

When Agencies Go Nuclear: A Game Theoretic Approach to the Biggest Sticks in an Agency's Arsenal

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ABSTRACT

A regulatory agency's arsenal often contains multiple weapons. Occasionally, however, an agency has the power to completely obliterate its regulatory targets or to make major waves in society by using a "regulatory nuke." A regulatory nuke is a tool with two primary characteristics. First, it packs power sufficient to profoundly impact individual regulatory targets or significantly affect important aspects of society or the economy. Second, from the perspective of the regulatory agency, it is politically unavailable in all but the most extreme situations. They are found in many corners of the federal bureaucracy. This Article illustrates that even when individual regulatory nukes get our attention, we often think about these weapons in unproductive ways. Typically, regulatory nukes are approached in a bipolar way. On the one hand, they may be seen as regulatory anomalies with little relevance to most regulated entities. On the other hand, particularly if an agency has launched its regulatory nuke, the launch becomes part of agency lore and the story is of the destruction left in its wake.

Drawing on the Nobel Prize-winning game theory developed by Thomas Schelling, this Article moves beyond the dud/mushroom cloud dichotomy and recasts the regulatory nuke as an important factor that influences the calculus of regulation. This analysis suggests that agencies often get mileage out of regulatory nukes by pointing their weapons rather than firing them: the power of the tool is often leverage in regulatory diplomacy—for threats, posturing, and coercion. Although this Article is based on game theory, it also provides a wealth of examples that work to illustrate the real-world importance of the theory to many aspects of the administrative state.

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“*Speak softly and carry a big stick[]*”

— Theodore Roosevelt¹

“*Political power grows out of the barrel of a gun.*”

— Mao Tse-Tung²

INTRODUCTION

Beginning in the 1970s, Yale Law School began requiring employers participating in the law school’s on-campus recruiting program to sign a pledge not to discriminate against students based on a number of factors, including a student’s sexual orientation.³ Most employers had no problem signing the nondiscrimination pledge, but military recruiters refused to sign given the military’s “Don’t Ask, Don’t Tell” policy,⁴ which excluded openly gay service members.⁵ Because of this, Yale Law School barred military recruiters from its on-campus recruiting process.⁶ In the years that followed, Yale Law School continued to require employers to sign its pledge and military recruiters continued to refuse to sign, thereby dragging out the stalemate.⁷

After the terrorist attacks of September 11, 2001, Congress gave the Department of Defense the power to cut off an entire university’s federal funding if any part of that university barred military recruiters.⁸ In other words, if Yale Law School did not change its ways

1 RESPECTFULLY QUOTED: A DICTIONARY OF QUOTATIONS REQUESTED FROM THE CONGRESSIONAL RESEARCH SERVICE 123 (Suzy Platt ed., 1989) (internal quotation marks omitted).

2 *Id.* at 271 (internal quotation marks omitted).

3 *Burt v. Rumsfeld*, 354 F. Supp. 2d 156, 166 (D. Conn. 2005), *rev’d sub nom.* *Burt v. Gates*, 502 F.3d 183 (2d Cir. 2007).

4 This was the official military policy from December 1993 to September 2011. See Phil Willon, *What’s Next for Military’s Gays*, L.A. TIMES, Oct. 17, 2011, at AA1.

5 *Burt v. Rumsfeld*, 354 F. Supp. 2d at 168.

6 *Burt v. Gates*, 502 F.3d at 185.

7 *See id.*

8 More specifically, Congress enacted a law that prohibits the provision of federal funds to an

institution of higher education (including any subelement of such institution) if the Secretary of Defense determines that that institution (or any subelement of that institution) has a policy or practice . . . that either prohibits, or in effect prevents . . . a military department or Secretary of Homeland Security from gaining access to campuses, or access to students . . . on campuses, for purposes of military recruiting

and if the Department of Defense exercised its newfound regulatory power, all of Yale University (not just the law school) would be at risk of losing its federal funding. At the time, estimates of Yale's federal funding amounted to about \$300 million annually.⁹ The law school did not receive much of this money, but losing such funding would have presumably eviscerated Yale's science, engineering, and medical programs. Despite this risk, Yale Law School continued to adhere to its policy of barring military recruiters.¹⁰

After it became clear that Yale Law School was not willing to back down, the Department of Defense gave the law school an ultimatum: give the military the same recruiting opportunities the law school provided to other employers, or lose all federal funding.¹¹ The law school tried to postpone the day of reckoning and attempted to litigate its way out of the Department of Defense's threat, but was unsuccessful.¹² In 2007, unable to wiggle out of the agency's regulatory crosshairs, Yale Law School surrendered and opened its doors to military recruiters.¹³

This story of the Department of Defense resorting to a particularly strong regulatory tool provides an excellent example of a government agency deploying what I refer to as a "regulatory nuke." A regulatory nuke is a tool with two primary characteristics. First, it packs power sufficient to profoundly impact individual regulatory targets or significantly affect important aspects of society or the economy. Second, from the perspective of the regulatory agency, it is politically unavailable in all but the most extreme situations. They are not limited to the situation described above, nor does the military have a monopoly on regulatory nukes within the federal bureaucracy. In fact, many agencies have regulatory nukes, most of which often go unnoticed because they are rarely (and sometimes never) launched.

Consider a few examples of some powerful but rarely launched regulatory nukes. One might be surprised to learn that the Federal Communications Commission ("FCC") has the power to pull the plug on major media outlets, such as the National Broadcasting Company,

in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer[.] . . .

10 U.S.C. § 983(b)(1) (2006).

⁹ *Burt v. Rumsfeld*, 354 F. Supp. 2d at 169.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Burt v. Gates*, 502 F.3d at 192.

¹³ Thomas Kaplan, *Yale Law, Newly Defeated, Allows Military Recruiters*, N.Y. TIMES, Oct. 1, 2007, at B4.

by revoking their licenses to broadcast on the public airwaves;¹⁴ that the No Child Left Behind Act gives administrators the power to shut down public schools all over the country;¹⁵ and that the Internal Revenue Service (“IRS”) has the power to revoke the tax-exempt status (often an essential component of fundraising) of some of the Nation’s most revered institutions, such as universities, museums, hospitals, and places of worship.¹⁶

Sometimes an agency actually launches a regulatory nuke. With regulatory mushroom clouds on the horizon, these situations quickly generate news stories, lawsuits, congressional hearings, and scholarly work. In the recent past, we certainly noticed when the Federal Housing Finance Agency swooped in to take over Fannie Mae and Freddie Mac,¹⁷ when the Justice Department put an end to Arthur Andersen by prosecuting it criminally,¹⁸ and when the IRS revoked Bob Jones University’s tax-exempt status.¹⁹

Because regulatory nukes in an agency’s arsenal often remain unlaunched, however, it is easy to brush them aside or to pretend that, for all practical purposes, regulatory nukes do not exist. It is important to recognize, though, that even if a regulatory nuke is rarely or never *launched*, this does not mean that a regulatory nuke is rarely or never *used*. Regulatory nukes often have other uses. Similar to the ways in which countries rely on nuclear weapons to influence diplomacy, agencies often use the threat of regulatory nukes to influence regulated entities.²⁰ Just as the military forced Yale Law School’s hand by issuing an ultimatum, leveraging a potential target’s fear of a regulatory nuke’s launch can be enough for an agency to secure regulatory compliance. Even if an agency does not launch its regulatory nuke, an agency’s threat of the nuke’s use may cause some to awe that the agency pulled out the big guns.

“The big guns.” It is striking how much of the vernacular surrounding regulation alludes to warfare. In addition to big guns,²¹ com-

¹⁴ See *infra* Part II.C.

¹⁵ See *infra* Part II.G.

¹⁶ See *infra* Part II.B.

¹⁷ See Julie Anderson Hill, *Bailouts and Credit Cycles: Fannie, Freddie, and the Farm Credit System*, 2010 WIS. L. REV. 1, 56.

¹⁸ See *infra* notes 124–28 and accompanying text.

¹⁹ See *infra* note 74 and accompanying text.

²⁰ See, e.g., Lars Noah, *Administrative Arm-Twisting in the Shadow of Congressional Delegations of Authority*, 1997 WIS. L. REV. 873, 874 (discussing “a threat by an agency to impose a sanction or withhold a benefit in hopes of encouraging ‘voluntary’ compliance with a request,” and calling such actions “administrative arm-twisting”).

²¹ See, e.g., IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRAN-*

mentators, scholars, and decisionmakers talk about an agency's arsenal,²² war chest,²³ and weapons.²⁴ Further, at times, we label the conditions sufficient to activate regulatory enforcement as triggers,²⁵ and call clearly permissible behaviors of regulated entities safe havens.²⁶ When an agency resorts to extraordinary means in pursuit

SCENDING THE DEREGULATION DEBATE 40 (1992) (discussing "benign big gun" agencies that "sp[peak] softly while carrying very big sticks"); John Braithwaite, *A Future Where Punishment Is Marginalized: Realistic or Utopian?*, 46 UCLA L. REV. 1727, 1729 (1999) (detailing a study of Australian business regulatory agencies finding "that while the Benign Big Guns rarely or never used punishment, agencies with weaker powers used prosecution much more often"); Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 375 (2005) ("Congress backed up these measures with beefed-up criminal and civil penalties—big guns, indeed—administered by the Securities and Exchange Commission (SEC)."); Benjamin I. Sachs, *Labor Law Renewal*, 1 HARV. L. & POL'Y REV. 375, 397–98 (2007) ("[A]n administrative agency can rely on self-regulation . . . only when the government agency possesses a 'big gun' of enforcement power—that is, when the agency has access to extremely powerful sanctions.").

²² See, e.g., *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 87 (1998) ("The Environmental Protection Agency (EPA) has the most powerful enforcement arsenal: it may seek criminal, civil, or administrative penalties."); *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313 (1978) ("[W]hen an entrepreneur embarks upon such a business, he has voluntarily chosen to subject himself to a full arsenal of governmental regulation."); *United States v. FCC*, 652 F.2d 72, 108 (D.C. Cir. 1980) (Robinson, J., dissenting) ("[T]he Clayton Act . . . increases the Commission's regulatory range as well as its arsenal of regulatory weapons.").

²³ See, e.g., *Smith v. Mount*, 726 P.2d 474, 477 (Wash. Ct. App. 1986) (stating that the "seizing agency could use the forfeiture procedure as a device to contribute to its drug enforcement war chest"); Donald S. Yamagami, *Prosecuting Cyber-Pedophiles: How Can Intent Be Shown in a Virtual World in Light of the Fantasy Defense?*, 41 SANTA CLARA L. REV. 547, 550 (2001) (stating that "the government increased its war chest to help catch Internet crimes directed against children").

²⁴ See, e.g., *Dole v. United Steelworkers*, 494 U.S. 26, 33–34 (1990) ("An agency charged with protecting employees from hazardous chemicals has a variety of regulatory weapons from which to choose."); *FTC v. Dean Foods Co.*, 384 U.S. 597, 625 (1966) (Fortas, J., dissenting) (arguing that the All Writs Act "is not a charter to be used at the behest of an administrative agency in order to supply it with a weapon which Congress has withheld"); Peter H. Schuck, *Some Reflections on the Future of Mass Torts*, 12 CONN. INS. L.J. 505, 511 (2006) ("[R]egulatory agencies can wield a formidable armamentarium of weapons.").

²⁵ See, e.g., *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 410 (2008) (Thomas, J., dissenting) ("The charge is presented to the agency with jurisdiction over such matters—the [Equal Employment Opportunity Commission]—to trigger enforcement proceedings that are intended to eliminate violations of the [Age in Discrimination Employment Act]."); *Sierra Club v. EPA*, 557 F.3d 401, 408 (6th Cir. 2009) ("The more that is required of the [Environmental Protection Agency] before it can make such a 'finding,' the less often the agency will be able to pull the initial enforcement trigger."); *Cnty. Ass'n for Restoration of the Env't v. Henry Bosma Dairy*, 305 F.3d 943, 953 (9th Cir. 2002) ("The point is to trigger agency enforcement and avoid a lawsuit.").

²⁶ See, e.g., *Commodity Futures Trading Comm'n v. R.J. Fitzgerald & Co.*, 310 F.3d 1321, 1330 (11th Cir. 2002) ("Such an exacting standard would . . . [allow] clearly misleading statements to escape [U.S. Commodity Futures Trading Commission] enforcement . . . [and afford brokers a] safe haven so long as no actual 'guarantee' is made."); *Hosp. Res. Pers., Inc. v. United*

of regulatory compliance, we might say that the agency dropped the bomb²⁷ or that it went nuclear.²⁸ At least on an intuitive level, regulation reminds us of warfare, but is there more to the analogy?

For decades, we have described regulation in terms of warfare. This Article takes a more critical look at the analogy and finds that it not only provides an apt comparison, but also provides a useful lens through which to view the calculus of regulation. Specifically, the Article draws on game theory, particularly Thomas Schelling's Nobel Prize-winning scholarship on countries' uses of nuclear weapons,²⁹ to explain how agencies use regulatory nukes. It turns out that regulatory nukes and actual nukes are used in a similar manner such that the analogy provides fertile ground to help us understand the largest and often most misunderstood weapons in an agency's arsenal. Game theory helps us see the fallacy of assuming that because agencies rarely launch these weapons, they rarely use them. Use of regulatory nukes more often takes the form of a protracted standoff than a mushroom cloud. Game theory also provides a lens through which to best view the threats, posturing, and coercion that occur during the back-and-forth that is a prelude to a possible launch. Our tendency to focus on explosions (or the lack of them), while ignoring regulatory diplomacy, means that we risk missing the bigger picture—just as we would in the context of actual nuclear bombs if we focused only on Hiroshima and Nagasaki, while ignoring the Cold War. We should not be so blinded by the explosion of an agency going nuclear that we overlook the more important story that is hidden in the shadows.

Bringing that important story out of the shadows is a significant aim of this Article. And telling this story through the lens of game

States, 860 F. Supp. 1557, 1562 (S.D. Ga. 1994), *affirmed in part, vacated in part*, 68 F.3d 421 (11th Cir. 1995) (“Plaintiff had a reasonable basis for treating its workers as independent contractors under the general safe haven provision of [the Revenue Act of 1978].”).

²⁷ E.g., Terry Carter, *The Pre-Emption Prescription*, 94 A.B.A. J. 42, 43 (2008) (“The FDA dropped another bomb in January with a new rule”); Ed Anderson, *Mayor: B.R. is Doormat for Feds*, TIMES-PICAYUNE (New Orleans), Aug. 22, 2006, at A1 (quoting Baton Rouge mayor as saying that the Federal Emergency Management Agency “has dropped the bomb on us” (internal quotation marks omitted)); Barbara Behrendt, *A New Twist for Manatee Center*, ST. PETERSBURG TIMES (Fla.), June 13, 1990, (Citrus Cnty. ed.) at 1 (“[T]he agency came to Crystal River and dropped its bomb”).

²⁸ Lisa L. Casey, *Class Action Criminality*, 34 J. CORP. L. 153, 174 (2009) (“When Milberg Weiss refused to acquiesce to prosecutors’ demands, the Justice Department ‘went nuclear,’ filing seven felony counts against the entity in May, 2006.”); Jonathan R. Macey, *A Pox on Both Your Houses: Enron, Sarbanes-Oxley and the Debate Concerning the Relative Efficacy of Mandatory Versus Enabling Rules*, 81 WASH. U. L.Q. 329, 342 (2003) (“[A] downgrade by a rating agency is like a corporate nuclear bomb.”).

²⁹ See *infra* Part III.

theory not only allows us to see how the game is played, but also how regulators, potential targets, and lawyers involved could play the game better. Given that regulatory nukes are found in many regulatory arenas, the Article touches significant aspects of many substantive areas of law, including administrative, environmental, tax, labor, and banking law, to name a few.

To this end, Part I defines “regulatory nuke.” Part II provides ten examples of regulatory nukes that involve a wide range of agencies and policy areas. Parts III through VII expand on game theory developed to explain nuclear deterrence and Schelling’s insights to help explain the strategies employed by agencies to leverage regulatory nukes and influence their targets. More specifically, Part III provides an overview of the regulatory nuke game, and the remainder of the Article focuses on individual decision nodes introduced in the regulatory nuke game.

Part IV takes up the topic of agencies threatening to use regulatory nukes. This discussion highlights the complexity of the calculus behind an agency’s decision to threaten to launch a regulatory nuke and also provides agencies with some practical advice about how to navigate this decision. This Part shows that agencies often *use* regulatory nukes by aiming the nuke instead of launching it, and that this use makes regulatory nukes much more powerful than their launch rate would suggest.

Part V examines how targets might react when an agency threatens or fails to threaten the launch of a regulatory nuke. It also highlights that whether a regulatory agency is ultimately pushed to the brink often hinges on the mindset, incentives, and characteristics of the agency’s target.

Part VI delves into the agency’s decision of whether to launch the regulatory nuke. In cases where an agency has made a threat, this decision is often triggered by a target refusing to bend to the threat. Particularly because regulatory agencies often have strong incentives to back down from having to launch a regulatory nuke, this Part also illustrates how in some instances giving an agency a regulatory nuke might actually *weaken* rather than strengthen a regulatory agency’s authority.

Part VII explains how the concept of retaliation can play out in the realm of regulatory nukes. In many instances, agencies that launch regulatory nukes (or even threaten to launch them) often have them stripped away or downsized by Congress or the courts.

I. “REGULATORY NUKE” DEFINED

As the term “regulatory nuke” is rooted in a comparison to nuclear weapons, it makes sense to step back and ask, “What makes nuclear bombs nuclear?” Although there are myriad possible ways to answer this question accurately, I will focus on two of them. The first relates to the destructive power of nuclear weapons, and the second draws upon the political taboo associated with launching the weapon. A regulatory nuke is a tool with two primary characteristics. First, it packs power sufficient to profoundly impact individual regulatory targets or significantly affect important aspects of society or the economy. Second, from the perspective of the regulatory agency, it is politically unavailable in all but the most extreme situations.

A. *Destructiveness*

The iconic mushroom cloud images of nuclear weapons make clear that these weapons can obliterate their targets. Given their enormous force, it is not surprising that much of the most memorable commentary about nuclear weapons focuses on their destructive power. For example, when Albert Einstein said, “I do not know how the Third World War will be fought, but I can tell you what they will use in the Fourth—rocks!”³⁰ he captured the fear that nuclear weapons have enough destructive power to obliterate modern society. Similarly, John F. Kennedy compared the anxiety created by nuclear weapons with “liv[ing] under a nuclear sword of Damocles, hanging by the slenderest of threads, capable of being cut at any moment by accident or miscalculation or by madness.”³¹ He added to that grim comparison an even more ominous prognosis: “The weapons of war must be abolished before they abolish us.”³²

Historical events are also instructive. Compare, for example, Germany’s air raids of England during World War II with that of the United States dropping nuclear bombs dropped on Japan. Germany dropped tons of the conventional explosive, TNT, on England for fifty-seven nights,³³ killing approximately 43,000 people.³⁴ By con-

³⁰ ALICE CALAPRICE & TREVOR LIPSCOMBE, *ALBERT EINSTEIN: A BIOGRAPHY* 124 (2005) (internal quotation marks omitted).

³¹ John F. Kennedy, Address in New York City Before the General Assembly of the United Nations (Sept. 25, 1961), in *PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: JOHN F. KENNEDY: 1961*, at 618, 620 (1962).

³² *Id.*

³³ ALAN AXELROD, *ENCYCLOPEDIA OF WORLD WAR II* 189 (Jack A. Kingston ed., 2007).

³⁴ *Id.*

trast, single nuclear bombs dropped on Hiroshima and Nagasaki killed about 118,000³⁵ and 73,000³⁶ people, respectively.

Beyond these telling statistics, consider a few descriptions of Hiroshima. Begin with the perspective of the Captain of the *Enola Gay*: “As the bomb fell over Hiroshima and exploded, we saw an entire city disappear.”³⁷ From the ground, one eyewitness said Hiroshima “look[ed] as if a monster steamroller had passed over it and squashed it out of existence.”³⁸ Another reported that Hiroshima was “[n]o longer a city, but a burnt-over prairie.”³⁹ The closer one got to the point of impact, the more the destructive power of the bomb became clear: “Of thousands of others, nearer the centre of the explosion, there was no trace. They vanished.”⁴⁰ Stunningly, when the Strategic Arms Reduction Treaty II was signed in the 1990s, at stake were “[f]ifteen thousand weapons with an average yield of 20 Hiroshima bombs.”⁴¹

Now, drawing on metaphor, consider the destructive nature of regulatory nukes. As illustrated, nuclear bombs are destructive to their targets in two ways.⁴² First, nuclear weapons can obliterate their targets.⁴³ To assess the destructiveness of a regulatory tool, we look to see the extent to which it can obliterate its regulatory targets. In this analysis, it is the extent of harm rather than the size of the target that counts. For example, if we were to consider a tool used to regulate banks, it would not matter if the target were the entire American banking system, Bank of America, or a local bank serving the town of American Fork, Utah.⁴⁴ All the destructiveness test evaluates is the

35 *Id.* at 425.

36 *Id.* at 585.

37 Morton S. Perlmutter & Dick Ringler, *Nuclear Anxiety: Social Symptomatology and Educational Therapy*, in *FAMILIES AND THE PROSPECT OF NUCLEAR ATTACK/HOLOCAUST* 59, 60 (Teresa D. Marciano & Marvin B. Sussman eds., 1986).

38 Wilfred Burchett, *The Atomic Plague*, in *REBEL JOURNALISM: THE WRITINGS OF WILFRED BURCHETT* 2, 2 (George Burchett & Nick Shimmin eds., 2007).

39 MICHIIHIKO HACHIYA, *HIROSHIMA DIARY: THE JOURNAL OF A JAPANESE PHYSICIAN AUGUST 6-SEPTEMBER 30, 1945*, at 8 (Warner Wells ed. & trans., 1955).

40 *See* Burchett, *supra* note 38, at 4.

41 Professor Joseph Rotblat, Founder & President, Pugwash Council, Speech Before the Nobel Committee: Remember Your Humanity (Dec. 10, 1995), *available at* <http://www.pugwash.org/award/Rotblatnobel.htm>.

42 *See supra* notes 30–41 and accompanying text.

43 *See supra* notes 33–41 and accompanying text.

44 It is interesting that this test that focuses on the devastation experienced by targets maps fairly well to the way that Schelling conceived the strategic interaction at play within nuclear strategy. THOMAS C. SCHELLING, *ARMS AND INFLUENCE* 15 (2d ed. 2008). He said, for example, that there is such thing as massive retaliation “on a diminutive scale, with local effects

extent to which the regulatory tool destroys the target's ability to function.

Second, a nuclear weapon's impact is large in scope—it can impact entire cities and beyond.⁴⁵ Translating destructive scope to the regulatory world, we look to see how far the harm of the regulatory tool is felt across society. Drawing on the same banking example, the destructive scope of harm is much greater if we are talking about the national banking system than a national bank, and the destructive impact of both are much greater than the impact felt by a local bank that only serves a small town.

Whereas nuclear bombs are destructive both in their power to destroy discrete targets and to inflict harm over large areas, regulatory nukes only need to be destructive in either their impact or their scope. Of course, if a regulatory tool is destructive in its impact on targets and in its scope, it is all the more worthy of being classified as a regulatory nuke.

B. *Political Taboo*

A second trait of a regulatory nuke relates to whether the regulatory tool is perceived to be a political regulatory taboo. At the most basic level, a taboo is something that is culturally forbidden, banned, or otherwise prohibited.⁴⁶ Although the concept of taboo is often tied to religious beliefs and fear of the supernatural, taboo can also grow out of social custom and risk.⁴⁷ Within the context of regulatory nukes, the taboo makes a regulatory tool politically unavailable to an agency in all but the most extreme circumstances.

Just as with destructiveness, the inclusion of taboo as a trait of regulatory nukes grows out of the analogy to nuclear weapons. Four decades ago, President Lyndon B. Johnson observed that “[t]here is no such thing as a conventional nuclear weapon.”⁴⁸ Culturally speaking, nuclear weapons were then, and still are, far from conventional:

not unlike those of Hiroshima.” *Id.* (describing the U.S. Army's retaliatory attacks in the 1860s on American Indian civilians in their winter camps).

⁴⁵ See *supra* notes 33–41 and accompanying text.

⁴⁶ Consider, for example, the following definitions for “taboo” found in Merriam-Webster's: “forbidden to profane use or contact because of what are held to be dangerous supernatural powers”; “banned on grounds of morality or taste”; “banned as constituting a risk”; “a prohibition against touching, saying, or doing something for fear of immediate harm from a supernatural force”; “a prohibition imposed by social custom or as a protective measure.” MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1271 (11th ed. 2007).

⁴⁷ *Id.*

⁴⁸ SCHELLING, *supra* note 44, at vii.

they are weapons regarded as only fit for use under the most dire circumstances. This perception is perhaps best encapsulated by a euphemism for launching a nuclear weapon—"the unthinkable."⁴⁹ Although nuclear bombs have existed for more than sixty years, headlines across the world still demonstrate profound alarm concerning these weapons that grips us when a country even test fires a rocket designed to deliver a nuclear weapon.⁵⁰ This stands in contrast to the TNT-based explosions that occur frequently in Iraq and Afghanistan, which are portrayed, for the most part, in the international press, "[n]ot with a bang but a whimper."⁵¹

What explains this difference in cultural perception between nuclear bombs and TNT-based bombs? In Schelling's view, the move from TNT warfare to nuclear warfare crosses a line—something that he called "the nuclear taboo."⁵² It is not surprising that nuclear bombs have become taboo. One reason for the taboo is the destructive power of nuclear weapons discussed above. Additionally, the dread and horror of the terrible diseases and deformities inflicted on bomb survivors, and in many cases their offspring, may be part of the reason that society views the weapons in such a negative light. Others may reject use of the nuclear weapon due to the absolute environmental damage created in every bombed area or the fallout that ensues after a nuclear explosion.

Schelling noted that we find symbolic thresholds, stopping points, and taboos in many areas of life where we find conflict and competition, such as business competition, racial negotiations, gang warfare, child discipline, and all kinds of negotiated competition.⁵³ In fact, according to Schelling, these can be found where there is "distinctive restraint that can be recognized by both sides, conspicuous stopping places, conventions and precedents to indicate what is within bounds and what is out of bounds, [and] ways of distinguishing new initiatives from just more of the same activity."⁵⁴

49 See, e.g., HERMAN KAHN, *THINKING ABOUT THE UNTHINKABLE* 19 (1962).

50 See, e.g., Ewen MacAskill & Ian Black, *US Condemns Iran's 'Provocative Actions' as Regime Test-Fires Missile that Could Hit Europe*, *GUARDIAN* (London), Dec. 17, 2009, at 19; *North Korea Test-Fires Missiles*, *N.Z. HERALD*, Oct. 14, 2009, at A17; *N. Korea Test-Fires Missile*, *DAILY YOMIURI* (Tokyo), Mar. 11, 2003, at 1; Michael Slackman, *Iran Test-Fires Upgraded Version of Its Most Advanced Missile*, *N.Y. TIMES*, Dec. 17, 2009, at A22.

51 T. S. ELIOT, *The Hollow Men*, in *POEMS 1909–1925*, at 123, 128 (n.d.).

52 Thomas C. Schelling, Op-Ed., *The Nuclear Taboo*, *WALL ST. J.*, Oct. 24, 2005, at A14.

53 SCHELLING, *supra* note 44, at 135.

54 *Id.*

In addition to the categories Schelling noted, we can add regulation to the aspects of society where we see these symbolic thresholds. What are the sorts of factors that separate a regulatory taboo from the world of ordinary regulation and make regulatory nukes perceived as politically unavailable in all but the most extreme circumstances? The perception may be credited to a number of factors, including perceived disproportionality between the harm inflicted by the regulated entity and its punishment, collateral damage associated with a regulatory tool imposed on those other than the regulated entity, a history of not launching the regulatory tool, the political dynamic or social ordering of the regulator and its potential targets, and political pressure and fallout.

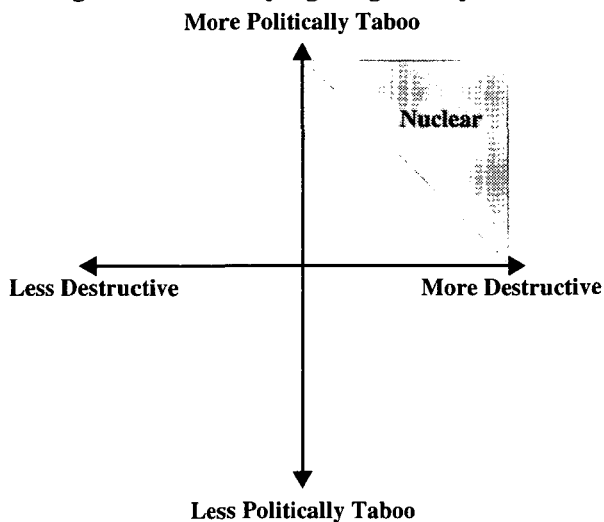
Taboo is a function of perception, cultural norms, and expectations.⁵⁵ Because of this, any regulatory tool can become more or less politically taboo as time passes or circumstances change. As a regulatory tool becomes more taboo, it makes an agency's threat to use it all the more incredible—even unthinkable.

C. Summary

To summarize, regulatory nukes have two traits. First, regulatory nukes have great destructive power. The more power a regulatory tool has to annihilate potential targets (i.e., destructive impact) and the broader its impact is on society (i.e., destructive scope), the more accurate the term “regulatory nuke” becomes. Second, regulatory nukes have political taboos associated with them. Different regulatory nukes might be considered taboo for different reasons, but for whatever the reason, taboo makes the tool politically unavailable.

As illustrated in Figure 1, identifying regulatory nukes is more art than science, particularly when the tool is not extremely destructive or politically taboo. A regulatory tool need not meet the extreme of either pole of these two spectrums, but it must contain sufficient amounts of each. Unfortunately, what is meant by “sufficient amounts” is more of a judgment call than a bright line. To provide additional context, I give ten examples of regulatory nukes below.

⁵⁵ See *supra* notes 46–47 and accompanying text.

Figure 1. Identifying Regulatory Nukes

II. EXAMPLES OF REGULATORY NUKES

This Part provides ten examples of regulatory nukes from a wide variety of policy areas and administrative agencies. The diversity of examples highlights the importance of regulatory nukes in many areas of regulation.

A. *Discrimination Law and Federal Funding*

As a condition for receiving almost any federal grant, the recipient must agree to comply with Title VI of the 1964 Civil Rights Act,⁵⁶ which prohibits discrimination on the basis of race, color, and national origin.⁵⁷ Title IX provides similar protections for sex-based discrimination within the educational context.⁵⁸ In passing this civil rights legislation, Congress not only created an obligation for federal grantees to comply with each act, but it also provided agencies that disseminate federal funds the ability to revoke those funds in the event that discrimination prohibited by each statute occurs.⁵⁹ Based on this regulatory power, a number of agencies have promulgated rules describing how federal funds may be revoked.⁶⁰

⁵⁶ 42 U.S.C. § 2000d (2006).

⁵⁷ *Id.*

⁵⁸ *See* 20 U.S.C. § 1681 (2006).

⁵⁹ *See id.* § 1682; 42 U.S.C. § 2000d-1.

⁶⁰ *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 619 n.7 (1983) (Marshall, J., dissenting) (listing examples of such regulations); *see also, e.g.*, 7 C.F.R. §§ 15.1–12 (2011) (U.S. Department of Agriculture); 15 C.F.R. §§ 8.1–15 (2010) (Department of Commerce); 28 C.F.R. §§ 43h2.101–112 (2010) (Department of Justice); 32 C.F.R. §§ 195.1–14 (2010) (Department of

From the regulatory target's perspective, revocation of federal funding can prove extremely destructive. Take, for example, the importance of federal funding for colleges and universities. The federal government funds about sixty percent of the costs of research programs within higher education.⁶¹ Cuts at that level may threaten the viability of such programs.

Revocation of federal funding is also a political taboo. For example, in the nearly forty years since the enactment of Title IX, revocation has been an extremely rare event⁶² even though sex-based discrimination has been prevalent during that time.⁶³ Why has revocation become a political taboo? It not only punishes the offenders of the law, but also harms many people who did nothing wrong: a single discriminator within an institution can cut off a vital pipeline of financial support for the institution as a whole. Moreover, discrimination is unfortunately so commonplace that revocation seems like a disproportionate remedy. Particularly for large institutions, revocation works like a sledgehammer when a scalpel would suffice.

B. *IRS Revocation of Tax-Exempt Status*

Tax-exempt organizations constitute some of society's most revered and important institutions: churches, universities, hospitals, advocacy groups, foundations, museums, and other organizations built to serve the needs of the poor, advance the arts, and educate society.⁶⁴ The IRS not only has power to determine what organizations qualify for tax-exempt status, but it also has the power to revoke the tax-

Defense); 34 C.F.R. §§ 100.1–13 (2010) (Department of Education); 40 C.F.R. §§ 7.10–.135 (2010) (Environmental Protection Agency).

⁶¹ See NAT'L SCI. FOUND., *ACADEMIC R&D EXPENDITURES: FY 2008*, at 8 tbl.1 (2010), available at <http://www.nsf.gov/statistics/nsf10311/pdf/nsf10311.pdf>.

⁶² See LINDA JEAN CARPENTER & R. VIVIAN ACOSTA, *TITLE IX*, at 30 (Amy N. Clocksin et al. eds., 2005) ("No federal money has ever been lost because of an [Office of Civil Rights] finding of a violation of Title IX."); Barbara Anne Murphy, *Education: An Illusion for Women*, 3 S. CAL. REV. L. & WOMEN'S STUD. 19, 53 (1993) ("Between 1972 and 1991, the Department of Education did not revoke funding to one school due to gender discrimination in violation of Title IX."); Leora Tanenbaum, *Hey, Teach!*, *NATION*, Feb 28, 1994, at 280, 282 ("Title IX, the 1972 federal statute outlawing sex discrimination in schools, has never been seriously enforced; it sits in the books like a cruel joke. Neither the Education Department nor the Office of Civil Rights has ever actively pursued its enforcement.").

⁶³ See, e.g., U.S. DEP'T OF EDUC., *ANNUAL REPORT TO CONGRESS OF THE OFFICE OF CIVIL RIGHTS FISCAL YEAR 2007–08*, at 30 (2009), available at <http://www.ed.gov/about/reports/annual/ocr/annrpt2007-08/annrpt2007-08.pdf> (reporting that the office initiated twenty-one compliance reviews involving potential Title IX violations in fiscal year 2008).

⁶⁴ I.R.C. § 501(c)(3) (2006).

exempt status of an organization that fails to live up to its charitable mission.⁶⁵

A tax-exempt status often proves vital to fundraising. Once the exemption is revoked, the organization can no longer solicit donations with the promise that donors can write off the value of the donation for tax purposes.⁶⁶ Some have gone so far as to equate revocation with an organizational “death penalty.”⁶⁷

Revocation has also become a political taboo. For the most part, the IRS turns a blind eye to violations of the tax code that would permit revocation.⁶⁸ The IRS has proved particularly squeamish, for example, when it comes to churches willing to violate the prohibition against endorsing political candidates.⁶⁹ During the 2004 presidential election cycle, there were a handful of well-publicized incidents of nonprofit churches endorsing candidates.⁷⁰ Although the IRS handed out some warnings, it ultimately declined to impose any penalties.⁷¹ Since then, a number of churches have actively challenged the IRS to revoke their exempt statuses.⁷² Beginning with thirty-three churches in 2008, the Alliance Defense Fund has organized an annual “Pulpit

⁶⁵ *Id.* § 170(c)(2)(D).

⁶⁶ With minor exceptions not pertinent here, taxpayers who wish to deduct the amount of their charitable donations under § 170 may only take that deduction for money donated to organizations that meet the requirements of § 501(c)(3).

⁶⁷ See, e.g., Oliver A. Houck, *On the Limits of Charity: Lobbying, Litigation, and Electoral Politics by Charitable Organizations Under the Internal Revenue Code and Related Laws*, 69 BROOK. L. REV. 1, 65 (2004).

⁶⁸ See, e.g., NICHOLAS P. CAFARDI & JACLYN FABEAN CHERRY, UNDERSTANDING NON-PROFIT AND TAX EXEMPT ORGANIZATIONS § 6.06, at 84 (2006) (noting that the IRS seldom revokes a nonprofit organization’s tax-exempt status because of revocation’s harsh consequences); BERTRAND M. HARDING, JR., THE TAX LAW OF COLLEGES AND UNIVERSITIES § 9.1, at 349 (3d ed. 2008) (observing that “it would be quite unusual for the IRS to attempt to revoke a major educational institution’s tax-exempt status”); GEORGE D. WEBSTER & HUGH K. WEBSTER, THE LAW OF ASSOCIATIONS § 7.08, at 7-32.2 (release 64 2011) (“The IRS has shown an inclination to impose the excise tax under section 4955 in lieu of revocation of exemption in cases where the violation appears to be minor in relation to the organization’s other exempt purpose activities.”); Lloyd Hitoshi Mayer, *Politics at the Pulpit: Tax Benefits, Substantial Burdens, and Institutional Free Exercise*, 89 B.U. L. REV. 1137, 1149 (2009) (“To date the IRS has resolved the vast majority of violations, whether involving houses of worship or statements from the pulpit, through written advisories instead of imposing any penalty.”).

⁶⁹ I.R.C. § 501(c)(3).

⁷⁰ See, e.g., Mayer, *supra* note 68, at 1139 (discussing All Saints Church in Pasadena, California).

⁷¹ *Id.*

⁷² See *id.* at 1139–40; Joy Powell, *Warroad Church Preaches Politics as Part of Protest*, STAR TRIB. (Minneapolis), Oct. 2, 2011, <http://www.startribune.com/politics/statelocal/130951318.html> (reporting on a Minnesota church that participated in the 2011 “Pulpit Freedom Sunday” event).

Freedom Sunday,” which encourages pastors to preach about the moral qualifications of candidates for political office; to date, the IRS still has not pursued these violations.⁷³

Only on rare occasions has the IRS revoked the nonprofit status of a widely recognized organization. One of these rare occasions occurred in 1976, when the IRS formally revoked Bob Jones University’s exempt status after the University was found to be discriminating illegally on the basis of race.⁷⁴ Although one could point to a handful of other cases in which the IRS dismantled an active organization, this taboo certainly grows stronger with time. In fact, about a decade ago, Congress actually changed the law and gave the IRS additional regulatory tools in light of its unwillingness to exercise its revocation power.⁷⁵ Some in Congress speculated that the reason the IRS would not pull the revocation trigger was because the penalty was too harsh.⁷⁶

C. *Revocation of Broadcast Licenses*

Congress has given the FCC a broad mandate to assure that broadcast stations serve the “public interest, convenience and necessity.”⁷⁷ When the FCC finds that a station does not meet this public interest standard, the regulatory tools at its disposal range from fines to the revocation of a station’s broadcast license.⁷⁸

With its license revoked, a station has no legal means to broadcast, and thus the station’s core business is destroyed. Many other members of society also may feel the destructive power of a license revocation. For example, there are many who would feel the impact of the Fox network losing its licenses: it is not hard to imagine fans of

⁷³ See Stephanie Strom, *The Political Pulpit*, N.Y. TIMES, Oct. 1, 2011, at B1 (quoting lawyers defending the churches as stating that “they are virtually certain [the IRS] has no continuing audits of church political activity”).

⁷⁴ *Bob Jones Univ. v. United States*, 461 U.S. 574, 580–81 (1983) (noting that the university did not admit black students until 1971, and still excluded anyone in an interracial relationship or who advocated interracial marriage in 1976); Rev. Rul. 71-447, 1971-2 C.B. 230 (“Therefore, a school not having a racially nondiscriminatory policy as to students is not ‘charitable’ within . . . sections 170 and 501 (c) (3) of the Code . . . and accordingly does not qualify as an organization exempt from Federal income tax.”).

⁷⁵ H.R. REP. NO. 104-506, at 54–55 (1996); SUBCOMM. ON OVERSIGHT OF H. COMM. ON WAYS & MEANS, 103d CONG., 2D SESS., REP. ON REFORMS TO IMPROVE THE TAX RULES GOVERNING PUBLIC CHARITIES 17 (Comm. Print 1994).

⁷⁶ SUBCOMM. ON OVERSIGHT OF H. COMM. ON WAYS & MEANS, 103d CONG., 2D SESS., REP. ON REFORMS TO IMPROVE THE TAX RULES GOVERNING PUBLIC CHARITIES 16.

⁷⁷ 47 U.S.C. §§ 309(a), 312(a)(2) (2006).

⁷⁸ See 18 U.S.C. § 1464 (2006); 47 U.S.C. § 312(a).

American Idol using their dialing and texting skills to deluge Congress with complaints.

Revocation of a broadcast license also serves as a good example of a political taboo. In fact, to date, the FCC has never revoked the license of a commercial television or radio broadcaster due to content regulation.⁷⁹ From time to time, however, the FCC has threatened to revoke licenses to get a broadcaster's content in line with FCC standards. For example, after a public firestorm related to the controversial Janet Jackson "wardrobe malfunction" during the 2004 Super Bowl halftime show,⁸⁰ the FCC pursued a repeat offender of FCC standards, Howard Stern.⁸¹ Ultimately, instead of risking its license, Clear Channel Communications—which broadcasts Stern's syndicated talk show—paid \$495,000 in fines⁸² and removed Stern from the dial for a time.⁸³ This move actually facilitated Stern's decision to move to satellite radio, which is outside the FCC's regulatory reach.⁸⁴

The reason for the taboo surrounding this regulatory tool certainly has much to do with the entities that the FCC regulates. Commercial broadcasters represent some of the most influential institutions in the country, and that influence extends into the halls of Congress.⁸⁵ It also seems disproportionate to revoke a station's license for the contents of a single show, let alone for a few episodes. Additionally, it is possible that the FCC may see this as a political

⁷⁹ See Matthew A. Klopp, *Constitutional Malfunction: Does the FCC's Authority to Revoke a Broadcaster's License Violate the First Amendment?*, 13 *COMMLAW CONSPICUOUS* 309, 310 (2005) ("Although the FCC has never fully exercised its statutory enforcement powers, it has repeatedly warned broadcasters of its willingness to revoke a broadcaster's license for indecent broadcasts.").

⁸⁰ *Id.* at 309–10.

⁸¹ Clear Channel Broad. Licenses, Inc., 19 FCC Rcd. 6773, 6780 (2004) ("We remind licensees that serious, repeated cases of indecency violations could be subject to license revocation."); see also *FCC Indecency Fines, 1970–2004*, WASH. POST, <http://www.washingtonpost.com/wp-srv/business/graphics/web-fcc970.html> (last visited Nov. 20, 2011).

⁸² Clear Channel Broad. Licenses, Inc., 19 FCC Rcd. 6773, 6780 (2004).

⁸³ See Klopp, *supra* note 79, at 329; *Howard Stern Makes His Debut on Satellite Radio, Uses Expletive*, ASSOCIATED PRESS, Jan. 9, 2006, available at http://www.usatoday.com/life/people/2006-01-09-stern-debut_x.htm.

⁸⁴ See *Howard Stern Makes His Debut on Satellite Radio, Uses Expletive*, *supra* note 83; see also Clay Clavert, *The First Amendment, the Media and the Culture Wars: Eight Important Lessons From 2004 About Speech, Censorship, Science and Public Policy*, 41 *CAL. W. L. REV.* 325, 357 (2005).

⁸⁵ See Anthony E. Varona, *Changing Channels and Bridging Divides: The Failure and Redemption of American Broadcast Television Regulation*, 6 *MINN. J.L. SCI. & TECH.* 1, 3 (2005) (discussing broadcasters' power and influence).

taboo due to its desire to avoid First Amendment challenges from broadcasters.⁸⁶

D. Federal Regulation of State Driver's Licenses

States have traditionally had broad autonomy to determine the makeup of and qualifications for driver's licenses. However, in 2005, Congress stepped into this policy area by passing the REAL ID Act.⁸⁷ This Act focuses on reducing license forgeries and increasing the standards for drivers to prove their identities before receiving a license (e.g., by requiring a birth certificate, social security card, and photo identification).⁸⁸ A state's failure to comply with the Act's requirements may trigger federal sanctions, including the government refusing to honor that state's license for "official purposes," such as passing through security checkpoints in airports and gaining entry into federal buildings.⁸⁹

The REAL ID Act is an example of a regulatory tool with a destructive force that is extreme in its scope. Sanctions under the Act would result in a large portion of a state's population not having adequate identification for commercial air travel or to enter federal buildings. This would impinge on a citizen's ability to travel and meaningfully participate in many aspects of government—both of which are fundamental features of federal citizenship.⁹⁰ The scope of the destructive power of the regulatory tool is broad—only those within state government can opt to comply with the mandates of the

⁸⁶ The Supreme Court has recently granted certiorari to a First Amendment challenge to the FCC indecency regulations by Fox and other television networks, in which the Second Circuit held the regulations unconstitutionally vague. *Fox Television Stations, Inc. v. FCC*, 613 F.3d 317, 319 (2d Cir. 2010), *cert. granted*, 131 S. Ct. 3065 (2011).

⁸⁷ REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302 (codified as amended in scattered sections of 8 U.S.C.).

⁸⁸ *See id.* § 202(c)(1), 119 Stat. at 312–13.

⁸⁹ *Id.* §§ 201(3), 202(a)(1), 119 Stat. at 312; 6 C.F.R. § 37.3 (2011).

⁹⁰ Racial discrimination by segregated inns, hotels, and restaurants was one of the reasons Congress passed the Civil Rights Act of 1964. *See Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 252–53 (1964). The importance of travel to a person's ability to access economic and social opportunities, and thus its impact on interstate commerce, was the basis to which Congress and later the Court tied the enactment of the Act. *See id.* (detailing how interference with travel divorces people from participation in numerous social and economic activities). The Court has long considered the right to travel as a fundamental right. *See Edwards v. California*, 314 U.S. 160, 177–78 (1941) (Douglas, J., concurring). The inability to enter federal government buildings could deprive a person of due process and equal protection under the law. *See, e.g., Tennessee v. Lane*, 541 U.S. 509, 523 (2004) (finding that the right of physical access to courts is protected by the Due Process Clause of the Fourteenth Amendment).

REAL ID Act,⁹¹ but all citizens of the state might suffer. Barring all state citizens without a passport or other federal identification from these activities is obviously a political taboo. In addition to the impact on a state's citizens, this taboo relates to the federal intrusion into a policy area traditionally reserved for states.⁹² In fact, to protest this intrusion, about half of the states have passed laws or resolutions aimed at voicing protest of or even refusing compliance with the REAL ID Act.⁹³ Objections voiced by the states include concerns that the Act is an unfunded mandate,⁹⁴ an identity theft hazard,⁹⁵ an excessive burden on citizens,⁹⁶ and a de facto requirement for a national identification card,⁹⁷ to name a few.

E. Laws Linked to Federal Highway Funds

At times Congress has conditioned the receipt of federal highway funds on states taking certain actions. When Congress does this, it is more than a prod. In fiscal year 2009, the federal highway funds distributed to states amounted to more than \$42.8 billion.⁹⁸

The federal government eventually found ways to leverage the power that accompanies such a large pot of money to coerce states to comply with Congress's will in a number of ways. For example, in the 1960s and 1970s, Congress made federal highway dollars contingent on states passing laws that require motorcyclists to wear safety helmets.⁹⁹ The Clean Air Act¹⁰⁰ allows the Environmental Protection

⁹¹ See, e.g., REAL ID Act of 2005 § 202(c)(1), 119 Stat. at 312.

⁹² See, e.g., *Opposition Voices*, REALNIGHTMARE.ORG, <http://realnightmare.org/opposition/9/> (last visited Nov. 23, 2011) (quoting various government officials and commentators who argue that the Act interferes with principles of federalism).

⁹³ *Anti-Real ID Legislation in the States*, REALNIGHTMARE.ORG, <http://www.realnightmare.org/news/105/> (last visited Nov. 23, 2011).

⁹⁴ See Act of Apr. 18, 2007, 2007 Wash. Sess. Laws 333; H.R. Res. 4, 2009 Gen. Sess., 2009 Utah Laws 2577; S. Con. Res. 16, 86th Gen. Assemb., Reg. Sess., 2007 Ark. Acts 579.

⁹⁵ See Act of Jan. 1, 2010, ch. 432, 2009 Or. Laws 1134; Act No. 807, 2008 La. Acts 3059; S. 4, 2007 Gen. Assemb., Reg. Sess. (Ga. 2007).

⁹⁶ See Act of June 18, 2007, 105th Gen. Assemb., 2007 Tenn. Priv. Acts at ccliv; H.R.J. Res. 27, 95th Gen. Assemb., 2007 Ill. Laws 10,140; S. Con. Res. 4040, 60th Leg. Assemb., 2007 N.D. Laws 2110.

⁹⁷ See Act of Apr. 17, 2007, 2007 Mont. Laws 916; S. Con. Res. 7, 83rd Leg. (S.D. 2008); H.R. J. Res. 07-1047, 66th Gen. Assemb., First Reg. Sess. (Colo. 2007).

⁹⁸ FED. HIGHWAY ADMIN., COMPARISON OF FEDERAL HIGHWAY TRUST FUND HIGHWAY ACCOUNT RECEIPTS ATTRIBUTABLE TO THE STATES AND FEDERAL-AID APPORTIONMENTS AND ALLOCATIONS FROM THE HIGHWAY ACCOUNT FISCAL YEARS 1957-2009 (2010), available at <http://www.fhwa.dot.gov/policyinformation/statistics/2009/pdf/fe221.pdf>.

⁹⁹ Highway Safety Act of 1966, Pub. L. No. 89-564, 80 Stat. 731, 732-33 (codified at 49 U.S.C. §§ 30101-30170 (2006)); 23 C.F.R. § 204.4 (1969).

¹⁰⁰ Clean Air Act, 42 U.S.C. §§ 7401-7515 (2006).

Agency (“EPA”) to pull federal highway funds if a state fails to comply with the Act’s national air quality standards.¹⁰¹ Additionally, Congress directed the Department of Transportation to withhold up to ten percent of federal highway funds from states that did not set their drinking age at twenty-one.¹⁰²

The destructive power of revoking federal highway funds is impressive in its scope. States unwilling to capitulate to the federal mandate lose a valuable source of federal support. Congress understands that this is a substantial stick: “[B]ecause federal funds account for ninety-five percent of a state’s transportation budget, highway funds provide the leverage for Congress to achieve its goals.”¹⁰³

Revoking highway funding may be politically taboo for a number of reasons, and a concrete example helps frame this discussion. Consider the ability of EPA to revoke highway funds when states fail to comply with certain provisions of the Clean Air Act.¹⁰⁴ One reason that EPA might be reticent to employ these sanctions is because they can impose significant collateral damage on taxpayers, or in the event that investments in transportation infrastructure are not forthcoming, commuters within the impacted area. Furthermore, because much of the Clean Air Act relies on cooperative federalism, loss of highway funds may make it more difficult for EPA to achieve its goals of increasing air quality. Lastly, states are powerful players in the political arena, which makes using the stick politically difficult.

F. Institutional Backstops

Congress sometimes entrusts a regulatory program to more than one agency or delegates powers to both federal and state entities.¹⁰⁵ When Congress’s mandates call for cooperation, it makes sense for Congress to split up tasks and to create an institutional backstop if the cooperation fails to materialize.

For example, statutes based on cooperative federalism often entrust states with particular tasks. However, in the event that a state fails to deliver, the federal government is instructed to step in.¹⁰⁶ This

101 *Id.* §§ 7410(m), 7509(b)(1).

102 23 U.S.C. § 158(a)(1) (2006); *see also* *South Dakota v. Dole*, 483 U.S. 203, 205 (1987).

103 Denis Binder, *The Spending Clause As a Positive Source of Environmental Protection: A Primer*, 4 *CHAP. L. REV.* 147, 160 (2001).

104 42 U.S.C. §§ 7410(m), 7509(b)(1).

105 *See, e.g., id.* § 7410 (requiring states to develop plans to reduce air pollution and authorizing EPA to promulgate a federal antipollution plan if a state fails to submit a plan or its plan falls short of federal requirements).

106 *See id.*

is common in environmental law. The Clean Air Act requires the federal government to set national air quality standards¹⁰⁷ and leaves it largely to states to determine their individual compliance methods.¹⁰⁸ If a state fails to meet the federal standard, the Clean Air Act leaves room for the federal government to step in and to complete the state's regulatory task.¹⁰⁹ This same sort of institutional structure also characterizes parts of the Clean Water Act,¹¹⁰ the Resource Conservation and Recovery Act,¹¹¹ and the Magnuson-Stevens Fishery Conservation and Management Act.¹¹²

Environmental law also has examples of backstop provisions dealing with relations between federal agencies. The Clean Water Act primarily entrusts the Army Corps of Engineers to oversee regulation of the dredging and filling of water bodies by allowing the Corps to issue permits to fill wetlands.¹¹³ In the event that EPA finds that a Corps permit fails to meet the statutory standards, however, EPA is given the power to veto permits provided by the Corps.¹¹⁴

When institutional backstops kick in, they override the status quo put in place by congressional legislation. Depending on what power is being supplanted and how it is supplanted, the destructive scope may be significant. In a frequently recounted example from the 1970s, EPA stepped in to address Los Angeles's air quality problems.¹¹⁵ To push the greater Los Angeles area toward compliance, EPA attempted to implement gas rationing as part of its solution.¹¹⁶

Regulatory backstops are by their nature a political taboo because, if resorted to regularly, the backstops would set the institutional structure provided for by Congress on its head. Of course, crossing Congress can cause problems related to congressional oversight and judicial review.

¹⁰⁷ *Id.* § 7409.

¹⁰⁸ *Id.* § 7410(a).

¹⁰⁹ *Id.* § 7410(c).

¹¹⁰ *See* 33 U.S.C. §§ 1252–1253 (2006).

¹¹¹ *See* 42 U.S.C. §§ 6905, 6948.

¹¹² *See* 16 U.S.C. §§ 1801–1883 (2006).

¹¹³ 33 U.S.C. § 1344.

¹¹⁴ *Id.* § 1344(c).

¹¹⁵ *See* Barry T. Woods, Comment, *Environmental Land Use, Indirect Source Controls and California's South Coast Plan; Is the Day of Attainment Coming?*, 23 ENVTL. L. 1273, 1284 (1993).

¹¹⁶ *See id.*

G. School Closures and the No Child Left Behind Act

When Congress passed the No Child Left Behind Act of 2001 (“NCLBA”),¹¹⁷ some complained that a culture of lax enforcement pervaded the Department of Education.¹¹⁸ With the NCLBA, Congress provided the Department with a new arsenal of regulatory tools to help deliver the promises of the statute. Under the NCLBA, schools that do not make “adequate yearly progress”¹¹⁹ may face various penalties including the dramatic sanctions of shutting down schools and abolishing school districts.¹²⁰

Closing schools and districts clearly has a destructive impact on the entities that it regulates. From the perspective of a school or district, shutting down the school is a form of obliteration. There is nothing more one could do to punish a school or a district. It effectively serves as an institutional death penalty.

Given the number of people who have complained that the NCLBA forces teachers to teach to annual assessment tests,¹²¹ it seems that many believe it is possible that an administration may resort to these extreme regulatory tools. However, even when the NCLBA allows for extreme sanctions, administrators rarely employ them.¹²² They are a political taboo because, in addition to their potential for collateral damage, this regulatory tool also impacts a policy area that is traditionally reserved for the province of state government.¹²³ There may also be a sense that destroying the target does not

117 No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified at 20 U.S.C. §§ 6301–7941 (2006)).

118 Abigail Aikens, *Being Choosy: An Analysis of Public School Choice Under No Child Left Behind*, 108 W. VA. L. REV. 233, 250 (2006); William L. Taylor, *What Are the Likely Impacts of the Accountability Movement on Minority Children?: Title I as an Instrument for Achieving Desegregation and Equal Educational Opportunity*, 81 N.C. L. REV. 1751, 1759–60 (2003) (asserting the department “has been permeated by a culture of non-enforcement”).

119 20 U.S.C. § 6311(b)(2).

120 *Id.* § 6316(c)(10)(C).

121 See, e.g., Nora Brunelle, *Political Education: An Analysis of the Policy and Politics Behind Utah’s Opposition to No Child Left Behind*, 2006 UTAH L. REV. 419, 435 (noting criticism that the law’s provisions “force teachers to ‘teach to the test,’ rather than to the needs of their students”); Ryan S. Vincent, Note, *No Child Left Behind, Only the Arts and Humanities: Emerging Inequalities in Education Fifty Years After Brown*, 44 WASHBURN L.J. 127, 143 (2004) (same).

122 Amy M. Reichbach, Note, *The Power Behind the Promise: Enforcing No Child Left Behind to Improve Education*, 45 B.C. L. REV. 667, 682, 694 (2004) (noting that the federal government had failed to enforce the NCLBA during its first two years); see also Taylor, *supra* note 118, at 1759–60 (providing examples of hesitancy to enforce the NCLBA).

123 See Thomas Rentschler, *No Child Left Behind: Admirable Goals, Disastrous Outcomes*, 12 WIDENER L. REV. 637, 643 (2006); Sarah D. Greenberger, Comment, *Enforceable Rights, No Child Left Behind, and Political Patriotism: A Case for Open-Minded Section 1983 Jurisprudence*, 153 U. PA. L. REV. 1011, 1016 (2005).

improve the overall education in a state. It just leaves the state with one fewer school and many upset parents, teachers, and students.

H. Criminal Prosecutions

Up to this point, I have provided examples of agencies using administrative penalties. Additionally, regulatory nukes may have a criminal component to them. Many regulatory programs have select criminal sanctions for particularly egregious violations. For example, criminal enforcement of some provisions of corporate law, environmental law, and tax law are highly unusual and seem to qualify as regulatory nukes. The best way to illustrate the analogy between criminal sanctions and regulatory nukes is by looking at a concrete example.

Consider the criminal prosecution of and resulting demise of Arthur Andersen. Up until several years ago, Arthur Andersen was one of the world's largest accounting firms.¹²⁴ During its nearly century-long existence, Arthur Andersen spent a great deal of time building a brand that signified accuracy and integrity.¹²⁵ In the 1990s and the early 2000s that reputation came crashing down as the firm was tangled up in a number of public fiascos, including a controversial audit of Enron.¹²⁶

As the firm increasingly became embroiled in the collapse of Enron, two Andersen employees ordered others at Andersen to shred various Enron-related documents.¹²⁷ The Department of Justice not only went after the responsible Andersen employees but also brought an obstruction of justice claim against the firm itself.¹²⁸

The Department of Justice has tremendous power to destroy corporations by prosecuting them. For Arthur Andersen, the destruction did not even take a final conviction. By the time the Supreme Court overturned Arthur Andersen's convictions,¹²⁹ it was merely a shell of its former self. The indictment alone was enough to push the firm

¹²⁴ See Pamela H. Bucy, *Why Punish?: Trends in Corporate Criminal Prosecutions*, 44 AM. CRIM. L. REV. 1287, 1301 (2007).

¹²⁵ Ken Brown & Ianthe Jeanne Dugan, *Andersen's Fall from Grace Is a Tale of Greed and Miscues*, WALL ST. J., June 7, 2002, at A1.

¹²⁶ *Id.*

¹²⁷ *Arthur Andersen LLP v. United States*, 544 U.S. 696, 700–01 (2005).

¹²⁸ *Id.* at 702; see also Albert D. Spalding, Jr. & Mary Ashby Morrison, *Criminal Liability for Document Shredding After Arthur Andersen LLP*, 43 AM. BUS. L.J. 647, 650 (2006).

¹²⁹ *Arthur Andersen*, 544 U.S. at 708.

over the edge.¹³⁰ The destructive force of the prosecution was not only felt by the firm, but also by its more than 28,000 employees¹³¹ and its owners.

Corporations are rarely prosecuted criminally.¹³² Prosecuting corporations is a political taboo, presumably because of the collateral damage associated therewith—a few employees cost thousands of employees their jobs and many investors their investments.¹³³ Although the story of the demise of Arthur Andersen is one for the history books as a rare prosecution, the strategy of threatening to indict a corporation is a much more common way for prosecutors to secure its cooperation.¹³⁴

I. Presidential Regulatory Nukes and Desegregation

It is not just agencies that have access to regulatory nukes. The President controls several of them. Among the most striking powers delegated to the President are those found in the Insurrection Act.¹³⁵ The Act allows the President to call in armed forces in the event of political insurrection, domestic violence, or an attempt to overthrow the government.¹³⁶

Presidents only rarely unleash the full power of the Act. Most famously, President Eisenhower employed the Insurrection Act to desegregate a high school in Little Rock, Arkansas.¹³⁷ After *Brown v. Board of Education*,¹³⁸ the South inched toward desegregating schools. In 1957, Central High School had planned to enroll nine black students.¹³⁹ Due to public clamor in Little Rock surrounding the issue in the summer of 1957, President Eisenhower fielded a ques-

¹³⁰ Michael A. Simons, *Vicarious Snitching: Crime, Cooperation, and "Good Corporate Citizenship,"* 76 ST. JOHN'S L. REV. 979, 981 (2002).

¹³¹ See Elizabeth K. Ainslie, *Indicting Corporations Revisited: Lessons of the Arthur Andersen Prosecution*, 43 AM. CRIM. L. REV. 107 (2006).

¹³² Simons, *supra* note 130, at 986.

¹³³ See Wilson Meeks, *Corporate and White-Collar Crime Enforcement: Should Regulation and Rehabilitation Spell an End to Corporate Criminal Liability?*, 40 COLUM. J.L. & SOC. PROBS. 77, 98 (2006).

¹³⁴ See *id.* at 99; Cindy A. Schipani, *The Future of the Attorney-Client Privilege in Corporate Criminal Investigations*, 34 DEL. J. CORP. L. 921, 925 (2009).

¹³⁵ 10 U.S.C. §§ 331–336 (2006).

¹³⁶ *Id.* § 333.

¹³⁷ William C. Banks, *Providing "Supplemental Security"—the Insurrection Act and the Military Role in Responding to Domestic Crises*, 3 J. NAT'L SECURITY L. & POL'Y 39, 69 n.162 (2009).

¹³⁸ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

¹³⁹ Wiley A. Branton, *Little Rock Revisited: Desegregation to Resegregation*, 52 J. NEGRO EDUC. 250, 261 (1983).

tion about whether he would deploy federal troops to assist in desegregation.¹⁴⁰ He responded, "I can't imagine any set of circumstances that would ever induce me to send federal troops . . . into any area to enforce orders of a federal court, because I believe that [the] common sense of America will never require it."¹⁴¹

What Eisenhower did not anticipate was that Arkansas Governor Orval Faubus would deploy troops of the state's National Guard to thwart desegregation attempts in Arkansas and that an angry mob would accompany those troops.¹⁴² Although Governor Faubus ultimately withdrew the troops,¹⁴³ disturbances both inside and outside the school kept the black students from attending school for more than a few hours.¹⁴⁴ President Eisenhower resolved that the school would not be integrated without federal intervention, and on September 24, he signed an Executive Order that federalized the Arkansas National Guard and sent the 101st Airborne Division to Little Rock.¹⁴⁵ The nine students made it through the school year with the help of federalized National Guard troops.¹⁴⁶

The power of this regulatory tool is impressive both in its impact and, in this case, its scope. Despite a recalcitrant governor and a state unwilling to admit black students into what had been all-white schools, President Eisenhower was able to facilitate desegregation. A Little Rock citizen at the time referred to the situation as "living in a police state."¹⁴⁷ In a limited way, the description is accurate. However, if sending in the 101st Airborne Division had not proved sufficient, President Eisenhower was willing to deploy additional military force: his order actually authorized the Secretary of Defense to deploy "any or all of the units of the National Guard of the United States and of the Air National Guard of the United States within the State of Arkansas to serve in the active military service of the United States for an indefinite period and until relieved by appropriate orders."¹⁴⁸ This order sounded the death knell for school segregation in Little Rock.

¹⁴⁰ James W. Vander Zanden, *The Impact of Little Rock*, 35 J. EDUC. SOC. 381, 382 (1962) (quoting President's news conference held July 17, 1957).

¹⁴¹ *Id.*

¹⁴² See Branton, *supra* note 139, at 261-62.

¹⁴³ ELIZABETH JACOWAY, *TURN AWAY THY SON: LITTLE ROCK, THE CRISIS THAT SHOCKED THE NATION* 158 (2007).

¹⁴⁴ See *Cooper v. Aaron*, 358 U.S. 1, 12 (1958).

¹⁴⁵ See Exec. Order No. 10,730, 3 C.F.R. 89 (Supp. 1957).

¹⁴⁶ *Cooper*, 358 U.S. at 12.

¹⁴⁷ VIRGIL T. BLOSSOM, *IT HAS HAPPENED HERE* 3 (1959).

¹⁴⁸ Exec. Order No. 10,730, 3 C.F.R. 89.

President Eisenhower also recognized that he was dealing with a political taboo and made clear that he understood this from the minute he issued the Order. In his televised speech to the Nation regarding his decision, he explained, "The proper use of the powers of the Executive Branch to enforce the orders of a Federal Court is limited to extraordinary and compelling circumstances. Manifestly, such an extreme situation has been created in Little Rock."¹⁴⁹ Some of the factors that caused him to rely on the Insurrection Act to enforce the orders of federal courts included his duty to uphold the law, the need to avoid anarchy and mob rule, the failure of state and local government to restore social order, and the need to protect the reputation of the United States abroad.¹⁵⁰

J. The NCAA "Death Penalty" Sanction

To be sure, regulatory nukes are not a tool available just to the federal government. One example well outside the federal bureaucracy is a power held by the National Collegiate Athletic Association ("NCAA") in its oversight of athletic programs within higher education institutions.

The NCAA promulgates and enforces rules governing college athletics.¹⁵¹ In the event that NCAA staff finds that a school has repeatedly committed major violations of its rules, the NCAA may employ a number of regulatory sanctions, including banning a school from participating in a particular sport for up to two years.¹⁵² Banning teams from playing is known as the "death penalty."¹⁵³

At least when it comes to sports programs recognizable to the average sports fan, the only time that the NCAA has prohibited a school from participating in a sport came in 1987, when the NCAA cancelled the football season of Southern Methodist University ("SMU").¹⁵⁴ The reason for the sanction was that during 1985 and 1986, SMU had found a way to channel between \$50 and \$725 each

¹⁴⁹ Dwight D. Eisenhower, Radio and Television Address to the American People on the Situation in Little Rock (Sept. 24, 1957), in *DEBATING THE CIVIL RIGHTS MOVEMENT, 1945-1968*, at 60, 63 (Steven F. Lawson & Charles Payne eds., 1998).

¹⁵⁰ *Id.* at 62-64.

¹⁵¹ NAT'L COLLEGIATE ATHLETIC ASS'N, 2009-10 NCAA DIVISION I MANUAL: CONSTITUTION, OPERATING BYLAWS, ADMINISTRATIVE BYLAWS 1 (2009), available at <http://www.ncaapublications.com/p-3934-2009-2010-ncaa-division-i-manual.aspx>.

¹⁵² See *id.* at 293.

¹⁵³ See, e.g., Rodney K. Smith, *The National Collegiate Athletic Association's Death Penalty: How Educators Punish Themselves and Others*, 62 *IND. L.J.* 985, 987 (1987).

¹⁵⁴ NCAA Comm. on Infractions, *SMU Football Program Suspended One Year for Infractions*, NCAA News, Mar. 4, 1987, at 13.

month to a number of players on the team, amounting in total to \$61,000.¹⁵⁵ This violation came on the heels of other SMU misconduct and only after the NCAA discovered that SMU lied about the violations.¹⁵⁶

This regulatory tool can debilitate its targets. In SMU's case, the NCAA prohibited the football team from playing in scrimmages or games in 1987 and cancelled about half of its games, including all home games, in 1988.¹⁵⁷ The penalty put SMU's football program in a tailspin. In fact, a full fifteen years after the penalty was imposed, commentators noted that SMU was still affected by the sanction.¹⁵⁸

Although a recent scandal involving a booster paying and offering other perks to University of Miami football players raised the possibility of its use again, the NCAA has not imposed the penalty since the SMU episode.¹⁵⁹ In a fifteen-year period, twenty other college programs qualified for the "ultimate sanction," but all were spared.¹⁶⁰ According to *Sports Illustrated*, the reason that the NCAA dropped the "death bomb" could be found in the "athletic rubble" at SMU.¹⁶¹

A political taboo has certainly developed around this regulatory tool. According to former SMU coach Phil Bennett, the NCAA's "death penalty" was "like the atomic bomb. The NCAA did it one time and created devastation beyond belief—and it's never going to be done again."¹⁶² Additionally, when one team suffers, other teams in the same conference also take a hit because athletic conference rivals share revenues and rely on each other for competition.

As this and the other examples of regulatory nukes show, an entity with a regulatory nuke wields a powerful weapon. As shown in the remainder of the Article, by examining regulatory nukes through the lens of game theory, we can achieve a greater understanding of how agencies use regulatory nukes, how regulatory targets respond, and what costs are related to agencies going nuclear.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ Tim Layden, *The Loneliest Losers*, *SPORTS ILLUSTRATED*, Nov. 18, 2002, at 69.

¹⁵⁹ See, e.g., Erik Brady & Steve Wieberg, *Cloud over Miami*, *USA TODAY*, Aug. 18, 2011, at 1A.

¹⁶⁰ Layden, *supra* note 158, at 69.

¹⁶¹ *Id.*

¹⁶² *Id.*

III. A GAME THEORETIC APPROACH TO REGULATORY NUKES

Schelling's insights about conflict and war have proven extremely useful. In fact, these insights made up the centerpiece of the Nobel Prize Committee's decision to make him a Nobel laureate.¹⁶³ The Nobel Committee found that his work made an important contribution to game theory.¹⁶⁴ Particularly important was the way in which he framed noncooperative game theory, which moved beyond the zero-sum games that had monopolized game theory at the time.¹⁶⁵ In significant part, the way he conceptualized game theory broadened the reach of the tool and paved the way for game theory to take hold across the social sciences.¹⁶⁶

Schelling's motivations for much of his early work on nuclear strategy are relevant to the current discussion. Contemporary with Schelling's writing, Soviet Premier Nikita Khrushchev threatened the United States with the words, "We will bury you,"¹⁶⁷ and later pounded a shoe on the podium while addressing the United Nations.¹⁶⁸ There was real fear that the Cold War would heat up to the point of nuclear war.¹⁶⁹

In Schelling's environment, it is hard to imagine a more pressing need than understanding nuclear strategy. Schelling was not concerned with the question of when to launch nuclear weapons or how to survive an attack. Rather, he wanted to understand how to use nuclear weapons before they were launched, how they could be used in bargaining, and how to make nuclear threats in a way that others would take seriously.¹⁷⁰

In this context, Schelling educated military strategists on the great value of keeping the nuclear bomb a taboo of warfare. He

¹⁶³ See Jorgen Weibull, Chairman, Econ. Prize Comm., Nobel Prize Award Ceremony Presentation Speech (Dec. 10, 2005), available at http://nobelprize.org/nobel_prizes/economics/laureates/2005/presentation-speech.html.

¹⁶⁴ *Id.*

¹⁶⁵ See KUNGL. VETENSKAPSAKADEMIEN: THE ROYAL SWEDISH ACADEMY OF SCIENCES, ROBERT AUMANN'S AND THOMAS SCHELLING'S CONTRIBUTIONS TO GAME THEORY: ANALYSES OF CONFLICT AND COOPERATION 1-2 (2005).

¹⁶⁶ See *id.* ("The work of . . . Thomas C. Schelling[] was essential in developing non-cooperative game theory further and bringing it to bear on major questions in the social sciences.")

¹⁶⁷ See Harold P. Southerland, *Law, Literature, and History*, 28 VT. L. REV. 1, 50 (2003).

¹⁶⁸ *Id.*

¹⁶⁹ Thomas C. Schelling, An Astonishing Sixty Years: The Legacy of Hiroshima 365 (Dec. 8, 2005), available at http://nobelprize.org/nobel_prizes/economics/laureates/2005/schelling-lecture.pdf

¹⁷⁰ See generally KUNGL. VETENSKAPSAKADEMIEN: THE ROYAL SWEDISH ACADEMY OF SCIENCES, *supra* note 165.

showed how elevating the threat of nuclear warfare could be leveraged in diplomacy to get concessions and reduce the chance of warfare.¹⁷¹ He also illustrated that in order to keep the country safe, it was much more important to learn to communicate threats of an attack rather than to draw up top-secret plans about how to annihilate the enemy.¹⁷² Fittingly, since his thinking on the subject has proven central to understanding and maintaining the nuclear taboo, the first words of his Nobel Lecture were, “The most spectacular event of the past half century is one that did not occur. We have enjoyed sixty years without nuclear weapons exploded in anger.”¹⁷³

I cannot pretend that the need to understand regulatory nukes remotely approaches the need to understand actual nuclear weapons. However, the common perception of regulatory nukes needs to expand in the same way that Schelling expanded society’s knowledge of nuclear strategy. We need a more nuanced understanding of how agencies actually use regulatory nukes and how they potentially could be used.

Although this sort of thinking is often neglected, when it is advanced it very often focuses on whether or not the agency has launched the regulatory nuke and the chances of it happening again. Sometimes these discussions will paint the regulatory nuke as nothing more than a dud. Other times we might find perpetuation of tales of how a regulatory agency left a target in ashes.

What we do not hear enough about is what falls between a dud and a regulatory Armageddon. In between these poles we find most cases, and these cases are driven by threats, risks, and posturing. This Part attempts to set out some groundwork for thinking about how agencies use regulatory nukes, and presents a simplified game similar to those that have grown out of Schelling’s insights and are often used to describe nuclear strategy today.

Game theory is well suited to analyzing strategic interactions, such as the handling of a regulatory nuke. Game theory rests on a number of typical assumptions: (1) there are a set of players in the game, (2) each of the players has various strategies from which to choose, and (3) for each strategy available there is a corresponding payoff received by the players.¹⁷⁴

¹⁷¹ See *id.* at 6–7.

¹⁷² See *id.* at 9–10.

¹⁷³ Schelling, *supra* note 169, at 365.

¹⁷⁴ See DAVID M. KREPS, *GAME THEORY AND ECONOMIC MODELING* 10 (1990).

The simplified game used in this Article consists of two players: a regulatory agency with a regulatory nuke and the potential regulatory target, which—depending on the regulatory nuke—could be an individual, an organization, a group of organizations, a segment of society, or a sector of the economy. In the example discussed in the Introduction, where Congress gave the Department of Defense the power to revoke any university's federal funding in the event that any part of the university refused to give military recruiters the same access it provided other employers, the agency was the Department of Defense and the target was a particular university.

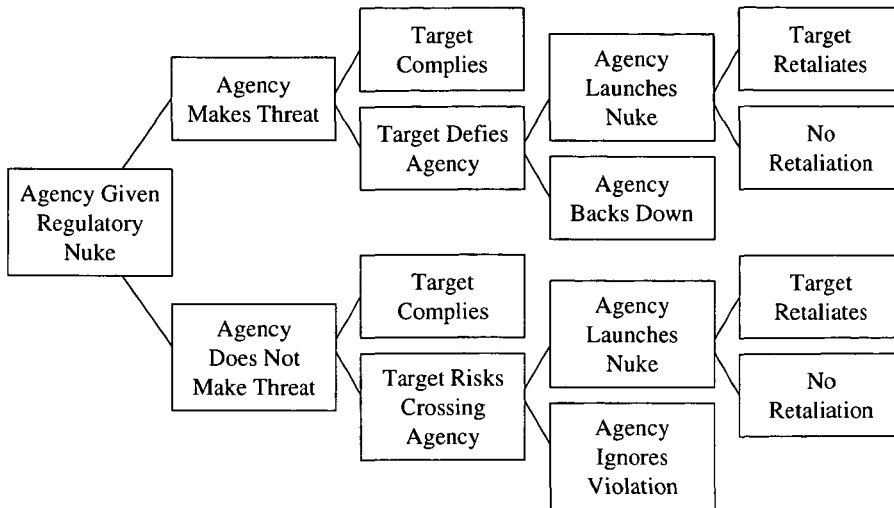
The strategies in our game are the choices facing each of the players in relation to regulatory nukes. The game focuses on four strategic interactions. First, there is a question as to whether the agency will threaten to launch its regulatory nuke. The threat is often the major way agencies get mileage out of their regulatory nukes. Second, we focus on the potential target's response to the threat. The major question encountered here is whether the regulatory target will comply with the agency's command. In the event that a threat has not been issued, the regulatory target may nonetheless choose to comply with (or violate) the regulatory mandate on the books. Third, this game focuses on whether the agency launches its regulatory nuke in the event that the target defies the agency's threat or violates the law. When a regulated target complies, the model sensibly assumes that an agency will not launch a regulatory nuke.¹⁷⁵ Fourth, the target may opt to retaliate if it is so capable.

The type of game relied upon in this Article is an "extensive form" game. The visual representation of an extensive form game looks like a decision tree. Extensive form games incorporate a temporal factor into the game.¹⁷⁶ For example, the game takes into account that an agency first decides if it will make a threat, and then the potential target must decide how to respond to the threat.¹⁷⁷ Given these parameters, the game tree for this game is shown in Figure 2.

¹⁷⁵ In game theory, this is known as a dominant strategy: a "course of action that outperforms all others no matter what the other players do." AVINASH K. DIXIT & BARRY J. NALEBUFF, *THINKING STRATEGICALLY: THE COMPETITIVE EDGE IN BUSINESS, POLITICS, AND EVERYDAY LIFE* 59 (1991). Typically, dominant strategies eliminate options from consideration from game trees. This is why we do not consider further how agencies respond when a regulated entity complies.

¹⁷⁶ See KREPS, *supra* note 174, at 13.

¹⁷⁷ See *id.*

Figure 2. Game Played by an Agency with a Regulatory Nuke

The outcome of a player employing a given strategy is the payoff. An agency making a threat gets a completely different payoff depending on, for example, whether or not a regulatory target heeds its threats. To decide what move to make, the players look ahead and calibrate their strategies based on their best speculation as to how the game will play out. Game theory also assumes that actors are rational, at least to the extent that the players would choose a strategy with higher payoffs over strategies with lower payoffs.¹⁷⁸ This is not to say that players always have perfect information, but rather that with their available information, they try to do their best to make themselves better off.¹⁷⁹ In other words, if an agency believes that a target will comply with a threat, it will play the game accordingly. Similarly, the agency is much more likely to be squeamish about making a threat if the agency believes that eventually the target might retaliate.

Although much more could be said about game theory, this brief discussion should sufficiently lay the groundwork for the game used in this Article. Parts IV–VII discuss each of the major decision points introduced by the game, and begin by discussing the decision of whether or not to leverage threats.

IV. THREATS

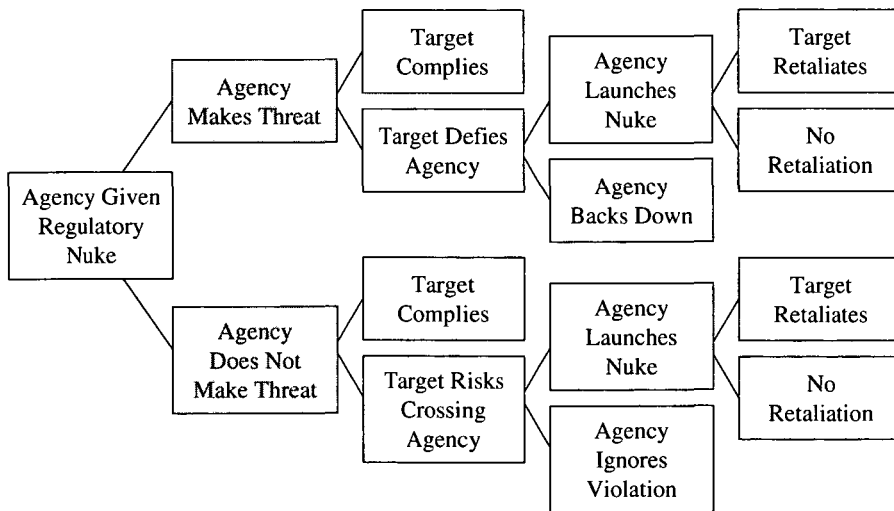
The first decision point that the game presents is the decision of whether or not the agency should threaten to launch its regulatory

¹⁷⁸ See THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT* 4 (2d ed. 1980).

¹⁷⁹ DIXIT & NALEBUFF, *supra* note 175, at 33.

nuke. “A *threat* is a response rule that punishes others who fail to cooperate with [the person making the threat].”¹⁸⁰ Schelling noted that “[s]uccessful threats are those that do not have to be carried out.”¹⁸¹ As President John F. Kennedy said of nuclear weapons, “To-day the expenditure of billions of dollars every year on weapons acquired for the purpose of making sure we never need them is essential to the keeping of peace.”¹⁸² Carrying out threats imposes a higher cost to everyone involved.¹⁸³ In this way, “a promise is different from a threat. . . . [A] promise is costly when it succeeds, and a threat is costly when it fails.”¹⁸⁴ So, of course, the agency hopes that the target will buckle when threatened. The art of making a threat to launch a regulatory nuke is in making the threat credible and serious enough that it manipulates the target’s behavior by altering the target’s belief about how the agency will act if the target does not comply. As a reminder of how the threat fits within the larger game, the threat decision node is highlighted in Figure 3.

Figure 3. Regulatory Nuke Game—Threats



¹⁸⁰ *Id.* at 125.

¹⁸¹ SCHELLING, *supra* note 44, at 10.

¹⁸² John F. Kennedy, American University Commencement Address (June 10, 1961), available at <http://www.americanrhetoric.com/speeches/PDFFiles/John%20F.%20Kennedy%20-%20American%20University%20Commencement.pdf>.

¹⁸³ This is reminiscent of parents saying, “This is going to hurt me more than it is going to hurt you.” Here and with other threats, both parties bear a cost when having to make good on a threat.

¹⁸⁴ SCHELLING, *supra* note 178, at 177.

Often, when regulatory nukes are discussed by scholars and practitioners, the discussion of threats is missing.¹⁸⁵ This is because the literature often conflates launching regulatory nukes with using them. This leads students and practitioners to misjudge how agencies operate. While studying environmental law in law school, I came to believe that I would be extremely unlikely to encounter the EPA veto of a wetlands dredge-and-fill permit discussed above.¹⁸⁶ However, a few months into practice, I was involved in a case where EPA threatened the very thing I had written off as a red herring. I remember going back to my class notes and textbook and shaking my head, thinking that I had encountered a statistical anomaly right out of the gate. Although EPA and the regulatory target ultimately negotiated a deal, the impression I had as a student was still wrong. The threat to use the regulatory nuke drove the resolution of that entire regulatory conflict. Launching a regulatory nuke is just one of many ways that an agency may use it.

Of course, it is often difficult to determine how often an agency threatens to use a regulatory nuke. Take the EPA veto just discussed as an example. Between 1972 and 2010, EPA only vetoed thirteen dredge-and-fill permits.¹⁸⁷ This seems hardly worth mentioning given that between 1988 and 2010, the Army Corps of Engineers processed more than 1.3 million permit applications.¹⁸⁸ Yet, focusing on the number of times this particular regulatory nuke was launched misses the larger picture.

Unlike many of the regulatory weapons that agencies are given, it is often difficult to make credible threats with regulatory nukes. Because regulatory nukes carry so much punch and because of the political taboo surrounding them, it is not always easy for agencies to make threats that seem realistic. As Schelling said in the context of nuclear weapons, "Saying so, unfortunately, does not make it true; and if it is true, saying so does not always make it believed."¹⁸⁹ Big threats often sound like big bluffs. The very things that make the power of the regulatory nuke difficult to ignore may make it difficult to execute the threat. As two prominent game theorists have noted, the threat to

¹⁸⁵ This does not mean that scholars have not focused on the role of threats at all within the administrative context. For a particularly insightful discussion of how agencies use threats to invoke action, see Noah, *supra* note 20, at 873–941.

¹⁸⁶ See *supra* Part II.F.

¹⁸⁷ U.S. ENVTL. PROT. AGENCY, CLEAN WATER ACT: SECTION 404(C) "VETO AUTHORITY" (n.d.), available at <http://water.epa.gov/type/wetlands/outreach/upload/404c.pdf>.

¹⁸⁸ *Id.*

¹⁸⁹ SCHELLING, *supra* note 44, at 35.

launch an actual nuclear weapon may prove “too big to be credible, too big to carry out, and too serious to stake a reputation over.”¹⁹⁰ With regulatory nukes, launching the weapon may become the fodder for news stories, the rallying cry of industries, the basis of lawsuits, and the subject of congressional hearings. Within this context it certainly rings true that “[t]he size of the threat can be a problem” because “bigger threats cost more . . . than small ones.”¹⁹¹

One of the major contributions of Schelling’s work was to help us understand how we might finesse those threats that do not seem credible to make them more believable. According to Schelling, a threat’s credibility may depend on the costs and risks associated with fulfillment for the party making the threat; therefore, a party’s commitment to fulfilling the threat is key.¹⁹² Some examples include (1) stretching of a “tripwire” across the enemy’s path of advance, (2) making fulfillment a matter of national honor and prestige, and (3) placing responsibility for fulfillment in the hands of “those whose resolution is strongest.”¹⁹³

The next Section lays out six major themes that run throughout Schelling’s work and provides a pathway to turn threats that seem like cheap talk into credible commitments. The Section also discusses the relevance of these tools to regulatory nukes.

A. *Surrendering Control*

With any large threat, like that of launching an actual nuclear weapon or a regulatory nuke, the problem of making the threat credible can be substantial. In the days of the Cold War, Schelling noted that the United States was facing this difficulty in trying to make its threats believable.¹⁹⁴ On the one hand, he noted that the leaders of the then-Soviet Union could act unstably: he pointed to Nikita Khrushchev’s erratic behavior and hot temperament as an example.¹⁹⁵

¹⁹⁰ DIXIT & NALEBUFF, *supra* note 175, at 137. Note that Schelling’s writing is mostly, but not entirely, compatible with this insight. Although Schelling is known for his scholarship surrounding the art of making credible commitments, he has also stated, for example, that

a threat that is ‘too big’ is likely to be superfluous rather than costly. If I threaten to blow us both to bits when it would have been sufficient to threaten our discomfort, you’ll likely still comply; since I have neither to discomfort us nor to kill us, the error costs nothing.

SHELLING, *supra* note 178, at 177.

¹⁹¹ *Id.*

¹⁹² *Id.* at 6.

¹⁹³ *Id.*

¹⁹⁴ SHELLING, *supra* note 44, at 38.

¹⁹⁵ *Id.* at 39.

Schelling argued that this instability worked to make Khrushchev's threats all the more believable—one could believe that shoe-thumping Khrushchev would launch his weapons.¹⁹⁶ Khrushchev's erratic behavior made his “[w]e will bury you”¹⁹⁷ threat all the more compelling. On the other hand, the electorate of the United States demanded leaders that were more stable. Yet when it came to making threats, “it [did] not always help to be, or believed to be, fully rational, cool-headed, and in control of oneself or one’s country.”¹⁹⁸ Stated in another way, what is unthinkable for a stable person might not prove unthinkable for a hothead or an unstable person. Put into more modern terms, there is little doubt that the behavior of Kim Jong Il or Mahmoud Ahmadinejad made their countries’ nuclear programs all the more threatening. A goal of Schelling’s work was to find ways that leaders could pose credible threats without making the world believe the leaders were unstable.¹⁹⁹

1. *Surrendering Control by Deterrent Threats*

Making threats credible is often difficult because “[t]he distinctive character of a threat is that one asserts that he will do, in a contingency, what he would manifestly prefer not to do if the contingency occurred, the contingency being governed by the second party’s behavior.”²⁰⁰ One way to make the threat credible is to allow the potential target to control its own destiny.²⁰¹ Professors Avirash Dixit and Barry Nalebuff compare this sort of strategy to an automatic trigger.²⁰² To the extent that the one possessing a weapon can allow the target to control the weapon, he removes from the equation the guesswork of whether the threat of launching the weapon is credible. An automatic trigger often works “because it makes aggression tantamount to suicide.”²⁰³ Just as the aptly named Peacekeeper Missile suggests, the whole idea of deterrence is that launching the weapons will not become necessary.²⁰⁴

196 *Id.*

197 See Southerland, *supra* note 167, at 50.

198 SCHELLING, *supra* note 44, at 37.

199 *Id.* at 38–39.

200 SCHELLING, *supra* note 178, at 123.

201 DIXIT & NALEBUFF, *supra* note 175, at 156.

202 *Id.* at 155–56.

203 *Id.* at 156.

204 The Peacekeeper Missile is a now-defunct “intercontinental-range, silo-based, solid propellant ballistic missile” developed as a way to increase U.S. “counterstrike capabilities against the Soviet Union” in the late 1970s. *Peacekeeper*, MISSILETHREAT.COM, http://www.missilethreat.com/missiles-of-the-world/id.85/missile_detail.asp (last visited Jan. 7, 2012).

Of course, one cannot create such an automatic trigger while assuring that the weapons will never be launched just because the risk is left in the hands of the potential target. As illustrated in the cult classic *Dr. Strangelove*,²⁰⁵ one can never really be sure that an automatic trigger will not be accidentally launched. Additionally, there is always the potential that the target will fail to act in predictable ways. But, to the extent possible, when making a commitment, we want to minimize the chances of an accidental launch by laying a tripwire “that is plainly visible, that cannot be stumbled on, and that is manifestly connected to the machinery of war.”²⁰⁶

This sort of strategy relies on deterrence. According to Schelling, Deterrence involves setting the stage—by announcement, by rigging the trip-wire, by incurring the obligation—and *waiting*. . . .

Deterrence tends to be indefinite in its timing. “If you cross the line we shoot in self-defense, or the mines explode.” When? Whenever you cross the line—preferably never, but the timing is up to you. If *you* cross it, *then* is when the threat is fulfilled, either automatically, if we’ve rigged it so, or by obligation that immediately becomes due. But we can wait—preferably forever; that’s our purpose.²⁰⁷

It is not unusual to see regulatory nukes packaged as deterrent tripwires, which requires drawing a clear line in the sand. This relates directly to the clarity and discretion of the commands found in statutes and rules. Of course, a clear statute provides a more defined line in the sand because the agency cannot renegotiate its position and withstand legal scrutiny—at least not without the help of a judge willing to accept a creative reading of the statute. Regulatorily speaking, this is the Thirty-Eighth Parallel.

For example, when the IRS gives an entity tax-exempt status, it also obligates the entity to comply with a set of regulatory requirements.²⁰⁸ Congress’s rules are much clearer in some instances than in others. On the one hand, the absolute prohibition against endorsing candidates for public office is a clear line and a nice tripwire.²⁰⁹ On the other hand, the prohibition against a nonprofit devoting a “substantial part of the activities” to influencing legislation is less effective

205 DR. STRANGELOVE (Columbia Pictures 1964).

206 SCHELLING, *supra* note 44, at 99.

207 *Id.* at 71–72.

208 *See, e.g.*, Treas. Reg. § 1.501(a)-1 (2011).

209 *See* I.R.C. § 501(c)(3)(2006).

as a tripwire.²¹⁰ It is interesting, but perhaps not surprising given Schelling's scholarship, that Congress received many questions about what it meant by a "substantial part of the activities" and later passed a safe harbor that provides nonprofit organizations a more defined standard that relies on precise dollar values and defined percentages of an organization's operating funds.²¹¹ When a tripwire is set, it is not surprising that potential targets want to know its precise location.

2. *Surrendering Control by "Compellent" Threats*

Sometimes threats do not simply require a potential target to restrain from crossing a line in the sand, but rather require the target to get out of the way to avoid harm. Schelling calls this use of threats *compellence*. According to Schelling, compellence usually involves *initiating* an action or threat that is credible, but that may cease or become harmless if the opponent responds.²¹²

A few examples of compellent threats might be helpful. The story of Moses and Pharaoh is a story of compellent threats: Moses says time and again in so many words, "Let my people go," or else.²¹³ So, before water turned to blood, before the frogs, the lice, and the locusts, Moses gave Pharaoh time to release the Israelites from slavery and thus avoid the threatened harm.²¹⁴ Compellent threats can also take the form of something short of all-out war—holding some pain in reserve. For example, when the United States dropped nuclear bombs on Hiroshima and Nagasaki, it not only destroyed those cities but also threatened the rest of Japan with additional bomb strikes unless it unconditionally surrendered. In game theory literature, the game of chicken, where two parties speed head-on toward each other in cars, often represents compellent threats. Of course, as difficult as it is to live with the shame of backing down, that shame is nothing compared to the harm of a collision. Chicken has many applications. In fact, Schelling noted in 1966 that chicken

is a universal form of adversary engagement. It is played not only in the Berlin air corridor but by Negroes who want to get their children into schools and by whites who want to keep them out; by rivals at a meeting who both raise their

²¹⁰ *See id.*

²¹¹ *See id.* § 501(h).

²¹² SCHELLING, *supra* note 44, at 72.

²¹³ *See, e.g., Exodus* 7:16, 8:1, :20–21.

²¹⁴ *See id.*

voices, each hoping the other will yield the floor to avoid embarrassment²¹⁵

Although the winner of a game of chicken is often determined by nerves and the extent to which a party is risk averse, a party can get a tactical advantage by relying on a credible commitment. The key to using credible commitments in the context of chicken is to credibly surrender control of one's own fate.²¹⁶

Sometimes regulatory nukes come packaged by Congress as compelling threats. For example, regulatory nukes that include punishment on a particular date unless a regulatory target has complied with the law fit this mold. We see this in the instances where Congress has instructed the Department of Transportation to hold back highway funds in the event that a state does not change its drinking law, require motorcycle helmets, or change its speed limit.²¹⁷ The same is true of the REAL ID Act, which requires states to meet a national identification standard within a particular time period if the state wants the Transportation Security Administration to recognize the state's driver's license as an adequate form of identification.²¹⁸ In all of these examples, there is little ambiguity about what a regulatory target must do in order to avoid the regulatory nuke. The only question that remains is whether either the federal government or the state will flinch, or whether a collision will occur.

B. *Leveraging Uncertainty and the Role of Brinkmanship*

When it is difficult to make something like the possibility of launching a regulatory nuke believable, threatening to increase the *likelihood* of a launch may prove more credible than just threatening to launch. As Dixit and Nalebuff put it, “[a]lthough the threat of *certainty* of war is not credible, one of a *risk* or *probability* of war can be credible.”²¹⁹ Uncertainty has the potential to make the unthinkable believable.²²⁰

Leveraging uncertainty in the military context is called *brinkmanship*. According to Schelling, brinkmanship is “the deliberate creation of a recognizable risk[,] . . . a risk that one does not com-

215 SCHELLING, *supra* note 44, at 116.

216 See DIXIT & NALEBUFF, *supra* note 175 at 144–45.

217 See, e.g., 23 U.S.C. § 158 (2006); *supra* notes 99–104 and accompanying text.

218 49 U.S.C. § 30301 (2006).

219 DIXIT & NALEBUFF, *supra* note 175, at 209.

220 *Id.* at 208–10.

pletely control.”²²¹ The purpose of brinkmanship is to “manipulat[e] the risk of a mutually bad outcome” in hopes of facilitating concessions and compromise.²²² To the extent brinksmanship works, it alters a potential target’s expectations.²²³

The brink is not . . . the sharp edge of a cliff where one can stand firmly, look down, and decide whether or not to plunge. The brink is a curved slope that one can stand on with some risk of slipping, the slope gets steeper and the risk of slipping greater as one moves toward the chasm. But the slope and the risk of slipping are rather irregular; neither the person standing there nor onlookers can be quite sure just how great the risk is, or how much it increases when one take a few more steps downward.²²⁴

The risks created by regulatory nukes often are uncertain. Even where an enactment or a rule provides definite timelines, there is the possibility that Congress or an agency will revisit the issue before the regulatory nuke is launched. For example, Congress and the executive branch have already extended the deadline associated with the REAL ID Act three times.²²⁵ Additionally, vague rules and statutes allow agencies to play with risk. The No Child Left Behind Act, which in theory contains the punch to shut down public schools and districts, leaves the actual decisions to a range of administrators—and the Obama Administration has announced it will let states opt out of the law’s requirements if they adopt other reforms.²²⁶ Although the FCC has the power to shut down television and radio stations, the use of this regulatory nuke comes down to how the agency carries out its very vague mandate to serve the “public interest.” When an agency is given broad standards rather than clear rules, it requires our best guesswork to determine whether an agency’s action is a bluff or a true threat to escalate the conflict to the next level. Like nuclear brinksmanship, this leaves open a number of risks related to many of the concerns Schelling raises: “random or haphazard processes . . .

²²¹ SCHELLING, *supra* note 178, at 200.

²²² DIXIT & NALEBUFF, *supra* note 175, at 206.

²²³ *Id.* at 207.

²²⁴ SCHELLING, *supra* note 178, at 199.

²²⁵ Mike M. Ahlers, *Obama Administration Delays Rule to Improve Driver’s License Security*, CNNPOLITICS (Mar. 4, 2011), http://articles.cnn.com/2011-03-04/politics/real.id_1_license-security-license-holders-real-id-act?_s=PM:POLITICS.

²²⁶ Greg Toppo, *No Child Left Behind Waiver Comes With a Hitch*, USA TODAY, Sept. 27, 2011, at 2A.

faulty information, faulty communication, misunderstanding, misuse of authority, panic, or human . . . failure.”²²⁷

Uncertainty plays an important role in an agency’s threat to launch regulatory nukes. Although many game theorists begin with the assumption that both sides have perfect information on the payoffs of their opponent’s response, uncertainty plays a much more important role when it comes to the reality of regulatory nukes. Absent uncertainty, we would expect agencies never to launch their regulatory nukes unless the regulatory target was not rational or had an unusual set of preferences. We would also expect to see targets play right up to the line. Most of the time, what we see is much more nuanced.

C. *Giving Control to a Committed Third Party*

Third parties can play a valuable role in making threats credible. Delegating decisionmaking power can increase credibility for a number of reasons. One is that it introduces some randomness into the equation.²²⁸ A second is that the person charged with a decision has “an incentive structure of his own that differs from his principal’s.”²²⁹ Schelling provides a number of examples of how delegation plays an important role in making credible commitments, including the use of thugs to collect debts and providing nuclear weapons to countries that are thought to be “less irresolute than the United States.”²³⁰

Agencies can also delegate some of their decisionmaking power. An agency is, in actuality, a “*they*” and not an “*it*,” and an agency might therefore vest the power to launch a regulatory nuke with lower-level bureaucrats. An agency may rely on particular experts to make some of its decisions, and retain the discretion to decide which experts to trust.²³¹ Additionally, regulatory nukes that are launched by those at the helm are often in the hands of political appointees who change from one administration to the next.

Interest groups often assert pressure or have influence on agencies, which complicates matters.²³² Those outside the agency that have

²²⁷ SCHELLING, *supra* note 178, at 201.

²²⁸ *Id.* at 202.

²²⁹ *Id.* at 29.

²³⁰ *Id.* at 142.

²³¹ See Terry M. Moe, *The Politics of Bureaucratic Structure*, in *CAN THE GOVERNMENT GOVERN?* 267, 271–73 (John E. Chubb & Paul E. Peterson eds., 1989).

²³² Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 *HARV. L. REV.* 915, 934 (2005) (“[N]o one doubts that interest groups and other external constituencies exert considerable influence over agencies.”).

power within may play an important role in the calculus of whether to make threats and to what extent those threats should be believed. Interest groups may also have the ability to force an agency to launch its regulatory nukes through citizen suits.²³³ Schelling's scholarship suggests the ability of a third party to access an agency's weapon may be crucial to making credible threats:

If you are faced with an enemy who thinks you would turn and run if he kept advancing, and if the bridge is there to run across, he may keep advancing. . . . But if you burn the bridge so that you cannot retreat, . . . he has a new calculation to make. He cannot count on what you would *prefer* to do if he were advancing irresistibly; he must decide instead what he ought to do if you were incapable of anything but resisting him.²³⁴

A nondiscretionary duty to launch a regulatory nuke accompanied with a citizen suit provision (something that is common in environmental law, for example²³⁵) can take the politically preferable options off the table.

D. *Staking Honor and Reputation*

Most often, the art of "maneuvering into a position where one clearly cannot yield"²³⁶ requires more than words. However, sometimes words are all that all we have. In such cases, one option that Schelling explored in the context of nuclear weapons was "to incur a political involvement, to get a nation's honor, obligation, and diplomatic reputation committed to a response."²³⁷ To do this, we might see leaders attempting to "create a bargaining position [with] public statements . . . calculated to arouse a public opinion that permits no concessions to be made."²³⁸ For example, President Kennedy, who Thomas Schelling advised, provided an example that helps illustrate the point. During the Cuban missile crisis, Kennedy established a firm line against Russian nuclear expansion into the Western Hemisphere: "[T]his secret, swift, and extraordinary buildup of Communist mis-

²³³ James E. Pfander, *Triangulating Standing*, 53 *ST. LOUIS U. L.J.* 829, 838–39 (2009) ("[T]he decision of Congress to include citizen suit provisions in the statute can be seen as a way of assuring interest groups a place at the regulatory table. Interest groups can sound the alarm, and invite more pointed congressional oversight, if regulations grow too lax.").

²³⁴ SCHELLING, *supra* note 44, at 43.

²³⁵ See, e.g., 33 U.S.C. § 1365(a) (2006).

²³⁶ SCHELLING, *supra* note 44, at 44.

²³⁷ *Id.* at 49.

²³⁸ SCHELLING, *supra* note 178, at 28.

siles . . . is a deliberately provocative and unjustified change in the *status quo* which cannot be accepted by this country if our courage and our commitments are ever to be trusted again by either friend or foe."²³⁹ With these words, Kennedy staked his reputation and that of the country on his dedication to the promise. Tying these reputations to his words made his words all the more credible.

Schelling puts great stock in this strategy of commitment to change the calculus of the country's future actions:

It is often argued that "face" is a frivolous asset to preserve, and that it is a sign of immaturity that a government can't swallow its pride and lose face. . . . But there is also the more serious kind of "face," the kind that in modern jargon is known as a country's "image," consisting of other countries' beliefs . . . about how the country can be expected to behave. It relates not to a country's "worth" or "status" or even "honor," but to its reputation for action. If the question is raised whether this kind of "face" is worth fighting over, the answer is that this kind of face is one of the few things worth fighting over.²⁴⁰

Likewise, when an agency makes a threat, it may choose to do so either in a private or public manner. For example, when an agency makes a threat in a news release, it likely has more skin in the game when it comes to making good on that threat. When an agency adds to this a rationale that justifies its actions, the agency may find it difficult to backtrack.

E. Interdependence

A major reason staking reputation has power is because a solid reputation is necessary going forward, not just in the present instance. As Schelling explained, "The main reason why we are committed in many of these places is that our threats are interdependent. Essentially we tell the Soviets that we have to react here because, if we did not, they would not believe us when we say that we will react there."²⁴¹

However, more than reputation is on the line when it comes to interdependence. A repeat player adds credibility to a threat if it "can persuasively point to an array of other negotiations in which its own

²³⁹ John F. Kennedy, *The Soviet Threat to the Americas* (Oct. 22, 1962), in 47 DEP'T ST. BULL., 715.

²⁴⁰ SCHELLING, *supra* note 44, at 124.

²⁴¹ *Id.* at 55.

position would be prejudiced if it made a concession in this one.”²⁴² Through this lens, “what is in dispute is usually not the issue of the moment, but everyone’s expectations about how a participant will behave in the future.”²⁴³

Similarly, a threat to launch a regulatory nuke is more likely to be seen as credible if it can be tied to programmatic concerns or concerns over setting an unpleasant precedent more broadly. For example, one reason it is difficult for the FCC to make credible threats with regard to the content of television and radio programming is that historically it has been unwilling to do so.²⁴⁴ With each successive turning of the blind eye, the agency has made the threat to launch its regulatory nuke that much more difficult to leverage. It also becomes that much more difficult to believe. On the other hand, because the military had pushed against any exclusion of military recruiters and was not willing to back down, those that crossed the military and denied its recruiters access came to expect the loss of federal funding.²⁴⁵

F. Willingness to Take Intermediate Steps

When wielding a regulatory nuke, it is often difficult to make words alone believable. However, there often is a broad range of options between going nuclear and doing nothing at all. As Schelling points out, “Between the threats of massive retaliation and of limited war there is the possibility of less-than-massive retaliation, of graduated reprisal.”²⁴⁶ When there is a range of options, Schelling suggests that one look for a way to break down a threat “into a series of consecutive smaller threats,” and use these smaller steps “to demonstrate on the first few transgressions that the threat will be carried out on the rest.”²⁴⁷ In noteworthy scholarship along this vein in the administrative context, Professors Ian Ayres and John Braithwaite have highlighted how the willingness to take intermediate steps can obviate the need to use more serious regulatory weapons.²⁴⁸ They argue that willingness to take small steps up what they referred to as the “enforcement pyramid”²⁴⁹ generally indicates willingness to take the next step

²⁴² SCHELLING, *supra* note 178, at 30.

²⁴³ SCHELLING, *supra* note 44, at 118.

²⁴⁴ See *supra* note 79 and accompanying text.

²⁴⁵ See *infra* notes 276–78 and accompanying text.

²⁴⁶ SCHELLING, *supra* note 178, at 194.

²⁴⁷ *Id.* at 41.

²⁴⁸ AYRES & BRAITHWAITE, *supra* note 21, at 35–41 (1992).

²⁴⁹ *Id.* at 35.

and thereby make it unnecessary to rely on what they refer to as “the benign big gun.”²⁵⁰

Because of this, Congress puts an agency at a real disadvantage in securing regulatory compliance when it provides a nuclear option, but very little else, in the agency’s arsenal. This is the reason, for example, that the IRS has trouble leveraging its ability to revoke a nonprofit organization’s tax-exempt status: it has the option to do nothing or to revoke, but in large part, between those extremes, the IRS’s hands are tied. By taking steps smaller than launching a regulatory nuke along the path of enforcement, an agency is able to show that it means business even when it comes to regulatory nukes.

This Part has discussed ways to make threats credible. Making threats credible, even when an agency wants to, is often difficult and sometimes impossible. And even when an agency attempts to make its threat credible, there is no guarantee that the potential target will get the message and respond to the threat as the agency hopes. The next Part turns to the decision facing the potential target: whether or not to comply.

V. COMPLIANCE AND DEFIANCE

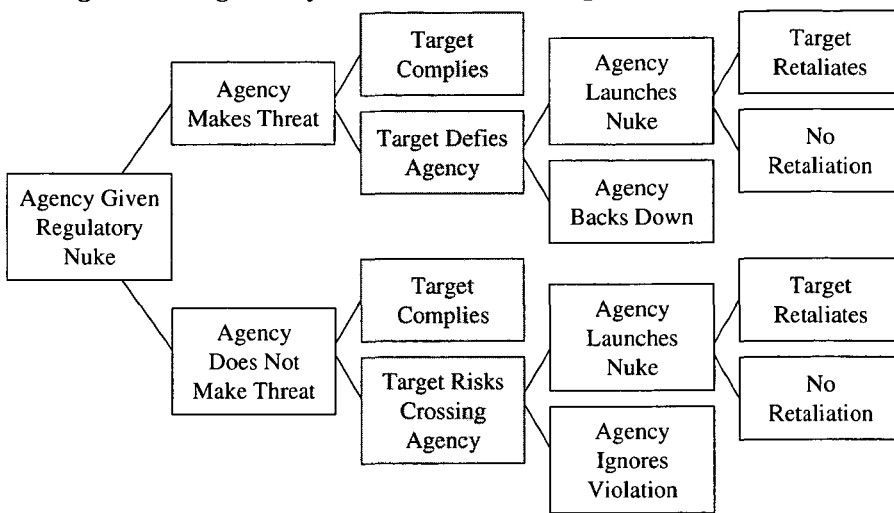
Many stories surrounding nuclear bombs provide insight into the topic of compliance and defiance. These stories include the dramatic moment of Japan surrendering in order to avoid further nuclear destruction, the tense episodes in the Cuban Missile Crisis and the drama of the Russian ships turning back, and the persistence of Kim Jong Il to continue North Korea’s nuclear program despite the pressure he faced from the international community.

In thinking about whether to comply with or defy a regulatory threat, or whether to risk crossing an agency in the event that a threat has not been made, a potential regulatory target has to take into account a number of factors. The following Sections introduce the major factors that come into play. These include the cost of compliance, the perception of risk, and the costs associated with regulatory nukes. After discussing these factors, the Section highlights the importance of considering the rate of compliance when thinking about the impact of regulatory nukes. Because compliance is generally less interesting than other ends to the regulatory nuke game, it is often overlooked.

²⁵⁰ *Id.* at 40. Some readers have asked me the difference between a regulatory nuke and the benign big gun. The major distinction is that a regulatory nuke is politically taboo. The examples Ayres and Braithwaite give, although significant, do not pose problems related to credibility when an agency threatens to use them.

Although focusing on compliance may sometimes seem boring, failing to focus on the rate of compliance often causes us to gloss over the big picture. The compliance and defiance decision nodes are highlighted in Figure 4.

Figure 4. Regulatory Nuke Game—Compliance and Defiance



A. Factors that Targets Consider

1. Compliance Costs

One factor a target might consider is the cost of compliance. Those who have seen the movie *Austin Powers: International Man of Mystery*²⁵¹ (and admit to the fact) will certainly remember the scene where Dr. Evil appears via television to various world leaders. He informs them that he has in his possession nuclear missiles, stolen from the fictional country of Kreplachistan.²⁵² He attempts to blackmail the world leaders: “If you want it back, you’ll have to pay me . . . one million dollars!”²⁵³ At this meager blackmail ransom, the world leaders act confused. Once he realizes that he has confused the ransom amount, he says, “Sorry. One-hundred billion dollars!”²⁵⁴ The leaders get a much more solemn look about them. Then, one of the world leaders explains that it is the policy of the United Nations not to negotiate with terrorists.²⁵⁵

²⁵¹ AUSTIN POWERS: INTERNATIONAL MAN OF MYSTERY (New Line 1997).

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.*

This silly example provides a helpful starting point for discussing two major categories of compliance costs. The first category is effort costs, which include the costs (both monetary and otherwise) that are necessary to comply with the threat. In this example, the effort costs increase dramatically once Dr. Evil realizes that he gave the wrong ransom cost—from one million to one-hundred billion dollars.

The second category is political costs, which encapsulate the negative consequences of complying with a threat. In the Dr. Evil example, the political costs are those associated with negotiating with a terrorist. Though the leaders do not specifically state what political costs are associated with negotiating with a terrorist, they might include the costs of a bad precedent and the costs associated with gaining a reputation for caving in to a terrorist's threats.

Within the realm of regulatory nukes, the amount of effort required to comply with an agency's threat can vary widely. Take the mandate found in the Clean Air Act that requires automobile manufacturers to create something akin to the catalytic converter.²⁵⁶ When Congress imposed that obligation, whether the automotive industry could create such a device in a way that would prove commercially viable was a bit of guesswork.²⁵⁷ Such an invention seemed to loom on the horizon, and prototypes had been made, but its success was not assured.²⁵⁸ Compare the invention of speculative technologies by the auto industry with that of the effort of Yale Law School backing down and allowing military recruiters on campus, which would perhaps entail scheduling a room or setting up a table, or efforts associated with a nonprofit organization not endorsing a political candidate, which probably would not require changing the status quo.

The current debate over Iran's nuclear program serves as a nice illustration of a third category of costs: the political costs of compliance. President Ahmadinejad's menacing political reputation in Iran, the Middle East, and the world is in large part the result of his not backing down against the intense foreign pressure to forgo pursuing a nuclear program.²⁵⁹ Even though Iran will certainly spend money pur-

²⁵⁶ See 42 U.S.C. § 7521(m)(1) (2006).

²⁵⁷ See Carol M. Rose, *Environmental Law Grows Up (More or Less), and What Science Can Do to Help*, 9 LEWIS & CLARK L. REV. 273, 277–78 (2005).

²⁵⁸ See *id.*

²⁵⁹ See, e.g., David E. Sanger & Michael Slackman, *U.S. Is Skeptical on Iranian Deal for Nuclear Fuel*, N.Y. TIMES, May 18, 2010, at A1 (“The earlier agreement fell apart under political pressure in Iran when nearly every political faction criticized it as compromising Iran’s right to nuclear energy.”).

suing a nuclear program, from Ahmadinejad's perspective, the cost of not pursuing such a program is political disaster.²⁶⁰

Similarly, in the context of regulatory nukes, political costs are often important considerations. The reason Yale Law School had such a difficult time allowing military recruiters on campus is that it had a longstanding opposition to the military's policy of excluding gays and lesbians.²⁶¹ Complying with the military's demands forced Yale Law School to compromise its position.²⁶² Before the federal government stepped in to force desegregation of schools in the South, local political pressure compelled southern states to maintain the status quo for as long as possible even though doing so was otherwise costly.²⁶³ This pressure is apparent beyond the desegregation issue in the South; we have seen tensions flare up when the federal government steps into a role traditionally left to states, including decisions to attempt to control land use patterns under the Clean Air Act,²⁶⁴ educational standards for state-run public schools,²⁶⁵ laws relating to speed limits on highways,²⁶⁶ motorcycle helmet laws,²⁶⁷ the legal drinking age,²⁶⁸ and the format and content of driver's licenses.²⁶⁹ Political costs may also come into play when a regulatory target is a repeat player with an agency. When faced with a regulatory threat, the target has to worry about whether its actions would set a problematic precedent and weaken the target in other strategic interactions.

²⁶⁰ See *id.*

²⁶¹ See *supra* notes 10–12 and accompanying text.

²⁶² See *supra* notes 10–12 and accompanying text.

²⁶³ See Branton, *supra* note 139, at 258.

²⁶⁴ 42 U.S.C. § 7410 (2006); see also, e.g., Jacalyn R. Fleming, Comment, *The Scope of Federal Authority Under the Endangered Species Act: Implications for Local Land Use Planning*, 65 ALB. L. REV. 497, 497 (2001) (discussing the Federal Government taking land use controls from the States under environmental acts, including the Clean Air Act).

²⁶⁵ See, e.g., Rentschler, *supra* note 123, at 640–53 (discussing in depth the shift of power over education from state to federal government); Greenberger, *supra* note 123, at 1016 (examining the impact of the tension between state and federal government on enforcement by the Department of Education).

²⁶⁶ See, e.g., Tom Christoffel, *Traffic Safety in the Electronic Age: Radar Detectors vs. Speed Law Enforcement*, 24 NEW ENG. L. REV. 1, 5–6 (1989) (discussing the vigorous debate about whether speed limits should be left to state or federal government).

²⁶⁷ See *id.* at 8 (discussing federal use of the spending power to influence the states' police power to mandate the use of motorcycle helmets).

²⁶⁸ See generally *South Dakota v. Dole*, 483 U.S. 203 (1987).

²⁶⁹ See, e.g., H.B. 287, 60th Leg., Spec. Sess., 2007 Mont. Laws 916, 917 (“WHEREAS, the mandate to the states, through federal legislation that provides no funding for its requirements, to issue what is, in effect, a national identification card appears to be an attempt to ‘commandeer’ the political machinery of the states and to require them to be agents of the federal government, in violation of the principles of federalism.”).

2. *Risk of an Agency Launching a Regulatory Nuke*

A second factor a target may consider is the perceived risk of an agency launching its regulatory nuke. The perceived seriousness of the threat is a function of the potential damage caused by a launch of a regulatory nuke and the probability that the agency will launch it. The greater the harm caused by the nuke and the more credible the threat, the more a regulatory target should worry.

This is a complicated analysis for a number of reasons. Consider that different targets might weigh the same risks differently. The answer to “why do agencies go nuclear?” in many cases might be found in the characteristics of the potential target rather than in the characteristics of the agency. It could be an unusual regulatory target that presses the agency to prove its threat rather than an unusual agency that launches its regulatory nuke. Consider, for example, the archetypal story of standing up to what seemed to be assured destruction: the story of David and Goliath.²⁷⁰ The fact that David fought the well-armored giant says a lot more about David than it does about Goliath.²⁷¹

There are many factors that determine why different targets perceive similar risks differently. It might have to do with the information the target has available to it. For example, if one is well aware of the fact that an agency hardly ever resorts to a regulatory nuke, threats to launch it might be more difficult to communicate with credibility. It might have to do with how the threat was delivered. And, because the psychology of risk analysis is so personal, “once delivered, it is often difficult to predict how others will react—whether the threat will be heeded.”²⁷²

Moreover, people are generally very poor at considering high-stakes risks with low probabilities. The field of cognitive psychology has established that people have bimodal response to catastrophic risk.²⁷³ This line of research suggests that people pay much more attention to particular risks than the risks rationally deserve and also fail

²⁷⁰ 1 *Samuel* 17:1–:51.

²⁷¹ Had Goliath smashed David, the story would read very differently. I imagine that David would have ended up as an archetype of delusion. Thankfully, David prevailed and the archetype of delusion is safely in the hands of the modern Chicago Cubs fan.

²⁷² SCHELLING, *supra* note 178, at 28.

²⁷³ See Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 *ECONOMETRICA* 263, 263 (1979); see also, e.g., Jonathan Baron, *Cognitive Biases, Cognitive Limits, and Risk Communication*, 23 *J. PUB. POL'Y & MKTG.* 7, 9 (2004); Reid Hastie & W. Kip Viscusi, *What Juries Can't Do Well: The Jury's Performance as a Risk Manager*, 40 *ARIZ. L. REV.* 901, 910 (1998).

to take some catastrophic risks seriously enough.²⁷⁴ So it may be that many regulatory targets fail to adequately consider the risk a regulatory nuke poses because people are just bad at sizing up that sort of risk.

3. *Harm Associated with a Regulatory Nuke*

A third factor that a target might consider is the harm associated with an agency going nuclear. Although we tend to think about getting nuked as complete annihilation, the harm felt is somewhat contextual. When a potential target does not care (or care very much) about getting hit by a regulatory nuke, the threat to nuke is not nearly as dire to that target as we might believe. Take the example of Yale Law School and the decision it was required to make to lift its ban of military recruiters or to risk the larger university losing all sources of federal funding.²⁷⁵ Again, while Yale Law School did not receive much in the way of federal funding, Yale University's science, engineering, and medical programs substantially depended on it and a loss of funding would hurt the well-being of the larger campus.²⁷⁶ By contrast, Vermont Law School and William Mitchell College of Law had likewise barred military recruiters from campus, and the Department of Defense threatened to revoke funding from the law schools.²⁷⁷ Unlike Yale Law School, however, these schools are not associated with larger universities that rely heavily on federal funding.²⁷⁸ Although there is no doubt that the decision to keep out recruiters came at somewhat of a cost, the cost is nowhere near the devastating blow that would have been dealt to schools like Yale. Both Vermont and William Mitchell had their funds revoked, yet still held firm nevertheless.²⁷⁹

²⁷⁴ See Catherine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 *STAN. L. REV.* 1471, 1519 (1998).

²⁷⁵ *Burt v. Rumsfeld*, 354 F. Supp. 2d 156, 169 (D. Conn. 2005), *rev'd sub nom. Burt v. Gates*, 502 F.3d 183 (2d Cir. 2007).

²⁷⁶ See *supra* notes 9–10 and accompanying text.

²⁷⁷ See Katrina M. Gallo, Casenote, *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 33 *OHIO N.U. L. REV.* 715, 726 (2007) (discussing schools facing sanctions as a result of denying military recruiters access to campus).

²⁷⁸ See Lindsay Gayle Stevenson, *Military Discrimination on the Basis of Sexual Orientation: "Don't Ask, Don't Tell" and the Solomon Amendment*, 37 *LOY. L.A. L. REV.* 1331, 1357–58 (2004) (discussing the abilities of schools that received little federal funding to maintain anti-discrimination policies).

²⁷⁹ See Gallo, *supra* note 277, at 726 ("According to Geoffrey Shields, dean of Vermont Law School, 'We've stuck to our guns, and I anticipate we'll continue to stick to our guns.'").

Additionally, although the threat from the IRS to revoke an organization's nonprofit status can be an extreme remedy because it is so painful to entities that currently seek or plan to seek contributions on the promise of a tax write-off, the threat is not nearly as dire to a nonprofit organization that does not care about its ability to offer donors a tax deduction.

B. Untold Story of Compliance

Because the threat of regulatory nukes translates into the possibility of the regulatory target suffering major damage, it is easy to gloss over the fact that, in the vast majority of cases, regulatory targets comply when faced with the threat of a regulatory nuke. Furthermore, compliance is often won the easy way: without the agency even having to make a threat to the individual target. The prospect that the threat and launch is in the offing is deterrent enough.

Consider a regulatory nuke that is quite familiar to the average American—the prospect of prison time for tax evasion. In 2009, the IRS received nearly 140 million tax returns and only *recommended* that the Justice Department prosecute 1269 for tax or tax-related crimes.²⁸⁰ This represents fewer than 1 recommendation for every 100,000 returns submitted. Additionally, it seems unlikely that the Justice Department would pursue each recommended case. Interestingly, the IRS only examined approximately one percent of the returns filed in detail.²⁸¹ The IRS does not need to use direct threats to convince most Americans that paying federal taxes is necessary.²⁸² Although the story of the citizen who failed to pay taxes and ended up in prison might get media coverage and capture the public's attention, the much more common story of compliance is less exciting. "Citizen Pays Taxes" is a terrible headline. With mushroom clouds on the horizon in this example and many like it, we overlook the story that defines the vast majority of potential regulatory targets and rather focus on the story of the exception.

When commentators remark on how infrequently an agency uses a regulatory nuke, they commonly leave out the line of thinking associated with the rate of compliance. In instances of extreme noncompliance, a failure to use a regulatory nuke does make the nuke dead-

²⁸⁰ INTERNAL REVENUE SERV., FISCAL YEAR 2009 ENFORCEMENT RESULTS (2010), available at http://www.irs.gov/pub/irs-drop/fy_2009_enforcement_results.pdf.

²⁸¹ *Id.*

²⁸² Admittedly, Americans comply with the IRS's demand to pay taxes for a number of reasons other than fear of prison time.

letter law. If, however, compliance is high, as it seems to be in the context of the federal tax system, it may just be a reflection of an agency's efficiency in leveraging the regulatory nuke. Launching the regulatory nuke is not the only use of the nuke. As Schelling has made clear in the nuclear-missile setting, weapons have uses beyond warfare; they hold potential for "*diplomatic* use of potential violence."²⁸³ "The power to hurt is bargaining power. To exploit it is diplomacy—vicious diplomacy, but diplomacy."²⁸⁴

Sometimes agencies do leverage the threat of launching regulatory nukes to spur compliance. For example, one of the powers that the Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP") uses to secure compliance with the Equal Employment Opportunity Act of 1972²⁸⁵ is to debar contractors from receiving federal contracts.²⁸⁶ Although the Department of Labor has shown itself willing to threaten debarment, most of the time it does not need to follow through with its threat.²⁸⁷ It turns out this way because once a government contractor receives a notice of an OFCCP review (i.e., the regulatory threat), compliance with the law (and perhaps overcompliance) is forthcoming.²⁸⁸

To summarize, compliance should be expected when the cost of compliance is less than the harm expected from a regulatory nuke and the probability the harm will occur.²⁸⁹ The next Part turns to those circumstances in which a regulatory target does not comply and how an agency grapples with the decision of whether to go nuclear.

VI. DETONATION AND HUMILIATION

According to Schelling, countries might end up going to war for a number of reasons. Two of these are relevant here. First, "war can occur because both sides become committed to irreconcilable posi-

²⁸³ SCHELLING, *supra* note 44, at ix.

²⁸⁴ *Id.* at 2.

²⁸⁵ Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified as amended in scattered sections of the U.S.C.).

²⁸⁶ James P. Sterba, *Completing Thomas Sowell's Study of Affirmative Action and Then Drawing Different Conclusions*, 57 STAN. L. REV. 657, 663-64 (2004).

²⁸⁷ See Frank Dobbin & Alexandra Kalev, *Enforcement of Civil Rights Law in Private Workplaces: The Effects of Compliance Reviews and Lawsuits over Time*, 31 LAW & SOC. INQUIRY 855, 863 (2006) (finding that there were seventeen debarments between 1977 and 1985).

²⁸⁸ See Frank Dobbin & Alexandra Kalev, *The Architecture of Inclusion: Evidence from Corporate Diversity Programs*, 30 HARV. J.L. & GENDER 279, 286 (2007) ("Debarment is rare, so the real sanction . . . is the compliance review itself.").

²⁸⁹ Others have used similar equations when discussing whether to comply with a nuclear threat. See, e.g., JAMES D. MORROW, *GAME THEORY FOR POLITICAL SCIENTISTS* 41 (1994).

tions from which neither is willing to back down.”²⁹⁰ Second, it may be that in an attempt to make credible commitments, we have “relinquished the power to retreat.”²⁹¹ Both of these reasons illustrate a real cost of credible threats: failure to comply means living with the results of following through or living with the cost of being proven a pushover.²⁹² It may be we have destroyed our options and we follow through because “we just cannot help it” or because due to “some overwhelming cost of not reacting in the manner we had declared” we have no practical choice in the matter.²⁹³ It is in that hour that those leveraging a regulatory nuke for politics, negotiation, and diplomacy come to realize what it means to “surrender[] and destroy[] options that [they] might have been expected to find too attractive in an emergency.”²⁹⁴

An agency with a regulatory nuke might find itself without any options in a number of situations. First, sometimes agencies tie their hands with rules or prior positions.²⁹⁵ An agency that has committed to an interpretation of law or a program might not be able to turn away without being found arbitrary and capricious.²⁹⁶ Second, an agency might have its hands tied by Congress’s clear language and a court willing to enforce that language.²⁹⁷ In such cases, noncompliance may leave an agency no legally permissible choice but to launch its regulatory nukes.²⁹⁸ Third, an agency that has bound up administrative prestige might not be able to alter its course due to political reasons.²⁹⁹ Certainly, “if the commitment is ill defined and ambiguous—if we leave ourselves loopholes through which to exit—our opponent will expect us to be under strong temptation to make a graceful exit (or even a somewhat graceless one) and he may be right.”³⁰⁰ We would not expect an exit door to be used, however, if the costs of backing down outweigh the costs of launching the regulatory nukes. All of this goes back to how much flesh an agency puts into the game in trying to make its threats credible.³⁰¹

290 SCHELLING, *supra* note 178, at 201.

291 *Id.* at 37.

292 SCHELLING, *supra* note 44, at 43.

293 *Id.*

294 *Id.* at 44.

295 *See supra* Part IV.A.1.

296 *See* 5 U.S.C. § 706 (2006).

297 *See supra* Part IV.A.2.

298 *See supra* Part IV.A.2.

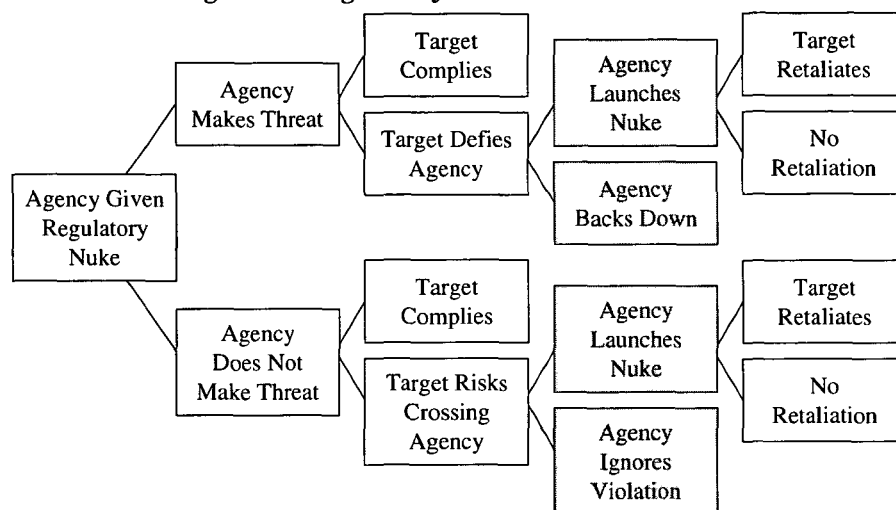
299 *See supra* Part IV.D.

300 SCHELLING, *supra* note 44, at 48.

301 *See supra* Part IV.D-E.

If an agency finds itself in this position, it is faced with two unpleasant options, as shown in Figure 5. The first is launching the regulatory nuke and dealing with the attendant controversy.³⁰² The second is showing the world that it does not have the nerve to pull the trigger and living with the fact that it showed itself to be a pushover.³⁰³ To put this into context, however, consider several examples of each option and result.

Figure 5. Regulatory Nuke Game—Launch



A. Going Nuclear

Just as Hiroshima and Nagasaki are now associated with the nuclear bomb, an agency's launch of a regulatory nuke quickly dominates the history of that regulatory tool. The fact that the weapon is defined by its launches is characteristic of regulatory nukes too. It is the lost highway funds and the organizations that are no longer considered nonprofits that define the tool.³⁰⁴

Most of the time, a regulatory nuke is launched only after an agency threat or a series of threats. Consider, for example, one of the most memorable standoffs in environmental law: EPA's efforts to leverage threats found in the Clean Air Act to push Los Angeles to tackle its air pollution problem in the 1970s. In 1972, the greater Los Angeles area submitted to EPA a plan showing how it would come into compliance with the Act's ambient air quality standards for car-

³⁰² SCHELLING, *supra* note 44, at 43.

³⁰³ *Id.*

³⁰⁴ See *supra* Part II.

bon monoxide and ozone pollutants, as required by law.³⁰⁵ At the time, the common perception among the line-level bureaucrats at EPA and among those who created the plan was that EPA would have no political choice but to approve the plan because Southern California's compliance with the Act seemed virtually impossible.³⁰⁶ However, EPA's first Administrator, William Ruckelshaus, refused to approve the plan because it did not bring Los Angeles into conformity with the Act's standards before the statutory deadline of 1975.³⁰⁷ EPA gave Southern California six months to come up with a plan that conformed to the Act.³⁰⁸ Ruckelshaus explained that if the region failed, EPA would have to come up with its own federal implementation plan.³⁰⁹ With this, EPA had made its threat.

The greater Los Angeles area did not come up with a plan and EPA sat on its hands for six months, and then a number of cities, organizations, and individuals adversely impacted by Los Angeles's dirty air sued EPA for failing to comply with the Clean Air Act.³¹⁰ A federal district court agreed with the plaintiffs and ordered EPA to create a federal plan.³¹¹ EPA complied with the court's order and launched its regulatory nuke. The federal implementation plan included, among other things, a gas rationing provision that (but for a political firestorm and intervention by Congress) could have reduced Los Angeles's gas consumption by eighty-two percent by 1977.³¹²

Other examples already mentioned of agencies going nuclear after notice include the military taking away federal funding from the University of Vermont and William Mitchell School of Law,³¹³ EPA pulling the trigger on advanced pollution controls,³¹⁴ and the Department of Transportation taking away federal highway funding for states

³⁰⁵ John Dreyfuss, *State, U.S. Agree on Clean Air Plan: It Won't Work*, L.A. TIMES, Jan. 16, 1972, at B1.

³⁰⁶ *Id.*

³⁰⁷ Approval and Promulgation of Implementation Plans, 37 Fed. Reg. 10,842, 10,852 (May 31, 1972) (codified at 40 C.F.R. § 52 (2011)).

³⁰⁸ *Id.* at 10,854–55.

³⁰⁹ *Id.* at 10,842.

³¹⁰ See *City of Riverside v. Ruckelshaus*, 4 Env't Rep. Cas. (BNA) 1728, 1729 (C.D. Cal. 1972).

³¹¹ *Id.* at 1731.

³¹² See California Air Quality Standards, 38 Fed. Reg. 2193, 2195 (Jan. 22, 1973); Woods, *supra* note 115, at 1284–85.

³¹³ See discussion *supra* Part V.A.3.

³¹⁴ See discussion *supra* Part V.A.1.

that bucked the federal government and refused to adjust the legal age to drink alcohol.³¹⁵

In some unusual cases, agencies go nuclear without giving much notice. In many ways, these instances represent both a missed opportunity to secure compliance and, more often than not, the inability to make a threat due to constraints placed on the agency. An example of the inability of an agency to make threats is found in the federal government taking over major financial institutions during the economic meltdown of 2008.³¹⁶ The federal government could not give the failing banks much notice or make detailed threats because it was worried about creating further instability in the markets or that its actions would induce shareholders to dump their stocks.³¹⁷ Other examples of surprise attacks include raids of employers suspected of employing illegal immigrants or the Justice Department bringing criminal charges against a corporation like Arthur Andersen for obstruction of justice. Although the federal government generally does not launch these regulatory nukes, advance warning creates a risk that the business would remove the illegal immigrants or that a company would destroy evidence of its obstruction.

B. Keeping Quiet and Backing Down

To the extent that an agency threatens to launch its regulatory nuke in the face of noncompliance but does not, it is certain that it would have been much better for the agency to have never threatened to launch it. In the absence of a threat, the regulatory nuke is an underutilized tool—maybe a sleeping dragon, and perhaps a dud. In the face of a threat, it is not the tool that warrants our attention, rather it is the agency. The agency has shown weakness, and, to its detriment, proved itself unable to pull the trigger.³¹⁸

³¹⁵ See discussion *supra* Part II.E.

³¹⁶ See generally *The Condition of Financial Institutions: Examining the Failure and Seizure of an American Bank: Hearing Before the H. Subcomm. on Fin. Inst. & Consumer Credit of the H. Comm. on Fin. Servs.*, 111th Cong. (2010).

³¹⁷ See, e.g., BAIRD WEBEL & EDWARD V. MURPHY, CONG. RESEARCH SERV., RL 34730, TROUBLED ASSET RELIEF PROGRAM: LEGISLATION AND TREASURY IMPLEMENTATION 18–19, 25–26 (2009). This does not mean that the banks were caught totally unaware of the possibility of a federal takeover. Although there were no formal agency actions, the companies were well aware of their inability to raise capital and that a federal takeover was one of the consequences that might follow. See Hill, *supra* note 17, at 52–55.

³¹⁸ As discussed below, one could view the use of regulatory nukes as a game of chicken. “[W]ith chicken it takes two *not* to play. If you are publicly invited to play chicken and say you would rather not, you have just played.” SCHELLING, *supra* note 44, at 118. When a potential target challenges an agency to use its regulatory nuke, the agency cannot avoid playing chicken.

For example, two agencies have suffered in recent years due to their inability to launch regulatory nukes. The first is the IRS. As mentioned earlier, one of the regulatory nukes the IRS possesses is the ability to strip a charitable organization of its nonprofit status in the event that the organization endorses a political candidate.³¹⁹ The IRS's inability to follow through with threats has emboldened churches to challenge the IRS by publicly endorsing candidates in what the churches deemed "Pulpit Freedom Sunday" and then sending copies of their sermons endorsing candidates to the IRS.³²⁰ As of yet, the IRS has not responded to these provocations, which only highlights the IRS's unwillingness to enforce all the more.³²¹

Also mentioned earlier is the FCC's power to revoke licenses of commercial broadcasters.³²² Although the FCC has threatened revocation, it has never actually pulled the trigger.³²³ Perhaps because of this, many television and radio shows have come to rely on the FCC's reputation of weakness as a fairly routine comedy ploy. For example, a *South Park* episode mocking the FCC's decency standards included the word "shit" 162 times.³²⁴ Rather than receiving respect because of its regulatory nuke, due to its inability to pull the trigger, the FCC's weakness has become a punch line, and the agency itself a punching bag.

Because so much rides on whether an agency can obtain compliance from its targets, as discussed earlier, the art of making credible threats is vital to an agency's attempt to leverage a regulatory nuke.³²⁵ Although credibility is the agency's currency in this game, sometimes

The loss is more pronounced when the agency draws attention to itself by making threats, only to back down later.

³¹⁹ See *supra* Part II.B.

³²⁰ Strom, *supra* note 73.

³²¹ See *id.*

³²² See *supra* Part II.C.

³²³ See Klopp, *supra* note 79, at 310 ("Although the FCC has never fully exercised its statutory enforcement powers, it has repeatedly warned broadcasters of its willingness to revoke a broadcaster's license for indecent broadcasts."); see also Michael Cohen, *Have You No Sense of Decency? An Examination of the Effect of Traditional Values and Family-Oriented Organizations on Twenty-First Century Broadcast Indecency Standards*, 30 SETON HALL LEGIS. J. 113, 134 (2005) ("The law also allows the FCC to revoke the license of any station that violates its regulations; however, the Commission has never exercised this power for an indecency violation.").

³²⁴ Sallie Hofmeister, *Indecency Proposal Getting Static from Cable*, L.A. TIMES, Apr. 5, 2005, at C1 (noting that *South Park* was among shows on cable networks, which are exempt from FCC broadcast regulations, that "dramatiz[e] the very things that federal regulations prohibit on broadcast television").

³²⁵ See *supra* Part IV.

regulated targets have the ability to retaliate. The next Part addresses this possibility.

VII. RETALIATION

Within the realm of actual nuclear arms, the threat of retaliation is often credited as the reason why the weapons have not been launched.³²⁶ This is the gist of mutually assured destruction (“MAD”). Critical to modern-day nuclear strategy is the likelihood that launching a nuclear warhead will result in a counterattack in kind. The songwriter Sting captured the thrust of why MAD can be credited with keeping peace:

Mister Khrushchev said, “We will bury you”
I don’t subscribe to this point of view
It’d be such an ignorant thing to do
If the Russians love their children too³²⁷

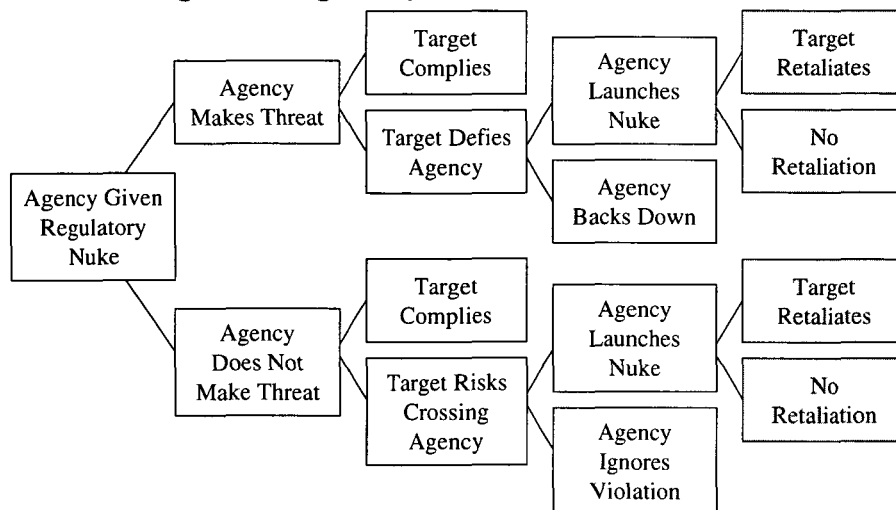
Along these lines, an important take-home message of Schelling’s early work was that an optimal military strategy would emphasize both the power to hurt and the commitment not to launch the weapons unless an opponent launches one first: “It is the power to hurt, not military strength in the traditional sense, that inheres in our most impressive military capabilities at the present time. We have a Department of *Defense* but emphasize *retaliation*[]”³²⁸

Although retaliation has a role in the world of regulatory nukes, it is not the symmetrical role that we see in the world of actual nuclear weapons. For regulatory nukes, we do not find mutual and identical threats. However, in some instances a regulated entity has its own sort of recourse to retaliation. The subsequent Sections highlight three types of potential retaliation, and the retaliation decision nodes are shown in Figure 6.

³²⁶ See Blake Klein, “Bad Cop” *Diplomacy & Preemption: An Analysis of International Law and Politics Governing Weapons Proliferation*, 14 DUKE J. COMP. & INT’L L. 389, 391–92 (2004) (discussing the threat of retaliation as a weapon in the Cold War).

³²⁷ STING, *Russians*, in LYRICS BY STING 104 (2007).

³²⁸ SCHELLING, *supra* note 44, at 7.

Figure 6. Regulatory Nuke Game—Retaliation

A. *Targets with Their Own Weapons*

The first sort of retaliation worth noting is the punishment that targets themselves can inflict on agencies willing to launch regulatory nukes. For example, big industries often have the ability to dump millions of dollars into advertisement campaigns and lobbying efforts designed to punish an agency that crosses them. For an illustration of a potential retaliation of this sort, consider the Medicine Equity and Drug Safety Act of 2000.³²⁹ The bill purported to give pharmacists and drug wholesalers the ability to import less costly prescription drugs from outside of the United States.³³⁰ Before this could occur, however, the Act required the Secretary of Health and Human Services (“HHS”) to make a finding that drug imports would not pose additional risks to the public health and would lead to significant savings for consumers.³³¹ None of those who have served as Secretary of the HHS have been willing to make such a finding or seemingly even seriously considered doing so.³³² There are those who have argued that this should not be surprising because the structure of the Act purposely made it difficult for the Secretary to pull the trigger.³³³ Although making cheaper foreign drugs might seem politically popular

³²⁹ 21 U.S.C. § 384 (2006).

³³⁰ DONNA U. VOGT & BLANCHARD RANDALL IV, CONG. RESEARCH SERV., RS 20996, PRESCRIPTION DRUGS: IMPORTATION FOR PERSONAL USE 1–2 (2001).

³³¹ *Id.* at 2.

³³² David Sirota, *We’ve Seen This Healthcare Trigger Before*, SALON.COM (Sept. 12, 2009, 8:12 AM), <http://www.salon.com/news/opinion/feature/2009/09/12/trigger>.

³³³ *Id.*

to the average consumer, the prospect is terrifying to the deep-pocketed U.S. drug industry and the prospect of retaliation from the drug industry apparently terrifies HHS.³³⁴ Similar stories could be told with regard to the banking, tobacco, or automotive industries.

However, not every regulatory nuke targets a gigantic industry. Politically, some of the tools that regulators exploit to utilize a threat's value have impacts that are concentrated on a particular business (rather than industry) or a particular project (rather than policy). In such cases, there is the possibility that the regulatory target does not have much power to retaliate politically. For example, the government contractors under the thumb of the OFCCP are generally not national players with vast resources.³³⁵ So, when the OFCCP conducts a review of the contractor's compliance with the Equal Employment Opportunity Act, the regulatory target might not have much political recourse at all. Because of this, it is much less costly for the agency to make its threats and to follow through. In this vein, it is easy to wonder if the federal government really would have revoked highway funds for a state failing to raise the drinking age to twenty-one if the holdouts had been California, Florida, and New York rather than Wyoming, South Dakota, and Louisiana.³³⁶ Would the Department of Defense have revoked Yale University's federal funding if Yale Law School had held out?³³⁷ Would the NCAA really have given the Death Penalty had USC, Florida, or Notre Dame been in its sights instead of SMU?³³⁸

B. *Third-Party Retaliation*

Additionally, agencies might worry about retaliation from those other than the regulatory target. Even in the context of actual nuclear armaments, this is not unusual. Remember again Kennedy's threat to Russia during the Cuban Missile Crisis: "It shall be the policy of this Nation to regard any nuclear missile launched from Cuba against any nation in the Western Hemisphere as an attack by the Soviet Union on the United States, requiring a full retaliatory response upon the

³³⁴ Vaishali V. Shah, *Prescription Drugs in America: The Pain of Pricing Has an Unpromising Cure*, 2006 U. ILL. L. REV. 859, 862 n.22.

³³⁵ See Sterba, *supra* note 286, at 664 (noting that only four large corporations had been debarred during the first three decades of OFCCP enforcement).

³³⁶ See *supra* note 103 and accompanying text.

³³⁷ See *supra* notes 3–12 and accompanying text.

³³⁸ See *supra* notes 159–64 and accompanying text.

Soviet Union."³³⁹ If Russia bombed Guyana, for example, Russia had to wonder whether the United States would respond in kind.

The world of checks and balances provides avenues for third-party retaliation. Congress, for example, has many avenues by which to make life difficult for an agency. The spectrum of options available to Congress starts with members of Congress advocating in the name of constituent services and holding a hearing, includes intermediate sanctions such as disfavoring the agency in budgetary matters, and finally culminates with congressional nukes in the form of revoking an agency's power and initiating impeachment proceedings against agency leaders.

Agencies might also fear retaliation from the courts. Courts could find that the agency violated the law when using its regulatory nuke. Very often, when an agency launches a regulatory nuke, a lawsuit will follow, creating a real concern. For example, when EPA did what many considered the unthinkable and attempted to hold the auto industry to the statutory deadlines imposed by the Clean Air Act for improved emissions standards, the agency's action was set aside by a federal court of appeals.³⁴⁰ Similarly, the Supreme Court sunk the FDA's attempt to classify tobacco as a drug by finding that Congress could not have meant for the agency to take this step, despite the fact that tobacco seemed to meet the statutory definition of a drug.³⁴¹ As for the Executive, if an agency crosses the President, it might mean agency restructuring, personnel changes, or other consequences of antagonizing the person ultimately charged with administering the agency. However, rather than employing tools to punish an agency that goes nuclear, the President, or those heading agencies, more often take precautions to exercise a degree of control over regulatory nukes. An illustrative example of this is the history of EPA's ability to veto dredge-and-fill permits issued by the Corps of Engineers, as discussed earlier in the Article.³⁴² Although lower-level bureaucrats could initially make such decisions, at the end of the 1980s, EPA began to require that the decision to veto be made much further up the chain.³⁴³ In the event that a line-level bureaucrat wants to veto one of the Corps's decisions, the decision is elevated up the chain of com-

339 John F. Kennedy, Radio and Television Report to the American People on the Soviet Arms Buildup in Cuba (Oct. 22, 1962), in PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: JOHN F. KENNEDY: 1962, at 485, 485 (1963).

340 *Int'l Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 649 (D.C. Cir. 1973).

341 *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160-61 (2000).

342 *See supra* Part II.F.

343 *See U.S. ENVTL. PROT. AGENCY, MEMORANDUM OF AGREEMENT BETWEEN THE ENVI-*

mand both within the Corps and EPA.³⁴⁴ If negotiations fail on the way up the chain of command, the final decision on whether EPA will veto a permit rests with the Administrator of EPA.³⁴⁵

C. *Political Fallout*

Depending on geography, nuclear fallout may limit the ability of a country to launch nuclear weapons. Consider the unlikely scenario of the United States bombing Vancouver, Canada, or Juarez, Mexico. Doing so would almost certainly mean extensive fallout for Seattle, Washington, or El Paso, Texas. Perhaps more realistically, this is part of what keeps Israel from nuking the Palestinians regardless of how heated the fighting gets between them.

Although regulatory nukes do not result in fallout the same way actual nuclear weapons do, they do present the risk of political fallout. In using a regulatory nuke, an agency might worry about the political influence of interest groups, hostile politicians, skeptical journalists, or grassroots movements, just to name a few. In many ways, these are predictable outcomes of using regulatory weapons that have elements of political taboo associated with them.

Of course, the broader the scope of harm inflicted by a regulatory nuke, the more likely it is that political fallout is an issue. For example, in the 1970s, when EPA attempted to enforce the Clean Air Act in Los Angeles by mandating gas rationing, EPA faced fierce opposition from the city.³⁴⁶ If the Department of Homeland Security decided to pull the trigger on its power under the REAL ID Act, residents of states failing to comply might suffer the consequences as they try to enter airports or federal buildings without federally recognized forms of identification.³⁴⁷ The same is true if the Department of Transportation or EPA were to confiscate a state's highway funds.³⁴⁸

Sometimes, even when the scope of a regulatory nuke is not broad, the political fallout of using it can be dramatic—although often not in ways that are predictable. For example, when the leaders of New London, Connecticut, decided to use the power of eminent do-

RONMENTAL PROTECTION AGENCY AND THE DEPARTMENT OF THE ARMY (1992), available at http://water.epa.gov/lawsregs/guidance/wetlands/upload/1992_MOA_404q.pdf.

³⁴⁴ See *id.* at 7–9.

³⁴⁵ 33 U.S.C. § 1344(c)–(d) (2006).

³⁴⁶ See Patrick Del Duca & Daniel Mansueto, *Indirect Source Controls: An Intersection of Air Quality Management and Land Use Regulation*, 24 *LOY. L.A. L. REV.* 1131, 1140–41 (1991) (discussing the “political uproar” surrounding the EPA decision).

³⁴⁷ See *supra* notes 87–98 and accompanying text.

³⁴⁸ See *supra* notes 104–04 and accompanying text.

main to evict Susette Kelo and her neighbors in order to facilitate redevelopment of the city, the city leaders would have had difficulty anticipating the fallout that would surround their decision.³⁴⁹ This decision not only made its way to the Supreme Court (something highly unusual in its own right), but also exploded into political discontent that ended the careers of many of the officials that oversaw the decision, and also brought nationwide news coverage and the adoption of political reforms across the country.³⁵⁰ The symbolic power of that regulatory nuke has in many ways become synonymous with abusive use of governmental power.

CONCLUSION

In informal conversation, we often hear people comparing an agency's power to aspects of war: big guns, arsenals, war chests, weapons, and triggers, just to name a few. When an agency resorts to an extraordinary means that ordinarily is politically unavailable, we might say that the agency dropped the bomb, or that it went nuclear. Analyzed through the lens of game theory, we see that this analogy is not only apt but also holds untapped insights into agency powers. This theoretical lens suggests, and real-world examples confirm, that the way an agency leverages its regulatory nukes is more nuanced than might be expected. As the Peacekeeper Missile's name implies, successful leveraging of nukes, including regulatory nukes, can result in compliance that negates the need to launch the weapon. Regulatory nukes often are misunderstood and underestimated by legal scholars and practitioners. Remedying this misconception is important if we are to understand the regulatory nuke's true force, and if those inside and outside of agencies are to understand how the regulatory nuke game is played. Even in the rare event that an agency goes nuclear, we should not be so blinded by the light of the explosion that we fail to see the more important story of threats and compliance that hides in the shadows.

³⁴⁹ Bruce Ramsey, Commentary, *Susette Kelo Lost Her Case—but Started a Movement to Reform the Law of Eminent Domain*, SEATTLE TIMES, Feb. 17, 2009, http://seattletimes.nwsource.com/html/opinion/2008753858_opina18ramsey.html; Jerome Tuccille, *Susette Kelo's Revenge: New London Regrets Eminent Domain Fiasco*, EXAMINER.COM (Mar. 10, 2009) <http://www.examiner.com/civil-liberties-in-national/susette-kelo-s-revenge-new-london-regrets-eminent-domain-fiasco>.

³⁵⁰ INST. FOR JUSTICE, FIVE YEARS AFTER KELO: THE SWEEPING BACKLASH AGAINST ONE OF THE SUPREME COURT'S MOST-DESPISED DECISIONS (2010), http://www.ij.org/images/pdf_folder/private_property/kelo/kelo5year_ann-white_paper.pdf.