¹⁹⁶—but this may be impracticable.

Political control can have other costs as well. It can generate holdup problems, making it harder for the agency to make needed decisions.¹⁹⁷ Similarly, on the international level, unilateral country control may be less efficient,¹⁹⁸ prevent needed coordination,¹⁹⁹ or generate a worse reputation²⁰⁰ than centralized action through boundary organizations. Unpopular agency actions may also generate blame and electoral backlash for those politicians too closely affiliated with the organizations.²⁰¹ For instance, members of Congress often prefer their lack of control over the Defense Base Closure and Realignment Commission. That way, when the Commission effectively closes a military base, the legislators have distance from the decision.²⁰² More generally, adding to the classic administrative state can be deeply unpopular for Democrats and Republicans alike, especially if it costs money.²⁰³ Conversely, less political control may permit an agency to be

¹⁹⁵ See generally Nolan McCarty, *The Appointments Dilemma*, 48 AM. J. POL. SCI. 413 (2004) (discussing potential legislative responses to greater executive control over agencies).

¹⁹⁶ See *id.* at 415 (proposing a moderate presidential commitment to satisfy the legislature); see also Mathew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 433 (1989) (arguing that “effective political control of an agency requires ex ante constraints on the agency (that is, a means of restricting the agency’s decisionmaking before it actually makes policy choices)”).

¹⁹⁷ Wood & Bohte, *supra* note 189, at 184.

¹⁹⁸ See Kenneth W. Abbott & Duncan Snidal, *Why States Act Through Formal International Organizations*, 42 J. CONFLICT RESOL. 3, 12 (1998) (highlighting the World Bank as one such organization).

¹⁹⁹ See Oona A. Hathaway, *International Delegation and State Sovereignty*, 71 LAW & CONTEMP. PROBS., Winter 2008, at 115, 143.

²⁰⁰ See Leslie Johns, *Courts as Coordinators: Endogenous Enforcement and Jurisdiction in International Adjudication*, 56 J. CONFLICT RESOL. 257, 259-60 (2012) (suggesting noncompliance in an international system has negative reputational repercussions); Edward D. Mansfield & Jon C. Pevehouse, *Democratization and International Organizations*, 60 INT’L ORG. 137, 144 (2006) (discussing negative effects of transitional states’ failures to meet international obligations).

²⁰¹ See Lavertu, *supra* note 190, at 170 (proposing that policymakers focus on certain special interest constituencies that are more likely to pay attention to bureaucratic structure).

²⁰² See Jon D. Michaels, *The (Willingly) Fettered Executive: Presidential Spinoffs in National Security Domains and Beyond*, 97 VA. L. REV. 801, 893-94 (2011) (describing the creation of the Commission by Congress to lessen political pressures). An alternative perspective would be that such institutional structures allow credible commitments. See Edward Rubin, *Hyperdepoliticization*, 47 WAKE FOREST L. REV. 631, 659, 662 (2012).

²⁰³ See Jon D. Michaels, *Privatization’s Pretensions*, 77 U. CHI. L. REV. 717, 751 (2010) (noting the political attraction of “concealing the size and scope of civilian and military programmatic commitments”).

“off-budget,”²⁰⁴ which generates its own electoral benefits. Politicians may also want to effectively delegate control to interest groups, which may be better able to capture entities.²⁰⁵ Alternatively, politicians may realize that greater control undermines the agency expertise needed in a highly uncertain and important policy area.²⁰⁶ Finally, political control comes with legal constraints on how money can be spent, how workers can be hired and fired, and the level of review the courts can impose.²⁰⁷

In short, the President and Congress have to consider the costs and benefits of political control in deciding what form the agency should take. The cost-benefit analysis may differ for each branch. This one dimension generates several propositions:

Proposition 1: If the benefits to political control exceed the costs, the President prefers more control over the agency. If the costs to political control dominate the benefits, the President prefers less control over the agency.

Proposition 2: As with the President, if the benefits to political control exceed the costs, Congress prefers more control over the agency. If the costs to political control dominate the benefits, Congress prefers less control over the agency.

Proposition 3: Assuming the benefits to political control exceed the costs, in a unified government, Congress is more willing to let the President have more control over the agency. If the durability of the President's party in the White House, however, is shaky, Congress is less willing to let the President have more control over the agency.

Proposition 4: Assuming the benefits to political control exceed the costs, in a divided government, the President and Congress must compromise on control of the agency. If the costs to political control dominate the benefits,

²⁰⁴ Harold Seidman, *The Quasi World of the Federal Government*, 6 BROOKINGS REV., Summer 1988, at 23, 24. The movement of Fannie Mae from a more central agency to a government corporation to a privately owned GSE “can be directly attributable to revisions in budget rules.” KOPPELL, *supra* note 19, at 6.

²⁰⁵ See Matthew D. McCubbins et al., *supra* note 196, at 457 n.91 (describing capture theory).

²⁰⁶ See Lavertu, *supra* note 190, at 152 (suggesting the benefits of cooperation are greater in uncertain environments); Stephenson, *supra* note 192, at 83 (rejecting the idea that control is best in uncertain environments); *cf.* Stephenson, *supra* note 193, at 1444 (noting that increased discretion in the delegated task may encourage more research investment by the agency).

²⁰⁷ See Michaels, *supra* note 202, at 835-42 (describing how private contractors have been used in the national security context to avoid legal constraints and increase employment flexibility). Interestingly, there might be some political benefits to less control. If the “Hatch Act and civil service laws do not apply,” the President can use his appointment authority to these entities “to reward political supporters,” and these officials can engage in political work. Seidman, *supra* note 204, at 27.

however, the President and Congress both prefer less control. If one institution views the net benefits as positive and the other as negative, the former institution faces no opposition in getting more control.

Considering only political control, the political branches often create boundary organizations when the costs to such control dominate the benefits. They may also form such entities during periods of divided government. Boundary organizations can then be a second-best outcome for each branch: unlike some agency structures that give one actor more power than the other, some boundary organizations give little control to either branch.²⁰⁸

Stability of institutional control also shapes the negotiation. To the extent that we expect more stability in party control in Congress than in the White House, the majority party in Congress may prefer boundary organizations to executive agencies. In a unified government, if the majority party in Congress expects more constant party control in the White House than in Congress, it may prefer executive agencies.

This also plays out in vertical decisions. As George Krause and Ann Bowman show, “delegat[ing] policymaking authority to subnational entities is contingent upon the partisan composition of state governments.”²⁰⁹ Specifically, “national level politicians respond directly to partisan political preferences at the state level and either consolidate or delegate policymaking authority accordingly.”²¹⁰ In addition, “the national government (principal), wishing to mitigate adverse selection problems, will prefer to devolve such authority when its policy interests are more apt to be faithfully represented at the subnational level (agents).”²¹¹ These propositions about control across institutions at any given time and predicted control in the future partly explain the decision to delegate considerable authority to the states in the Patient Protection and Affordable Care Act (ACA). In part, Democrats fearing future Republican Presidents delegated considerable authority to the states, in the expectation of more faithfulness by Democratic states over time in administering the ACA.²¹² Another part of the decision to delegate

²⁰⁸ As noted earlier, the analysis presumes each institution is a single actor. Think of each institution as its median member. Extreme members, for example, prefer less centralization. See Jacques Crémer & Thomas R. Palfrey, *Political Confederation*, 93 AM. POL. SCI. REV. 69, 70 (1999).

²⁰⁹ George A. Krause & Ann O’M. Bowman, *Adverse Selection, Political Parties, and Policy Delegation in the American Federal System*, 21 J.L. ECON. & ORG. 359, 360-61 (2005).

²¹⁰ *Id.* at 361.

²¹¹ *Id.*

²¹² Cf. Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1105 (2014) (noting that Republican states have “refus[ed] to take part”).

to the states rested on the political costs of creating too much federal bureaucracy.

Separate from concerns of stability of party dominance, partisanship may also factor into preferences on political control.²¹³ Republicans, given their stated preferences for states' rights, may see more benefits to giving control to entities at the federal–state border than to organizations entirely at the federal level.²¹⁴ By contrast, Democrats, given their preferences for international organizations, may see more benefits to allocating authority to organizations at the federal–foreign border.²¹⁵ Nevertheless, partisanship seems secondary compared to institutional priorities on the political control dimension, unlike on the competence dimension, to which I now turn.

2. Competence

Political control—particularly its benefits—receives considerable attention in political science. But it does not sufficiently explain a wide variety of agency forms on its own. Consider the federal courts and agency-related nonprofit corporations such as PCAOB. The President and Congress have some political control over both the courts and PCAOB through, respectively, the appointment of judges and SEC members, who then choose PCAOB members. Yet, both operate largely independently of the two elected branches. Even more strikingly, the institutions are quite different: the courts are classic public entities while the agency-related nonprofit corporations have state charters and freedom from many traditional government restrictions. For instance, PCAOB members have higher salaries than the President of the United States.²¹⁶

Agency competence, as viewed by the political actors, tries to capture some of these distinctions. Competence here reflects the *perceived* ability of agencies to perform a set delegated task.²¹⁷ Ability generally reflects some notion of efficiency, but it could also reflect democratic legitimacy or some

²¹³ See Jide Nzelibe, *Partisan Conflicts over Presidential Authority*, 53 WM. & MARY L. REV. 389, 397 (2011) (discussing different parties' potential rankings of presidential authority).

²¹⁴ See Bulman-Pozen, *supra* note 212, at 1099 (noting the “standard federalism narrative”).

²¹⁵ *Id.*

²¹⁶ Compare *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3147 n.1 (2010) (reporting salaries of the PCAOB Chairman and other members), with BARBARA L. SCHWEMLE, CONG. RESEARCH SERV., 90-53, SALARIES OF FEDERAL OFFICIALS: A FACT SHEET 2 (2005) (providing the President's salary).

²¹⁷ This perceived competence could be actual competence due to external factors (e.g., market imperfections) or internal factors (e.g., institutional transaction costs or capacities).

other characteristic besides political control.²¹⁸ As perceived by the actor, decisions of competence are social welfare decisions, and decisions as to control are political decisions. Competence is not measured quantitatively, such as whether entities are more or less competent. Rather, competence is measured along a private–public metric (or for the other dimensions, along the nonfederal/non–Executive Branch–federal/Executive Branch metric). The most competent entity to conduct criminal trials is arguably purely public. The most competent entity to build a courthouse is likely private.

The President and Congress have preferences along this private–public metric (or boundary–center metric) as to the best performance of the delegated task. In contrast to political control, where the focus is on the branch's interests, competence may reflect more partisan than institutional preferences. Conservatives tend to lean toward the private sector,²¹⁹ while liberals are more likely to see the public sector as socially desirable.²²⁰

Because one can assume that the President and Congress want the agency to perform the task well, this construction of competence does not easily encompass Terry Moe's theory that political actors seek certain agency structures to prevent agencies from carrying out intended tasks.²²¹ For instance, Moe suggests that conservatives in Congress favored an independent regulatory commission structure for the Consumer Product Safety Commission because industry groups would find it easier to delay agency enforcement.²²² This set of preferences could be viewed as recording preferences for incompetence for some actors and competence for others. This complicates how the two actors negotiate competence, although I do not consider this issue further.

In sum, the President and Congress must assess competence in performing the delegated task to determine what structure the agency should take. The assessment may differ for each political party and perhaps for each branch.

²¹⁸ Conservatives, for example, may believe that private entities are more efficient or better protect individual liberty than public ones. By contrast, liberals may believe that public entities are more efficient (due to private market failures) or better represent the public interest than private organizations.

²¹⁹ See LEWIS, *supra* note 23, at 71; David Leonhardt, *Romney's First 100 Days*, N.Y. TIMES, Aug. 26, 2012, at SR1 (noting that under a Romney Administration, "the private sector would take over some government functions").

²²⁰ Cf. John M. Broder, *Bashing E.P.A. Is New Theme in G.O.P. Race*, N.Y. TIMES, Aug. 18, 2011, at A1 (noting that the 2012 Republican presidential candidates viewed the Environmental Protection Agency as "the very symbol of a heavy-handed regulatory agenda imposed by the Obama administration").

²²¹ See Moe, *supra* note 183, at 277 (explaining how, in a democratic government, politicians "favor structures" that are beneficial to them politically).

²²² *Id.* at 295–96.

This second dimension, in isolation, generates two propositions, as applied to the private–public boundary:

Proposition 5: Republicans often believe more private organizations are better at performing the delegated task than more public ones.

Proposition 6: Democrats often believe more public organizations are better at performing the delegated task than more private ones.²²³

Considering only competence, as measured on this private–public dimension, Republicans in control of the White House and Congress are more likely than Democrats to create boundary entities. During periods of divided government, the President and Congress may compromise on boundary organizations.

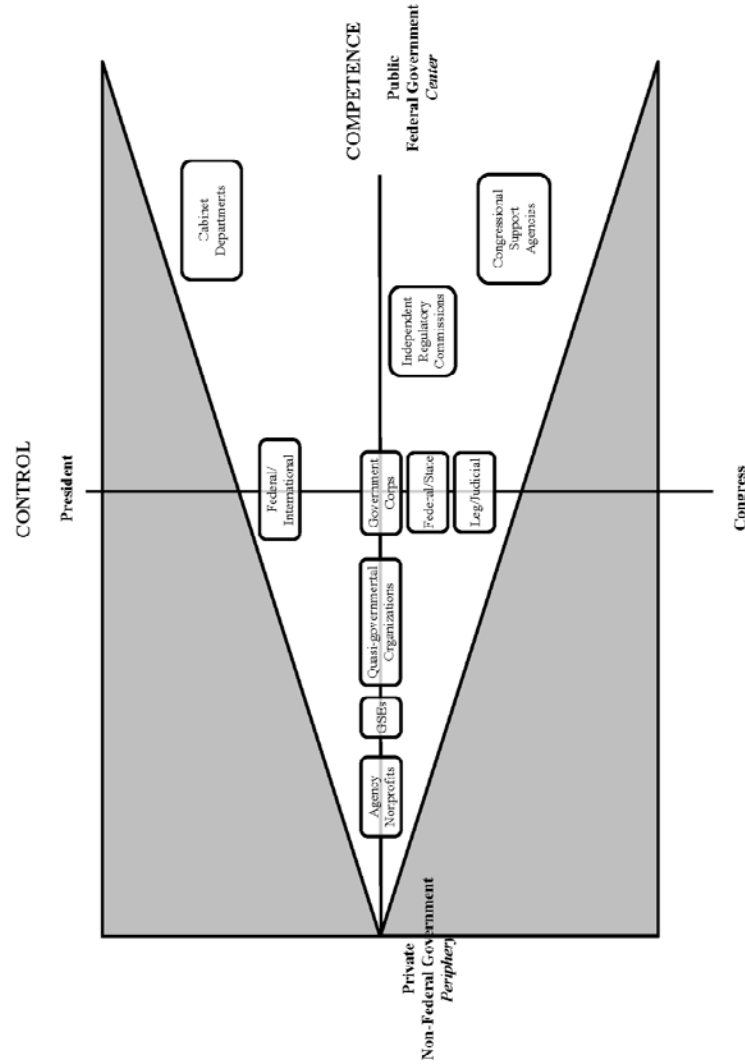
3. Putting Political Control and Competence Together

Even with just two dimensions (political control and agency competence) and two designers (the President and Congress), decisions regarding agency structure can become quite complicated. This subsection seeks to explain when these designers will choose to create boundary organizations. Figure 1 roughly illustrates the placement of a variety of entities, including boundary organizations, along these dimensions. The political control dimension, represented on the vertical axis, captures presidential control at the top and congressional control at the bottom. Entities toward the center face little congressional or presidential control, or can place both overseers in conflict to gain independence.²²⁴ The competence dimension, represented on the horizontal axis, moves from structures more peripheral to the federal government or Executive Branch on the left to more central structures on the right.

²²³ Democrats generally believe that the federal government is better at performing the delegated task than state governments, while Republicans typically subscribe to the inverse. *See* Bulman-Pozen, *supra* note 212, at 1099.

²²⁴ This framework creates some complexities, as entities firmly under congressional control do not necessarily confront less presidential control than some entities closer to the origin, which are removed from both presidential and congressional control.

Figure 1: Positive Theory of Agency Creation



Some spaces in this two-dimensional model do not house organizations. Most notably, the Constitution and other bodies of law like the APA preclude some locations, and the following Section takes up legal constraints in more detail.

By contrast, other spaces hold many organizations. Mixed public-private entities crowd along the horizontal axis, for example. The placements are

relative. A line of public entities is at the right, in which Cabinet departments face the most presidential control. The courts and organizations at the boundary of the Legislative and Executive Branches face little or opposing amounts of presidential and congressional control. Congressional support agencies, such as the Congressional Budget Office (CBO), and entities at the border of the Legislative and Judicial Branches face more congressional control than presidential control. The preferences of the President and Congress are not marked; I consider them more systematically below.

In certain contexts, the agency designers face tradeoffs between their preferences on political control and agency competence. Specifically, if the benefits to political control exceed the costs, Republican Presidents and Congresses confront a conflict between their desire for political control and their desire for private organizations. Democratic Presidents and Congresses, however, do not face such a conflict, as many assume they prefer public entities. Conversely, if the costs to political control outweigh the benefits, Democratic Presidents and Congresses face a choice between their desire to avoid control and their desire for public organizations. Republican Presidents and Congresses do not confront a conflict in this circumstance, as most people assume they prefer private entities. Those who are economically inclined can think of the tradeoff as a two-good consumer utility model. If the consumer is Republican, the vertical axis measures political control, and the horizontal axis measures the extent of privatization (so the origin is set at roughly no control and no privatization). The opposing party functions as the budget constraint, allowing only so much control and privatization.

In addition to the connection between the two dimensions for a specific actor, one must consider how the preferences of the President and Congress interact in order to understand which organizational structures are chosen. Consider five cases: (1) a divided government, in which benefits to political control exceed costs for both actors; (2) a divided government, in which costs to political control dominate benefits for both actors; (3) a divided government, in which benefits to political control exceed costs only for Democrats; (4) a unified government, in which benefits to political control exceed costs for both actors; and (5) a unified government, in which costs to political control dominate benefits for both actors. Relevant party variations are considered in each case.

In the first case, both Republicans and Democrats see the benefits to political control as exceeding the costs. Because of the divided government, the actors here are at odds—a Republican President and Democratic Congress (or a Democratic President and Republican Congress) will disagree on political control and agency competence. The outcome depends

on bargaining strength but likely rests in the middle area of both dimensions.²²⁵

In the second case, both Republicans and Democrats view the costs to political control as exceeding the benefits. The actors are less at odds than in the first case, but some conflict remains. A Republican President and Democratic Congress (or the reverse) have more similar views on political control but still clash on agency competence. The result is similar to the first case, probably with the agency somewhere in the middle of both of the two metrics. The difference is that the parties want to relinquish political control (as opposed to engaging in a zero-sum game).

In the third case, Republicans see the costs of political control as exceeding the benefits, but Democrats view the benefits of political control as exceeding the costs. Neither party, therefore, faces any tradeoff on its own preferences concerning political control and agency competence. In the case of a Democratic President and Republican Congress, both favor presidential control but must compromise on agency competence. Thus, the organizations in the upper two quadrants of the figure (as determined by the figure, not the page) represent possible outcomes. With a Republican President and Democratic Congress, both institutions favor congressional control and must compromise on agency competence. The organizations in the lower two quadrants of the figure are possible outcomes.

In the fourth case, as with the first, both Republicans and Democrats see the benefits to political control as exceeding the costs. Unlike the first case, however, the same party controls both the White House and Congress. Under Democratic control, one can expect a classic executive agency structure. Under Republican control, the desire for privatized structures tempers the desire for political control, likely resulting in boundary entities (perhaps with more presidential appointments).

In the fifth case, as with the second, both Republicans and Democrats view the costs to political control as exceeding the benefits. Unlike the second case, however, in the fifth case the same party controls both the White House and Congress. Under Republican control, one anticipates an agency structure with considerable connections to the private sector. Under Democratic control, the preference for public structures and lack of control may yield boundary organizations within the federal government.

In short, this analysis predicts that Congress and the White House will often establish boundary entities to perform tasks. Boundary organizations

²²⁵ If the Republican player trades off between political control and agency competence in the classic consumer utility diagram, the Democratic player acts as the budget constraint, pushing in toward the origin.

are therefore not marginal at all. These predictions could be tested by looking at changes in agency structures—which would keep agency functions relatively constant, in line with the model's assumption of a set task.

B. *The Consequences of Boundary Organizations*

The previous Section illustrated why politicians may want to establish boundary organizations. This Section briefly evaluates whether these entities are desirable in terms of social welfare and democratic legitimacy. Commentators often presume, explicitly or implicitly, some tradeoff between these two goals.²²⁶ Just as boundary organizations balance the competence and responsiveness concerns of political actors, they also balance these normative objectives. Assuming these objectives are worthwhile and achievable, that balance will be optimal in a number of contexts, and suboptimal in others.

1. Social Welfare

A social welfare planner cares about the public's economic interest. Compared to other entities, boundary organizations, particularly those at the public-private border, may promote that interest for a variety of reasons. First, such entities may be more flexible—both in terms of policy mechanisms and objectives—because of market pressure or other factors.²²⁷ One reason may be the relative freedom that boundary entities enjoy from restrictions that other federal agencies face.²²⁸ Alternatively, or in combination, flexibility may result from market or other pressures to innovate. Second, border agencies may be more insulated from the special interests of public or private actors (on either side of the boundary),²²⁹ which often

²²⁶ See, e.g., KOSAR, QUASI GOVERNMENT, *supra* note 62, at 4 (noting the belief that the “unusual structures [of quasi-governmental organizations] would be constructed to promote ‘flexibility,’ even when flexibility sometimes resulted in less accountability”).

²²⁷ Cf. Freeman, *supra* note 24, at 631 n.368 (noting that privatization could result in “cost savings without a concomitant decline in quality”).

²²⁸ See Michaels, *supra* note 202, at 838-40 (describing private organizations' greater flexibility in contracting and employment compared to government agencies); Lex Rieffel & James W. Fox, *The Millennium Challenge Corporation: An Opportunity for the Next President* 6 (Brookings Inst., Global Economy & Development Working Paper No. 30, 2008) (noting a special-purpose government corporation's freedom from requirements, including the obligation to commit government funds in the year they are appropriated).

²²⁹ See Barkow, *supra* note 23, at 20-21 (noting that insulation can promote public interest regulation). Relatedly, insulation from all political actors can foster stability, which can be beneficial—even if that insulation results in biased outcomes. See Matthew C. Stephenson, *Optimal Political Control of the Bureaucracy*, 107 MICH. L. REV. 53, 55 (2008) (proposing that “the greater the bureaucracy's expected policy bias, the lower the optimal level of bureaucratic insulation”).

diverge from the public's interest. Thus, they may be able to function outside of arrangements that are dysfunctional. Third, if there are externalities or informational asymmetries in the market, boundary organizations may produce more efficient outcomes than purely private actors.²³⁰ Finally, boundary organizations may have more expertise.²³¹ This expertise may derive from higher employee salaries, especially for entities unconstrained by federal hiring rules.²³²

The social welfare story of boundary organizations is easy to tell. Indeed, it is the story told about many of these entities, particularly public-private ones.²³³ But it may not be true in certain contexts, such as when organizations get stuck in particular modes of acting. Purely public or other central actors may be more entrepreneurial, boundary organizations may lack the necessary authority to implement their decisions,²³⁴ or organizations may simply find it easier to operate on one side of the border than on both sides. Similarly, purely private entities may have even more flexibility than quasi-private ones.²³⁵ Another context is when power vacuums that insulate border agencies produce opportunities for nonpublic behavior by such entities—either because they have special interests of their own or because other institutions are better able to capture them.²³⁶ Semiprivate entities, for instance, may face little market oversight.²³⁷ Market failure offers yet another context in which purely public entities may outperform partially

²³⁰ In fact, many of these entities are not lines in the federal budget requiring governmental outlays but are self-supporting entities producing revenues for the government.

²³¹ See Daniel Abebe, *Rethinking the Costs of International Delegations*, 34 U. PA. J. INT'L L. 491, 522 (2013) (noting that “international institutions can take advantage of the aggregation of human expertise . . . and the accumulation of institutional knowledge built up over time”).

²³² See Rae André, *Assessing the Accountability of Government-Sponsored Enterprises and Quangos*, 97 J. BUS. ETHICS 271, 280 (2010) (recognizing suggestions that “paying people more than governments will allow and, offering other private-sector inducements, will attract better employees”).

²³³ See MOE, *supra* note 19, at 44 (describing the corporate governance of “[g]overnment corporations . . . under the supervision . . . of a department or agency head”).

²³⁴ Osofsky & Wiseman, *Dynamic Energy Federalism*, *supra* note 19, at 44.

²³⁵ Cf. Yair Aharoni, *Performance Evaluation of State-Owned Enterprises: A Process Perspective*, 27 MGT. SCI. 1340, 1342 (1981) (noting that state-owned enterprises must meet multiple objectives, making them less effective).

²³⁶ See Doug Bandow, *Uncle Sam as Investment Banker: The Failure of Washington's Overseas Enterprise Funds* (Cato Inst., Policy Analysis No. 260, 1996), available at object.cato.org/sites/cato.org/files/pubs/pdf/pa260.pdf (arguing that OPIC and government investment fund decisionmakers suffer from conflicts of interest because of future job possibilities).

²³⁷ See Stanton, *supra* note 76, at 838 (“Because of their government backing, most GSEs receive only minimal feedback from the markets”); see also JOHN D. DONAHUE, *THE PRIVATIZATION DECISION: PUBLIC ENDS, PRIVATE MEANS* 78 (1989) (noting that competitiveness is more important than whether an entity is public or private).

private ones. Even if the boundary organizations are self-supporting or raise money for the government, on net, they often still impose some costs. Finally, where broader and more central agencies entice more talented workers, for example, boundary organizations may have less expertise.²³⁸

Similar normative analysis can be applied to boundary organizations other than public-private entities. For instance, interstate compact agencies and international organizations may be necessary to solve particular problems of collective action and to improve efficiency.²³⁹ Such entities may, however, also be more prone to capture by special interests, undermining social welfare.²⁴⁰

In short, boundary organizations have tremendous potential in terms of social welfare. But they are not guaranteed to serve the public's economic interest better than other entities.

2. Democratic Legitimacy

A proponent of democratic legitimacy desires, at least in part, accountability.²⁴¹ Accountability can mean many things; here, I use the term to cover the “repercussions of government action: government officials . . . may suffer penalties for ‘misbehavior’ or receive rewards for ‘good behavior,’ both genuine and perceived.”²⁴² In other words, accountability encourages “responsiveness, although not necessarily effectiveness.”²⁴³ Compared to

²³⁸ André, *supra* note 232, at 280.

²³⁹ See Hathaway, *supra* note 199, at 144 (“[S]tates might enter into agreements that delegate authority to an international body in order to overcome a collective-action dilemma.”).

²⁴⁰ See Hasday, *supra* note 21, at 24-25 (“Capture by private economic interests is . . . a perennial problem . . .”).

²⁴¹ O’Connell, *supra* note 42, at 1716.

²⁴² *Id.* at 1719; see also KOPPELL, *supra* note 19, at 176 (providing five dimensions of accountability: “transparency, liability, controllability, responsibility and responsiveness”); Jerry L. Mashaw, *Accountability and Institutional Design: Some Thoughts on the Grammar of Governance* (noting six important considerations in accountability relationships: “who is liable or accountable to whom; what they are liable to be called to account for; through what processes accountability is to be assured; by what standards the putatively accountable behavior is to be judged; and, what the potential effects are of finding that those standards have been breached”), in PUBLIC ACCOUNTABILITY: DESIGNS, DILEMMAS AND EXPERIENCES 115, 118 (Michael W. Dowdle ed., 2006).

²⁴³ O’Connell, *supra* note 42, at 1719. Another perspective views accountability as barring arbitrary decisionmaking—providing procedural-like protections rather than substantive outcomes. See generally Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461 (2003) (arguing that a concern for theorizing agency legitimacy has obscured the risks of arbitrary agency decisionmaking); B. Guy Peters & Jon Pierre, *Public-Private Partnerships and the Democratic Deficit: Is Performance-Based Legitimacy the Answer?* (finding that hybrid entities may meet performance targets but not give sufficient process), in DEMOCRACY AND PUBLIC-PRIVATE PARTNERSHIPS IN GLOBAL GOVERNANCE 41 (Magdalena Bexell & Ulrika Mörth eds., 2010).

other entities, boundary organizations may suffer on this dimension. First, such organizations may be less transparent.²⁴⁴ This opacity may come from exemption from governmental disclosure requirements, such as FOIA, or exemption from information mandates on private entities, such as SEC requirements. Second, border agencies may face fewer overseers and fuzzier lines of accountability. After all, it may be easier to evade attention at the boundary. Alternatively, border agencies may face more overseers, resulting in less authority or willingness to punish wayward actions.²⁴⁵ Both alternatives would cause boundary organizations to confront fewer, or less severe, consequences for misbehavior.

As with the promotion of the social welfare story, the unaccountability narrative is straightforward and popular.²⁴⁶ The narrative is somewhat ironic: the attempt to remove entities from politics gives them legitimacy in some contexts.²⁴⁷ In any event, the reality may be quite different, or at least more complicated, for boundary organizations. To begin, some boundary organizations are subject to governmental disclosure requirements while others face considerable media attention because of the issues they address. Boundary organizations may confront similar or even more scrutiny than purely public entities, though through different accountability mechanisms.²⁴⁸ Namely, fewer overseers can result in more vigilant oversight if they are less willing to free ride off the efforts of others. Alternatively, overseers on both sides of the boundary may take an active role in supervision. In addition, border organizations could face greater repercussions for bad actions.²⁴⁹ Each side of the boundary may exact particular penalties, and it may be easier to terminate a boundary organization than a core executive agency.

²⁴⁴ See, e.g., Leslie Wayne, *Spreading Global Risk to American Taxpayers*, N.Y. TIMES, Sept. 20, 1998, at B1 (“OPIC runs its fund program almost exclusively behind closed doors . . .”).

²⁴⁵ See Michael M. Ting, *A Strategic Theory of Bureaucratic Redundancy*, 47 AM. J. POL. SCI. 274, 277 (2003) (exploring the effects of redundant jurisdictions on strategic policy actors through a game-theory model).

²⁴⁶ See MOE, *supra* note 19, at 44-45 (describing the unaccountability narrative); Jack M. Beermann, *Privatization and Political Accountability*, 28 FORDHAM URB. L.J. 1507, 1552 (2001) (“[T]he appearance and reality of political accountability are placed in doubt when government power is wielded by entities that are either outside government or only loosely connected to government.”).

²⁴⁷ See Matthew V. Flinders, *Quangos: Why Do Governments Love Them?*, in QUANGOS, ACCOUNTABILITY AND REFORM: THE POLITICS OF QUASI-GOVERNMENT 26, 30-31 (Matthew V. Flinders & Martin J. Smith eds., 1999).

²⁴⁸ Cf. Freeman, *supra* note 24, at 665-75 (noting that private entities face specific accountability mechanisms).

²⁴⁹ Contrary to popular assumption, they may also be less tempted to stray from the wishes of political principals than more central agencies, even keeping punishment fixed. Cf. Abebe, *supra* note 231, at 517-18 (analyzing international organizations).

Concerns about legitimacy may also turn on the nature of the organization's activities. We may worry more about boundary organizations engaged in rulemaking and adjudication and less about those engaged in activities common to private market participants. As discussed above, entities at the boundary may raise serious democratic concerns. They are not, however, automatically less accountable than more traditional organizations.

Social welfare and democratic legitimacy are often in tension,²⁵⁰ but they are not necessarily so. In the conventional story of public-private entities (and perhaps federal-foreign and federal-state organizations), economic objectives trump democratic ones.²⁵¹ Yet boundary organizations can promote both efficiency and accountability through explicit design decisions.²⁵² As to social welfare, performance targets may improve substantive decisions. As to accountability, more auditing by organizations such as the GAO may be helpful.²⁵³ As to both, sunset provisions may foster accountability and prevent capture that undermines social welfare.²⁵⁴ If design decisions are made, however, without these goals in mind, boundary entities could operate in a manner that promotes neither goal.

C. *Application of Positive and Normative Theories to Movement of Organizations*

These theories, positive and normative, also apply to the movement of agencies, which is generally ignored by political scientists and administrative law scholars. Specifically, politicians typically do not expect movement (including agency termination) when designing an agency. In one standard account, agency structure (that is established *ex ante*) controls, at least in part, agency behavior *ex post*.²⁵⁵ If agency design and procedures are not durable, the political bargaining game may shift—players may reach a different outcome if the time horizon is shorter. In addition, if its “hardwiring” is softer than imagined, the agency's decisions as a normative matter may

²⁵⁰ KAREN M. HULT, AGENCY MERGER AND BUREAUCRATIC REDESIGN 3 (1987).

²⁵¹ Moe, *supra* note 38, at 305 (describing the shift away from the view that “accountability to political leadership and . . . due process in decision making trumps . . . performance and results”).

²⁵² Cf. Laura A. Dickinson, *Public Values/Private Contract* (listing suggestions for making privatization more accountable), in GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY 335 (Jody Freeman & Martha Minow eds., 2009).

²⁵³ See Anthony M. Bertelli, *Governing the Quango: An Auditing and Cheating Model of Quasi-Governmental Authorities*, 16 J. PUB. ADMIN. RES. & THEORY 239, 244-45 (2006) (analyzing the relationship between auditing requirements and expected levels of “cheating”).

²⁵⁴ See Stanton, *supra* note 76, at 843 (citing the sunset provisions of the First and Second Banks of the United States).

²⁵⁵ McCubbins et al., *supra* note 196, at 433.

become more or less desirable. For example, if, as David Lewis finds, “agencies insulated from presidential control are more durable than other agencies,” we might be more worried about their lack of accountability.²⁵⁶

On the positive (or predictive) side, agencies that shift structure tend to move from the center to the boundary, and any shift in this direction may reflect changes in preferences on both the political control and competence dimensions.²⁵⁷ On the political control dimension, the costs of more political control may increase relative to the benefits. In times of fiscal constraint, for example, the desire to push an agency off budget literally decreases the attractiveness of political control. On the competence dimension, changing party control of the political branches may increase support for more private agency structures, though there are considerable transaction costs attached to changing the structure of an existing agency.²⁵⁸ Typically, there needs to be something more—perhaps an incident of political mismanagement or failure in a particular area—to spur a shift away from political actors, no matter which party is in control.²⁵⁹

Though seemingly less common, agencies can also move from the boundary to the center. Such a change also indicates shifts on these two dimensions. On the political control dimension, the benefits of more political control may increase compared to the costs, possibly as a result of some crisis where voters will reward political actors for taking charge. On the competence dimension, as with movement toward the boundary, changing party control may generate support for restructuring. Again, an incident of mismanagement or failure—at the boundary—could help overcome transaction costs.

As with the creation of an agency, any movement of an agency may foster (or undermine) social welfare and democratic legitimacy. All of the above theories—positive and normative—implicitly assume the legality of boundary

²⁵⁶ Lewis, *supra* note 141, at 399. The results are a bit confusing. Government commissions, as a general group, are less durable than classic executive agencies. *Id.* at 395. But commissions with fixed terms and party-balancing requirements are “substantially more durable.” *Id.* at 395-96.

²⁵⁷ HULT, *supra* note 250, at 5; cf. B. Guy Peters, *Government Reorganization: A Theoretical Analysis*, 13 INT’L POL. SCI. REV. 199, 206 (1992) (summarizing another theory of government reorganization as a result of “social, economic or technological changes” (emphasis omitted)).

²⁵⁸ See James G. March & Johan P. Olson, *Organizing Political Life: What Administrative Reorganization Tells Us About Government*, 77 AM. POL. SCI. REV. 281, 281 (1983) (finding a number of piecemeal changes to agencies and very little comprehensive reorganization). This claim presumes that it is more likely that agency structure will shift toward the boundary when power shifts from Democrats to Republicans than agency structure will move toward the center when power shifts from Republicans to Democrats. Republicans may care more about government structure than Democrats, which would support such an assumption.

²⁵⁹ See LIGHT, *supra* note 194, at 188-89 (highlighting how making agency programs more private allowed the government programs to be saved in some form).

organizations. Yet law can also shape the positive constraints of agency design as well as the normative implications.²⁶⁰ The next Part takes up that topic.

III. LEGAL IMPLICATIONS OF BOUNDARY ORGANIZATIONS

Boundary agencies—with ties to the market, another sovereign, or another branch—are prevalent in the administrative state. Yet they are not easily defined in the law: for example, an agency for constitutional purposes does not mirror an agency for statutory purposes, and an entity can be an agency under one statute but not another. They also display some variation in terms of executive and congressional oversight. For these boundary agencies, labels have consequences, and the authority to label can be significant. But with Congress labeling agencies for many statutory commands, the courts determining constitutional (and, if Congress is not explicit, statutory) status, and the White House marking executive obligations, the result is often a confusing list of legal attributes for any given boundary organization. In short, an organization may be a government entity for some purposes but not for others.²⁶¹

Take Amtrak as an example. The Supreme Court accepted Congress's decision to exempt Amtrak from the APA,²⁶² and the D.C. Circuit extended that decision to exempt Amtrak from the False Claims Act.²⁶³ But the Supreme Court refused to defer to Congress when it came to constitutional obligations, finding Amtrak subject to the First Amendment.²⁶⁴ In July 2013, the D.C. Circuit held that “just because [the Supreme Court] treated Amtrak as a government agency for purposes of the First Amendment does not dictate the same result with respect to all other constitutional provisions.”²⁶⁵ The D.C. Circuit then concluded that Amtrak is a private entity for purposes of Congress's ability to delegate regulatory authority because of its power to “seek profit on behalf of private interests.”²⁶⁶ As such, the

²⁶⁰ Cf. Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1314-15 (2003) (calling for public law mandates to cover purely private entities performing government functions).

²⁶¹ Cf. Ronald C. Moe, *United States* (noting, incorrectly, that “[i]f the entity is not an agency of the United States [under Title 5], it comes under private law”), in *DISTRIBUTED PUBLIC GOVERNANCE: AGENCIES, AUTHORITIES AND OTHER GOVERNMENT BODIES* 243, 254 (Org. for Econ. Co-Operation & Dev. ed., 2002).

²⁶² See *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 392 (1995) (holding that Congress's decision was “dispositive of Amtrak's status as a Government entity for purposes of matters that are within Congress's control”).

²⁶³ *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 491-92 (D.C. Cir. 2004).

²⁶⁴ *Lebron*, 513 U.S. at 394, 400.

²⁶⁵ *Ass'n of Am. R.Rs. v. U.S. Dep't of Transp.*, 721 F.3d 666, 676 (D.C. Cir. 2013).

²⁶⁶ *Id.* at 677.

D.C. Circuit struck down part of the Passenger Rail Investment and Improvement Act of 2008 as an unconstitutional delegation.²⁶⁷

The Smithsonian Institution provides another useful example of the confusing legal status of boundary organizations. Courts have determined, sometimes in dicta, that it is a government entity entitled to sovereign immunity,²⁶⁸ a federal agency for purposes of the Federal Tort Claims Act (FTCA),²⁶⁹ an instrumentality of the federal government under the Federal Employment Compensation Act,²⁷⁰ and a designated federal entity under the Inspector General Act.²⁷¹ The OLC has added the Federal Property and Administrative Services Act to that list.²⁷² Courts have ruled, however, that it is not a federal agency for purposes of the Privacy Act²⁷³ or the APA.²⁷⁴ Furthermore, the Smithsonian does not have to meet state insurance and licensing requirements in seeking annuities.²⁷⁵ The OLC has concluded that because of the Smithsonian's "unique" nature, its status should be determined statute by statute.²⁷⁶

Amtrak and the Smithsonian are not unique in their ambiguity, as far as boundary organizations go. The Red Cross is immune from local taxes as a federal instrumentality but is not subject to FOIA.²⁷⁷ The Federal Deposit Insurance Corporation (FDIC) acts in various capacities, including as an insurer, regulator, receiver, and purchaser.²⁷⁸ In *O'Melveny & Myers v. FDIC*, the Supreme Court ruled that the FDIC, as a receiver, could not rely on federal common law.²⁷⁹ The Court remarked that "the FDIC is not the United States."²⁸⁰ Some lower courts have simply applied that statement directly so long as the FDIC is functioning as a receiver.²⁸¹ Other lower

²⁶⁷ *Id.*

²⁶⁸ *Expeditions Unlimited Aquatic Enters., Inc. v. Smithsonian Inst.*, 566 F.2d 289, 295, 296 app. A-1 (D.C. Cir. 1977) (panel opinion affirmed en banc and included in appendix).

²⁶⁹ *Id.* at 296 app. A-1.

²⁷⁰ *Dong v. Smithsonian Inst.*, 125 F.3d 877, 883 (D.C. Cir. 1997).

²⁷¹ *Id.*

²⁷² *Immunity of Smithsonian Inst. from State Ins. Laws*, 21 Op. O.L.C. 81, 82 (1997).

²⁷³ *Dong*, 125 F.3d at 879.

²⁷⁴ *Immunity of Smithsonian*, 21 Op. O.L.C. at 83.

²⁷⁵ *See id.* at 84 (explaining that a state may not regulate the United States directly and determining that application of state insurance laws to the Smithsonian would constitute direct regulation of the United States).

²⁷⁶ *Id.* at 86 n.7.

²⁷⁷ *United States v. City of Spokane*, 918 F.2d 84, 87-88 (9th Cir. 1990).

²⁷⁸ Adam Shajnfeld, *An Identity in Disarray: The Federal Deposit Insurance Corporation's Government-Agency Status*, 128 BANKING L.J. 36, 37-38 (2011).

²⁷⁹ 512 U.S. 79, 83 (1994) (noting the FDIC's special status is no reason to create a judicial exception to the post-*Erie* rule that state law governs).

²⁸⁰ *Id.* at 85.

²⁸¹ Shajnfeld, *supra* note 278, at 39.

courts have rejected such a broad reading of the statement.²⁸² The result: “the farrago of decisions regarding the FDIC’s identity—even without *O’Melveny’s* statement—are not conducive to distillation of any coherent rule.”²⁸³

Most recently, the DRBC has generated some important legal challenges. After the National Environmental Policy Act (NEPA), which requires federal agencies to assess environmental consequences of their actions, took effect in 1970, the DRBC issued regulations to comply.²⁸⁴ A decade later, the DRBC suspended its regulations for budgetary reasons—choosing to rely instead on traditional federal agencies to perform analyses for its projects—before formally repealing the regulations in 1997.²⁸⁵ In late September 2012, the Eastern District of New York ruled that although the APA did not cover the DRBC, the APA’s waiver of sovereign immunity did.²⁸⁶ By finding that the plaintiffs lacked standing, however, the court did not have to address a number of other difficult issues, including whether the DRBC is a federal agency.²⁸⁷

What becomes evident rather quickly is the lack of clear legal rules, even within a particular category of boundary organizations. For instance, in a recent survey of government corporations, the GAO had to rely on self-reports to determine which of fifteen statutes (including the APA and FOIA, among others) applied to each respondent.²⁸⁸ Some corporations complied with as few as two statutes; others with as many as fourteen.²⁸⁹ Although this lack of clarity may keep the OLC busy,²⁹⁰ it is not ideal for agency governance.

To be clear, flexibility in agency design has benefits. Government corporations may be the best choice for some situations; independent regulatory commissions are optimal for others. I do not take a position here on whether there are too many types of administrative entities,²⁹¹ but I do posit that within these basic agency types, clarity on legal obligations (particularly

²⁸² *Id.*

²⁸³ *Id.* at 41.

²⁸⁴ *New York v. U.S. Army Corps of Eng’rs*, 896 F. Supp. 2d 180, 185 (E.D.N.Y. 2012).

²⁸⁵ *Id.*

²⁸⁶ *Id.* at 184, 189.

²⁸⁷ *Id.* at 197-98.

²⁸⁸ U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 65, at 29-30, 34-37.

²⁸⁹ *Id.* at 34-37.

²⁹⁰ *See, e.g.*, Status of Nat’l Veterans Bus. Dev. Corp., 2004 WL 3554703, at *4-5 (O.L.C. Mar. 19, 2004) (considering whether the NVBDC is a government corporation).

²⁹¹ *Cf.* Henry E. Smith, *Standardization in Property Law* (noting and explaining the “closed number’ of property forms”), in RESEARCH HANDBOOK ON THE ECONOMICS OF PROPERTY LAW 148, 148 (Kenneth Ayotte & Henry E. Smith eds., 2011).

statutory mandates) could make the organization's performance more predictable and its oversight more consistent. Ex ante clarity on legal rules for organizations cannot be perfect, of course. Some boundary organizations generate judicial challenges, and the courts serve as an ex post agency designer, modifying agency structures to comport with legal mandates as the Supreme Court did in *Free Enterprise*.

In this Part, I consider first the constitutional and common law of boundary organizations, discussing their legality as well as their obligations and defenses. I then examine the most relevant statutes to these entities, including those governing jurisdiction in the federal courts and those targeting agency action. I also consider the applicability of other governance mechanisms, such as presidential directives, the budget process, and litigation authority. Finally, I use these boundary organizations to reconsider some classic issues in constitutional and administrative law.

A. Constitutional and Common Law Implications

The constitutional status of a federal agency, whether located centrally within the Executive Branch or more peripherally, depends on several core doctrines. The positive authority for creation is typically straightforward, but that authority must not infringe on the separation of powers, the nondelegation doctrine, and the Appointments Clause, among other principles. These constraints operate in conventional as well as surprising ways for boundary organizations.

1. Legality of Boundary Organizations

Under the Necessary and Proper Clause, Congress can enact laws needed to carry out its legislative powers,²⁹² which include the delegation of intelligible tasks to the administrative state. Specifically, Congress can create a range of agencies, including those at the federal government's boundaries, to carry out these functions.²⁹³ There are, however, constitutional limits on this power. I focus here on constraints rooted in general

²⁹² U.S. CONST. art. I, § 8, cl. 18.

²⁹³ See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 316 (1819) ("The power of establishing a corporation is not a distinct sovereign power or end of government, but only the means of carrying into effect other powers which are sovereign."); see also *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738, 771 (1824) ("All the powers of the government must be carried into operation by individual agency, either through the medium of public officers, or contracts made with individuals.").

separation of powers principles, the nondelegation doctrine, and the Appointments Clause.²⁹⁴

a. *Separation of Powers*

Under separation of powers principles, no single branch can aggrandize its power beyond what the Constitution permits. Relatedly, no branch can encroach on the authority of another branch. These principles are more relevant to boundary organizations at the interstices of the branches of the federal government than to entities at intergovernmental borders or the public-private divide. Indeed, many important separation of powers cases involve boundary organizations entirely within the federal government.²⁹⁵

Organizations at the Legislative Branch's borders seem to face the most skepticism under a separation of powers analysis. The original structures of the Federal Election Commission (FEC) and the MWAA, for instance, did not survive because of improper connections to Congress.²⁹⁶ And the structure of the GAO, where Congress controls removal of the agency's leader, prevented Congress from delegating executive authority to cut deficits to the GAO.²⁹⁷ More recently, the OLC warned that requirements that entities concurrently report to the President and Congress "impair the Constitution's 'great principle of unity and responsibility in the Executive

²⁹⁴ Another constraint would be Article III, particularly for federal-international adjudicatory entities. For example, the National Council for Industrial Defense filed a lawsuit arguing that the binational panels under the United States-Canada Free Trade Agreement (FTA) violate Article III. *Nat'l Council for Indus. Def., Inc. v. United States*, 827 F. Supp. 794 (D.D.C. 1993). The lawsuit was dismissed on jurisdictional grounds. *Id.* at 797. Compare Patrick Tangney, *The New Internationalism: The Cession of Sovereign Competences to Supranational Organizations and Constitutional Change in the United States and Germany*, 21 YALE J. INT'L L. 395, 447 (1996) (finding "the constitutionality of the FTA panels . . . highly questionable"), with Kristina Daugirdas, *International Delegations and Administrative Law*, 66 MD. L. REV. 707, 739 (2007) (finding no separation of powers issue). Under the Supreme Court's recent decision in *Stern v. Marshall*, which took a formalist approach to such questions in the bankruptcy context, such federal-foreign boundary organizations seem more at risk. See generally 131 S. Ct. 2594 (2011).

²⁹⁵ See, e.g., *Mistretta v. United States*, 488 U.S. 361, 396-97 (1989) (upholding congressional delegation of power to the Sentencing Commission); *Bowsher v. Synar*, 478 U.S. 714, 733-34 (1986) (invalidating Congress's delegation to an entity over which Congress exerted some control through removal).

²⁹⁶ *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 276-77 (1991) (finding that a provision creating a "Board of Review" composed of members of Congress with veto power over MWAA's decisions violated separation of powers principles); *Buckley v. Valeo*, 424 U.S. 1, 140-41 (1976) (per curiam) (holding that the composition of the FEC was improper because its members were "Officers of the United States" but not properly appointed under the Appointments Clause).

²⁹⁷ *Bowsher*, 478 U.S. at 732-34.

Department.”²⁹⁸ Obligations to multiple branches, particularly where one of those branches is Congress, could therefore impermissibly weaken another branch’s authority.

Removal restrictions imposed by statute on less conventional agencies have run into difficulty as well. For one, the Supreme Court struck down the bar on the SEC’s authority to remove PCAOB members.²⁹⁹ Additionally, the D.C. Circuit recently severed the for-cause restriction on the Librarian of Congress’s power to remove judges on the Copyright Royalty Board, an institution at the border of the Legislative and Executive Branches.³⁰⁰

While much attention is given to the branches’ attempts to expand their authority, it is sometimes in one branch’s interest to place a boundary entity squarely in another branch. For example, the OLC, which sits within the Department of Justice, recently emphasized that the GAO was a Legislative Branch agency in arguing that Congress had acquiesced to certain recess appointments that the Executive Branch wanted to defend. Specifically, the Comptroller General, the head of the GAO, ruled that the Pay Act permits compensation of those appointed “during periods when the Senate is not actually sitting and is not available to give its advice and consent . . . , irrespective of whether the recess . . . is attributable to a final adjournment *sine die* or to an adjournment to a specified date.”³⁰¹ By placing the GAO in the Legislative Branch, the OLC equated the Comptroller General’s Pay Act ruling with congressional acceptance of intrasession recess appointments.³⁰² The D.C. Circuit, however, dismissed this argument in striking down President Obama’s intrarecess appointments.³⁰³

As reflected above, boundary organizations help distinguish the two primary approaches to separation of powers questions. A formalist approach, which focuses on structural attributes in defining the constitutional boundaries

²⁹⁸ The Constitutional Separation of Powers Between the President and Cong., 20 Op. O.L.C. 124, 175 (1996) (quoting *Myers v. United States*, 272 U.S. 52, 131 (1926)).

²⁹⁹ *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3151 (2010); see also Peter Conti-Brown, *Is the Federal Reserve Constitutional?*, LIBR. L. & LIBERTY (Sept. 1, 2013), <http://www.libertylawsite.org/liberty-forum/is-the-federal-reserve-constitutional> (arguing that the Federal Open Market Committee, the part of the Federal Reserve Bank that sets monetary policy, is unconstitutional because the “President cannot remove members of the FOMC without reaching through two explicit for-cause removal restrictions, on top of a third layer of at-will removability”).

³⁰⁰ *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1340 (D.C. Cir. 2012).

³⁰¹ *Appointments—Recess Appointments*, 28 Comp. Gen. 30, 37 (1948).

³⁰² *Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions*, 2012 WL 168645, at *7 (O.L.C. Jan. 6, 2012).

³⁰³ *Canning v. NLRB*, 705 F.3d 490, 514 (D.C. Cir.), cert. granted, 133 S. Ct. 2861 (2013).

among the three branches,³⁰⁴ would find many boundary organizations problematic.³⁰⁵ By contrast, a functionalist approach, which considers practical effects on the balance of powers,³⁰⁶ would generally find them acceptable, though not always. The prevalence of boundary organizations therefore suggests that formalist jurisprudence, if adopted more extensively, could radically transform the administrative state.

b. *Nondelegation Doctrine*

There are two manifestations of the nondelegation doctrine. First, Congress cannot delegate legislative authority to another branch. So long as Congress provides an “intelligible principle” to guide its delegation of authority to a government actor, there is no delegation of legislative authority.³⁰⁷ This manifestation does not affect boundary organizations any differently than other organizations. Second, Congress cannot delegate significant authority to a private actor.³⁰⁸ This manifestation, by contrast, does affect boundary organizations differently. The difference had, however,

³⁰⁴ John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1958 (2011).

³⁰⁵ See KU & YOO, *supra* note 22, at 74-75 (finding separation of powers problems with international organizations); Ronald J. Krotoszynski, Jr., *Cooperative Federalism, the New Formalism, and the Separation of Powers Revisited: Free Enterprise Fund and the Problem of Presidential Oversight of State-Government Officers Enforcing Federal Law*, 61 DUKE L.J. 1599, 1618-29 (2012) (suggesting that, if *Free Enterprise* is read to require presidential control over execution of all federal law, cooperative federalism programs are likely unconstitutional).

³⁰⁶ Manning, *supra* note 304, at 1951-52.

³⁰⁷ *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 472 (2001).

³⁰⁸ *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936). Some argue that Congress also cannot delegate to international bodies. Ku, *supra* note 22, at 121; cf. *Natural Res. Def. Council v. EPA*, 464 F.3d 1, 9 (D.C. Cir. 2006) (“The legal status of ‘decisions’ of this sort appears to be a question of first impression. There is significant debate over the constitutionality of assigning lawmaking functions to international bodies. A holding that the Parties’ post-ratification side agreements [under the Montreal Protocol] were ‘law’ would raise serious constitutional questions in light of the nondelegation doctrine, numerous constitutional procedural requirements for making law, and the separation of powers.” (internal citations omitted)). Alexander Volokh has recently argued that *Carter Coal* should be seen as a due process—not as a nondelegation—decision. Alexander Volokh, *The New Private-Regulation Skepticism: Nondelegation, Due Process, and Antitrust Challenges*, HARV. J.L. & PUB. POL’Y (forthcoming) (manuscript at 35, 37), available at <http://papers.ssrn.com/id=2335659>. Under his reasoning, the D.C. Circuit reached the right result but with the wrong reasoning. *Id.* (manuscript at 41). This argument would make any agency that considers profit motives potentially unconstitutional. *Id.*; see also Froomkin, *supra* note 13, at 575 (noting that the delegation label for *Carter Coal* is “misleading” because, rather than relying on separation of powers, the doctrine “seeks to prevent private individuals from judging or regulating their own causes”).

long been a theoretical one. The *Carter Coal* decision that established the rule dated to 1935 and was considered a “dormant” doctrine until summer 2013.³⁰⁹

In July 2013, the D.C. Circuit struck down section 207 of the Passenger Rail Investment and Improvement Act of 2008 for delegating legislative authority to Amtrak, which it determined to be a private entity.³¹⁰ Section 207 mandates that Amtrak and the Federal Railroad Administration “jointly . . . develop new or improve existing metrics and minimum standards for measuring the performance and service quality of intercity passenger train operations.”³¹¹

The decision is an odd one—a second attempt, perhaps, at reviving the nondelegation doctrine, this time in its private manifestation. The D.C. Circuit conceded that “[m]any of the details of Amtrak’s makeup support the government’s position that it is not a private entity of the sort described in *Carter Coal*.”³¹² Most critically, the Supreme Court held in *Lebron v. National Railroad Passenger Corp.* that Amtrak was a governmental actor for the purposes of the First Amendment.³¹³ The D.C. Circuit, however, pointed to Amtrak’s corporate characteristics (including that, “somewhat tellingly, Amtrak’s website is www.amtrak.com—not www.amtrak.gov”).³¹⁴ The court distinguished *Lebron*:

Just as it is impermissible for Congress to employ the corporate form to sidestep the First Amendment, neither may it reap the benefits of delegating regulatory authority while absolving the federal government of all responsibility for its exercise. The federal government cannot have its cake and eat it too. In any event, *Lebron*’s holding was comparatively narrow, deciding only that Amtrak is an agency of the United States for the purpose of the First Amendment. It did not opine on Amtrak’s status with respect to the federal government’s structural powers under the Constitution—the issue here.³¹⁵

³⁰⁹ See, e.g., Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1440 (2003) (“[W]hile *Carter*’s constitutional prohibition on private delegations thus remains alive in theory, it is all but dead in practice.”); see also *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 388 (1940) (permitting private parties to propose regulations); *Currin v. Wallace*, 306 U.S. 1, 15 (1939) (upholding the Tobacco Inspection Act where Congress conditioned regulations by the Secretary of Agriculture in a given market on approval by “two-thirds of the growers voting”); *Ku*, *supra* note 22, at 120 (“[W]ith a few exceptions in the now distant past, courts have refused to adopt a formalist analysis of delegations from the federal government to non-federal actors.”).

³¹⁰ *Ass’n of Am. R.Rs. v. U.S. Dep’t of Transp.*, 721 F.3d 666, 674-77 (D.C. Cir. 2013).

³¹¹ Passenger Rail Investment and Improvement Act of 2008, Pub. L. No. 110-432, § 207(a), 122 Stat. 4907, 4916.

³¹² *Ass’n of Am. R.Rs.*, 721 F.3d at 674.

³¹³ 513 U.S. 374, 397 (1995).

³¹⁴ *Ass’n of Am. R.Rs.*, 721 F.3d at 675.

³¹⁵ *Id.* at 676-77 (citation omitted).

Even putting aside the machinations the court went through to distinguish *Lebron*, it seems a stretch to liken Amtrak to a purely private entity, which is a course the court had to take to strike down the statute under *Carter Coal*. The Internet Corporation for Assigned Names and Numbers (ICANN), assuming the Commerce Department does not retain control over its decisions, seems more susceptible to a nondelegation doctrine challenge under *Carter Coal*.³¹⁶

The D.C. Circuit's attempted revival of the second nondelegation doctrine depends on a formalist approach. Under this approach, delegations of regulatory authority to entities at the public-private, federal-state, and federal-international boundaries could be questioned.³¹⁷ Gillian Metzger's theory on purely private entities might provide a middle ground between eliminating large portions of the administrative state and permitting vast delegations to quasi-federal entities. Metzger proposes that if "delegation creates an agency relationship between the private actor and the government," courts would need to "assess whether the delegation is adequately structured to preserve constitutional accountability."³¹⁸ This approach could work for boundary organizations as well.³¹⁹

c. *Appointments Clause*

Under the Appointments Clause, the President must nominate, with Senate confirmation, all principal officers.³²⁰ The Clause allows Congress to alter this mandate for inferior officers by assigning appointment power in "the President alone, in the Courts of Law, or in the Heads of Departments."³²¹ Because the leaders of boundary organizations are often selected in less typical ways than officials of classic agencies—for instance by shareholders or states—these organizations highlight some critical questions.

³¹⁶ See Froomkin, *Wrong Turn*, *supra* note 20, at 148-50 (noting major similarities between ICANN and the Bituminous Coal Conservation Act at issue in *Carter Coal*).

³¹⁷ See Common Legislative Encroachments on Executive Branch Authority, 13 Op. O.L.C. 248, 250 (1989) ("One of the gravest new threats to executive branch power is Congress's growing penchant for assigning the executive power to persons who are not part of the executive branch."), *superseded by* The Constitutional Separation of Powers Between the President and Cong., 20 Op. O.L.C. 124, 124 (1996).

³¹⁸ Metzger, *supra* note 309, at 1486.

³¹⁹ This subsection has focused on congressional delegation to a boundary organization. A related doctrine, subdelegation, addresses agency delegation to such entities. See *Defenders of Wildlife v. Gutierrez*, 532 F.3d 913, 927 (D.C. Cir. 2008) (recognizing that the Coast Guard could not subdelegate to the International Maritime Organization without evidence of congressional intent).

³²⁰ U.S. CONST. art. II, § 2, cl. 2.

³²¹ *Id.*

First, boundary entities lead to prominent disagreements about who qualifies as an officer. There is consensus that exercising significant federal authority is a necessary condition for being an officer. But what happens when that authority is wielded by an international, state, or private official?³²² In one view, propounded by the Clinton Administration, “[t]he Appointments Clause simply is not implicated when significant authority is devolved upon non-federal actors,”³²³ such as state officials or private parties. In another view, propounded by the George H.W. Bush Administration, the Clause could come into play.³²⁴ The governing OLC view is that “a position, however labeled, is in fact a federal office if (1) it is invested by legal authority with a portion of the sovereign powers of the federal Government, and (2) it is ‘continuing.’”³²⁵ The text seems open to either view described above, but the OLC memorandum makes clear that contractors and state officials are ordinarily excluded.³²⁶ Contractors seem to be an easier case than state officials, under the OLC’s reasoning.³²⁷

Following the Clinton Administration’s view, the Ninth Circuit ruled that state officials on the Pacific Northwest Electric Power Conservation Planning Council (an organization formed by an interstate compact) are not officers, regardless of whether they exercise federal power.³²⁸ Similarly, the “members of multinational or international entities who are not appointed to represent the United States” are not officers.³²⁹ Under the senior Bush Administration’s view, however, these officials would be officers if they apply

³²² See *Ku*, *supra* note 22, at 117-18 (noting that the Supreme Court has not resolved this question).

³²³ *The Constitutional Separation of Powers Between the President and Cong.*, 20 *Op. O.L.C.* 124, 145 (1996).

³²⁴ See Paul R. Verkuil, *Outsourcing and the Duty to Govern*, in *GOVERNMENT BY CONTRACT*, *supra* note 252, at 310, 318.

³²⁵ *Officers of the United States Within the Meaning of the Appointments Clause*, 2007 WL 1405459, at *1 (O.L.C. Apr. 16, 2007).

³²⁶ *Id.* at *18, *20.

³²⁷ *Id.* (“[A]lthough it is true as a general matter that contractors do not hold an office under the United States, the reason for that (in most cases) is that they do not exercise any delegated sovereign authority. . . . [S]tate officers ordinarily do not possess delegated sovereign authority of the federal Government, even when they assist in the administration of federal law. . . . State officers, even when enforcing federal law, generally exercise the sovereign law enforcement authority of *their State*, ultimately delegated by the people of that State; if they hold any office, they are officers of their State or locality, not of the United States. They hold authority independently of a delegation from the federal Government, and they and those who appoint them are accountable for their actions to the people of the State.”).

³²⁸ *Seattle Master Builders Ass’n v. Pac. Nw. Elec. Power & Conservation Planning Council*, 786 F.2d 1359, 1364-66 (9th Cir. 1986).

³²⁹ *The Constitutional Separation of Powers*, 20 *Op. O.L.C.* at 146.

federal law.³³⁰ To the extent that nonvoting members wield significant authority, this issue also arises in the recent Dodd–Frank legislation.³³¹ That Act created the FSOC, tasked with regulating risks to financial stability. The FSOC’s structure has generated an Appointments Clause challenge because three of the five nonvoting members are state officials.³³²

Even under the Clinton Administration’s view, federal actors exercising significant federal authority at the boundary must meet the requirements of the Appointments Clause.³³³ Boundary organizations can create two different (but related) legal disputes for these requirements: determining whether their officials are federal officials and, if so, whether they exercise sufficient federal power. While directors of corporations owned entirely by the government seem to be federal, directors of corporations only partially owned by the government may not be.³³⁴ The OLC, for example, determined that the directors of the Communications Satellite Corporation, a privately owned government corporation that later merged with Lockheed Martin, were not federal actors—and therefore were not subject to the Appointments Clause.³³⁵

It can also be difficult to determine if officials (assuming they are federal) exercise enough federal power to fall under the Appointments Clause. In striking down the Board of Review in the original design of the MWAA, the court determined that, although the states had created it through a compact, the Board exercised significant federal power.³³⁶ Significant authority is a separate requirement, and the state officials serving on the FSOC may fail to meet the first Bush Administration’s definition of officers on that ground.

A second question boundary organizations raise under the Appointments Clause is what counts as a department. As a starting point, a department

³³⁰ See Jim C. Chen, *Appointments with Disaster: The Unconstitutionality of Binational Arbitral Review Under the United States–Canada Free Trade Agreement*, 49 WASH. & LEE L. REV. 1455, 1481–82 (1992) (discussing the applicability of the Appointments Clause to the panelists on a binational panel).

³³¹ See *supra* note 121.

³³² Complaint for Declaratory and Injunctive Relief at paras. 89–91, 132, *State Nat’l Bank of Big Spring v. Geithner*, 2013 WL 3945027 (D.D.C. 2013) (No. 12–1032), 2012 WL 2365284.

³³³ As discussed below, if any entity is seen as part of the federal government for the Bill of Rights, it should arguably also be seen as part of the federal government for structural mandates. *The Constitutional Separation of Powers*, 20 Op. O.L.C. at 148 n.70.

³³⁴ See Breger & Edles, *supra* note 31, at 1228–29 (describing the differences between wholly owned federal government corporations and mixed-ownership corporations).

³³⁵ *Comm’n’s Satellite Corp.*, 42 Op. Att’y Gen. 165 (1962).

³³⁶ *Hechinger v. Metro. Wash. Airports Auth.*, 845 F. Supp. 902, 907–08 (D.D.C.), *aff’d*, 36 F.3d 97 (D.C. Cir. 1994).

must be executive in nature.³³⁷ The D.C. Circuit recently ruled that judges on the Copyright Royalty Board are proper inferior officers if the Librarian of Congress, who appoints them, can remove them at will.³³⁸ Although the decision focused on the statutory removal restriction, which the court struck down, it also relied on a determination that the Librarian of Congress was a proper head of a department who could appoint an inferior officer.³³⁹ The Library of Congress, however, is not listed as part of the Executive Branch in any official classification. Many, including the OLC, label the Library of Congress a legislative agency.³⁴⁰

To reach its holding that the Librarian was a proper head of a department under the Appointments Clause, the court reasoned that, while the Library performs some legislative tasks, the President's power to appoint and remove the Librarian and the Library's power to promulgate copyright regulations make it a "component of the Executive Branch."³⁴¹ The court had to rely on classifying functions: an agency can, in this view, be an executive department for some purposes but not for others.³⁴²

Third (and connected to the second point), boundary organizations raise questions about who counts as a head of a department under the Appointments Clause. To uphold the leadership structure of the USPS, the Ninth Circuit had to find that the Postmaster General and Deputy Postmaster General were inferior officers and that the nine governors appointed by the President and confirmed by the Senate were the head of the USPS.³⁴³ For the Postmaster General, selected by the nine governors, the reasoning rests on deeming the nine governors the head of the department even though the Postmaster General has an equal vote (to each Governor) on decisions. The court found that because the Postmaster General is "the management alter ego" of the governors, "the structure of the organization and the nature of

³³⁷ See *Buckley v. Valeo*, 424 U.S. 1, 127 (1976) (per curiam) (noting that "neither Congress nor its officers were included within the language 'Heads of Departments'" in the Appointments Clause).

³³⁸ *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1340-41 (D.C. Cir. 2012).

³³⁹ *Id.* at 1341-42.

³⁴⁰ See *The Constitutional Separation of Powers Between the President and Cong.*, 20 Op. O.L.C. 124, 172 (1996) ("Most of the functions undertaken by the Library of Congress . . . can comfortably be described as in aid of the legislative process.").

³⁴¹ *Intercollegiate Broad. Sys.*, 684 F.3d at 1341-42; see also *Keeffe v. Library of Cong.*, 777 F.2d 1573, 1574 (D.C. Cir. 1985) (referring to the Library of Congress as a "congressional agency").

³⁴² Cf. Statement on Signing the Consolidated Appropriations Act, 2012, 2011 DAILY COMP. PRES. DOC. 966 (Dec. 23, 2011) (refusing to comply with a statutory provision conditioning funds to the Library of Congress on use by "the Copyright Office, which performs an executive function in administering the copyright laws").

³⁴³ *Silver v. U.S. Postal Serv.*, 951 F.2d 1033, 1038-41 (9th Cir. 1991) (per curiam).

his position place clear boundaries on how this vote can be cast.”³⁴⁴ For the Deputy Postmaster General, selected by the nine governors and the Postmaster General, the reasoning is more complicated—the Postmaster General’s involvement in selection must be seen not to disturb the earlier reasoning.³⁴⁵ The boundary nature of the USPS thus makes the analysis quite complicated.³⁴⁶

There are other related issues. Boundary organizations also generate confusion under the Federal Vacancies Reform Act of 1998, which governs how President-appointed, Senate-confirmed positions can be filled with temporary acting officials.³⁴⁷ According to the OLC, the U.S. representatives to the IBRD and to the International Monetary Fund are not covered by the Act but the U.S. Permanent Representative to the United Nations is.³⁴⁸ In addition, certain boundary organizations seem particularly prone to confirmation battles, resulting in large numbers of recess appointments.³⁴⁹

2. Obligations and Defenses of Boundary Organizations

Many constitutional obligations apply only to state actors. All-government entities, whether boundary organizations or not, easily qualify as state actors. Only boundary organizations at the government–nongovernment divide present challenges. The primary question for boundary organizations at the public–private border, therefore, is whether they are sufficiently public to fall under the obligations imposed on, and defenses provided to, government actors.

³⁴⁴ *Id.* at 1040–41.

³⁴⁵ *Id.*

³⁴⁶ *See id.* at 1044 (O’Scannlain, J., dissenting) (“Congress could not have intended nine members of the Board to be the head of department for Appointments Clause purposes while intending all eleven members to be head of department for purposes of running the Postal Service.”). Similar issues seem to arise with the FOMC. *See* Conti-Brown, *supra* note 299.

³⁴⁷ The Act applies to “an Executive department, a Government corporation, and an independent establishment,” but excludes members of FERC, the Surface Transportation Board, and a “board, commission, or similar entity that . . . is composed of multiple members[] and . . . governs an independent establishment or Government corporation.” 5 U.S.C. §§ 105, 3349c (2012).

³⁴⁸ *See* Applicability of the Fed. Vacancies Reform Act to Vacancies at the Int’l Monetary Fund and the World Bank, 24 Op. O.L.C. 58, 58, 61 (2000).

³⁴⁹ *See* CONG. RESEARCH SERV., RECESS APPOINTMENTS BY PRESIDENT CARTER, JANUARY 20, 1977–JANUARY 20, 1981 (1984); Neil A. Lewis, *Still No End to Turmoil at Legal Services*, N.Y. TIMES, Dec. 31, 1990, at 10 (discussing the senior Bush Administration’s appointments to the Legal Services Corporation).

a. *Obligations*

The Supreme Court has acknowledged that the analysis of when the actions of boundary and other entities are governmental actions has “not been a model of consistency.”³⁵⁰ The Supreme Court, for example, split as to whether the United States Olympic Committee (USOC) was covered by the Equal Protection Clause.³⁵¹ In that case, the majority ruled that the USOC was not a government actor under the Constitution.³⁵² Specifically, the Court noted that the boundary organization managed “amateur sports,” a nontraditional function, and that the government did not exercise sufficient control over it.³⁵³ Four justices, however, found the entity to be a governmental actor. They believed the USOC was sufficiently governmental because, among other factors, “it represents this Nation to the world community” and the federal government was involved in its decision to boycott the 1980 Olympic Games.³⁵⁴

In *Lebron v. National Railroad Passenger Corporation*, however, a divided Supreme Court ruled that Amtrak was an instrumentality of the United States “for the purpose of individual rights guaranteed against the Government by the Constitution.”³⁵⁵ This holding conflicted with the statute creating Amtrak, which explicitly stated that Amtrak was not a government agency.³⁵⁶ The Court recounted the history of government corporations, concluding that these entities had been considered part of the government.³⁵⁷ The Court also noted a series of factors that constitutionally tied Amtrak to the government. First, Amtrak was created by a special statute explicitly to further federal governmental objectives.³⁵⁸ Second, its leadership structure had considerable ties to the Executive Branch. At that time, the President directly appointed six of the nine directors, four with Senate confirmation; the Secretary of Transportation chose two, and the last was the President of Amtrak, chosen by the other directors.³⁵⁹ In sum, the Court

³⁵⁰ *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374, 378 (1995).

³⁵¹ *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 542-43 (1987).

³⁵² *Id.* at 542-47.

³⁵³ *Id.* at 545-47.

³⁵⁴ *Id.* at 550, 552 (Brennan, J., dissenting).

³⁵⁵ 513 U.S. at 394.

³⁵⁶ *Id.* at 391.

³⁵⁷ *Id.* at 387-94.

³⁵⁸ *Id.* at 397; *see also* Beermann, *supra* note 20, at 178 (“It is difficult to imagine a government corporation that is not formed to advance a governmental policy. While some policies might seem somewhat peripheral, such as the United States Olympic Committee’s function of administering the United States’ entries in the Olympic Games, it would seem difficult for courts to distinguish between government corporations that advance government policies and those that do not.”).

³⁵⁹ *Lebron*, 513 U.S. at 397.

held that “where . . . the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment.”³⁶⁰

The next year, the Supreme Court declined to hear a case where the Ninth Circuit held that Freddie Mac was not a state actor under the Constitution.³⁶¹ The Ninth Circuit determined that although “Freddie Mac’s purposes are ‘federal governmental objectives[,]’ . . . the level of government control over the corporation is so much lower than that exercised over Amtrak.”³⁶² Unlike Amtrak, where the government chooses most of the directors, shareholders choose thirteen of Freddie Mac’s eighteen directors.³⁶³ In the Ninth Circuit decision, each factor of the *Lebron* analysis was necessary for constitutional obligations to attach. Some courts have followed that approach,³⁶⁴ while others have focused on particular prongs.³⁶⁵ A holistic approach might yield more consistent outcomes.³⁶⁶

Even if an entity is not a state actor, it could still be liable under the Constitution if its actions are state actions.³⁶⁷ Thus, courts confronting a constitutional challenge to a boundary organization must first determine whether the entity is a state actor, and, if not, turn to whether the challenged

³⁶⁰ *Id.* at 400. Lower courts had reached different results about other government corporations before the *Lebron* decision. *See, e.g.,* *Tex. Rural Legal Aid, Inc. v. Legal Servs. Corp.*, 940 F.2d 685, 699 (D.C. Cir. 1991) (“LSC, which is entrusted with the duty to administer a federal statute and to interpret its terms, is a state actor for First Amendment purposes when it issues regulations pursuant to that statute.”); *Warren v. Gov’t Nat’l Mortg. Ass’n*, 611 F.2d 1229, 1232-35 (8th Cir. 1980) (“Since federal government regulation was not directly and substantially linked to the challenged foreclosure activity complained of by plaintiff and at issue here, no ‘federal government action’ exists and plaintiff has no cognizable constitutional claim under the fifth amendment.”).

³⁶¹ *Am. Bankers Mortg. Corp. v. Fed. Home Loan Mortg. Corp.*, 75 F.3d 1401, 1406 (9th Cir.), *cert. denied*, 519 U.S. 812 (1996).

³⁶² *Id.* at 1407-09.

³⁶³ *Id.* at 1407.

³⁶⁴ *See, e.g.,* *Hack v. President & Fellows of Yale Coll.*, 16 F. Supp. 2d 183, 188 (D. Conn. 1998) (following the *Lebron* approach); *see also* *Abu-Jamal v. Nat’l Pub. Radio*, 1997 WL 527349, at *4 (D.D.C. Aug. 21, 1997) (“At least two circuits have held, or at least presumed, that all three *Lebron* prongs need be met for private corporations to be considered governmental actors.”).

³⁶⁵ *See, e.g.,* *Barrios-Velazquez v. Asociacion de Empleados del Estado Libre Asociado de Puerto Rico*, 84 F.3d 487, 492 (1st Cir. 1996) (discussing application of the third prong); *Abu-Jamal*, 1997 WL 527349, at *4 (same).

³⁶⁶ *Beermann, supra* note 20, at 179.

³⁶⁷ *See* *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352 (1974) (explaining that state action may occur if an entity provides an “essential public service”).

action is state action.³⁶⁸ The two analyses are similar but not identical. Until recently, some courts considered the following factors in determining whether action by a private entity qualified as state action: “(1) the nexus between the government and the challenged action, (2) whether the alleged government actor performed functions traditionally reserved to the government, and (3) whether the government coerced or encouraged the challenged action.”³⁶⁹

In 2001, the Supreme Court ignored these tests for state action and applied a seemingly new test in analyzing whether the Tennessee Secondary School Athletic Association, a “statewide association incorporated to regulate interscholastic athletic competition among public and private secondary schools,” could be sued for constitutional violations after placing a school’s athletic program on probation and barring two teams from competition.³⁷⁰ The majority found this conduct constituted state action because “[t]he nominally private character of the Association [was] overborne by the pervasive entwinement of public institutions and public officials in its composition and workings.”³⁷¹ The dissent noted the new test³⁷² but argued a multifactor test should be used instead.³⁷³ This decision leaves lower courts with more factors to consider. The Second Circuit subsequently noted that there was “no single test” but rather a “host of facts” that might justify holding an entity liable for constitutional violations.³⁷⁴ The multifactor approach fits more comfortably with functionalist approaches to constitutional questions.

More generally, *Lebron* means that boundary organizations potentially face two complicated analyses: whether they are part of the state and, if not, whether they engage in state action. The courts, not Congress, determine a boundary organization’s status for constitutional obligations. Yet Congress

³⁶⁸ See, e.g., *Barrios-Velazquez*, 84 F.3d at 492-95 (finding that AEELA is neither a state actor nor engaged in state action); *Am. Bankers*, 75 F.3d at 1406, 1410-11 (holding that Freddie Mac is neither a state actor nor engaged in state action); *Hack*, 16 F. Supp. 2d at 192 (finding that Yale is neither a state actor nor engaged in state action). Sometimes, courts call the former analysis the “structural” analysis and the latter analysis the “functional” analysis. *Hall v. Am. Nat’l Red Cross*, 86 F.3d 919, 921-22 (9th Cir. 1996). With boundary entities, both questions are meaningful. Cf. *Nat’l Collegiate Athletic Ass’n v. Tarkanian*, 488 U.S. 179 (1988) (focusing on the state action question with no examination of the state actor issue for non-boundary organization); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 930 (1982) (same).

³⁶⁹ *Hall*, 86 F.3d at 922.

³⁷⁰ *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 288, 290 (2001).

³⁷¹ *Id.* at 298.

³⁷² *Id.* at 305 (Thomas, J., dissenting).

³⁷³ *Id.* at 309-11.

³⁷⁴ *Cooper v. U.S. Postal Serv.*, 577 F.3d 479, 491 (2d Cir. 2009).

can assign statutory obligations.³⁷⁵ The result, therefore, is that Amtrak is an agency for the First Amendment but not for the APA, the False Claims Act, and perhaps the nondelegation doctrine. If Congress does not expressly exclude a boundary organization from the APA or a similar statute, however, the organization's constitutional status as a government agency generally determines its statutory status as well. These issues are not just theoretical; they are raised in recent litigation.³⁷⁶

b. *Defenses*

In addition to constitutional obligations, boundary organizations present interesting questions about governmental defenses. Such defenses include special protections (such as deliberative process) within litigation and immunity from suit (and from state law obligations). In recent years, the Supreme Court and U.S. Courts of Appeals have wrestled with a number of these issues.

One significant question is whether an entity has immunity from suit under the Eleventh Amendment. Agencies formed by interstate compacts have generated two Supreme Court cases. In *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, the Supreme Court refused to apply sovereign immunity to the compact agency:

Unless there is good reason to believe that the States structured the new agency to enable it to enjoy the special constitutional protection of the States themselves, and that Congress concurred in that purpose, there would appear to be no justification for reading additional meaning into the limited language of the Amendment.³⁷⁷

In *Hess v. Port Authority Trans-Hudson Corp.*, the Court also refused to give the compact agency the protection of the Eleventh Amendment, pointing out that the relevant states "lack financial responsibility for the Port Authority" and "bear no legal liability for Port Authority debts."³⁷⁸ Yet

³⁷⁵ The Court made a similar distinction in the ACA case, between a tax for constitutional purposes and a tax for the Anti-Injunction Act. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2583 (2012).

³⁷⁶ Another recent constitutional challenge to a boundary organization was Lance Armstrong's lawsuit against the U.S. Anti-Doping Agency for due process violations in conducting its investigation and releasing its findings. Complaint and Jury Demand at paras. 4, 9, *Armstrong v. Tygart*, 886 F. Supp. 2d 572 (W.D. Tex. 2012) (No. 12-0606), 2012 WL 2688774. The district court dismissed the complaint but did not decide the agency's constitutional status. *Armstrong*, 886 F. Supp. 2d at 591.

³⁷⁷ 440 U.S. 391, 401 (1979).

³⁷⁸ 513 U.S. 30, 45-46 (1994).

the Court did not rule out that other compact agencies could qualify for such protection. The D.C. Circuit has held, for instance, that the Washington Metropolitan Area Transit Authority has sovereign immunity from suit.³⁷⁹ This issue also arises frequently for public–private boundary organizations at the state level. In July 2013, for example, the Sixth Circuit barred the Municipal Gas Authority of Georgia from claiming sovereign immunity in a dispute over the price of natural gas.³⁸⁰

Similar questions arise regarding federal immunity for government corporations and other public–private entities. The D.C. Circuit ruled that the American Institute in Taiwan, “a unique entity through which the United States performs consular services on Taiwan and conducts commercial, cultural, and other relations with the people on Taiwan, enjoys sovereign immunity from a *qui tam* suit brought by the Institute’s former Managing Director.”³⁸¹ Likewise, the D.C. Circuit ruled that Federal Prisons Industries, Inc., a government corporation, is entitled to sovereign immunity, absent congressional waiver.³⁸² The Third Circuit, by contrast, ruled that the “Red Cross does not share sovereign immunity with the United States such that jury trials in personal injury suits would be inconsistent with, or interfere with, the role outlined in the organization’s charter.”³⁸³ Other related questions include whether public–private organizations are immune from federal antitrust laws,³⁸⁴ and whether public–private entities are immune from local taxation as instrumentalities of the United States.³⁸⁵

³⁷⁹ *Morris v. Wash. Metro. Area Transit Auth.*, 781 F.2d 218, 222 (1986).

³⁸⁰ *Town of Smyrna v. Mun. Gas Auth. of Ga.*, 723 F.3d 640, 650 (6th Cir. 2013). *See also* *United States ex rel. Lesinski v. S. Fla. Water Mgmt. Dist.*, 739 F.3d 598, 602–05 (11th Cir. 2014) (holding that the South Florida Water Management District was an “arm of the state” entitled to immunity); *United States ex rel. King v. Univ. of Tex. Health Sci. Ctr. at Houston*, 2013 WL 5881083, at *8–9 (5th Cir. Nov. 4 2013) (finding the University of Texas Health Science Center to be an “arm of the state” entitled to immunity from False Claims Act suits).

³⁸¹ *Wood ex rel. U.S. v. Am. Inst. in Taiwan*, 286 F.3d 526, 528 (D.C. Cir. 2002).

³⁸² *Galvan v. Fed. Prison Indus., Inc.*, 199 F.3d 461, 463 (D.C. Cir. 1999).

³⁸³ *Marcella v. Brandywine Hosp.*, 47 F.3d 618, 624 (3d Cir. 1995).

³⁸⁴ *See, e.g., Fed. Trade Comm’n v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003, 1010 (2013) (“[W]e recognize state-action immunity only when it is clear that the challenged anticompetitive conduct is undertaken pursuant to a regulatory scheme that ‘is the State’s own.’”); *see also* Volokh, *supra* note 308, (manuscript at 43–60) (discussing division among the Courts of Appeals on antitrust challenges to state regulatory boards (such as the North Carolina Board of Dental Examiners), a form of boundary organization). The Supreme Court recently agreed to hear a case involving the North Carolina quasi agency. *N.C. Bd. of Dental Exam’rs v. Fed. Trade Comm’n*, No. 13–534, 82 U.S.L.W. 3260 (2013), *granting cert. to* *N.C. State Bd. of Dental Exam’rs v. Fed. Trade Comm’n*, 717 F.3d 359 (4th Cir. 2013).

³⁸⁵ *See, e.g., United States v. City of Spokane*, 918 F.2d 84, 88 (9th Cir. 1990) (holding that the American Red Cross was not subject to local taxation).

Additionally, certain boundary officials who do not qualify as officers under the Appointments Clause may still be entitled to protections under the qualified immunity doctrine. This doctrine, which prevents government and some other officials from having to defend their actions in court, “protect[s] government’s ability to perform its traditional functions.”³⁸⁶ It rests on several specific policy concerns acknowledged by a number of courts. First and most important, immunity from suit avoids “‘unwarranted timidity’ on the part of those engaged in the public’s business.”³⁸⁷ Second, it “ensure[s] that talented candidates [are] not deterred by the threat of damages suits from entering public service.”³⁸⁸ Third, it prevents litigation from distracting these talented employees from their duties.³⁸⁹ In trying to determine whether actors qualify for such immunity, the Supreme Court has emphasized the actors’ objectives. If “working for the government in pursuit of government objectives,” the actors are “principally concerned with enhancing the public good” and are much more likely to get immunity.³⁹⁰

B. Statutory Implications

The statutory landscape for classic executive agencies and independent regulatory commissions is clear: To put it simply, they are federal agencies under most statutory definitions of an agency. Thus, they are federal agencies able to sue in federal court and are subject to the APA (and FOIA). By contrast, the picture for boundary organizations other than regulatory commissions is anything but clear. In a report on government corporations and some other boundary entities, the GAO needed four pages of charts to explain which of fifteen statutes the entities *reported* they complied with.³⁹¹

This Section looks at the complicated legal terrain surrounding whether boundary organizations can sue or be sued in federal court and whether they must follow the APA and FOIA.³⁹²

³⁸⁶ *Wyatt v. Cole*, 504 U.S. 158, 167 (1992).

³⁸⁷ *Filarsky v. Delia*, 132 S. Ct. 1657, 1669 (2012).

³⁸⁸ *Id.* at 1659 (second alteration in original).

³⁸⁹ *Richardson v. McKnight*, 521 U.S. 399, 411 (1997).

³⁹⁰ *Filarsky*, 132 S. Ct. at 1667.

³⁹¹ U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 65, at 34-37.

³⁹² In addition to the statutes considered by the GAO and the National Environmental Policy Act, boundary organizations also present interesting questions under criminal law. *See, e.g.*, 18 U.S.C. § 201 (2012) (defining who is a public official for purposes of “[b]ribery of public officials and witnesses”); *Id.* § 666 (defining who is an agent for purposes of “[t]heft or bribery concerning programs receiving Federal funds”).

1. Federal Court Jurisdiction

While classic executive agencies and independent regulatory commissions can bring suit in federal court under 28 U.S.C. § 1345,³⁹³ boundary organizations have generated a number of cases about the provision's applicability.³⁹⁴

Whether a boundary organization can sue under section 1345 depends on whether that entity is “expressly authorized to sue and be sued,”³⁹⁵ and whether that entity “satisfies the definition of agency provided by section 451.”³⁹⁶ Under section 451, “[t]he term ‘agency’ includes any department, independent establishment, commission, administration, authority, board or bureau of the United States or any corporation in which the United States has a proprietary interest, unless the context shows that such term was intended to be used in a more limited sense.”³⁹⁷ It is, therefore, not necessary for Congress to label a boundary organization an “agency” for that entity to invoke jurisdiction under section 1345.³⁹⁸

Additionally, the phrase “corporation in which the United States has a proprietary interest”³⁹⁹ includes governmental corporations whether or not stock is issued, and excludes those in which the government's interest is merely “custodial or incidental.”⁴⁰⁰ Some courts have considered whether 28 U.S.C. § 1349 limits section 1345 jurisdiction and therefore whether the government must hold a majority of a corporation's stock in order to have the requisite proprietary interest.⁴⁰¹ Several courts, however, have ruled that “section 1349 does not affect any jurisdictional grant other than that provided

³⁹³ See 28 U.S.C. § 1345 (2006) (“Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.”).

³⁹⁴ A similar issue arises under Federal Rule of Appellate Procedure 4(a)(1)(B). See, e.g., *Scott v. Fed. Reserve Bank of Kansas City*, 406 F.3d 532, 536-37 (8th Cir. 2005) (applying the *Hoag Ranches* factors, developed in the § 1345 context).

³⁹⁵ *Fed. Sav. & Loan Ins. Corp. v. Ticktin*, 490 U.S. 82, 85 (1989).

³⁹⁶ *Gov't Nat'l Mortg. Ass'n v. Terry*, 608 F.2d 614, 616 (5th Cir. 1979).

³⁹⁷ 28 U.S.C. § 451 (2006).

³⁹⁸ *Terry*, 608 F.2d at 616; see also *Acron Invs., Inc. v. Fed. Sav. & Loan Ins. Corp.*, 363 F.2d 236, 239 (9th Cir. 1966) (“An ‘independent agency’ is no less an ‘agency’ in the ordinary sense of the word whether it is described in § 451 or not. . . . § 451 is not an all-embracing definition.”).

³⁹⁹ *Acron Invs.*, 363 F.2d at 239.

⁴⁰⁰ *Terry*, 608 F.2d at 618.

⁴⁰¹ See 28 U.S.C. § 1349 (2006) (“The district courts shall not have jurisdiction of any civil action by or against any corporation upon the ground that it was incorporated by or under an Act of Congress, unless the United States is the owner of more than one-half of its capital stock.”).

by 28 U.S.C.A. § 1331(a).⁴⁰² In other words, section 1349 prevents federal court jurisdiction if section 1345 does not apply (and if the claim being raised does not qualify for federal question jurisdiction).

For a boundary organization such as a government corporation in which stock has not been issued, section 1345 jurisdiction generally depends on the nature of the government's interest, determined by analysis of that organization's "functions, financing, and management."⁴⁰³ The Ninth Circuit, for instance, has a six-factor test.⁴⁰⁴ It is clear, however, that an entity does not become a governmental agency for purposes of section 1345 "simply because it is federally chartered and regulated."⁴⁰⁵

A number of cases explore the applicability of this jurisdictional statute. In one of the most recent, *Federal Home Loan Bank of San Francisco v. Deutsche Bank Securities, Inc.*, the District Court rejected the argument that the Bank (FHLB-SF) was a federal agency under section 1345.⁴⁰⁶ In that case, the defendants sought to characterize the FHLB-SF as an agency under section 1345 for removal to federal court. Using the six-factor framework of *Hoag Ranches*, the court determined that although the FHLB-SF arguably serves a governmental interest and is an arm of the federal government under the APA, other considerations weighed against treating the Bank as an agency⁴⁰⁷: "the government has very little involvement in the FHLB-SF's management;" the Bank "receives no government money;" the Bank "is privately owned and capitalized only by its members;" and there is an "absence of any reference to the Banks as agencies in any statute."⁴⁰⁸

A related issue is whether "sue and be sued" clauses in statutes governing boundary organizations confer federal question subject matter jurisdiction

⁴⁰² *Terry*, 608 F.2d at 620; see also *Rauscher Pierce Refsnes, Inc. v. FDIC*, 789 F.2d 313, 314 (5th Cir. 1986) (finding that the FDIC is an agency within the *Terry* framework); *Acron Invs.*, 363 F.2d at 240 (holding the corporation was an agency within the meaning of § 451); *Fed. Land Bank of Columbia v. Cotton*, 410 F. Supp. 169, 170 (N.D. Ga. 1975) ("[F]ederally-chartered corporations cannot sue or be sued in federal court *merely because* they are federally chartered, unless the United States government owns 51% of the capital stock." (citation omitted)).

⁴⁰³ *Terry*, 608 F.2d at 617.

⁴⁰⁴ *Hoag Ranches v. Stockton Prod. Credit Ass'n (In re Hoag Ranches)*, 846 F.2d 1225, 1227-28 (9th Cir. 1988). The six factor test includes (1) the extent to which the alleged agency performs a governmental function; (2) the scope of government involvement in the organization's management; (3) whether its operations are financed by the government; (4) whether persons other than the government have a proprietary interest in the alleged agency and whether the government's interest is merely custodial or incidental; (5) whether the organization is referred to as an agency in other statutes; and (6) whether the organization is treated as an arm of the government for other purposes, such as amenability to suit under the Federal Tort Claims Act. *Id.* at 1227-28.

⁴⁰⁵ *Id.* at 1227.

⁴⁰⁶ Nos. 10-3039, 10-3045, 2010 WL 5394742, at *8-11 (N.D. Cal. Dec. 20, 2010).

⁴⁰⁷ *Id.*

⁴⁰⁸ *Id.* at *9-11.

outside of section 1345. In *American National Red Cross v. S.G.*, the Supreme Court, in a split decision, held that such a clause in the Red Cross's Charter conferred jurisdiction in any case where the Red Cross was a party.⁴⁰⁹ A split D.C. Circuit panel recently applied the *Red Cross* rule to find federal jurisdiction in a case involving Fannie Mae because the "Fannie Mae 'sue and be sued' provision expressly refers to the federal courts in a manner similar to the Red Cross statute."⁴¹⁰ It is not clear that other Courts of Appeals will agree.⁴¹¹

Boundary organizations face two other jurisdictional issues. The first involves the Little Tucker Act, which permits certain claims "against the United States, not exceeding \$10,000" to be heard in the Court of Federal Claims in the first instance and in the Federal Circuit on appeal.⁴¹² Plaintiffs often seek to invoke the Act, as it waives sovereign immunity for damages. "[A]s long as no other specific statutory provision bars jurisdiction," the question becomes whether a boundary organization is "a federal instrumentality act[ing] within its statutory authority to carry out [the government's] purposes."⁴¹³ In December 2012, the Federal Circuit transferred a case against the MWAA, an interstate compact, because it did not qualify for Little Tucker Act jurisdiction.⁴¹⁴ The court noted that there was no easy test for determining what qualifies as a federal instrumentality⁴¹⁵ and relied on the *Lebron* factors to evaluate the MWAA.⁴¹⁶ The second jurisdictional issue concerns federal corporations. Assuming the relevant legislation does not otherwise specify, courts generally find them to be "national citizens only, lacking state citizenship for purposes of diversity jurisdiction."⁴¹⁷ There is a "localization" exception if the entity's actions are limited to a particular state, though the exception has become "more restrictive" in recent years.⁴¹⁸

⁴⁰⁹ 505 U.S. 247, 257 (1992).

⁴¹⁰ *Pirelli Armstrong Tire Corp. Retiree Med. Benefits Trust v. Raines*, 534 F.3d 779, 784 (D.C. Cir. 2008).

⁴¹¹ *Cf. id.* at 785 (noting that "two district courts have reached the contrary conclusion").

⁴¹² 28 U.S.C. §§ 1295(a)(3), 1346(a)(2) (2006 & Supp. V 2012).

⁴¹³ *Auction Co. of Am. v. FDIC*, 132 F.3d 746, 749 (D.C. Cir. 1997) (third alteration in original) (quoting *Butz Eng'g Corp. v. United States*, 499 F.2d 619, 622 (Ct. Cl. 1974)).

⁴¹⁴ *Corr v. Metro. Wash. Airports Auth.*, 702 F.3d 1334, 1337-38 (Fed. Cir. 2012).

⁴¹⁵ *Id.* at 1336.

⁴¹⁶ *See id.* at 1337 (noting that, among other things, "MWAA was in large part created by, and exercises the authority of, Virginia and the District of Columbia").

⁴¹⁷ Lund, *supra* note 20, at 340.

⁴¹⁸ *Id.* at 351. National banks are, by statute, "deemed citizens of the States in which they are respectively located." 28 U.S.C. § 1348 (2006).

2. The APA and FOIA

The APA and FOIA also refer to agencies as a general category. The APA defines “agency” as any “authority of the Government of the United States, whether or not it is within or subject to review by another agency.”⁴¹⁹ It excludes “the Congress; the courts of the United States; the governments of the territories or possessions of the United States; the government of the District of Columbia” and “agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them; courts martial and military commissions; military authority exercised in the field in time of war or in occupied territory;” and some other entities.⁴²⁰

FOIA applies to any “‘agency’ . . . includ[ing] any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.”⁴²¹ Obligations under FOIA apply to more entities⁴²²; Congress can exempt an organization that would otherwise fall under one of these statutes in specific legislation governing that organization.

Congress has often been more explicit about which boundary organizations are subject to the APA and FOIA than to section 1345.⁴²³ Most government corporations, for example, fall within FOIA’s definition of agency unless Congress expressly exempts them.⁴²⁴ Fewer such corporations must follow the APA.⁴²⁵ Congress’s directions, therefore, create fewer cases about these statutes’ applicability than section 1345. If there is a dispute, Congress’s decision will govern.⁴²⁶

If, however, Congress does not make an explicit decision, the courts must determine whether the statutes apply. For example, organizations

⁴¹⁹ 5 U.S.C. § 551(1) (2012).

⁴²⁰ *Id.* (internal numbering omitted).

⁴²¹ 5 U.S.C. § 552(f) (2012).

⁴²² Craig D. Feiser, *Privatization and the Freedom of Information Act: An Analysis of Public Access to Private Entities Under Public Law*, 52 FED. COMM. L.J. 21, 31 & n.63 (1999).

⁴²³ See Beermann, *supra* note 20, at 173 (noting that Congress often specifies whether a government corporation is subject to the APA).

⁴²⁴ See Feiser, *supra* note 422 at 36 (“Congress intended the FOIA’s terms to be read liberally in favor of disclosure ‘unless information is exempted under clearly delineated statutory language.’” (quoting S. REP. NO. 89-813, at 3 (1965))). GSEs, however, are generally not subject to FOIA. Breger & Edles, *supra* note 31, at 1232.

⁴²⁵ Indeed, when the GAO surveyed government corporations about which of fifteen statutes they followed, the GAO did not include the APA. U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 65, at 34-37.

⁴²⁶ See Beermann, *supra* note 20, at 173, 175-76 (discussing government corporations).

formed by interstate compacts have generated a number of cases. Some courts, including the Third, Eighth, and D.C. Circuits, have accepted or assumed a “quasi-federal agency” doctrine that would subject an entity to the APA.⁴²⁷ This analysis typically weighs three factors: “(1) whether the originating compact is governed, either explicitly or implicitly, by federal procurement regulations; (2) whether a private right of action is available under the compact; and (3) the level of federal participation.”⁴²⁸ In contrast, the Second Circuit recently reversed a district court for applying this analysis to an agency formed by interstate compact, noting that it was “skeptical of the validity of this judge-created concept.”⁴²⁹

The ultimate result for all of these statutes is similar: there are no bright lines for boundary organizations. This ambiguity derives from a dearth of decisions as well as inconsistency among the tests used and decisions made. Administrative law scholars have said little about this confusion.⁴³⁰ They seemingly have failed to note the Circuit split on how to analyze whether boundary organizations are subject to the APA. Congress could clarify which statutes apply when forming boundary organizations but does not always do so. And when it does make decisions, it is under no obligation to make those decisions consistent across organizations of the same type. This is unfortunate. Given the prevalence of boundary organizations, these statutory obligations should be more consistently applied by Congress.⁴³¹

⁴²⁷ See, e.g., *Am. Trucking Ass'ns, Inc. v. Del. River Joint Toll Bridge Comm'n*, 458 F.3d 291, 304 n.10 (3d Cir. 2006) (assuming, but not deciding, that the APA applied); *Heard Commc'ns, Inc. v. Bi-State Dev. Agency*, 18 F. App'x 438, 439-40 (8th Cir. 2001) (applying quasi-federal agency doctrine to determine that the appellee was not a quasi-federal agency); *Elcon Enters., Inc. v. Wash. Metro. Area Transit Auth.*, 977 F.2d 1472, 1479-80 (D.C. Cir. 1992) (assuming, but not deciding, that the APA applies to an interstate compact agency). The D.C. Circuit has also adopted APA standards by reference in reviewing actions by boundary organizations. See *Old Town Trolley Tours of Wash., Inc. v. Wash. Metro. Area Transit Auth.*, 129 F.3d 201, 204 (D.C. Cir. 1997) (applying the test to an interstate compact agency).

⁴²⁸ *Am. Trucking Ass'n*, 458 F.3d at 304 n.10.

⁴²⁹ *New York v. Atl. States Marine Fisheries Comm'n*, 609 F.3d 524, 534 (2d Cir. 2010). To determine whether FOIA applies, courts examine whether there is “substantial federal control,” among other factors. *Irwin Mem'l Blood Bank of the S.F. Med. Soc'y v. Am. Nat'l Red Cross*, 640 F.2d 1051, 1054-55 (9th Cir. 1981). Federal “funding and supervisory activities” of recipients of government contracts, for example, do not qualify as substantial federal control. *Forsham v. Harris*, 445 U.S. 169, 181 (1980).

⁴³⁰ In one of the rare exceptions, Jack Beermann has argued that for government corporations, “the choice of the corporate form should be strong evidence that Congress did not intend agency status unless Congress locates the corporation within an agency or department.” Beermann, *supra* note 20, at 175.

⁴³¹ See William S. Morrow, Jr., *The Case for an Interstate Compact APA*, ADMIN. & REG. L. NEWS, Winter 2004, at 12, 13 (calling for an APA for interstate compacts).

C. Governance Mechanisms

As with constitutional and statutory mandates, other mechanisms of control fall unevenly on boundary organizations. This Section examines how presidential directives, the budget process, and litigation authority affect these organizations.

1. Presidential Directives

For classic executive agencies, presidential directives play an important role in agency decisionmaking. Under Executive Order 12,866, such agencies must submit significant proposed and final rulemakings and guidance, sometimes along with a cost-benefit analysis, to the Office of Information and Regulatory Affairs (OIRA) for prior approval.⁴³² Although only executive agencies have to wait for approval, all “agencies” must submit notice of all nontrivial regulatory plans to OIRA annually.⁴³³

Some boundary organizations, such as the Commission on Civil Rights and the Pension Benefit Guaranty Corporation, appear to comply with the Unified Agenda reporting requirements or other directives to “agencies”; others do not.⁴³⁴ For example, the National Credit Union Administration (NCUA) recently made headlines by establishing contingency fee arrangements with its lawyers to “sue several major banks over losses suffered by insolvent credit unions.”⁴³⁵ Such arrangements are banned under a presidential directive for all agencies (as defined by the APA) and the Postal Service, except for the GAO and “elements of the intelligence community.”⁴³⁶ The NCUA claimed the directive did not apply to it because “it is an independent agency acting as a liquidator of failed credit unions.”⁴³⁷ Legal experts seem split.⁴³⁸ According to one expert, Congress permitted such action by statute by equating the agency with a “credit union” when it acts as a liquidator.⁴³⁹

⁴³² Exec. Order No. 12,866, 3 C.F.R. 638 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 802-06 (2012).

⁴³³ *Id.* at 641-42, 644-48.

⁴³⁴ *Current Regulatory Plan and the Unified Agenda of Regulatory and Deregulatory Actions*, OFF. INFO. & REG. AFF., <http://www.reginfo.gov/public/do/eAgendaMain> (open drop down menu under “Select Agency” for a list of agencies) (last visited Feb. 21, 2014).

⁴³⁵ Cary Coglianese, *When Is a Federal Agency Not a Federal Agency?*, REGBLOG (Oct. 29, 2012), <https://www.law.upenn.edu/blogs/regblog/2012/10/when-is-a-federal-agency-not-a-federal-agency.html>.

⁴³⁶ Exec. Order No. 13,433, 3 C.F.R. 217, 218 (2008).

⁴³⁷ James V. Grimaldi & Alicia Mundy, *Nice Payday for ‘Toxic’ Work*, WALL ST. J., Oct. 25, 2012, at C1.

⁴³⁸ *Id.*

⁴³⁹ Coglianese, *supra* note 435.

To help improve accountability, the White House may be able to revise any of its directives to explicitly include independent regulatory commissions and other boundary organizations, though the legal authority to do so is disputed.⁴⁴⁰ In 2011, President Obama did order independent regulatory commissions and boards to comply with the “general requirements [of Executive Order 15,563] . . . concerning public participation, integration and innovation, flexible approaches, and science” and to issue a plan like executive agencies to “promote retrospective analysis of rules . . . in accordance with what has been learned.”⁴⁴¹ These requirements could be extended to all boundary organizations.⁴⁴² To eliminate any questions over legality, Congress could pass legislation allowing the President to extend regulatory oversight tools to such organizations.

Alternatively, the White House could dedicate resources to overseeing particular types of boundary organizations separately. According to CRS, the Bureau of the Budget (OMB’s predecessor) “was instrumental in the passage of the [Government Corporation Control Act of 1945], and created a separate office to oversee the formation, and monitor the operation, of government corporations on behalf of the President.”⁴⁴³ Although no such office exists today,⁴⁴⁴ its history suggests the feasibility of such an institutional arrangement.

2. Budget Process

Almost all executive agencies and independent regulatory commissions are funded at least in part by regular appropriations. Such appropriations allow for presidential and congressional oversight through the presidential budget proposal and the actual congressional appropriations.⁴⁴⁵ A “short

⁴⁴⁰ See VIVIAN S. CHU & DANIEL T. SHEDD, CONG. RESEARCH SERV., R42720, PRESIDENTIAL REVIEW OF INDEPENDENT REGULATORY COMMISSION RULEMAKING: LEGAL ISSUES 12 (2012) (“[T]here may be lingering questions as to whether the President has the legal authority to extend requirements of the executive order to the IRCs without . . . congressional action.”). I have written in support of proposed legislation that permits the President to extend regulatory review to independent regulatory commissions and boards. Letter from Jonathan H. Adler et al., Admin. Law Professors, to Senators Joe Lieberman and Susan Collins on S. 3468, The Indep. Agency Regulatory Analysis Act (Jan. 2, 2013) (on file with author).

⁴⁴¹ Exec. Order No. 13,579, 3 C.F.R. 256, 257 (2012).

⁴⁴² Cf. Datla & Revesz, *supra* note 23, at 824-25 (arguing that because all independent agencies are somewhat executive, the President can exercise control absent an explicit congressional bar).

⁴⁴³ KOSAR, FEDERAL GOVERNMENT CORPORATIONS, *supra* note 62, at 10.

⁴⁴⁴ *Id.* at 10 & n.41.

⁴⁴⁵ See Barkow, *supra* note 23, at 43 (“One way to limit political control through budgetary oversight is to allow agencies to submit budget proposals directly to Congress without having to go through OMB and thus the President. . . . [Another way is for Congress to] allow agencies to submit their budget requests concurrently to OMB and Congress, which eliminates the President’s

list” of executive agencies and independent regulatory commissions are entirely self-funded.⁴⁴⁶ The list would be considerably longer, however, if boundary organizations outside of independent regulatory commissions were included as well. Indeed, as Part II demonstrates, agency designers often prefer to make organizations “off budget.”

Just as restrictions on the removal of agency leaders bring insulation, so does independence from traditional funding mechanisms.⁴⁴⁷ Congress could impose political control through funding and play to partisan preferences for off-budget entities by providing nominal appropriations to an organization—which could be more than paid back through investment returns, user fees, or other mechanisms.⁴⁴⁸ OPIC would be an example as it makes money for the federal government. The existence of nominal congressional appropriations for administrative expenses helps foster congressional oversight.⁴⁴⁹

3. Litigation Authority

The Attorney General usually controls the federal government’s litigation;⁴⁵⁰ such control “brings [agencies] closer to the administration position.”⁴⁵¹ Yet Congress can change this default by statute⁴⁵² and sometimes does so for boundary entities. For example, the Dodd–Frank Act gives the new CFPB independent litigating authority in the lower courts (though the agency must consult with the Attorney General) and the ability to request such authority in front of the Supreme Court.⁴⁵³ Usually, these statutes

ability to change agency policy before Congress sees the agency’s original proposal.”); Daugirdas, *supra* note 22, at 521 (detailing how Congress provides instructions to the World Bank through appropriations riders).

⁴⁴⁶ By one count, the “short list” includes only the Bureau of Engraving and Printing, Comptroller of the Currency, Farm Credit Administration, Farm Credit System Insurance Corporation, FDIC, Federal Home Loan Mortgage Corporation, FHFA, Federal Prisons Industries Inc., Federal Reserve Board, NCUA, and the Office of Thrift Supervision. Note, *supra* note 56, at 1823 & n.12; see also LEWIS & SELIN, *supra* note 19, at 120 (eliminating CFPB from the list); Barkow, *supra* note 23, at 44 (adding PCAOB to the list).

⁴⁴⁷ Barkow, *supra* note 23, at 44.

⁴⁴⁸ See KOPPELL, *supra* note 19, at 128.

⁴⁴⁹ ILIAS AKHTAR, *supra* note 69, at 5-7. To the extent that boundary organizations do not rely on traditional appropriations, other mechanisms of oversight can fill the gaps. For example, the Senate may delay confirming nominees to organizations that are “off budget” more than nominees to organizations funded by regular appropriations.

⁴⁵⁰ See 28 U.S.C. §§ 516–519 (2006).

⁴⁵¹ Alan B. Morrison, *How Independent Are Independent Regulatory Agencies?*, 1988 DUKE L.J. 252, 254.

⁴⁵² Devins, *supra* note 57, at 263-64 (recognizing that Congress has the right to make exceptions to the Attorney General’s control). The Justice Department sometimes arranges for agencies to handle certain aspects of litigation.

⁴⁵³ 12 U.S.C. § 5564(a)-(e) (2012).

restrict such authority to actions in the lower courts and give power to the Solicitor General at the highest level of litigation. Most independent regulatory commissions and boards, for example, “have the final say in litigation until a case reaches the Supreme Court.”⁴⁵⁴ Only a few organizations, including the FCC and the Nuclear Regulatory Commission, have independent litigating authority at the Supreme Court.⁴⁵⁵ Some others, such as the FTC, have such power if the Solicitor General “refuses to defend their position.”⁴⁵⁶

Sometimes, boundary organizations claim independent litigating authority despite immense political pressure not to. For instance, the Postal Service, by a 6-5 vote of its Governors, refused to withdraw a motion to represent itself in the D.C. Circuit in a 1993 rate-setting conflict with the Postal Rate Commission.⁴⁵⁷ The District Court for the District of Columbia then protected the Governors through a preliminary injunction against their removal.⁴⁵⁸ According to Neal Devins, the Postal Service needs independent legal authority in rate-setting disputes because such “disputes pit the Postal Service against the Postal Rate Commission, an independent agency whose litigation is entrusted to the Attorney General.”⁴⁵⁹

Additionally, while litigation authority is usually defined in terms of the levels of the federal courts, some boundary organizations have more unusual arrangements. For example, while the Justice Department represents the Export-Import Bank in federal court, the boundary organization controls its litigation abroad.⁴⁶⁰ To the extent that political control over a boundary organization is not desired, for social welfare or other reasons, independent litigating authority functions to provide some insulation—at least if challenges are likely to be brought in court.⁴⁶¹ Congress, however, must explicitly provide for this authority.

⁴⁵⁴ Devins, *supra* note 57, at 258.

⁴⁵⁵ Barkow, *supra* note 23, at 55 n.215.

⁴⁵⁶ Devins, *supra* note 57, at 275. A larger group of agencies, including the Agriculture Department, can file a petition for certiorari. *Id.* at 275 n.105.

⁴⁵⁷ Devins, *supra* note 16, at 310.

⁴⁵⁸ *Mail Order Ass'n of Am. v. U.S. Postal Serv.*, 986 F.2d 509, 512 (D.C. Cir. 1993).

⁴⁵⁹ Devins, *supra* note 16, at 306-07.

⁴⁶⁰ 12 U.S.C. § 635(a)(1) (2012).

⁴⁶¹ See Barkow, *supra* note 23, at 55-56 (noting that independent litigation authority allows agencies to ensure that mandates are properly followed); cf. Michael Herz & Neal Devins, *The Consequences of DOJ Control of Litigation on Agencies' Programs*, 52 ADMIN. L. REV. 1345, 1374-75 (2000) (concluding that DOJ control over litigation has some consequences but its effects are hard to quantify and are shaped by other factors).

D. Reconsidering “Classic” Agencies

Administrative law depends, at least implicitly, on a cramped view of the administrative state, composed of executive agencies and independent regulatory commissions.⁴⁶² Recent work posits that the administrative state cannot be divided neatly into these two categories. Kirti Datla and Richard Revesz argue that “all agencies should be regarded as executive and seen as falling on a spectrum from more independent to less independent.”⁴⁶³ In other words, agencies exist along a horizontal continuum of political control. Under that view, the President should be able to direct agency decisions subject to Article II, unless Congress explicitly provides otherwise.⁴⁶⁴

Political control could, however, also function vertically, between federal and state actors or federal and foreign players, as well as on other dimensions that drive agency structure. By viewing boundary organizations as important parts of the bureaucracy, this Section reconsiders several core issues of bureaucratic politics and administrative law. Drawing on the positive and normative theory in Part II, it examines both where boundary organizations should fit within the doctrine and how the doctrine might change for traditional entities.

To start, boundary organizations are typically absent from core administrative law doctrine. Deference doctrines rely on purely federal entities but do not distinguish among these entities. In *Mayo Foundation for Medical Education and Research v. United States*, the Court unanimously rejected the proposition that the Treasury Department deserved less deference for its interpretation of an ambiguous statute through notice and comment tax rulemaking: “[W]e have expressly [recognized] the importance of maintaining a uniform approach to judicial review of administrative action.”⁴⁶⁵ Some members of the Court have suggested that independent regulatory commissions might receive less deference under “arbitrary and capricious” review of section 706(2)(A) of the APA, because of their apparent distance from

⁴⁶² Cf. Aman, *supra* note 20, at 92 (“Administrative law is directly linked to the dominant theory of the state in vogue at any given point in time.”).

⁴⁶³ Datla & Revesz, *supra* note 23, at 769. They include some boundary institutions described in Part I, but exclude many of them from their analysis. *See id.* at 784 n.90.

⁴⁶⁴ *Id.* at 862.

⁴⁶⁵ 131 S. Ct. 704, 713 (2011) (internal quotation marks omitted).

politics.⁴⁶⁶ This proposition has gained traction only (slightly) in the academic commentary but was forcefully rejected by the Court's majority.⁴⁶⁷

Instead, deference doctrines draw largely from the perceived institutional characteristics of agencies, notably their accountability and expertise—at least relative to the courts. *Chevron* deference rests mostly on political accountability to the President;⁴⁶⁸ *Skidmore* deference draws primarily on expertise.⁴⁶⁹ To the extent that the former is more forgiving to agency action than the latter, we see again the allure of political control. How do boundary organizations fit in?⁴⁷⁰ On accountability, deference does not seem warranted because these entities appear less responsive to political overseers.⁴⁷¹ In addition, if states are less accountable to the President,⁴⁷² federal–state hybrids similarly may be insufficiently accountable to the President. And because the courts avoid distinguishing among specific agencies, it seems likely that courts would bar such entities as a group from falling under *Chevron*.⁴⁷³ On the other hand, the federal component of federal–state and other hybrids may provide enough presidential and congressional oversight to warrant deference. Of course, it is an empirical question: if deference depends on accountability, it would be important to figure out if agencies, whether classic or boundary, are in fact accountable to the President.

⁴⁶⁶ See, e.g., *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1830 (2009) (Breyer, J., dissenting) (“[The FCC]’s comparative freedom from ballot-box control makes it all the more important that courts review its decisionmaking to assure compliance with applicable provisions of the law—including law requiring that major policy decisions be based upon articulable reasons.”).

⁴⁶⁷ *Id.* at 1817 (Scalia, J.).

⁴⁶⁸ *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865-66 (1984).

⁴⁶⁹ *Skidmore v. Swift & Co.*, 323 U.S. 134, 137-38 (1944).

⁴⁷⁰ Abbe Gluck and Emily Stabile have examined how states might fit in. Gluck, *supra* note 25; Emily Stabile, *Federal Deference to State Agency Implementation of Federal Law* (working draft). Aaron Cooper has looked at how private parties (in implementing federal statutes) might be incorporated. Aaron R. Cooper, Note, *Sidestepping Chevron: Reframing Agency Deference for an Era of Private Governance*, 99 *GEO. L.J.* 1431 (2011).

⁴⁷¹ See KOPPELL, *supra* note 19, at 46 (claiming that hybrid entities are “somewhat less likely to satisfy the principal’s preferences”); Froomkin, *supra* note 13, at 607 (arguing government corporations are less accountable to the President).

⁴⁷² See Gluck, *supra* note 25, at 602-03 (arguing that states are less accountable but noting ways states could promote accountability); Joshua D. Sarnoff, *Cooperative Federalism, the Delegation of Federal Power, and the Constitution*, 39 *ARIZ. L. REV.* 205, 210 (1997) (arguing that delegation to states “places policymaking discretion in the hands of state officials for whom many federal citizens do not vote” and therefore that state officials “are unlikely to hear the political voices of out-of-state citizens when policymaking discretion is exercised”).

⁴⁷³ Courts have, for example, generally refused to extend *Chevron* to the states. Gluck, *supra* note 25, at 611 (citing *Orthopaedic Hosp. v. Belshe*, 103 F.3d 1491, 1495-96 (9th Cir. 1997)).

Deference does seem warranted on expertise. Here, courts do distinguish among agencies. When it comes to state agencies, courts have cited to their expertise in reviewing actions deferentially.⁴⁷⁴ If political actors create boundary organizations due to competence as described in Part II, those entities should be presumed to have relevant expertise.⁴⁷⁵

The more interesting question is not how well boundary organizations comply with traditional rationales but rather how such organizations might shape them. Boundary organizations suggest more encompassing notions of both accountability and expertise. Political accountability, under *Chevron*, is about responsiveness to the President.⁴⁷⁶ This focus is understandable if most agencies are classic executive agencies or independent regulatory commissions. But considering boundary organizations, it may be more accurate to think of accountability to a wider or more vigilant set of actors.⁴⁷⁷ Entities at the federal–state border, for instance, are arguably accountable to more political actors whose jobs depend on voters. Yet boundary organizations created by political branches to avoid political control are probably less accountable.

On expertise, if agencies are created in part for political reasons, agency structures of all kinds cannot be removed from politics. In other words, agencies may become experts in particular policy areas, but they are not designed by technocrats. Boundary organizations may make these partisan preferences more visible on a range of agency structures.

Under the Supreme Court's 2001 decision in *United States v. Mead Corp.*, considerable attention is paid to congressional intent. To qualify for *Chevron* deference when interpreting an ambiguous statute, an agency must have been delegated the authority to act with the force of law.⁴⁷⁸ Boundary organizations demonstrate that congressional intent is not dependent on agency structure. *Mead* also weighs procedure heavily. Not only does

⁴⁷⁴ See, e.g., *BellSouth Telecomms., Inc. v. Sanford*, 494 F.3d 439, 447 (4th Cir. 2007) (“[A]n order of a state commission may deserve a measure of respect in view of the commission’s experience [and] expertise”); *Abbeville Gen. Hosp. v. Ramsey*, 3 F.3d 797, 803 (5th Cir. 1993) (finding that the state agency warranted deference for its expertise and familiarity with the program at issue).

⁴⁷⁵ Some courts have applied *Skidmore* to the states. Gluck, *supra* note 25, at 611 (citing *Bell-South*, 494 F.3d at 449).

⁴⁷⁶ This cramped notion of accountability to the President supports not only *Chevron* but arguably also the separation of powers doctrine. Kimberly N. Brown, *Government by Contract and the Structural Constitution*, 87 NOTRE DAME L. REV. 491, 525 (2011). If courts considered accountability to a wider set of actors, they would presumably be less troubled by some boundary entities.

⁴⁷⁷ Cf. Gluck, *supra* note 25, at 602-03 (analyzing the complexities of state accountability to the federal government and the public).

⁴⁷⁸ 533 U.S. 218, 227 (2001).

Congress have to delegate to the agency the authority to act with the force of law, the agency must actually use that authority.⁴⁷⁹ There is thus theoretically both an ex ante examination about congressional delegation and an ex post analysis of the decisionmaking process. In practice, however, the latter is emphasized. Since *Mead*, notice and comment rulemaking essentially guarantees *Chevron* (as opposed to *Skidmore*) deference if the statute does not compel a particular interpretation.⁴⁸⁰ Procedure has become the manifestation of congressional intent.

To the extent that boundary organizations use a wider range of tools to make decisions than the rulemaking and adjudication categories entrenched in the APA,⁴⁸¹ they may have a harder time qualifying for deference under *Mead*. Boundary organizations should also make actions by traditional agencies that do not easily fall into the APA divisions more visible. The MWAA's running of airports brings to mind the DOE's running of laboratories, for example. Administrative law may therefore devote too much attention to rulemaking and adjudication.

At the same time, boundary entities suggest that the *Mead* analysis, even theoretically, may not be compelling. Boundary organizations demonstrate how tenuous congressional intent can be. The account of agency creation in Part II illustrates that Congress is just one player in the negotiation over agency form. Additionally, these entities make policy decisions using more than the traditional rulemaking and adjudication forms—the Court in *Mead* may have relied on a method of decisionmaking that is not how most decisions get made. In the end, boundary organizations may encourage more attention to the match between structure and delegated authority as well as to the procedures used to complete the delegated task.

Finally, the prevalence of boundary organizations undercuts the unitary executive theory. That theory requires that all executive authority vest in the President, who must take care that all the laws are faithfully executed. Although the theory's proponents tend to flag concerns with independent regulatory commissions and boards, they should also worry about the boundary organizations described in Part I. There are two options: adopt the unitary executive theory and dismantle considerable sections of the modern administrative state or adopt a more functional approach to executive

⁴⁷⁹ *Id.*

⁴⁸⁰ *Id.*

⁴⁸¹ LEWIS & SELIN, *supra* note 19, at 130-32; *cf.* CAROLINE N. BROWN ET AL., THE EVOLVING USE AND THE CHANGING ROLE OF INTERSTATE COMPACTS: A PRACTITIONER'S GUIDE 11, 14 (2006) (noting that interstate compacts do more than address "common boundary disputes" and that more recent compacts engage in considerable rulemaking activities).

power and work to make sure that boundary organizations are sufficiently accountable.

CONCLUSION

The federal bureaucracy is not confined to the Cabinet departments and freestanding agencies in the Executive Branch. The remainder is not, however, stuffed into a “Headless Branch,” as *Time* magazine suggested nearly fifty years ago.⁴⁸² There are federal entities in each of the three branches as well as at the interstices between any two branches and even among all three. Some organizations straddle the federal government, on one hand, and foreign countries, states, or tribes, on the other. Some have both a public and private side. The complex map of the administrative state is not new; hybrid structures date back to the founding of the country.

Despite this longstanding architecture of the bureaucracy, administrative law focuses almost entirely on the components directly under the President and the independent regulatory commissions and boards in the no man’s land between the President and Congress. This focus creates a number of problems. It constructs a fictional organizational chart and prevents systematic consideration of large and important swaths of the administrative state. Relatedly, it restricts the analysis of those swaths that do appear on the artificial chart. Despite these problems, the focus survives. After all, establishing a dichotomy (or continuum) of executive agencies and independent regulatory commissions provides tractability to consider complicated questions of institutional design and policy selection.

In this Article, I have tried to retain some tractability while widening the lens on the administrative state. Most simply, I have identified and classified some of the missing federal bureaucracy along the borders of more conventional categories. That classification exercise is mostly a static one—where those missing parts currently reside—but it also considers agencies’ movement within these categories. In addition, I have theorized about why political actors would create such organizations. Under the positive analysis, boundary organizations are common outcomes of the agency design process. These organizations have uneven effects on efficiency and democratic legitimacy. Social welfare may not always trump accountability in these alternative agency structures, and in some cases there might not be a tradeoff at all between the two (partly because both are sacrificed). Finally, I have examined the legal issues surrounding these other entities and how these entities might shape already established law and governance of federal

⁴⁸² *The Headless Branch*, TIME MAG., July 31, 1964, at 57.

agencies. There is still considerable work to be done, including testing the positive theory, developing the normative implications in greater detail, and proposing more definite legal conclusions.

To return to the postal service, in its modern form, it is a paragon boundary organization. If the USPS were not missing from (or pushed to the margins of) the artificial organization chart of the modern administrative state, we could have more discussion about why the political branches create government corporations and why they establish executive agencies or independent regulatory commissions. We could have more analysis of the efficiency and legitimacy of government corporations and the social welfare and accountability of executive agencies. We could also better assess how the Constitution and agency statutes justify and govern agency action—of all kinds. We could have a broader view of administrative law to match the complexity and breadth of the administrative state.