

## Delegation and Bureaucratic Policymaking in the Presence of Binding Legal Constraints: Like a Good Neighbor, State Farm is There...

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### Abstract

We explore how a substantial body of contemporary scholarship on bureaucratic policymaking in the United States has been profoundly influenced by a body of literature that fails to take into account various binding ex ante and ex post legal constraints on rulemaking. We identify how the implications of these constraints raise several questions regarding the explanatory utility of several extant theories of bureaucratic policymaking. We illustrate our arguments with an in-depth case study of the Environmental Protection Agency's experiences with promulgating an arsenic standard for drinking water; and we trace out the elements of a theory that might account for the role of these constraints in contemporary rulemaking processes.

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## **Like a Good Neighbor, State Farm is There...**

It would be a gross understatement to say that bureaucracy is important for lawmaking. In contemporary American policy making processes, bureaucratic agencies are where the rubber hits the road. As any high school civics student (or admirer of *School House Rock*) can explain, laws are created when bills that emerge in one chamber of the U.S. Congress are passed in identical forms by both chambers and signed into law by the president, or else passed over the president's veto. Policy, however, is created following the passage of that law. The law itself often does little to change status quo policies; rather, the consequences of lawmaking are realized mainly through policy implementation in the federal bureaucracy.

In most cases, legislatures, and the U.S. Congress in particular, have little capacity to implement policies that follow from legislative mandate. The U.S. Constitution provides for the president to execute the laws, and thus Congress has endowed the federal bureaucracy with the necessary resources to implement policy. Likewise, despite the best of intentions, most legislatures lack sufficient capacity to delineate all of the relevant details of policy implementation to ensure that the policies that follow from new laws actually reflect the wishes of the lawmakers. Hence, bureaucratic agencies are often afforded significant autonomy in spelling out the details from numerous and sometimes quite vague legislative mandates; and yet the details that agencies decide upon have the force of law.

Given that Congress is reliant upon the bureaucracy to implement its will, and given that the bureaucracy, to a significant degree, is in a position to interpret congressional intentions, a fundamental question in American policy making is how might, and can, Congress direct the bureaucracy to ensure that bureaucratic policy outputs are consistent with congressional policy preferences? A voluminous body of legal, economic, and political science scholarship has

engaged various aspects of this question with both competing and complementary answers. One of the most influential arguments in these literatures was offered by McCubbins, Noll, and Weingast (1987, 1989) in their exploration of the role and purpose of administrative procedures. McCubbins, Noll, and Weingast (“McNollGast” from here on) offered a novel and provocative perspective by suggesting that procedures were an important means for exacting legislative control over the bureaucracy to achieve policy goals.

Shortly before McNollGast penned their seminal articles, however, the U.S. Supreme Court decided two cases that have become pillars of administrative law in the United States: *Motor Vehicles Manufacturers Association of the U.S. v. State Farm Mutual Automobile Insurance Co.* (463 U.S. 29, 1983) and *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* (467 U.S. 842, 1984). At the time McNollGast wrote, many scholars had not fully understood and appreciated the significance of these two cases, and thus their implications for policy implementation are not reflected in McNollGast’s perspective of the rulemaking process. Nor are the implications of these cases 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.

In particular, we describe how *State Farm* and *Chevron* are problematic for the autopilot and deck-stacking arguments originally advanced by McNollGast. *Chevron*, which accords judicial deference to agencies when statutory language is ambiguous, makes it difficult to direct agency policy choices through deck-stacking. Since agencies have more autonomy in rulemaking post-*Chevron*, Congress cannot rely on procedure alone; it must hardwire the preferences of favored constituencies into statutory language. Likewise, even if Congress could meaningfully

influence agency policy choices through procedural deck-stacking, *State Farm*, which held that agencies cannot simply rescind rules for political reasons, short-circuits the autopilot process by making it more difficult for policies to reflect changes in the political preferences of enfranchised constituents.

In what follows, we review the main elements of McNollGast’s argument and identify how McNollGast’s conclusions regarding agency design and policy making seem questionable in light of *Chevron* and *State Farm*. We provide a brief overview of the legal background of the *Chevron* and *State Farm* decisions, and we identify how the implications of the two cases, combined with other aspects of binding administrative procedures and hard look judicial review, relate to contemporary models of congressional delegation. We further illustrate these implications with an in-depth case study of the EPA’s experiences with setting an arsenic standard for safe drinking water. Finally, we conclude with a discussion of how scholars might account for the constraints that we identify in future models of delegation and policy implementation.

### **Administrative Procedures and the Politics of Bureaucratic Control**

Writing for a special issue in the *Journal of Law, Economics and Organization* on the “Law and Economics of Procedure,” Mathew McCubbins, Roger Noll, and Barry Weingast advanced an argument that would essentially redefine the field of bureaucratic politics. Given the voluminous body of scholarship that has engaged McNollGast (1987), and owing to space constraints, we will only review the central elements and conclusions of their theory here.<sup>1</sup>

In trying to engage the fundamental question raised above—how might congress control the bureaucracy—McNollGast casts the question in a principal-agent framework, wherein

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<sup>1</sup> Gailmard (2015) provides a timely overview of the intellectual contributions of, and reactions to, McNollGast (1987).

Congress would be considered a principal who delegates policymaking authority to a bureaucracy (i.e., the agent). In characterizing such a relationship, McNollGast made a forceful argument as to why ex post sanctions would generally be ineffective at ensuring that an agency chose policies that were consistent with congressional wishes. More specifically, McNollGast (1987; 251-253) claims that a legislature would be hesitant to devote scarce resources to monitoring an agency in an effort to uncover incidents of bureaucratic malfeasance. Moreover, even if bureaucratic malfeasance is detected, imposing some sort of ex post sanction might be quite cumbersome, as it would often require agreement among both chambers of congress (and the president), it would highlight a case of government wrongdoing to the electorate (which could be politically harmful), and it might otherwise compromise the core mission activities of the agency in question.

Given the numerous shortcomings of various ex post oversight mechanisms, it would be natural to suggest that legislatures exercise very little control over the bureaucracy. Not so, argue McNollGast, who explain how administrative procedures can facilitate a form of ex ante control over the bureaucracy that, in many ways, could dominate whatever benefits might be obtained by employing ex post control mechanisms (under the best circumstances). More specifically, if “the details of administrative law as applied to any given decision problem will affect the outcome...then rules of standing and evidence and the allocation of burdens of proof will affect the range of decisions available to an agency.” Hence, elected officials can essentially control the bureaucratic policy outputs by altering the procedures that govern their policy making processes; and “because policy is controlled by participants in administrative processes, political officials can use procedures to control policy without bearing costs themselves, or even having to know what policy is likely to emerge” (McNollGast 1978; 254).

In describing the Administrative Procedure Act of 1946, the authors argue that the legislation, as passed, addressed one of the fundamental underlying problems of political control. By ensuring that Congress would be reasonably well-informed about day-to-day agency activities, the APA ameliorated the pervasive information asymmetry that might normally exist between Congress and the bureaucracy. In considering the role of administrative procedures in the process of agency creation, the authors make several bold claims: procedures “create a decisionmaking environment [in the agency] that mirrors the political circumstances that gave rise to the establishment of the policy” (McNollGast 1987; 255) and they 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 addition, should the relevant political interests change over time, administrative procedures will ensure that the agency exhibits an “autopilot function,” whereby “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” (pp. 263-264).

If administrative procedures could truly contribute to a policy making environment that mirrored the environment at the time of an agency’s creation, stacked the deck in favor of those interests in the winning coalition, and set the agency off on autopilot, legislators (according to McNollGast) could essentially sit back and let the policy process run, without having to worry about engaging in any substantive form of oversight. By compelling the agency to publicize its activities, and channeling those activities in a particular way, administrative procedures would essentially outsource bureaucratic oversight to directly-affected parties who had material stakes in an agency’s decisions.

### **Questions Raised by McNollGast**

As alluded to above, McNollGast's influence on the field of bureaucratic politics and political economy of organizations cannot be overstated. Likewise, in trying to expand upon, and test the implications of McNollGast's arguments, several scholars have raised various critiques with McNollGast's claims regarding the efficacy of administrative procedures. While it is not our goal to pile on additional criticisms to McNollGast's arguments, it is still worthwhile to note certain omissions and potential misinterpretations of McNollGast, which might limit its utility (and the utility of those theories that build upon McNollGast) for explaining contemporary delegation relationships in the United States.

First, it is useful to note that contrary to how it is (perhaps unintentionally) portrayed by McNollGast, the Administrative Procedure Act of 1946 was not obviously written with the prime goal of directing rulemaking activity in the federal bureaucracy. In 1946, the overwhelming majority of bureaucratic policy making in the United States was conducted via adjudicatory action. Indeed, as noted by Mashaw (1994, 185-186) rulemaking was not employed meaningfully until the late 1960s and early 1970s.<sup>2</sup> This is not to say that McNollGast's claims regarding the information provision consequences of the APA are wrong, but rather that it is less plausible to suggest that the designers of the 1946 Act were pushing for said information provision guidelines with an eye towards directing and controlling rulemaking processes. Indeed, a casual reading of the 1946 Act reveals that only two-thirds of one of its nine pages explicitly engages rulemaking; and the rulemaking section (Sec. 4) simply dictates that any agency shall provide general notice of any rulemaking, that it shall be published in the Federal Register, that "interested persons" will have an opportunity to participate in rulemaking through

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<sup>2</sup> Mashaw and Harfst (1987) note how some of the progressive-leaning policy making agencies such as NHTSA, OSHA and the CPSC found themselves moving away from rulemaking activities and back towards creating policy through adjudicatory action over a relatively short period of time.

the provision of various forms of information, and that the agency account for that information in “a concise general statement of their basis and purpose.”<sup>3</sup>

While the APA arguably facilitates information provision to various actors (including Members of Congress), there is nothing in the Act that would clearly induce the other conjectured consequences of employing administrative procedures: mirroring, deck-stacking, and/or autopilot.<sup>4</sup> Hence, the source of these functions necessarily must follow from other pieces of legislation, passed subsequent to the APA. On this point, McNollGast points to how the National Environmental Protection Act (passed in 1969), the Consumer Products Safety Act (passed in 1972), and the Regulatory Flexibility Act of 1980 enfranchised different parties in the rulemaking process, thereby facilitating mirroring and deck-stacking. Likewise, they also point to how the Federal Communications Commission, given its vague legislative mandate, has been effectively able to conduct policy making on autopilot since its creation in 1934.

Even if we are willing to accept the appropriateness of these illustrative examples, it is still constructive to articulate some of the underlying assumptions that motivate McNollGast’s theoretical claims. First, for mirroring and deck-stacking to obtain it must be true that the intended beneficiaries are easily identifiable, and that they are likely to engage the policy making process through agency interactions, subsequent to agency creation. If either of these conditions does not hold, it is unlikely that the agency structure will mirror the composition of the winning coalition at the time of its creation (as the winners will not be clearly identified), and/or the procedural deck will not be stacked in favor of those winners, as they will have limited means by

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<sup>3</sup> Section 4 also states that publication of any substantive rule will not be made less than thirty days prior to its effective date, and it mandates that agencies will provide private parties with the right to petition for “the issuance, amendment, or repeal of a rule.”

<sup>4</sup> In fairness to McNollGast, they do not make the explicit claim in their 1987 article that mirroring, deck-stacking, and autopilot follow directly from the APA as created in 1946; but the language that they employ in their article is sufficiently loose that several readers have interpreted their arguments to suggest a more direct connection between the APA and these three phenomena.

which to direct the agency in its future decision making processes. Moreover, in regards to deck-stacking in particular, if economically disenfranchised interests were among the intended beneficiaries of the original bargain, then they must be provided with the means to gather and present substantively meaningful testimony during the policymaking process. (Otherwise, the deck will be stacked in favor of their opposing interests by design, which would yield undesirable policy outcomes.)

These, and several other, claims regarding the preconditions for, and consequences of, mirroring and deck-stacking are reasonably straightforward to engage, and potentially amenable to empirical verification. A more contentious issue, however, surrounds the plausibility of the concept of autopilot. As alluded to above, McNollGast suggest that administrative procedures facilitate a process whereby an agency can essentially change its direction and engage in modes of policymaking that are responsive to the changing interest group environment. Putting aside whether such a phenomenon would seem to contradict the manner in which an agency and its processes should mirror the environment in which it was created, and stack the deck in favor of the originating coalition's intended beneficiaries,<sup>5</sup> the very notion of autopilot implicitly suggests that an agency can change its policy making priorities and activities—dramatically, perhaps—in regards to changing political circumstances.

In other words, if empowered interest A expresses its preferences for policy in time  $t$ , we would expect the agency to provide a policy consistent with the wishes of empowered interest A. If empowered interest B emerges in time  $(t+1)$ , however, an agency making policy by autopilot

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<sup>5</sup> A careful reading of the authors' description of the evolution of the FCC (1987, 269-271) paints a picture of the agency that is not consistent with the authors' definition of autopilot. While the agency was able to engage in policy making with little subsequent legislative mandate following the Communications Act of 1934, their anecdote suggests that the interests who the agency were ultimately responsive to deviated significantly from those who were originally in favor of empowering the agency. This trend seems to contradict the authors' earlier statements about autopilot, which implicitly suggests that while an agency will be responsive to new interests over time, its policymaking intentions won't deviate from preferences of the original governing coalition.

would be expected to create policy consistent with the wishes of empowered interest B—even if those policies dramatically contradicted the policies that had been promulgated in period (t) to appease empowered interest A! Even if such changes might be technically feasible at the time that empowered interest B lays its demands before the agency, there are reasons to believe that extant legal doctrine might limit the appeal (to Congress) of delegating the type of authority that would be necessary for autopilot to be ensue. Likewise, even if Congress delegated sufficiently broad and/or ambiguous authority to facilitate autopilot, there are explicit binding legal constraints that would prevent an agency from creating policy on autopilot, as implicitly delineated by *McNollGast*.

### ***Chevron* and the Efficacy of Ambiguous Delgation**

*McNollGast* would likely suggest that ideal conditions for autopilot would be that the agency has sufficient discretion to alter its policies when political conditions change, and that the agency can promulgate rules in short order. Indeed, these are precisely the conditions that existed in regards to *Chevron U.S.A. v. Natural Resources Defense Council*. As many readers know, *Chevron* dealt with EPA rulemaking under the Clean Air Amendments of 1977. The Clean Air Act was amended in 1977 to improve air quality in "nonattainment" states—states that had not met the ambient air quality standards required by the Clean Air Act of 1970—and to maintain air quality in “attainment” states, those that had met standards. New or modified sources of air pollution in both non-attainment and attainment types of states were required to obtain permits to continue operating; and obtaining these permits generally meant complying with higher performance standards and upgrading to newer, “best available” technology.

The issue that made its way to *Chevron* was the definition of "stationary source" of air pollution. 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. 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 bubble. Under this approach, plants were allowed to increase emissions from one device 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. Not only did this arrangement greatly simplify bureaucratic life for factories, but it also allowed them to avoid complying the tighter standards required of new sources of pollution. If overall emissions from a plant increased due to installation of a new source within the plant, then as long as this increase was offset by a reduction in emissions from another, the new source was not subjected to the higher performance standards. Environmentalists, understandably, opposed the bubble concept.

The Department of Commerce and the non-ferrous smelting industry—in particular, American Smelting and Refining Company (ASARCO)—began lobbying the EPA in 1972 to employ the bubble concept (*ASARCO v. EPA*, 578 F.2d at 323-24, 1978). The agency initially resisted, but then compromised in September 1974 by proposing regulations that applied the bubble concept to *modified*, but not new, sources of air pollution. These regulations were finalized in 1975. Then, in 1976, the agency issued its Emission Offset Interpretive Ruling for nonattainment areas. This ruling allowed industries to construct new stationary sources as long as the increases in pollution from these sources were more than offset by reductions in the same pollutant within the area (Rhineland, 1981). Thus, the EPA had begun to embrace the bubble concept 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 to the Clean Air Act. In fact, Congress explicitly incorporated the EPA's offset policy in the statute.

Following the 1977 amendments, the EPA under the Carter administration continued to advance the bubble concept. The 1977 amendments explicitly provided for the prevention of significant deterioration of air quality in attainment areas, and the EPA promulgated regulations for attainment areas in 1978 that allowed the bubble concept to be applied within them, but similar to the 1975 regulations, the bubble could only be applied to modified sources, not to new sources. Thus, by mid-1978, the EPA had approved the bubble concept for modified stationary sources of air pollution in both attainment and non-attainment areas. Lawsuits followed.

The EPA was sued simultaneously by ASARCO and the Sierra Club over its 1975 regulations that allowed the bubble concept to be applied to modified sources. 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 concept should not be applied at all. Faced with these starkly different positions, the D.C. Circuit Court of Appeals in *ASARCO v. EPA* (578 F.2d 319, 1978) sided with the Sierra Club and held invalid the EPA's regulation allowing the bubble concept for modified sources. The court found that the bubble policy allowed firms to avoid complying with the stronger performance standards required for new stationary sources, and the court argued that the purpose of stronger performance standards for new stationary sources was to improve air quality, which the bubble worked against.

Following *ASARCO*, the EPA was sued over its 1978 regulations applying the bubble to modified sources in attainment areas. In *Alabama Power Co. v. Costle* (636 F.2d 323, 1979), Alabama Power Co. argued that the bubble concept should be applied to all new as well as modified sources. This time the D.C. Circuit Court took the pro-business side, holding that the

EPA's bubble policy was too restrictive when applied to attainment areas. Thus, *Alabama Power* held that the bubble must be used in areas that had attained air quality standards and that needed to prevent deterioration of air quality. *ASARCO*, in contrast, held that the bubble could not be used for new or modified sources when the objective was to improve air quality.

To comply with these decisions, and to reconcile *ASARCO* and *Alabama Power*, the EPA promulgated new regulations in August 1980 that allowed the bubble 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 a source was defined as an identifiable piece of equipment in nonattainment areas. This dual definition applied throughout the remaining months of the Carter administration. The Carter EPA, however, was not fully opposed to the bubble even in non-attainment areas. During the last days of the administration in January 1981, the agency proposed formal approval of Rhode Island's implementation plan that allowed two electric power plants in Providence, a nonattainment area, to operate under a bubble concept (EPA, 1981).

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. The Natural Resources Defense Council filed a petition for review, and in August 1982, the D.C. Circuit Court, following its dual precedents in *ASARCO* and *Alabama Power*, invalidated the EPA's redefinition of stationary source in nonattainment areas (*Natural Resources Defense Council, Inc. v. Gorsuch*, 685 F.2d 718, 1982). Then, upon appeal and two years later, the U.S. Supreme Court found in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* that the statutory term "stationary

source” was ambiguous and held that the EPA's bubble definition for nonattainment areas was a permissible construction of the term.

*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. Writing for the majority, Justice Stevens set forth a two-step procedure for reviewing agency rules.

First, always, is the question of whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the 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*, 467 U.S. at 842-43).

By setting a precedent for how agencies deal with legislative ambiguity, *Chevron* shifted the political advantage from Congress to the bureaucracy when statutes are ambiguous (Eskridge and Ferejohn, 1991-92). Normally, one would expect ambiguity to work to the advantage of Congress, for ambiguity allows elected politicians to vacillate, to push the agency in one direction at one time and in another direction at another time, and to avoid policy responsibility or to claim credit as they see fit. Ambiguity is also arguably advantageous for McNollgast’s deck-stacking and autopilot processes, in that it allows for policy flexibility over time; and it

allows “enfranchised” interests to control policy implementation outside of explicit and binding statutory constraints.

When viewed through McNollGast’s deck-staking lens, what is striking about the EPA’s implementation of the bubble policy pre-*Chevron* is that it proceeded as Congress surely preferred. The EPA’s bubble policy, particularly its dual interpretation of stationary source, reflected a compromise between manufacturing and environmental interests, albeit tilted in favor of manufacturers (Wasserman, 1985). The procedural deck, in McNollgast’s terms, was stacked in favor of both sets of interests, and the policy that emerged from the EPA’s rulemaking process reflected the same set and balance of interests in Congress during the 1970s. While environmental interests scored a number of policy successes in Congress during the late 1960s and early 1970s, business interests responded through counter-mobilization and became entrenched policy actors in both the legislative and executive branches by the early 1980s. Thus, any political solution at the time, legislative or administrative, needed to reconcile both sets of interests.

The autopilot and deck-stacking processes of McNollgast were therefore working smoothly as hypothesized during implementation of the Clean Air Act during the 1970s. However, when the U.S. Supreme Court intervened in *Chevron*, the procedural game between Congress and agencies changed significantly. Following *Chevron*, no longer could Congress write ambiguous legislation and then sit back and let enfranchised interests structure agency policy. After *Chevron*, there was no longer any assurance that enfranchised interests could prevail in the struggle over policy implementation across administrations. *Chevron* empowered agencies to do as they wished under ambiguous statutes as long as they followed a reasoned

approach.<sup>6</sup> Hence, one of the necessary pre-conditions of autopilot, the delegation of broad and/or ambiguous authority, became increasingly problematic for Congress in the wake of *Chevron*.

### **The *State Farm* Decision**

Just as the *Chevron* decision might have limited the attractiveness of congressional delegations of ambiguous authority to agencies, an earlier seminal court decision might likewise have posed challenges to the concept of autopilot. More specifically, in writing a response piece 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.

In other words, even if it was technically feasible for an agency to alter previously enacted policies following a change in political pressure, the *State Farm* decision (and the precedent that it establishes) would prevent an agency from deviating from its policy agendas, solely for political considerations. Hence, the *State Farm* decision represents a substantial barrier to the realization of agency policymaking by autopilot.

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<sup>6</sup>Although the immediate policy consequences of *Chevron* did not contravene congressional interests at the time, Congress could no longer be sure that agencies in the future would accommodate pro-business interests. Hence, when Congress amended the Clean Air Act 1990, it explicitly endorsed the bubble definition of stationary source. As amended, section 111(d) of the Clean Air Act defined a "major stationary source" as "any stationary source or group of stationary sources located in a contiguous area and under common control." In retrospect, then, Congress from the 1970s through 1990s preferred the bubble concept, yet had to secure it through explicit statutory language rather than rely on procedure to ensure a balance between environmental and business interests.

The *State Farm* decision has its origins in a series of NHTSA actions that began in the late 1960s. Operating on the basis of its rulemaking authority, as established in the National Traffic and Motor Vehicles Safety Act of 1966, and in light of an agency study that suggested that only 25-30% of American drivers would be wearing seatbelts by 1970 (Mashaw and Harfst 1990, p. 85), NHTSA proposed to amend Motor Vehicle Safety Standard 208 on July 2, 1969. As originally promulgated in 1967, Standard 208 required the provision of seatbelts in all passenger vehicles; and NHTSA's proposed amendment would have moved beyond this base requirement to mandate that manufacturers provide some sort of passive restraint technology in vehicles that could protect occupants in the event of a collision. The 1969 Advanced Notice of Proposed Rulemaking suggested that NHTSA believed that airbags, which had been patented in 1953, was a technically feasible passive-restraint technology that could be incorporated into automobile design; and their inclusion would lead to 10-12 thousand lives being saved each year (Mashaw and Harfst 1990, p. 85). The Advanced Notice proposed an effective date for passive restraint requirements of January 1, 1972—meaning that all automobiles produced after 1971 would be required to incorporate some sort of passive restraint technology that would protect occupants subject to various crash test guidelines, as delineated by NHTSA.

Following a series of workshops, meetings, and rule revisions, NHTSA published a completed rule on March 10, 1971 that mandated passive restraint technologies by August 15, 1975, and provided for the adoption of various transition technologies in the intervening years, as manufacturers adjusted their production facilities to comport with the 1975 deadlines.<sup>7</sup>

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<sup>7</sup> The March 10, 1971 rule stated that for vehicles made between January 1972 and August 1973, manufacturers could either provide either a) complete passive restraint protection, b) lapbelts installed in all seating positions and “front outboard seating restraints capable of meeting the injury criteria in a 30-mph, perpendicular barrier crash”, or c) combination lap and shoulder belts in the front seats, lap belts in all other seats, and “front outboard seating restraints capable of meeting the injury criteria in a 30-mph, frontal barrier crash without belt or anchorage failure.” For vehicles made between August 15, 1973 and August 15, 1975, manufacturers could provide either a) complete passive restraint protection, or b) passive protection for front seat occupants, with lap belts for all seats, and a

Following the publication of Standard 208, the Chrysler Corporation requested a judicial review of the Standard, and on December 5, 1972 the 6<sup>th</sup> Circuit, in *Chrysler Corp v. DOT* (1972), enjoined the implementation of Standard 208. While stating, explicitly and contrary to Chrysler’s arguments, that NHTSA had rulemaking authority to mandate passive restraints in automobiles, the court agreed with Chrysler’s assertion that certain technical aspects of the design of the test dummy that were delineated in Standard 208 (to be used for establishing the efficacy of different passive restraints technologies) did not constitute an “objective” standard for testing, as required by the Motor Vehicles Safety Act.<sup>8</sup> As noted by Mashaw and Harfst (1990, p. 92), the *Chrysler* ruling was effectively “an automobile manufacturer’s dream” in that it “articulated no limits on how objective the test device had to be, but demanded that the agency withhold regulatory action until every detail had been worked out.” Hence, as a result of *Chrysler*, the compliance deadline for Standard 208 was shifted to September 1976 while NHTSA was left to work out various aspects of the testing guidelines.

Independent of the *Chrysler* decision, various political battles had contributed to NHTSA shifting the compliance deadline for Standard 208 several times from its initial date of January 1<sup>st</sup>, 1972, and had paved the way for Congress imposing new constraints on NHTSA’s rulemaking powers. More specifically, as part of the 1974 Amendments to the Motor Vehicles Safety Act, it was established that any NHTSA mandate for passive restraints would be subject to a legislative veto. The amendments also prohibited NHTSA from mandating certain transition technologies that manufacturers might incorporate into vehicles prior to the passive restraint

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warning system for front seat seatbelts to ensure that they were engaged (National Transportation Safety Board 1979, 20-21).

<sup>8</sup> As described in Mashaw and Harfst (1990, 87-89) the Chrysler Corporation basically “threw the book” at Standard 208 in its plaintiff’s brief, trying to identify any possible technical or legal argument that the court would find compelling to justify the enjoining of the rule making process. Numerous issues other than the “objective” standard consideration were raised by Chrysler, yet were not endorsed by the Sixth Circuit.

requirement becoming universal, such as ignition interlock and/or warning mechanisms (such as lights and/or buzzers) that lasted more than eight seconds if seatbelts had not been engaged. Moreover, the amendments required that NHTSA conduct public hearings to solicit feedback on any passive restraint mandate that it might propose. Mashaw and Harfst (1990, p. 109) note that one goal of the hearing requirement proponents was to empower the manufacturers in the rulemaking process, which would likely contribute to further rulemaking delays.

Consistent with this argument, the hearing on passive restraints, which took place on May 23, 1975, brought together more than 300 participants, and yielded highly contentious and, at times, contradictory testimony regarding the virtues and likely efficacy of different restraint technologies. As a result of the hearings, NHTSA Secretary James Gregory submitted a memo to Secretary of Transportation William T. Coleman, recommending that full front passive protection not be required in automobiles until 1981 (Mashaw and Harfst 1990, pp. 186-187). Secretary Coleman was unwilling to act on Director Gregory's memo; and that decision, combined with other internal political matters at DOT led to Gregory stepping down in February, 1976.

Following Gregory's departure, Secretary Coleman reopened the rulemaking process for Standard 208 in June 1976 to engage questions regarding the efficacy and underlying costs and benefits of airbags. Based on the feedback that was received during the notice and comment period, Secretary Coleman issued a decision on December 6, 1976 in which he "call[ed] upon the automobile manufacturers to join the Federal government in conducting a large-scale demonstration program to exhibit the effectiveness of passive restraints" (National Transportation Safety Board 1979, 59). In essence, Secretary Coleman struck a deal with auto manufacturers, whereby NHTSA would not issue a rule requiring airbags in cars, if the

manufacturers would commit to voluntarily providing airbags for substantial portions of their fleets (Mashaw and Harfst 1990, p. 206).<sup>9</sup>

With the election of President Jimmy Carter and his subsequent appointment of Brock Adams as Secretary of Transportation, however, the regulatory agenda of NHTSA became more proactive; and Standard 208 became the focus of renewed activity. After briefly exploring possible regulatory options for dealing with the current safety standards, Secretary Adams issued a final rule on June 30, 1977, which mandated that manufacturers incorporate passive restraints into all passenger vehicles beginning in 1981, so that all passenger vehicles would be equipped with such technologies by September 1, 1983.<sup>10</sup>

The election of President Ronald Reagan, however, caused NHTSA to reverse its course once again. In February 1981 NHTSA reopened the rulemaking process for Standard 208 in light of the economic difficulties that the auto industry had experienced in recent years; and two months later, it announced a one-year delay in the application of the Standard. It should be no surprise that a wide range of parties had strong reactions to the Department's pronouncement. On the one side, insurance companies argued against the delay, stating that any further delays in rule implementation would lead to additional preventable injuries and deaths. On the other side, auto makers were arguing that the rule was incredibly costly; and due to their current economic situation, the only way that automobile manufacturers could comply with a passive-restraint mandate was through a less-costly passive belt option, which manufacturers conceded would be

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<sup>9</sup> Mashaw and Harfst (1990, p. 206) argue that at the time that Coleman negotiated this arrangement, he was ostensibly convinced that air bags were technically (and economically) feasible; but one appealing feature of this bargain was that it would facilitate "on-the-road experience," which would provide manufacturers and regulators with data regarding the efficacy of, and satisfaction with, these technologies.

<sup>10</sup> In overturning Secretary Coleman's decision, Secretary Adams stated that Coleman's arguments that the public would not accept passive restraints, which was one of the main motivations for not issuing a Standard, was "not one of the statutory criteria which the Department is charged by law to apply in establishing standards" (National Transportation Safety Board 1979, 62).

relatively ineffective, given that consumers could simply detach the belts (Mashaw and Harfst 1990, pp. 208-209). Finally, in October 1981, the agency published a notice that rescinded the passive restraint standard altogether.

In explaining its decision to rescind the standard, the Agency pointed to how industry plans had changed since 1977, when the Standard was promulgated, and the Agency had assumed that airbags would be installed in approximately 60% of new automobiles, with the remaining 40% complying with the Standard with passive belts. In contrast, as alluded to above, due to economic hardship in the industry, it had become evident that nearly 99% of automobiles would comply with the standard with passive belts. Given testimony from industry officials that most people hated the belts, the manufacturers (and NHTSA) anticipated that most occupants would detach them, thereby rendering them useless (*Motor Vehicle Manufacturers Association v. State Farm*, 463 U.S. 29, 2864). Hence, Standard 208 would likely be ineffective, though still quite costly to implement, as manufacturers would still have to add passive belts to all new cars. In sum, the costs of implementing Standard 208 could not be justified; and hence, the rule should be rescinded.

In response to the October 1981 rule rescission, State Farm Insurance Company filed suit in the DC Circuit Court of Appeals, seeking judicial review of the Agency's decision. The D.C. Circuit, in *State Farm Mutual Automobile Ins. Co. v DOT* (1982), ruled that the Agency's rescission of the rule was arbitrary and capricious (and therefore invalid). The decision was appealed to the Supreme Court, and in *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co.* (1983), the U.S. Supreme Court upheld the D.C. Circuit's decision, and sent the matter back to the Agency for redetermination. In the Court's decision, it questioned why NHTSA equated consumer displeasure with passive belts, and the possibility of their

detachment, to the certainty of consistent detachment (thereby rendering them useless).

Likewise, and more to the point, the Court questioned why NHTSA, even if it had firm evidence that passive belts would not achieve the goals of the Standard, wouldn't simply mandate airbags (and/or ban detachable passive belts) as a way to achieve the goals of Standard 208. As noted by the Court (463 U.S. 49, p. 2869).:

Given the effectiveness ascribed to airbag technology by the agency, the mandate of the Act to achieve traffic safety would suggest that the logical response to the faults of detachable seatbelts would be to require the installation of airbags. At the very least this alternative way of achieving the objectives of the Act should have been addressed and adequate reasons given for its abandonment.

Bluntly stated, without compelling evidence to suggest a change in course, the *State Farm* decision said that the Agency couldn't alter its policy choice, which had been based on a body of evidence to justify that particular choice. Moreover, the Court went so far as to say that rule rescissions should be judged by the same arbitrary and capricious standard that governs rule creation, rather than the more narrow standard that is employed to evaluate the legality of an agency refusing to promulgate a rule.

### **State Farm and Formal Models of Delegation**

In considering the implications of *State Farm* for our current understandings of delegation and rulemaking, it is useful to begin by positing certain practical aspects of the rulemaking process. First, upon being delegated rulemaking authority, the burden is on the agency to assemble a record to justify whatever policy choices it might ultimately make. If the agency is not able to create a substantive record to justify its choice(s), it faces the nontrivial risk of having its decision struck down by any reviewing court, on the grounds that it was engaging in

“arbitrary and capricious” rulemaking. This is an innocuous point that comports well with a wide range of scholarship on the politics of bureaucratic policymaking. Indeed, McNollgast (for example) would suggest that one of the points of notice and comment rulemaking would be to ensure that interested parties get their concerns on the record, so that the agency is compelled to respond to these considerations if and when it promulgates a rule.

Moving beyond the initial creation of the rule, however, the *State Farm* decision substantially ties the hands of the agency to continue to pursue a particular course of action. Once an agency has gone through the effort of developing a compelling rationale for why it chose a particular policy instrument, it is essentially bound by the record that it established to justify its decision, so as not to deviate from its proposed instrument—unless it can amass similarly compelling evidence as to why its initial choice was wrong.<sup>11</sup> The Supreme Court spoke precisely to this point in the conclusion of the majority opinion in *State Farm*, when it quoted *Greater Boston Television Corp. v. FCC* (1970): “An agency’s view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis.” Without a reasoned analysis, which will be evaluated by the same arbitrary and capricious standard that governed the initial instance of rulemaking, an agency cannot change its course of policy actions.

Taken together, these two features of rulemaking, the requirement to amass a substantive record to justify rule choice, and then being bound by that record in any future action, pose certain complications for the ways in which we often model the bureaucratic policymaking process. At the most shallow level, *State Farm* raises obvious concerns regarding the

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<sup>11</sup> Note, however, that the *State Farm* decision does not apply to “interpretive rules.” As recently established in *Perez v. Mortgage Bankers Association* (2015), an agency can significantly revise an interpretive rule without having to engage in notice-and-comment rulemaking.

applicability of McNollGast, who claim (as noted above) that upon being endowed with policymaking authority, the agency can operate on “autopilot” at later points in time—implicitly changing its policies in response to changes in the preferences of its political principals, without requiring new statutory authority. But at a more profound level, these two types of constraints, an ex ante constraint that induces agencies to generate substantive records that can likely withstand court scrutiny, and an ex post constraint that binds agencies to those records, might also cause complications for how scholars have employed several canonical models of delegation and policymaking in the extant literature.

Consider, for example, the family of noisy signaling models that have been analyzed in scholarship by Bawn (1995), Bendor and Meirowitz (2004), Epstein and O’Halloran (1994, 1996, 1999), Gailmard (2002), Volden (2002), and others.<sup>12</sup> All of these authors seek to understand the conditions under which a legislature might choose to delegate policymaking authority to a bureaucratic agent, who will choose and/or implement policy after receiving said authority. A common feature of these models is that actors’ preferences are defined (in part, at least) over the distance between their ideal points and policy outcomes. Building on earlier models of cheap talk in institutional settings (e.g., Crawford and Sobel 1982, Gilligan and Krehbiel 1987) the authors of all of these models all assume a disconnect between the policy that is chosen by a decision making body (an agency, for example), and the realized outcome. For example, a common assumption is that outcomes ( $o$ ) are a function of the policy chosen ( $p$ ) and a nature-induced shock ( $\omega$ ), such that:  $o = p + \omega$ , where  $\omega \sim U[0,1]$ , and that actors have quadratic policy preferences over outcomes (e.g.,  $U_i = -(x_i - o)^2$ , where  $x_i$  represents actor  $i$ ’s ideal

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<sup>12</sup> 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 for which notable uncertainty is present.

point).<sup>13</sup> A common feature of these models is that the agent is better-informed (and/or has the capacity to become better informed) about the value of  $\omega$ , than the legislature; and hence, delegating policy making authority to the agency can generate mutual benefits to both actors, by implementing policies for which there is relatively less variance associated with the outcomes, in comparison to a world in which a relatively uninformed legislature was promulgating policies unilaterally. Analysis of these models often yields insights regarding which types of agents will be delegated authority, depending on how aligned their preferences might be with those of Congress; and likewise, how much authority, or discretion, they will be afforded in making their decisions.

An implicit assumption in these models is that upon being delegated authority, a bureaucratic agent will act upon that authority to promulgate policy, subject to whatever legislative-mandated constraints were imposed at the time of delegation. That is, there is no substantial time-lapse between legislative-delegation and agency-policymaking. What happens, however, if there is a significant lapse in time between these events? In the context of the model, what happens if identifying the value of  $\omega$  is sufficiently time and/or labor-intensive that a substantial gap can emerge from the time that authority is delegated and the time that agencies ultimately act upon their authority? As illustrated by the airbag example above, such time-lags are not hypothetical situations. NHTSA had been delegated rulemaking authority as a result of the passage of the Motor Vehicles Safety Act in 1966, it issued an Advance Notice for Proposed Rulemaking in 1969 to modify Standard 208 (which was established in 1967), and a final rule wasn't promulgated until 1977 (which was then rescinded in 1981).

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<sup>13</sup> Variations in these specific assumptions regarding the distribution of the disturbance and/or actors' utility functions are employed in the collection of models that engage questions of delegation and policymaking. Wiseman (2013) provides a very brief review of the literature on information acquisition and policymaking in legislatures and bureaucracies.

In the eight years between the Notice of Proposed Rulemaking and the final rule being promulgated, there had been significant political and personnel changes in the White House, Congress, and NHTSA. So much so, that one might wonder 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? Of course, theory might suggest that Congress could potentially intervene and change the focus of agency activities in the midst of the rulemaking process, in response, perhaps, to feedback from external stakeholders. Indeed, historical evidence points to precisely this dynamic in play, when Congress passed the 1974 Amendments to the Motor Vehicle Safety Act, which constrained NHTSA from dictating that manufacturers could employ ignition interlock and/or cumbersome alarm systems in lieu of full passive restraint systems.<sup>14</sup> It's important to emphasize, however, that any change in the direction of agency policymaking would require new explicit mandates from Congress, rather than the agency automatically adjusting in response to changes in congressional preferences. In either case, it goes without saying that none of the models that are alluded to above account for the possibility that there will be a differences in preferences between those agents whom are initially delegated authority, and those who ultimately use the authority.<sup>15</sup>

In addition to the potential time-lag, which induces potential preference incongruity between Congress and the relevant agency, the *State Farm* precedent adds a new wrinkle to the nature of the delegation problem: upon promulgating a rule, the agency (and Congress) is

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<sup>14</sup> Congress had received a wide range of correspondence from consumers, meaning voters, who had purchased cars with those features in the early 1970s (National Transportation Safety Board 1979, 40-41).

<sup>15</sup> While Bawn (1995) does account for the role of uncertainty over agency preferences, she assumes that the legislature can influence the scope of preference uncertainty through the development of various administrative procedures. While this model shares some features with the phenomenon that we describe above, it is not substantively consistent with the argument that a time lag between delegation and rule promulgation can lead to notable political changes, thereby changing the political preferences of the agency (independent of extant procedural requirements).

basically stuck with it, regardless of whatever shifts in political preferences might ensue over time. This is not to suggest, of course, that agency rules can't be overturned by Congress, or that the agency can never alter its rules in a substantial way. The costs of overturning agency action through legislative channels, however, can be quite high (as McNollGast and other scholars might suggest). These costs might be particularly high in times of divided government when any bill seeking to overturn agency actions (i.e., through the Congressional Review Act) might likely be vetoed by a President. Likewise, a strict reading of *State Farm* would suggest that unless the agency can provide a compelling reason for substantially altering its original decisions, the Court will strike down any amendments that it might make to earlier rules. As to how often these competing constraints become salient considerations in policymaking is an empirical question; but as noted in the following case study, they can lead to profound difficulties for the way in which congress might seek to prod, and then control, agency policymaking.

### **An Illustration: The Arsenic Standard**

Most drinking water in the United States, even bottled water, contains arsenic. Arsenic enters water from naturally occurring deposits in soil and minerals and, to a lesser extent, from industrial processes such as the manufacturing of semi-conductors and wood preservatives. When ingested in large amounts, arsenic is extremely toxic to humans. Even when ingested in relatively small quantities over long periods of time, arsenic can cause cancer, nerve damage, diabetes, digestive problems, miscarriage, stillbirth, and congenital heart disease.

Arsenic levels in drinking water are currently regulated by the United States Environmental Protection Agency (EPA) under authority granted by the Safe Drinking Water Act (SDWA).<sup>16</sup> The first arsenic standard for drinking water in the United States, however, was

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<sup>16</sup> The FDA regulates bottled water. FDA standards for arsenic in bottled water are the same as the EPA's for public drinking water. See 21 CFR 165.110.

established by the Public Health Service in 1942. Congress had granted the Public Health Service quarantine powers in 1893 in order to quell the spread of typhoid and other infectious diseases, and eventually the PHS amended its *Interstate Quarantine Regulations* to bring drinking and culinary water on common interstate carriers—mostly trains and boats at the time—under its regulatory purview.<sup>17</sup>

The arsenic standard established by the Public Health Service in 1942 was 50 parts per billion (ppb), or 0.050 milligrams per liter, for the traveling public. Not until 1975 did the EPA apply the same standard to the non-traveling public, following the passage of the Safe Drinking Water Act (SDWA) in 1974. The Safe Drinking Water Act established the Office of Ground Water and Drinking Water within EPA, which paved the way for the regulation of a long list of contaminants in drinking water, including arsenic.

The Safe Drinking Water Act of 1974 called for a “national interim primary drinking water regulation” for arsenic and other chemicals known to have adverse health effects. The interim standards were intended to go into effect quickly and to be enforced by the states. The Act required interim regulations to be promulgated within 90 days, and thus the basis for the interim standards was generally what had already been set by the Public Health Service. For arsenic, EPA’s first national interim primary drinking water standard was therefore 50 ppb. Following the interim standard, the EPA Administrator was given authority to promulgate modified final standards after 180 days as “he deems appropriate” (Sec. 1412(a)(1)).

The 1974 Safe Drinking Water Act, together with amendments in 1986 and 1996, gave the EPA extremely broad authority to establish national drinking water standards. The 1986

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<sup>17</sup> See Article 3, paragraph 15 of the *Interstate Quarantine Regulations* and “Amendment to Interstate Quarantine Regulations: Pure Drinking Water for Passengers in Interstate Traffic.” *Public Health Reports*, Vol. 28, No. 5 (Jan. 31, 1913), p. 212.

amendments required the agency to establish maximum contaminant goals at a level such that “no known or anticipated adverse effects on the health of persons occur and which allows an adequate margin of safety.” The agency was further directed to establish standards as close to these goals as “feasible,” where feasible meant using “the best technology, treatment techniques and other means which the Administrator finds, after examination for efficacy under field conditions and solely under laboratory conditions, are available (taking costs into consideration)” Sec. 1412 (b)(3)(D)(4,5)).<sup>18</sup> Hence, by 1986, the agency had extremely wide latitude to establish arsenic standards, essentially anywhere between 3 ppb and 50 ppb.

From 1974 until 1986, the EPA promulgated 22 interim regulations previously developed by the Public Health Service, but the agency made little progress in regulating additional contaminants. By 1986, the EPA had regulated only one additional contaminant among 85 targeted for rulemaking, and the agency had still not issued a final drinking water standard for arsenic. Frustrated with the EPA’s slow progress, Congress amended the SDWA in 1986 and required the EPA to issue regulations for 83 contaminants by no later than June 1989. The 1986 amendments required the EPA to convert the interim standard for arsenic to a final national primary drinking water regulation by June 1988.

The regulation of arsenic is a policy for which there is a substantial amount of uncertainty, and the method by which such uncertainty might be resolved is unclear. Research findings on the health effects of arsenic, especially the effects of arsenic on cancer, have been slow to evolve over the years and remain unsettled. One difficulty with arsenic research is that animal studies are of limited value. Arsenic appears to be associated with skin cancer in humans,

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<sup>18</sup> The amendments in 1996 created additional rulemaking latitude for the EPA by easing the cost constraints on standards through variances, time extensions, and financial and technical support for small public water systems to comply with national standards.

but skin cancer is not evident in (more) furry animals. In addition, animals seem to ingest arsenic differently from humans. Arsenic is a valuable nutrient for animals, and animals seem able to detoxify arsenic much more successfully than humans. Most of what is known scientifically about the toxicity of arsenic comes from an epidemiological study of 40,000 individuals in rural Taiwan in 1968; and substantial differences between the Taiwanese and American populations in terms of diet and daily water consumption make comparisons difficult. Smaller scale studies in the U.S. have not found the same effects of arsenic as in Taiwan, especially at low levels of exposure.

The main scientific problem for the EPA in terms of assessing risk and setting an arsenic standard is determining the dose-response curve—how much arsenic must one consume through drinking water in order to be at risk of skin or internal cancers?<sup>19</sup> The default model used by the EPA in setting standards for all carcinogens is the “linear-no-threshold.” It assumes that the risk of cancer increases linearly with increases in dosage, and that there is zero risk with zero dosage. The linear assumption is generally considered to be a conservative approach, and in the absence of convincing data to the contrary, has been widely adopted by the EPA and other agencies.

Arsenic, however, seems to affect the human body differently than other carcinogens. At very high doses, there is general scientific consensus that arsenic causes skin cancer and possibly other internal cancers, but at lower doses there is much less consensus. Arsenic appears to have some nutritional value to humans, and the human body appears capable of detoxifying arsenic up to some level. Thus, the dose-response curve for arsenic may not be linear, and the threshold may not be zero. Ultimately, the problem in setting an arsenic standard was whether to employ the linear model or a sub-linear dose-response model. The linear model suggests that the

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<sup>19</sup> The EPA considers only the effects of cancer, not other health-related problems resulting from arsenic consumption, when setting standards.

maximum contaminant level for arsenic should be much lower than 50 ppb, but a sub-linear approach suggests that the 50 ppb standard would provide adequate public safety.<sup>20</sup>

The linear assumption for the dose-response model, and hence the appropriate standard for arsenic, divided the EPA internally for many years. The Office of Water (OW), and within it, the Office of Groundwater and Drinking Water (OGWDW), generally favored a higher maximum contaminant level (MCL) than the Office of Research and Development (ORD), the scientific research arm of the agency (Powell, 1997). The ORD was understandably concerned about case-by-case departures from the linear approach and the possible ramifications for regulation of other toxic substances such as hexavalent chromium, ethylene dibromide, and so forth. The OGWDW, however, had much closer and more frequent interactions with key stakeholders who opposed a lower MCL for arsenic, and the OGWDW generally called for additional research about the dose-response curve at low levels of exposure.

In addition to its own internal scientists, the EPA commissioned external studies and received reports and recommendations from the National Research Council of the National Academy of Sciences, as well as the EPA's Scientific Advisory Board. However, these external recommendations were often inconsistent, both across entities and across time, and they failed to provide any consensus for the agency. The NRC, for example, suggested in 1977 that the 50 ppb standard may not be adequate, then concluded in 1983 that the 50 ppb standard was sufficient, and subsequently recommended an MCL of 10 ppb in 2001. The EPA's ORD commissioned a study in 1983 that concluded there was no established relationship between arsenic exposure and skin cancer. Yet a special technical panel convened by the EPA in 1988 reported that there was

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<sup>20</sup> Under linear assumptions, the benefits of a 10 ppb standard slightly outweigh costs, but under non-linear assumptions, costs exceed benefits substantially. The EPA is now required under the SDWA to conduct cost-benefit analyses of all regulations, and thus the linear assumption is critical for justifying the 10 ppb standard. See Sunstein (2001-2002) and Burnett and Hahn (2001).

indeed a quantifiable link between arsenic and skin cancer and that a linear model was appropriate. Yet the EPA's Science Advisory Board criticized the special panel's conclusions and argued that a non-linear model might be more appropriate (Umshler (1999)).

Confronted with emerging scientific findings and conflicting recommendations, the EPA was uncertain about how to proceed and missed the 1988 deadline for promulgating an arsenic standard as mandated by Congress in the 1986 amendments to the SDWA. The agency was then sued in federal district court by the Bull Run Coalition, a citizens' group in Portland, Oregon. Bull Run and the EPA entered into a consent decree that initially extended the agency's deadline until 1989, and then when the EPA missed that deadline, gave the agency a choice between proceeding with a rule in 1992, or awaiting additional research and proposing a rule by 1999. The agency decided in 1991 to proceed with rulemaking rather than await additional research. Two new studies appeared in 1992, however, that established a link between arsenic and internal cancers. As the EPA scrambled to evaluate and assimilate these new findings, it missed the 1992 deadline. The district court then set a new deadline of September 1994 for the agency to propose a rule. As the EPA proceeded with its rulemaking in light of the new findings, the Science Advisory Board again criticized the agency's risk assessment for assuming linearity at low levels of exposure, and the agency missed the 1994 deadline. The court once again extended the deadline to November 1995, but the agency missed this deadline after the OGWDW declared that the agency needed to pursue additional research that had been suggested earlier in the year by the research foundation of the American Water Works Association, the leading trade association for drinking water suppliers.

Finally, the court-imposed deadlines for the EPA ended in 1996 when Congress amended the Safe Drinking Water Act and instructed the agency to propose a rule for arsenic by January 1,

2000 and to promulgate a final standard by January 1, 2001. This deadline was subsequently delayed until June 22, 2001 in a rider to the EPA appropriations for 2001. Senator Boxer attempted to strike the rider, but her amendment was tabled on a 63-32 vote. Support for the rider was strongest among senators from states west of the Mississippi River. Eventually, despite continued opposition to lowering the arsenic standard both within and outside the agency, the EPA complied with the congressional deadline and issued a final rule that lowered the arsenic standard from 50 ppb to 10 ppb on the last day of the Clinton Administration, January 19, 2001.

About the time President Bush was finishing his inaugural luncheon at the U.S. Capitol, his newly appointed chief of staff, Andrew Card, sent a memorandum to acting heads of agencies and executive departments directing them to withdraw any rules that had not yet been finalized or published, and to suspend for 60 days the implementation of any rules that had been published but had not yet taken effect. The arsenic rule was among those affected. The EPA had signed the arsenic rule and sent it to the Office of the Federal Register (OFR) in time for printing by Friday, January 19. Although the rule did not appear in print in the *Federal Register* until Monday, January 22, officials at the OFR determined that it was among rules on the regular publication schedule that were printed on Friday night and Saturday morning. Consequently, the arsenic rule was technically and literally published by the time the Card memo was circulated on Saturday afternoon.<sup>21</sup> Since it was already published, the arsenic rule could not be withdrawn, but its implementation could be delayed.<sup>22</sup>

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<sup>21</sup> Interview with OFR officials reported in OMB memorandum, *Regulatory Review: Delay of Effective Dates of Final Rules Subject to the Administration's January 20, 2001, Memorandum*, to Representative Henry Waxman and Senator Joseph Lieberman. United States General Accounting Office, Washington, DC, February 15, 2002.

<sup>22</sup> While courts have ruled that delaying the effective date of a published rule *indefinitely* is tantamount to withdrawing it and therefore requires notice and comment rulemaking (Jack, 2002, 1503), they have not prohibited the delay of published rules for a specified period of time such as 60 days. Still, the legality of this action is not entirely clear-cut. Agencies have generally managed to avoid notice and comment by asserting that delay falls under one of the two exceptions in the APA to notice and comment rulemaking: either that the matter engages “interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice,” or that the

Although the APA requires that rules generally become effective within 30 days, the Clinton Administration's EPA had established a 60-day window for the arsenic rule in order for water utilities to acquire the necessary equipment and technology to comply with the new standard. The new standard was to take effect on March 23, 2001. Thus, on March 23, 2001, pursuant to the Card Memo, the EPA published a final rule delaying the effective date of the arsenic rule for another 60 days until May 22, 2001.<sup>23</sup> This final rule was published without notice and comment, yet the suspension of the arsenic rule quickly gained national attention. *The New York Times* and *The Washington Post* ran front-page stories on the decision the following day, and the Democratic National Committee began airing television ads on the issue within weeks (Jehl, 2001; Pianin and Skrzycki, 2001). In one ad, a little girl fills a glass of water from the sink and asks, "Can I please have some more arsenic in my water, Mommy?"

The Safe Drinking Water Act and subsequent amendments were constructed around a delicate balance of interests. As reflected in the composition of the National Drinking Water Advisory Committee, the entity created by Congress to guide the agency in its rulemaking, the Safe Drinking Water Act sought a balance among environmentalists, consumers, state and local public officials, private water systems, large public water systems, and rural water systems (Balla and Wright, 2001). These were the "enfranchised" interests, to use McNollgast's terminology, which Congress intended to shape the agency's rules on arsenic and other contaminants. The installment of the new Bush administration upset this delicate balance, however, and interests opposed to the 10 ppb standard spoke with amplified voices in the new administration.

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agency for "good cause" finds that "notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest" (5 U.S.C. § 553(b)).

<sup>23</sup> Sanford (2003) argues that many delays are substantive, not procedural, because they impart real costs or benefits to affected parties. He argues that such delays would not withstand hard look review if challenged.

During the interim period between January 22 and March 23, the Bush administration was lobbied heavily to delay the arsenic rule by Kennecott Utah Copper Corporation, the National Rural Water Association, the National Wood Preserver's Association, the Western Governors Association, and members of Congress from rural and western states (Majority Staff of the Committee on Governmental Affairs, 2002). The main political opposition to arsenic regulation came from small water systems that tend to rely on ground water from wells, where arsenic levels are significantly higher than in ground water. The EPA had estimated that of the water systems exceeding the 10 ppb maximum contaminant level, 97 percent served less than 10,000 people. Hence, the costs of arsenic regulation would fall disproportionately on the smaller communities and water systems, especially in rural and western areas.<sup>24</sup>

Giving weight to the organized opposition to the arsenic rule, the EPA delayed the arsenic rule even longer by publishing a notice in the *Federal Register* on April 23, 2001 to postpone the effective date of the arsenic rule for another nine months until February 22, 2002. This notice elicited over 12,000 comments (Jack, 2002: 1509),<sup>25</sup> and on May 22, 2001, the agency published the final notice that confirmed the delay. Then, on July 9, 2001, the EPA published a notice requesting comments on contaminant levels for arsenic ranging from 3 ppb to 20 ppb. The commenting period was open until October 31, 2001.

Meanwhile, congressional opposition to the suspension of the arsenic rule was building. On April 4, Rep. Waxman introduced HR 1413 with 173 co-sponsors calling for the EPA to implement an arsenic rule with a 10 ppb standard. Senators Clinton and Boxer introduced similar

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<sup>24</sup> The SWDA Amendments of 1996 required the EPA to estimate costs and benefits of different arsenic standards, and according to EPA estimates, the average annual cost to households varies exponentially with the size of water system. For systems serving less than 100 people, the estimated average annual cost of achieving the 10 ppb standard is \$327, but for systems serving 100,000 to 1,000,000 the estimated average annual cost is just \$21 (Sunstein, 2001-2002, p. 2272).

<sup>25</sup> The justification for the delay was to reassess the scientific evidence and to re-evaluate the costs and benefits.

bills in the Senate. Although none of these bills made it out of committee, Rep. Bonior introduced an amendment to the EPA appropriations bill on July 27 that prohibited funds to be used for further delay or to implement a higher standard than 10 ppb.<sup>26</sup> This amendment passed 218-189 on a recorded vote with 18 Republicans joining all but 6 Democrats in the majority.<sup>27</sup> Then on August 1 a similar amendment passed in the Senate by 97-1 margin.<sup>28</sup> Finally, facing opposition in both chambers of Congress and a filibuster-proof Senate, Administrator Whitman relented and announced on October 31, 2001 that the 10 ppb rule would be implemented on schedule.

In considering the somewhat convoluted history of the arsenic standard, certain features of the process emerge that are relevant for our broader discussion about the prospects for delegation and agency control. First, establishing a new standard for arsenic took a long time. An interim standard was established in 1975, but no new standard had been established 11 years later when Congress amended the Safe Drinking Water Act in 1986. Then, even with congressional prodding, the EPA did not act on its authority by the congressionally-imposed deadline of 1988, and the agency then proceeded to violate four court-imposed deadlines such that a final rule wasn't promulgated until January 2001—26 years after the EPA had issued its interim standard!

The EPA wasn't merely sitting on its hands for these 26 years. Some interests within the agency were very much in favor of moving ahead with promulgating a formal standard for

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<sup>26</sup> HR 2620, "Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 2002." The rider mandated that "None of the funds appropriated by this Act may be used to delay the national primary drinking water regulation for Arsenic published on January 22, 2001, in the Federal Register (66 Fed. Reg. pages 6976 through 16 7066, amending parts 141 through 142 of title 40 of the 17 Code of Federal Regulations) or to propose or finalize a rule to increase the levels of arsenic in drinking water permitted under that regulation."

<sup>27</sup> H. Amdt. 261, July 27, 2001.

<sup>28</sup> S. Amdt. 1219, August 1, 2001.

arsenic, but uncertainty about the efficacy of any potential standard made consensus difficult. However, the lack of definitive scientific evidence, coupled with the agency's broad statutory mandate, also provided a great deal of discretion for the agency. Had the agency desired, it could have promulgated whatever standard was politically expedient among its stakeholders. Whether a "hard look" court would have approved such a rule is unclear, but the courts had been pressing the agency for years to finalize a standard, and in the absence of consensual scientific opinion, a politically motivated rule had a decent chance of withstanding scrutiny. Thus, the agency's hesitancy in finalizing a rule was most likely due to political stalemate among its stakeholders and among officials within the agency itself.

Across these 26 years, political preferences within the leadership of the agency changed, as the agency moved from being part of a Republican administration to a Democratic administration, back to Republican, and finally Democratic when the arsenic standard was ultimately finalized. Given these changes, it is natural to wonder whether the 93<sup>rd</sup> Congress in 1974, had it known how long it was going to take to finalize a standard, would have delegated the same rulemaking authority to an agency implementing policy in 2001 as it did to the Republican-controlled EPA of 1974-1976.<sup>29</sup>

The standard theoretical response to this question is that a substantial time-lag between delegation and rulemaking is not problematic for Congress because of the deck-stacking and autopilot processes hypothesized by McNollgast. Yet both processes failed to operate as expected in the arsenic example. Autopilot was restrained by *State Farm*. Given *State Farm*, the

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<sup>29</sup> Despite numerous political changes in Congress, it's clear that Congress was still content to have the EPA regulate arsenic, as it repeatedly passed bills through the 1980s and 1990s that mandated that the EPA issue a final arsenic standard on a specific timeline. Of course, it's worth noting that Congress's ability to legislate in this area seems to contradict extant theoretical accounts of delegation relations that assume that Congress is generally unable to pass substantive legislation to direct agency activities following the initial delegation decision. The authors thank Dave Lewis for this pointing out this insight.

EPA couldn't simply rescind the rule in response to political pressures from external stakeholders.<sup>30</sup> Instead of rescinding the rule outright, the Bush EPA could only delay, and it had to engage in a formal notice and comment to solicit information about changing the standard.

While *State Farm* gummed up the autopilot process, the Bush-led EPA was nevertheless determined to change the arsenic standard, even if it meant going through another protracted notice-and-comment process.<sup>31</sup> The agency clearly had the statutory latitude to promulgate a weaker standard, and officials within the agency certainly understood that the cost-benefit justification for the 10 ppb standard rested on shaky assumptions (Sunstein, 2001-2002; Burnett and Hahn, 2001). Still, with the procedural deck properly stacked (a la McNollGast), Congress should have been willing to let this new round of rulemaking play out. Given that the Bush administration was clearly leaning towards the interests of small, rural water systems, Congress was unwilling to wait. The EPA's broad discretion in regulating arsenic was not a consequence of *Chevron*-determined statutory ambiguity, but the effect was the same. Congress did what it must do when an agency acquires too much rulemaking authority—it reigned in the agency through explicit statutory action.

## **Moving Forward**

Our discussion has suggested that much of the extant theoretical literature on delegation and bureaucratic policymaking has neglected to account for particular legal mandates and constraints that profoundly influence the rulemaking process. This is not to say that these

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<sup>30</sup> In this sense, *State Farm* truly was a good neighbor to the congressional majority and to other advocates of the 10 ppb standard.

<sup>31</sup> Howell and Mayer (2005) have argued that the Clinton administration's midnight action on the arsenic rule was strategically motivated to put the Bush EPA in the difficult position of justifying a more lenient arsenic standard. Yet the new Bush administration appeared quite prepared to engage in that exercise. The Bush EPA suspended the arsenic rule for not just the usual 60 days, but for a total of 11 months, and it began a new rulemaking process in July that could have raised the standard to 20 ppb. Thus, if it was the intent of the Clinton administration to lay a political trap for the new Republican-controlled EPA, the Bush administration took little notice.

theories are wrong; but rather, we would argue that while the extant literature can teach us quite a bit about the political dynamics at play in various delegation relationships, they might be lacking in their explanatory power of contemporary delegation (and subsequent policymaking) relationships in the United States. Having said that, the question turns to: what should be done now? Do we simply throw up our hands and say “The process is too complicated for us to develop parsimonious theories with explanatory power”? We think not.

Most fundamentally, it’s quite possible that the extant models do offer a reasonable approximation of the policymaking process for *some* policy areas, yet not others. For example, for policies that are relatively less technical, such that there tends to be a relatively small gap in time between when authority is delegated and when it is ultimately used, the consequences of the *State Farm* decision might be relatively limited in scope. On this point, it would be constructive to identify which policy areas might be more or less amenable to the models that have been advanced by other scholars, thus far. For those policy areas that seem to be particularly bad fits for existing theories, we suggest that there are at least two ways to proceed.

First, our discussion above points to certain salient features of bureaucratic policymaking that could ideally be incorporated into existing theories, to explore their implications on the policymaking process. For example, given the length of time that often passes between the incidence of delegation and policy promulgation, one might seek to model the delegation decision as a stochastic process, in which a principal (e.g., Congress) delegates to an agent (e.g., an agency) whose preferences might vary across time, and policy (likewise) will be realized stochastically at different points in time. Developing such a model would allow scholars to wrestle with the kinds of issues we raise above in our discussion of the *State Farm* case and the EPA arsenic standard: when would Congress choose to delegate authority to an agency that

might have different policy preferences in the future, and likewise, might implement policy only after having changed its policy preferences at that future point in time?

Second, it might be worthwhile to reconsider the foundations of the most common models of delegation and agency policy-making altogether. Simply stated, much of the theoretical literature on delegation has essentially projected the spatial model of voting, which has been incorporated widely into the analysis of legislative politics, into the bureaucratic arena. One might ask, however, whether the spatial theory of voting is an appropriate baseline from which to develop a model of bureaucratic policymaking processes? In other words, is a bureaucratic agency concerned, largely, with the ideological dimensions of its policymaking activities, or is it motivated by other concerns? To the extent that the answer to the former question is “no,” and the answer to the latter question is “yes,” we might seek to explore models that analyze delegation and the subsequent bureaucratic policymaking process in an environment where legislators (and agencies) are motivated by things other than ideology, *per se*. On this point, it might be natural to suggest that legislators are motivated by reelection (e.g., Mayhew 1974) and/or the creation of good public policy (e.g., Fenno 1973), and that these motives are projected onto bureaucratic agents, who seek to choose policy instruments that are consistent with the reelection and/or policy quality goals of their legislative overseers. Hence, it might be constructive to analyze how and when bureaucracies might produce policies that have generally positive attributes that are appreciated by all legislators, rather than considering scenarios in which the agency is (essentially) choosing a policy in a spatial setting that corresponds to a zero-sum competition among political principals.<sup>32</sup>

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<sup>32</sup> On this point, recent scholarship that analyzes the endogenous creation of valence-laden policies (e.g., Hirsch and Shotts 2015, Hitt, Volden, and Wiseman 2014) might serve as the foundation for a model of bureaucratic policymaking that engages these types of considerations.

Regardless of what specific directions are taken, this paper will hopefully serve as a clear reminder that the bureaucratic policymaking process is influenced and constrained by well-defined legal mandates. Accounting for these mandates in our theories in a meaningful way can only serve to increase our understanding of lawmaking in the United States.

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