Chevron, _State Farm_, and the Impact of Judicial Doctrine on Bureaucratic Policymaking♠

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Abstract

We point to how two landmark Supreme Court cases, *Motor Vehicles Manufacturers Association of the U.S. v. State Farm Mutual Automobile Insurance Co.* (1983), and *Chevron U.S.A., Inc., v. Natural Resources Defense Council, Inc.* (1984) constrained the effectiveness of congressional and presidential control of the bureaucracy in substantial ways. We provide an overview of these cases, and we note how the dominant theories of bureaucratic policymaking in the political science literature fail to account for judicial doctrine in a meaningful way. We illustrate the implications of these cases for recent debates surrounding net neutrality policies, and we argue that bureaucratic control over the past 40 years has tilted in favor of the judicial branch of American national government.

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Introduction

The importance of the regulatory state in everyday American life is indisputable. To a great degree, the legal regime governing virtually all significant economic and social policy in the United States comes not from statutes enacted by Congress, but from regulations promulgated by administrative agencies. Over the past 40 years, for each statute enacted by Congress, federal agencies have promulgated an average of 19 final rules,[1] which has led scholars, politicians, and pundits to suggest that Congress has over-delegated its lawmaking authority to the bureaucracy.

Is American government beset with "runaway bureaucracy?" Is Congress able to control the bureaucracy in any meaningful way? The standard answers to these questions in the American political science literature are no, and yes. Delegation is appropriate, and the bureaucracy is held in check because Congress deploys a variety of administrative procedures and institutional mechanisms to keep bureaucratic policies in line with the preferences of elected representatives. This fundamental thesis, articulated most prominently by McCubbins, Noll, and Weingast (1987), has dominated scholarship on Congress and the bureaucracy for three decades.

Our purpose here is to reassess this widely accepted view of American politics. We contend that administrative procedures are no longer sufficient for Congress to control the bureaucracy. The reason, we claim, is that two landmark Supreme Court cases have largely eroded the effectiveness of administrative procedures as instruments of bureaucratic control. We analyze how *Motor Vehicles Manufacturers Association of the U.S. v. State Farm Mutual Automobile Insurance Co.* (1983; hereafter *State Farm*) and *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* (1984; hereafter *Chevron*) have undercut the effectiveness of

[1] The average for the 95th through 113th Congresses is 18.9. See https://www.govtrack.us/congress/bills/statistics and https://www.federalregister.gov/uploads/2016/05/docsPercentageChange2015.pdf.

congressional control functions originally theorized by McCubbins, Noll, and Weingast (1987). More generally, we argue that a shift in bureaucratic control over the past 40 years has tilted in favor of the judicial branch of American national government and against the legislative branch.

State Farm resulted from rulemaking by the National Highway Safety Administration (NHTSA) on passive restraints in automobiles. Under the NHTSA rule, passive restraints—either airbags or detachable automatic belts—were required under the Carter Administration in 1977 for all new cars by September 1983. However, the rule never took effect because the incoming Reagan administration thought it was economically harmful to the U.S. auto industry and rescinded it. Litigation eventually reached the U.S. Supreme Court, which in 1983 held that the rescission of the rule was arbitrary and capricious under the Administrative Procedure Act of 1946 (APA). The Court instructed NHTSA to present more reasoned analysis for jettisoning the rule. *State Farm* is important for several reasons, but perhaps most significant is that it established a precedent whereby executive agencies cannot rescind rules simply because administrators dislike them.

Chevron dealt with conflicting interpretations of the Clean Air Act, also across the Carter and Reagan Administrations. The Environmental Protection Agency (EPA) under President Carter implemented an interpretation favoring environmental interests, but the Reagan EPA chose another favoring manufacturing interests. The Supreme Court decided that both interpretations were admissible because the Clean Air Act was ambiguous. The Court then established a general precedent to deal with ambiguous statutes, holding that when statutes are ambiguous, an agency's interpretation—providing it is reasonable—should receive deference from the courts. For this reason, *Chevron* is widely thought to transfer power away from

Congress and to the executive branch when statutes are ambiguous (e.g., Eskridge and Ferejohn 1992).[2]

State Farm and *Chevron* are well-appreciated by administrative law scholars, but notably less-engaged by political scientists. Their implications for policy implementation are not reflected in McNollGast's seminal perspective of the rulemaking process, nor are they reflected in the subsequent waves of political science scholarship that have built on McNollGast's intellectual foundation. Our purpose in this paper is to address this disconnect between administrative law and political science research on congressional-bureaucratic relations.

To advance our argument, we begin by reviewing the dominant theoretical perspectives on bureaucratic policymaking and congressional control. We provide a brief overview of the legal background and implications of the *Chevron* and *State Farm* decisions to identify how much of the field has failed to account for the relevance and influence of judicial doctrine in a substantively appropriate way. We then illustrate these implications with a case study of the FCC's history with net neutrality rules. Finally, we conclude with a brief discussion of how scholars might account for the constraints that we identify in future models of delegation and policy implementation.

Theories of Delegation and Congressional Control

The publication of Theodore Lowi's *End of Liberalism* in 1969 (Lowi 1969), followed by George Stigler's theory of economic regulation in 1971 (Stigler 1971), raised awareness and concerns about political control of the bureaucracy. Both works perceived private interests as using the regulatory state to achieve their own ends, and both perceived politicians as supplying regulatory authority in response to demands by organized interests. Stigler challenged the notion

[2] *Chevron* is also the most frequently cited administrative law case of all time (Shane and Walker 2014), and it has been described as a "kind of Marbury, or counter-Marbury, for the administrative state" (Sunstein 1990).

that regulation always advances the public interest, and Lowi challenged the notion that Congress controls public policy. More specifically, Lowi argued that congressional delegation of lawmaking authority to the bureaucracy was “policy without law” (1969, 126), and he asserted that Congress had lost its public authority over policy because of excessive delegation.

Heightened perceptions of runaway bureaucracy led to a series of congressional hearings in 1973 to investigate if and how Congress might reclaim its lost public authority. The Select Committee on Committees concluded that Congress had neglected its oversight responsibilities, and experts testified that Congress lacked the resources and incentives to engage in systematic oversight (U.S. Congress 1978). Representatives shunned oversight, it was argued, because oversight activities did not provide electoral benefits sufficient to offset their costs.

Questions about congressional control of the bureaucracy soon occupied the attention of political scientists, not all of whom viewed the situation as dire and dark as Lowi. Fiorina (1977), for example, observed that a large and unwieldly bureaucracy benefited representatives’ electoral ambitions because it allowed them to engage in extensive constituency casework. He argued that although the bureaucracy as a whole might be out of control, individual agencies that delivered benefits to the districts of representatives on the committees overseeing those agencies were very much under control (Fiorina 1981). The only control that Congress valued and exercised, therefore, was over the provision of services to constituents, and at least in this respect, one could conclude that there was a degree of bureaucratic accountability.

Expanding on the theme that Congress favors agencies that provide the best clientele services to their constituents, Weingast and Moran (1983) articulated a theory of “congressional dominance,” which argued that agencies operate in alliance with congressional committees with similar policy interests. They found empirical support for their hypothesis in an analysis of the

Federal Trade Commission, which provided a particularly strong test; the FTC was the congressional poster child of a rogue agency run amok in the late 1970s. The agency had antagonized entrenched interests in Congress through its efforts to regulate the sale of used cars, children's television advertising, funerals, and other business activities. Weingast and Moran found that the FTC was in fact quite responsive to congressional interests. They concluded that not only had the FTC received strong supportive signals from Congress for each of its controversial rulemakings, but also that the agency's rulemaking practices changed in response to changes in the ideological preferences of senators on the agency's oversight committee during the 1970s.[3]

The theory of congressional dominance gained further traction in 1984 with McCubbins's and Schwartz's (1984) notion of "fire alarm" oversight, when they argued that Congress seldom engaged in direct and active surveillance of the bureaucracy through formal hearings and other official functions. Such approaches to oversight were analogous to "police patrols," which were time-consuming and inefficient. Instead, McCubbins and Schwartz posited that Congress exercised oversight indirectly by scrutinizing agency behavior in response to "fire alarms" sounded by citizens and organized interests when agency policy deviated from congressional intent. Thus, what appeared to be the neglect of oversight was, in reality, a congressional preference for one form of oversight over another.

Finally, in 1987, McCubbins, Noll, and Weingast—a. k.a, McNollGast—advanced an even stronger notion of congressional dominance. Writing for a special issue in the *Journal of Law, Economics and Organization,* McNollGast analyzed the problem of congressional

[3] Terry Moe (1987, 476), in contrast, has argued that the concept of congressional dominance "develops nothing that can be called a logic of control and pays precious little attention to the bureaucracy." For additional critique, see Muris (1986).

oversight as a principal-agent problem where Congress was the principal and the bureaucracy its agent.[4] More specifically, since executive agencies have greater expertise over the details of policy implementation than Congress, the principal-agent framework suggests that Congress must level the informational playing field in order to exert control over agencies. McNollgast argued that the Administrative Procedure Act helped solve Congress's informational problem (McNollgast 1999). The APA required notice-and-comment rulemaking, where agencies had to publish proposed rules and allow citizens and interested groups an opportunity to comment. By requiring the details of rules to be divulged before the rules were finalized and implemented, the APA has theoretically mitigated much of the pervasive information asymmetry that normally exists between Congress and the bureaucracy.

An additional advantage of a comment period is that agencies are subjected to the same political forces faced by Congress. Outside interests that mobilize for or against proposed rules will often be the same interests that mobilized to create the agency and its governing statutes in Congress. This tendency "create[s] a decisionmaking environment [in the agency] that mirrors the political circumstances that gave rise to the establishment of the policy" (McNollGast 1987, 255). This "mirroring" function, moreover, is complemented by what McNollgast call a "deck-stacking" function. Interests that successfully organize a winning coalition in Congress are also likely to dominate agency proceedings, and thus administrative procedures allow political actors to "stack the deck in favor of constituents who are the intended beneficiaries of the bargain struck by the coalition which created the agency" (McNollGast 1987, 261). In other words, by facilitating the collection and processing of information into the agency's policymaking process, Congress ensures that stakeholders are aware of the agency's policies, and the procedural deck

[4] Gailmard (2015) provides a timely overview of the intellectual contributions of, and reactions to, McNollGast (1987).

becomes stacked in favor of interests who were instrumental in originally shaping the congressional policy.

Importantly, mirroring and deck-stacking occur without any direct action or involvement by Congress. According to McNollgast, under the procedures of the APA, Congress need not engage in direct oversight activities in order to control bureaucratic policymaking; Congress can instead control the bureaucracy passively and procedurally. Even better, argue McNollgast, Congress need not intervene should the prevailing political interests change over time. Administrative procedures ensure that the agency exhibits an “autopilot function” where “policy decisions made by the agency evolve as the composition of participating groups changes … [so] that agencies respond to changes in their environment even if the politicians have not first spotted these changes” (1987, 263-264).

In short, the mirroring, deck-stacking, and autopilot functions of McNollgast operate theoretically as a result of administrative procedures, which in turn are predicted by a principal-agent model. The principal-agent framework, therefore, is the key that begins to unlock the puzzle of congressional control over the bureaucracy. Understandably, this framework has generated a large formal literature that builds on McNollgast’s foundation. Models by Bawn (1995), Bendor and Meirowiz (2004), Epstein and O’Halloran (1994, 1999), Gailmard (2002), and Volden (2002), for example, seek to understand the conditions under which a legislature might choose to delegate policymaking authority to a bureaucratic agency. All of these authors explore scenarios in which an agency is better-informed about the state of the world than the legislature, and the legislature seeks to leverage agency expertise to its advantage.

These formal models collectively demonstrate that legislative control of the bureaucracy is possible and that delegation is rational. A general finding is that delegation can be efficient for the legislature in that agency-implemented policies will have less variance in outcomes compared with outcomes determined unilaterally by a less-informed legislature. In addition, these models generally predict that the types of agencies to which Congress will delegate, and the amount of authority it delegates, depend on how aligned the agency's policy preferences are with Congress. Consistent with predictions of models of cheap talk in institutional settings (e.g., Crawford and Sobel 1982; Gilligan and Krehbiel 1987), delegation models predict that the greater the ideological alignment between the agency and Congress, the more Congress will be willing to delegate to the agency.[5]

A significant contribution of the formal literature is that congressional delegation of lawmaking authority to the bureaucracy is not as irresponsible and problematic as Lowi once asserted (Gailmard and Patty 2012). Delegation is rational under a broad range of circumstances, and bureaucratic policymaking does not occur wholly independent of Congress. Thus, not only can Congress control the bureaucracy, but it can do so on autopilot, operating through procedural or institutional mechanisms that do not involve overt and systematic oversight. This foundational theory has shaped fundamentally the way that political scientists understand congressional-bureaucratic relations and policymaking generally.

Despite its seminal contribution to how we understand congressional-bureaucratic relations, the usefulness of McNollgast's theory, together with much of the subsequent work that builds upon it, suffers from inattention to the binding nature of judicial doctrines of administrative law. The two cases we analyze here—*Chevron* and *State Farm*—have particularly important implications. We review both cases and explore their implications below.

[5] Huber and Shipan (2002) also shares features with this body of scholarship, in that they develop a theory in which a legislature delegates to an agency that is better equipped to engage technical policy domains where uncertainty is present.

The Supreme Court and the Erosion of Congressional Control

Decided one year apart, *State Farm* and *Chevron* established important precedents for the judicial review of agency policy, particularly when policy changes across presidential administrations. *Chevro*n explicitly recognizes agency expertise as a legitimate basis for bureaucratic policymaking, allowing agencies to make policy unilaterally, even when facing a congressionally-stacked deck. *State Farm* constrains the ability of agencies to alter regulations *ex post* simply because overseers' policy preferences change, thereby limiting the extent to which agencies can create policy by autopilot.

Chevron

Chevron resulted from EPA rulemaking under the Clean Air Amendments of 1977. As amended in 1977, the Clean Air Act was designed to improve air quality in "nonattainment" states—states not meeting the ambient air quality standards required by the Clean Air Act of 1970—and to maintain air quality in "attainment" states—those meeting standards. Permits were required for new or modified "stationary sources" of air pollution in both non-attainment and attainment states. To obtain a permit, industries had to submit to a public hearing and demonstrate that the proposed stationary source would meet EPA standards. Firms also had to implement newer, "best available" technology and monitor the effect of emissions on local air quality. The permitting process was therefore both time-consuming and expensive, and most large manufacturing firms objected.

The key question in *Chevron* was what exactly was meant by a "stationary source" of air pollution in the Clean Air Act. Prior to 1977, under the Nixon and Ford administrations, and during the first few years of the Carter administration, the EPA used a plant-wide definition of stationary source. Generally known as the "bubble" concept, the plant-wide definition treated all pollution-emitting devices within an entire plant as if they were encased in a single bubble. Plants were allowed to increase emissions from one device within the plant as long they reduced emissions from another. Each plant under the bubble concept required a permit, but each separate device within the plant did not.

The bubble definition greatly simplified bureaucratic life for factories, and it allowed them to avoid complying with the tighter standards required of new sources of pollution. Environmentalists, however, strongly opposed the bubble approach. They advocated instead a definition of stationary source that treated each pollution-emitting device within a factory as a separate source. Under this approach, each new or modified source within a plant would require a permit and need to satisfy the higher standards of "best available" technology.

The Department of Commerce and the American Smelting and Refining Company (ASARCO) began lobbying the EPA in 1972 to employ the bubble concept for all new or modified sources of air pollution in both attainment and nonattainment states. The agency initially resisted, but then compromised in September 1974 by proposing regulations that applied the bubble to *modified*, but not to new, sources of air pollution in both attainment and non-attainment states. These regulations were finalized in 1975. Then, to encourage new construction in non-attainment states, the EPA in 1976 issued its Emission Offset Interpretive Ruling. This ruling allowed industries to construct new stationary sources if the increases in pollution from these sources were *more than offset* by reductions in the same pollutant within the area (Rhinelander 1981).

Through these two rulings, the EPA had embraced a limited form of the bubble or variants of it well before Congress amended the Clean Air Act in 1977. This regulatory approach evidently satisfied Congress, for Congress did not explicitly redirect the EPA's practice when it finalized the 1977 amendments. In fact, Congress explicitly incorporated the EPA's offset policy in the statute. Thus, the 1977 Amendments plainly revealed Congress's desire to balance reductions in air pollution with economic growth, and the EPA's policy, which took a middle ground between industrialists and environmentalists, reflected this desire.

Yet soon after passage of the 1977 amendments, the EPA was sued simultaneously by ASARCO and the Sierra Club. ASARCO argued that the bubble should be applied in all situations, to new stationary sources as well as modified sources, and the Sierra Club argued the bubble definition should not be applied at all. In *ASARCO Incorporated v. EPA* and *Sierra Club v. EPA* (1978; hereafter *ASARCO*), the D.C. Circuit Court of Appeals decided in favor of the Sierra Club and held invalid the EPA's regulation allowing the bubble for modified sources in non-attainment areas. The court found that application of the bubble policy even for modified sources would not improve air quality, the key goal of the Clean Air Act.

In response to *ASARCO*, the EPA promulgated new regulations in 1978 that limited the bubble to modified sources in attainment areas only. This action provoked another lawsuit, this time from Alabama Power Company, which argued that the bubble should be applied to all new as well as modified sources (*Alabama Power Co. v. Costle* 1979; hereafter *Alabama Power*). In this instance, the D.C. Circuit Court took the pro-business side, holding that the EPA's bubble policy was too restrictive and should include new as well as modified sources when applied to attainment areas. By 1979, then, the federal courts had directed the EPA to apply the bubble to both new and modified sources of air pollution in attainment states, but had disallowed it in nonattainment states.

To reconcile *ASARCO* and *Alabama Power*, the EPA again promulgated regulations in August 1980 that allowed the bubble for both modified and new sources, but only in states that had attained the national ambient air quality standards. Hence, the EPA's new regulation presented a dual definition of stationary source. A stationary source was defined as an entire plant in attainment areas, but defined as an identifiable piece of equipment in nonattainment areas. This dual definition applied throughout the remaining months of the Carter administration.

The EPA under the new Reagan administration wasted little time in removing the last remaining obstacle to full application of the bubble concept. In October 1981, the EPA promulgated a new rule that eliminated the dual definition of stationary source and implemented a singular definition embracing the bubble concept entirely in both attainment and nonattainment states. The Natural Resources Defense sued the EPA, and in August 1982, the D.C. Circuit Court struck down the Reagan EPA's application of the bubble in nonattainment areas (*Natural Resources Defense Council, Inc. v. Gorsuch* 1982). Chevron U.S.A. then appealed to the Supreme Court.

In light of the shifting positions of the EPA under different presidential administrations, and in view of the significant economic stakes involved, the U.S. Supreme Court granted review. The Court found in *Chevron* that the statutory term "stationary source" was ambiguous, and it held that when a "statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute (*Chevron*, 843)." The Court concluded that the Reagan EPA's bubble definition for nonattainment areas was a permissible construction and thus reversed the lower court.

Chevron, of course, has had implications far beyond the bubble policy of the Clean Air Act. In resolving the ambiguity over the term "stationary source," the U.S. Supreme Court established a broad precedent for judicial deference to agency interpretations when statutes are ambiguous. This precedent is widely thought to have expanded the lawmaking authority of federal agencies at the expense of Congress. Silverstein (1994) claims that *Chevron* has produced a "steady ratcheting of power away from Congress and toward the executive branch." Robinson (2013, 565) argues that ambiguity "effectively shifts lawmaking away from the legislature into less democratically accountable branches." Farina (1989, 456) warned that the "danger" of *Chevron* "lies in its apparent obliviousness to the fundamental alterations it makes in our constitutional conception of the administrative state," and Eskridge and Ferejohn (1992, 533) argue that *Chevron* has contributed to an "overall shift of lawmaking authority from Congress to the President."

To understand this power shift in the context of McNollgast, it is useful to consider *Chevron's* impact on deck stacking. Prior to *Chevron*, Congress had carefully arranged the procedural deck to balance economic and environmental interests. Congress explicitly endorsed both sets of interests in 1977 by amending the Clean Air Act to "insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources" (42 USC 7470). The EPA understood clearly how the political cards were stacked. Its bubble policy, particularly its dual interpretation of stationary source, faithfully reflected the compromise between manufacturing and environmental interests (Wasserman 1985).

Once the U.S. Supreme Court decided *Chevron*, however, the procedural game between Congress and agencies changed. *Chevron* empowered agencies to do as they wished under ambiguous statutes so long as they followed a reasoned approach. In granting agencies this authority, the Court implicitly recognized the superior policy expertise of agencies, and thus *Chevron* fundamentally shifted the informational playing field in favor of agencies. After

Chevron, there was no longer any assurance that congressional interests would prevail in the struggle over policy implementation across administrations.[6]

Deck-stacking works best when agencies have strong incentives to discern the policy preferences of their congressional overseers. Prior to Chevron, statutory ambiguity provided such an incentive. When agencies lacked authority to make unilateral policy decisions under ambiguous statutes, agencies and courts had to work overtime to discern congressional intent from the legislative record. Ambiguity even worked to the advantage of Congress, for Congress could push agencies in different directions at different times, depending on what was politically expedient. In the post-*Chevron* world, however, agencies can act on their own authority when statutes are ambiguous, possibly in ways that are counter to the interests of those in Congress.[7]

State Farm

Operating on the basis of rulemaking authority established in the National Traffic and Motor Vehicles Safety Act of 1966, and in light of an agency study suggesting that only 25-30% of American drivers would be wearing seatbelts by 1970 (Mashaw and Harfst 1990, 85), NHTSA proposed to amend Motor Vehicle Safety Standard 208 in July 1969 to require manufacturers to provide passive restraint technology in vehicles.[8] NHTSA believed that airbags, which had been patented in 1953, were a technically feasible passive-restraint technology, and that their incorporation into automobile design would lead to 10-12 thousand lives being saved each year (Mashaw and Harfst 1990, 85). The Advanced Notice of Proposed Rulemaking in 1969 set an effective date for passive restraint requirements of January 1, 1972.

[6] By 1990, the bubble concept had gained majority support among pro-business Democrats in Congress. However, since procedural control over agencies had eroded since *Chevron*, Congress could no longer be assured that future EPAs would not scrap the bubble concept entirely. Hence, Congress turned to explicit statutory language to ensure its preferred policy rather than rely on deck-stacking or other procedural mechanisms, and it explicitly endorsed the bubble definition of stationary source when it amended the Clean Air Act in 1990.
[7] Wright (2010) advances a theory of ambiguous delegation that engages with these issues.
[8] As originally promulgated in 1967, Standard 208 only required the provision of seatbelts in all passenger vehicles.

Following a series of workshops, meetings, and rule revisions, NHTSA published a completed rule in March 1971 that mandated passive restraint technologies by August 15, 1975. Chrysler Corporation, together with other major manufacturers of automobiles, requested judicial review of Standard 208, and on December 5, 1972 the 6th Circuit, in *Chrysler Corp v. Department of Transportation* (1972; hereafter *Chrysler*), enjoined its implementation. While the court agreed with NHTSA in affirming that NHTSA had rulemaking authority to mandate passive restraints in automobiles, the court ultimately sided with Chrysler's assertion that certain technical aspects of Standard 208 did not constitute an "objective" testing standard for establishing the efficacy of passive restraint systems, as required by the Motor Vehicles Safety Act. As a result of *Chrysler*, NHTSA shifted the compliance deadline for Standard 208 to September 1976 while it attempted to work out various aspects of the testing guidelines.

Following a series of hearings in May 1975, NHTSA Secretary James Gregory recommended to Secretary of Transportation William T. Coleman that full front passive protection required in automobiles, but not until 1981 (Mashaw and Harfst 1990, 186-187). Secretary Coleman, an ally of the auto industry appointed by Gerald Ford, was unwilling to push ahead on Gregory's recommendation, which ultimately led to Gregory's resignation in February 1976.

Following Gregory's departure, Secretary Coleman reopened the rulemaking process for Standard 208 in June 1976 to study further the costs and benefits of airbags. Citing uncertainty about the effectiveness of airbags, Coleman called upon automobile manufacturers to join the federal government in a large-scale demonstration project where airbags would be installed and tested in federal vehicles. This project was part of a larger deal Coleman had struck with auto manufacturers, whereby NHTSA would not issue a rule requiring airbags in cars if the manufacturers would commit to providing airbags voluntarily for substantial portions of their fleets (Mashaw and Harfst 1990, 206).

With the election of President Jimmy Carter, Standard 208 became the focus of renewed activity under a more proactive agency. Carter appointed Brock Adams as Secretary of Transportation, and Adams promptly reversed William Coleman's policies on airbags. Adams reengaged the rulemaking process and issued a new final rule in June 1977 mandating that manufacturers incorporate passive restraints into all passenger vehicles beginning in 1981, with a goal that all passenger vehicles would be equipped with such technologies by September 1, 1983.

The election of President Ronald Reagan abruptly led NHTSA to reverse its course once again. NHTSA reopened the rulemaking process for Standard 208 in February 1981, and two months later it announced a one-year delay in the application of the standard. This decision elicited strong reactions from insurance companies and safety experts, who argued that any further delays in rule implementation would lead to additional preventable injuries and deaths. Automakers, however, supported the delay on grounds that airbags were too costly to implement. Instead of airbags, the auto industry favored automatic seatbelts as the most cost-effective option of complying with the passive restraint mandate. Finally, after more than seven months of delay, the agency published a notice in October 1981 that rescinded the passive restraint standard altogether.

In explaining the rescission, NHTSA pointed to how industry plans had changed since 1977 when the standard was first promulgated. At that time, NHTSA had assumed that airbags would be installed in approximately 60% of new automobiles, with the remaining 40% complying with automatic belts. Due to economic hardships in the industry, however, it became evident that nearly 99% of automobiles would comply with the standard using automatic belts.

Given testimony from industry officials that most people hated automatic seatbelts, auto manufacturers and NHTSA anticipated that most occupants would detach them, thereby rendering them useless (Mashaw and Harfst 1990, 208-209). Hence, Standard 208 would likely be ineffective, though still quite costly to implement, as manufacturers would have to add passive belts to all new cars. Arguing that the costs of implementing Standard 208 could not be justified, NHTSA simply rescinded the rule.

State Farm Insurance Company promptly filed suit in the DC Circuit Court of Appeals, seeking judicial review of the agency's rescission. In *State Farm Mutual Automobile Ins. Co. v DOT* (1982), the D.C. Circuit Court of Appeals ruled in favor of State Farm, holding that the rescission of the rule was arbitrary and capricious. The U.S. Supreme Court agreed upon appeal in *State Farm*. The Court's opinion questioned why NHTSA gave no consideration to modifying Standard 208 to require airbags instead of passive belts. Since NHTSA had previously decided that airbags comported with the mandate of the Motor Vehicles Safety Act, the Court concluded that the agency could not simply ignore that technology without reasoned analysis. The majority opinion held that an agency "must examine the relevant data and articulate a satisfactory explanation for its action," and that "an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance (*State Farm*, 2867).

Simply stated, the Supreme Court ruled in *State Farm* that the rescission of a rule must be judged by the same arbitrary and capricious standards governing rule promulgation, and it established a precedent that agencies cannot change policies simply in response to changes in political preferences. Disagreeing with the majority were Justices Rehnquist, Powell, and O'Connor, who argued in dissent that "a change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations." However, a 6-3 majority rejected this viewpoint and held instead that agencies wishing to reverse policies must begin the process of notice-and-comment rulemaking *de novo*.

In *State Farm*, therefore, the U.S. Supreme Court imposed a check on policy swings in rulemaking across presidential administrations. In the case of passive restraints, policy had changed four times across four different administrations between 1969 and 1981. In the Court's eyes, these policy fluctuations were more a function of changing partisan preferences than of changing factual circumstances and reasoned analysis.

Viewed in the context of McNollgast, *State Farm* imposes a substantial barrier to the realization of agency policymaking by autopilot. Autopilot rulemaking implies that agencies will change policies in response to changes in the preferences of their political principals, even without new statutory authority.[9] Under *State Farm*, however, agencies cannot reverse course for purely political reasons and must instead generate substantively compelling evidence to justify policy change. Moreover, once an agency has developed a compelling rationale for why it chose a policy in the first instance, it is constrained by that record unless it can amass similarly compelling evidence as to why its initial choice was wrong.

In the jargon of administrative law, *State Farm* imposes "hard look" review upon the rescission of regulations (see, e.g., (Bressman, Rubin, and Stack 2010). By taking a "hard look" at administrative policy change, *State Farm* slows down—perhaps even ossifies (i.e., Pierce

[9] Consistent with this claim, in an under-appreciated response to McNollGast (1989), Robinson (1989, 496) notes that:

> Even assuming conscientious effort by the judiciary to enforce the terms of a statute, we have no reason to expect courts to enforce the particular political bargains that lie behind those terms … an agency cannot satisfy its burden of providing rational justification for a policy by pointing to political desiderata, as the Supreme Court's opinion in *Motor Vehicle Manufacturers' Association v. State Farm Mutual Automobile Insurance Co*. makes clear.

2011, Yackee and Yackee 2010, 2011)—the regulatory process. The length of time between the formulation of a notice of proposed rulemaking and the implementation of a final rule can be quite substantial, especially for economically significant rules (Balla and Wright 2003; Pierce 2011). Yet an implicit assumption in many conventional formal models is that there is no substantial time-lapse between legislative-delegation and agency-policymaking.

As illustrated by the passive restraints case, long time-lags are not hypothetical situations, as agencies may spend many years investigating technical aspects of the policies that they are wrestling with (i.e., Potter 2017, Forthcoming). In the eight years between the first Notice of Proposed Rulemaking on Standard 208 in 1969 and the final rule in 1977, there were significant political and personnel changes in the White House, Congress, and NHTSA. One wonders whether the Congress that delegated the Department of Transportation rulemaking authority in 1966 would be content to have the NHTSA of the late 1970s and early 1980s implementing that authority? The formal models cited above are not able to engage this question, as none of them account explicitly for the possibility that the preferences of the agents who are delegated authority will diverge from the agents who ultimately exercise that authority at some later point in time.[10]

***State Farm*, *Chevron*, and Administrative Policy Change**

The implications of *State Farm* and *Chevron* for administrative policy change and stability are still evolving. While *State Farm* closed one door to administrative policy change, *Chevron* opened another. *State Farm* prevented agencies from changing policy for partisan reasons, and it subjected policy reversals to the nontrivial risk of being overturned by a

[10] While Bawn (1995) does account for the role of uncertainty over agency preferences, her model is not substantively consistent with the argument that a time lag between delegation and rule promulgation can facilitate changes in the political preferences of the agency (independent of extant procedural requirements).

reviewing court for “arbitrary and capricious” rulemaking. *Chevron*, in contrast, gave agencies autonomy to change policy when Congress failed to draft explicit language. In *Chevron*, the Supreme Court noted that “[a]n initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis” (863–64). Thus, *Chevron* conceded policy change, but only in the case of an ambiguous statute, and only when the agency assembled a reasonable record to justify change.

Together, these two cases defined broad parameters for when and how agencies could deviate from prior rulemaking precedents. Not until 25 years after *Chevron* did the Supreme Court find it necessary to revisit the issue of administrative policy change. One unresolved issue from *State Farm* was whether administrative policy reversals should be subjected to a higher level of scrutiny, or to more reasoned analysis, than that required for the initial adoption of a policy. In *FCC v. Fox Television Stations, Inc* (2009; hereafter *Fox*), a case involving change in the FCC’s policy on the use of expletives over the airways, a narrow 5-4 majority of the Supreme Court held that administrative policy reversals did not require heightened scrutiny. The majority argued that “*State Farm* neither held nor implied that every agency action representing a policy change must be justified by reasons more substantial than those required to adopt a policy in the first instance.” Writing for the majority, Justice Scalia stated that an agency reversing its position need only “display awareness that it *is* changing position” and demonstrate that “there are good reasons for it” (*Fox*, 515).

Four justices dissented from the majority in *Fox* and agreed instead with Justice Breyer, who wrote that policy change “requires the agency to answer the question, ‘Why did you change?’” He maintained that “a rational answer to this question typically requires a more complete explanation than would prove satisfactory were change itself not at issue" (*Fox*, 549). Justice Kennedy, who concurred with the majority, agreed in part with Justice Breyer in a separate opinion. As to the question of whether an agency must supply a more-reasoned analysis for policy change, Justice Kennedy wrote that it "is not susceptible, in my view, to an answer that applies in all cases" (*Fox*, 535). Especially important, he noted, were situations where agencies based past decisions on factual findings:

> Where there is a policy change the record may be much more developed because the agency based its prior policy on factual findings. In that instance, an agency's decision to change course may be arbitrary and capricious if the agency ignores or countermands its earlier factual findings without reasoned explanation for doing so. An agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past, any more than it can ignore inconvenient facts when it writes on a blank slate (*Fox*, 537).

Considering the differing viewpoints among the justices in *Fox*—a total of six separate opinions, two concurring and three dissenting—Kozel and Pojanowski (2011) observe that "the splintered decision yielded more questions than answers" (125), and that the issue of administrative policy change is still "very much in flux" (133). Exactly what the implications of *Fox* will be for future cases of administrative policy change are unclear and most likely will vary from case to case. On the surface, *Fox* would seem to allow agencies more flexibility, but it does not upend *State Farm*. Agencies wishing to change course must still articulate rational and neutral reasons for those changes through notice-and-comment rulemaking.

In summary, while *State Farm* and *Chevron* established fundamental principles governing administrative policy change, the Supreme Court continues to debate and refine those principles. Agencies have a responsibility under the Administrative Procedure Act to justify their policies by neutral principles and reasoned explanation, but they are also beset by constantly changing political pressures and changing factual circumstances. Thus, agencies must have the ability on the one hand to shape and reshape regulatory policy if government is to function efficiently, but on the other they must be prevented from making decisions based solely on personal preferences. These tensions are present in virtually all cases of administrative policy change, and precisely how they play out in each case is an empirical question.

More broadly, *State Farm* and *Chevron* have fundamentally transformed the institutional foundations of bureaucratic control. Prior to *State Farm*, a strong case could be made for congressional control of administrative policymaking, but the case for congressional control is considerably diminished in the post-*Chevron* period. The notion of an invisible congressional hand guiding agency policymaking through deck-stacking and autopilot rulemaking is simply not tenable post-*State Farm* and *Chevron*. Over the past several decades, administrative agencies and the federal courts have increasingly dominated regulatory policymaking at the expense of Congress. The following empirical case illustrates this claim and underscores the central role that federal courts now play in contemporary administrative policymaking.

Net Neutrality

In January 2018, the Federal Communications Commission finalized an order to roll back net neutrality rules established in 2015 during the Obama administration. Published just 367 days after President Trump's inauguration, *Restoring Internet Freedom* (2018) called for a major shift in the FCC's policies on the internet. The FCC's about-face on net neutrality is a classic case of policy change across presidential administrations, and it rests heavily on a legal foundation established by *State Farm* and *Chevron*. *State Farm* forced the agency to articulate its reasons for switching policies and to subject its reasons to public comment and scrutiny. *Chevron* gave the FCC exceptional deference and discretion to formulate net neutrality policy because of ambiguity in a key statutory term governing the regulation of telecommunications services. We trace here the evolution of net neutrality policies and illustrate how this important policy area has been shaped by actions of the bureaucracy and federal courts.

Telephone companies have been regulated since 1934 as common carriers of interstate communications under Title II of the Communications Act (47 U.S.C. sections 201-221). Title II requires common carriers to charge “just and reasonable” rates and to refrain from “unjust or unreasonable discrimination.” The Federal Communications Commission (FCC) is responsible for implementing these provisions and for regulating interstate communications generally.

The FCC’s implementation of Title II was relatively straightforward for many years, but with the advent of mainframe computing in the early 1960s, regulation soon became complicated. The telephone network had always been used to transmit voice, but mainframe computing also made it possible to transmit data. Computers proved useful not only for telephone message and circuit switching, but also for processing data transmitted through telephone lines from a remote user to the computer and back. Beginning in the mid-1960s, AT&T and other data processing companies and organizations found a burgeoning market for data transmission and processing through the telephone network.

Data processing evolved initially as an unregulated activity. The FCC did not classify data processing companies as common carriers, even though they used the regulated telephone network to connect with their customers and transmit data. Early on, the FCC was hesitant to interfere with the fast-moving and competitive market for data processing, but by 1970 it could no longer ignore the dual standards for data and voice transmissions. In 1970, the FCC completed the first of several inquiries to determine whether data processing should be regulated under Title II (see Zarkin 2000). Ultimately, the FCC chose *not* to regulate data processing. The agency drew a distinction between “basic service”—essentially communications as traditionally provided by telephone companies—and “enhanced service”—essentially data processing—and decided that enhanced services should continue unregulated (FCC 1970).

Congress maintained this basic distinction when it overhauled the Communications Act in 1996. Mirroring the FCC’s distinction between basic and enhanced service, the Telecommunications Act of 1996 distinguished between “telecommunications services” and “information services.” Telecommunications services were subject to Title II regulation, but information services were not. Information services were defined as the “offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.” “Telecommunications” were defined as transmissions “without change in the form or content of the information as sent and received,” and “telecommunications services” were defined as the offering of telecommunications for a fee directly to the public (47 U.S.C. section 151).

The FCC’s initial interpretation and implementation of this language allowed information service providers to use the telephone network—"via telecommunications”—without common carrier obligations. This hands-off approach to regulating information services was motivated in part by the emergence of the World Wide Web in the early 1990s. At that time, the primary, if not exclusive, means of access to the Internet was through the telephone network. Companies such as CompuServe, America Online, and EarthLink purchased access to the telephone network from local telephone companies, and they provided dial-up internet service to their customers through these leased lines. Neither Congress nor the FCC wished to hinder access to the internet.

Exempt from regulation, the demand for dial-up Internet Service Providers (ISPs) exploded as the internet grew in popularity. By the late 1990s, however, the arrival of broadband service through coaxial cable, a much faster means of connection and access, threatened to drive the dial-up ISP industry out of business. The demand for cable service rapidly expanded, and suddenly cable television companies, which could provide cable modem access to the Internet, were in high demand. In 1998, AT&T acquired Telecommunications Inc. (TCI) for $55 billion in one of the largest mergers of the decade.

At the time of its takeover by AT&T, TCI was the primary cable provider in Portland, Oregon. Local Portland officials insisted as part of the transfer agreement to AT&T that TCI be required to lease its cable facilities to existing dial-up ISPs in order to foster competition. AT&T objected to this condition and sued the City of Portland. AT&T argued that TCI should not be forced to lease its facilities because it was providing an information service and therefore was exempt from regulation.

The Ninth Circuit Court of Appeals ultimately ruled against the City of Portland, finding that the city's franchising authority did not allow for an open access condition (*AT&T Corp. v. Portland* 2000; hereafter *Portland*). However, the court also held that cable modem service should be regulated as common carriage. The court concluded that "cable broadband as a telecommunications service coheres with the overall structure of the Communications Act," and that the "principle of telecommunications common carriage governs cable broadband as it does other means of Internet transmission such as telephone service" (*Portland*, 879)

The FCC had been slow to rule on whether cable modem service was an information or telecommunications service, preferring to see how the technology developed before imposing broad regulations. However, *Portland* forced the agency's hand, and in 2002 the FCC issued a declaratory ruling that cable modem service was an information rather than a telecommunication service (Declaratory Ruling 2002). This ruling led to crucial litigation establishing the FCC's autonomy in regulating cable broadband.

Brand X, a dial-up ISP that aspired to enhance its offerings by leasing facilities from cable television companies, sued the FCC, arguing that cable Internet providers should be classified as telecommunications services under Title II. The lawsuit followed the path of *Portland* through the Ninth Circuit, which held to its previous finding in *Portland* and ruled in favor of Brand X. Upon appeal, however, the Supreme Court reversed the circuit court in favor of the FCC. The Court's reversal was guided by *Chevron*.

In *National Cable & Telecommunications Association et al.* v. *Brand X Internet Services et al*. 2005; hereafter *Brand X*) the Supreme Court found the term "telecommunications services"—defined as "the offering of telecommunications for a fee"—to be ambiguous. The Court concluded that an offering of telecommunications could be interpreted in various ways, and that the meaning ultimately depended on consumer perceptions. Writing for the majority, Justice Thomas observed that it is "common usage to describe what a company 'offers' to a consumer as what the consumer perceives to be the integrated finished product." At the time of the Court's decision in 2005, the FCC argued that consumers perceived cable broadband providers as offering an integrated service, consisting of not only transmission capabilities, but also additional capabilities such as e-mail, the ability to create web pages, and access to DNS (Domain Name System) service. Since these additional services involved information processing, and because the overall package was what consumers wanted, the FCC concluded that cable broadband service was an unregulated information service, not a regulated telecommunications service.

The Court analyzed the FCC's interpretation of "offering" under the deferential framework of *Chevron*. In a 6-3 decision with Justices Scalia, Ginsberg, and Souter dissenting, the Court concluded that the Telecommunications Act "fails unambiguously to classify the telecommunications component of cable modem service," which, following *Chevron,* "leaves federal telecommunications policy in this technical and complex area to be set by the Commission" (Brand X, 967).[11] In short, *Brand X* established that the key statutory term governing which telecommunications services could be regulated under Title II was essentially useless for guiding FCC policy. Given statutory ambiguity, the FCC was free establish whatever policy it wished provided it was reasonable.

As the *Brand X* case unfolded, the FCC began to face the larger problem of network discrimination by cable modem providers. In 2004, nearly a year before the Supreme Court's decision in *Brand X*, telephone service over the Internet, or voice over Internet Protocol (VoIP), became commercially available from companies such as Vonage and Nuvio. These startups found themselves in competition with cable ISPs that also offered telephone service over the Internet. Madison River Communications in North Carolina was one, and it blocked Vonage from offering phone service through its cables. Madison River reasoned that it could legally discriminate against Vonage because Madison was not regulated under Title II.

The FCC responded in March 2005 with a consent decree that prevented Madison River from blocking Vonage (FCC 2005a). This was the first skirmish in what would become a long

[11] In his classic dissent, Justice Scalia argued (*Brand X*, 986):

> If, for example, I call up a pizzeria and ask whether they offer delivery, both common sense and common "usage," ante, at 18, would prevent them from answering: "No, we do not offer delivery—but if you order a pizza from us, we'll bake it for you and then bring it to your house." The logical response to this would be something on the order of, "so, you do offer delivery." But our pizza-man may continue to deny the obvious and explain, paraphrasing the FCC and the Court: "No, even though we bring the pizza to your house, we are not actually 'offering' you delivery, because the delivery that we provide to our end users is 'part and parcel' of our pizzeria-pizza-at-home service and is 'integral to its other capabilities.'"

battle over net neutrality. Soon after the Madison River decree, the FCC issued a general policy statement establishing principles of net neutrality. These included the right of consumers to “access the lawful Internet content of their choice” and “to run applications and use services of their choice” (FCC 2005b). This policy guidance was not legally binding because it had not been subjected to the rulemaking process; nevertheless, the FCC found itself in the awkward position of having exempted broadband ISPs from regulation against discriminatory practices on the one hand, but having established a policy of regulating the discriminatory practices of broadband ISPs on the other. Over the next few years, the FCC would attempt to impose net neutrality rules on cable broadband providers without resorting to Title II regulation. In effect, the agency had become trapped by its declaratory ruling in 2002 (FCC 2002).

The U.S. Senate took note of the FCC’s dilemma and held hearings on net neutrality in early 2006 (U.S. Congress 2006). The Senate Committee on Commerce, Science, and Transportation was divided between two competing bills, one delegating clear authority to the FCC to establish net neutrality rules, and the other authorizing the FCC to report any neutrality problems to Congress, but not to issue regulations. In the end, neither bill advanced beyond committee. Legislators had little interest in wading into such politically charged waters.

Meanwhile, Comcast, the second largest cable Internet provider in the U.S.at the time, challenged the FCC’s neutrality guidance by blocking subscribers from using BitTorrent, a file sharing program that consumes large amounts of bandwidth. Several of Comcast’s subscribers filed a formal complaint with the FCC, and the FCC responded with an order preventing Comcast from interfering with subscribers’ use of software (FCC 2008). Since Comcast was not regulated under Title II, the FCC justified its disciplining of Comcast under its “ancillary” authority provided in Title I of the Communications Act.

The U.S. Supreme Court had previously given the FCC regulatory authority over cable television under Title I of the Communications Act. In the 1960s, the FCC issued regulations on cable television even though Congress had not delegated explicit regulatory authority over cable—the FCC was authorized only to regulate broadcast television. Yet the Court concluded in *U.S.* v. *Southwestern Cable* (1968) that the FCC's cable television rules were "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting" (FCC 2008). In the case of Comcast's blocking of BitTorrent in 2010, however, the D.C. Circuit Court of Appeals rejected the FCC's claim of ancillary authority, noting that "*Southwestern Cable's* recognition of ancillary authority over one aspect of cable" did not mean that the "Commission had plenary authority over all aspects of cable" (*Comcast Corp. v. FCC* 2010, 642).

The FCC nevertheless pushed ahead with an *Open Internet Order* in December 2010 (FCC 2010). In a last-ditch effort to justify net neutrality without reclassifying cable ISPs under Title II, the FCC argued that anti-blocking measures were necessary to encourage investment and competition among edge-providers such as Amazon, Google, and YouTube. As justification for this argument, the FCC cited section 706 of the Telecommunications Act of 1996, which gives the FCC authority for promoting competition by "removing barriers to infrastructure investment" (47 U.S.C. section 1302(a)).

The legal challenge to the *Open Internet Order* was led by Verizon, which argued that the FCC's blocking rule imposed common carriage regulations on broadband ISPs that could not be justified under section 706. The D.C. Circuit Court of Appeals agreed and struck down the FCC's anti-blocking rules in January 2014 (*Verizon* v. *Federal Communications Commission* 2014; hereafter *Verizon*). The circuit court observed, however, that "broadband providers represent a threat to Internet openness and could act in ways that would ultimately inhibit the speed and extent of future broadband deployment” (*Verizon*, 645).

The *Verizon* decision left the FCC with little recourse but to reclassify cable ISPs as a telecommunications service under Title II if it wanted to advance net neutrality. The agency finally did so in 2015, but only after public prodding from President Obama. The FCC presented its new net neutrality order as a “light touch regulatory framework” because it exempted cable Internet providers from 27 provisions of Title II, including rate regulation and unbundling, and over 700 other Commission rules and regulations (FCC 2015).

To justify its reclassification, the FCC argued that the type of service offered by broadband ISPs, and the way that consumers perceive broadband ISP service, had changed since 2002. In its original classification in 2002 (FCC 2002), the FCC distinguished between two types of services provided by cable modem ISPs: (1) Internet access or “connectivity” functions, and (2) user applications. Connectivity functions included physically connecting to the Internet backbone, domain name resolution through DNS, network security, caching, network monitoring, and other management activities. Applications included e-mail, access to online newsgroups, and the ability to create personal webpages. In 2002, the FCC viewed connectivity functions as a telecommunications service and applications as an information service.

In its declaratory ruling in 2002 (FCC 2002), and then again in *Brand X* in 2005, the FCC considered these two services to be intertwined, both in how they were marketed by ISPs and by customers’ understanding of the services they were purchasing. By 2015, however, the FCC changed its position and argued that customers viewed them as separate services. They noted that many consumers no longer used their ISPs’ applications for e-mail and web pages, but instead turned to third-party services such as Gmail, Yahoo!, or GoDaddy. Consequently, the FCC justified its reclassification of broadband providers under Title II by arguing that consumers now perceived and used their broadband ISP as a telecommunications service, or essentially as a utility.

The D.C. Circuit Court of Appeals agreed with the FCC in its June 2016 opinion in *U.S. Telecom v. FCC* (2016). The court's 2-1 majority acknowledged that "These conclusions about consumer perception find extensive support in the record and together justify the Commission's decision to reclassify broadband as a telecommunications service" (24). This decision did not settle the matter, however. Following the election of Donald Trump five months later, a politically reconstituted FCC moved to end net neutrality with its *Restoring Internet Freedom Order*. Judicial review of this order is a near certainty, but whether the federal courts will uphold it remains to be seen.

This brief history of net neutrality illustrates several key points. First, the Trump-FCC's position on net neutrality is a sharp break from the FCC's position in previous administrations. From 2005, when the FCC issued its first policy statement on net neutrality, until 2017, when the Trump-FCC sought to end the policy, the agency consistently supported a policy of net neutrality. The central problem facing the FCC through two Republican presidential administrations (Bush) and two Democratic administrations (Obama) was not whether the policy was desirable, but rather how to implement it. Second, absent new statutory authority, Title II regulation proved to be the only approach acceptable to the federal courts for implementing net neutrality. The DC Circuit Court of Appeals endorsed the FCC's argument that Title II regulation was necessary after considering how internet usage had changed over the years. Essential to the circuit court's endorsement was *Chevron* deference to the FCC resulting from ambiguity in the Telecommunications Act about what constitutes a "telecommunications service." Third, to reverse net neutrality in 2018, the *State Farm* precedent required the FCC to justify its action through notice-and-comment rulemaking. As a result, the *Restoring Internet Freedom Order* and the FCC's rationale for it are subject to judicial review under the "arbitrary and capricious" standard of the Administrative Procedure Act. The extent to which the agency's hands will be tied by its prior rulemaking record remains to be seen, but the DC Circuit clearly supported the previous FCC's rationale for imposing net neutrality rules in 2015 (*U.S. Telecomm v. FCC* 2016).

Fourth and finally, net neutrality is a case of policy formulation by an independent agency with substantial supervision and oversight from the judiciary. Congress has been largely an absentee player. Except for obfuscating the concept of a telecommunications service in the Telecommunications Act, Congress has had little discernable impact. Nor has Congress expressed a clear policy preference for net neutrality, even though one party has controlled both House and Senate for much of the policy history of net neutrality dating to 2005.[12] Thus, Congress neither stacked the net neutrality deck nor established the conditions for autopilot rulemaking.

Conclusion

Administrative agencies play a crucial role in American policymaking. On everyday issues ranging from fuel economy standards for automobiles, to the prosecution of undocumented immigrants, to internet access, bureaucratic agencies regularly initiate and implement policy change. Competition for control of the bureaucracy is therefore a regular feature of American national politics. We have argued here that institutional control of the federal bureaucracy has changed significantly over the past 30 years. We have explained how a

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[12] Republicans controlled both House and Senate in the 109th and 114th Congresses, and Democrats dominated both chambers in the 110th and 111th.

long period of congressional dominance over the bureaucracy, beginning with the Administrative Procedure Act in 1946 and continuing through the mid-1980s, gave way eventually to a period of judicial dominance continuing to this day. Marking the transition from congressional to judicial supervision of the bureaucracy were two landmark Supreme Court decisions. *State Farm* prevented agencies from shifting policies simply in response to shifting political winds, and *Chevron* allowed agencies to act unilaterally more easily and frequently by leveraging their policy expertise.

These two cases reflect a basic dilemma facing the courts. On the one hand is a view that agencies' policies should reflect changing political preferences of electoral institutions. Agency policy initiatives, after all, are the work of officials nominated by the president and confirmed by the U.S. Senate. On the other is the view that administrative policy should exhibit consistency and coherence across time, and that change should not be whimsical or arbitrary. The economic stakes of regulatory policy are often so substantial that economic planning can become difficult when regulations are whipsawed by electoral volatility.

How the federal courts will resolve this dilemma in coming years is unclear. More apparent is the fact that control over administrative policy change has increasingly moved into the purview of the courts and away from Congress. This is not to say that Congress yields no influence over administrative policy.[13] But when it comes to establishing general guidelines for administrative policymaking authority, bureaucratic supervision is currently better understood in terms of the federal courts than Congress, and this point has often been neglected by scholars in consequential ways.

[13] Most significant, perhaps, is Congress's use of appropriation riders (i.e., McDonald 2010) to enable or disable particular bureaucratic policy initiatives.

State Farm and *Chevron* both reflect a general preference of federal judges to insert themselves into the rulemaking process in significant ways, and thus future theories of bureaucratic policymaking must reflect the ideological preferences of federal judges for supervising agency decisions. Judicial influence over the bureaucracy certainly did not begin with *State Farm* and *Chevron*—they are to some extent outgrowths of "hard look" review and expanded standing (e.g., McFeeley 1984; Shapiro 1986; and Horowitz 1994)—but they are seminal cases for delineating the methods and boundaries of judicial supervision. The extent to which the federal courts will continue their efforts to manage bureaucratic policymaking remains is an open question. Litigation over net neutrality could be a pivotal case in determining the future of judicially-imposed stability in the regulatory process.

Future theories of bureaucratic policymaking must account as well for the long time-lags that frequently exist between legislative-delegation and agency-policymaking. Such lags are significant because the preferences of agents who initially delegate authority and those who later exercise that authority can easily diverge. Long lags are an increasingly common feature of American policymaking, and they make it difficult for Congress to anticipate and control rulemaking outcomes.

It goes without saying that the extant literature has collectively taught us a great deal about the political dynamics inherent in various delegation relationships and institutional arrangements. But existing theory could be improved substantially by accounting for the role of judicial doctrine in a substantively meaningful way. Such efforts will greatly enhance our understanding of the broader lawmaking system in the United States.

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