

Litigation-Fostered Bureaucratic Autonomy: Exploring the Institutional Roots of
a Post-*Chevron* Moment in Administrative Law and Politics

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Abstract

Chevron v. NRDC represents a judicially sanctioned authorization of political control over bureaucratic policy performance. This paper presents a theory which seeks to explain why, despite the fact that Chevron has not been overturned, courts have been relatively non-deferential in their review of agency outputs, especially in recent years. I argue that the change is not strictly behavioral, as some scholars have recently hypothesized. Rather, I argue that the change is structural and institutional. Modern administrative law emerged in the 1970s as an anti-capture/anti-autonomy device in service of greater public and political accountability of the bureaucracy. Agencies and interested parties adapted to this environment by internalizing adversarial legal capabilities, and this adaptation slowly converted administrative law's function as political circumstances changed. I argue that litigation by interest groups, aided by disgruntled civil servants, is now a fundamental tool used in the battle against political manipulation of bureaucratic preferences and is at least partly accountable for the movement away from Chevron. I also suggest that this institutional phenomenon is partially desirable and partially problematic, but largely out of our control.

Introduction

A puzzle has emerged in administrative law and bureaucratic politics regarding the relative discretion or autonomy of the United States' federal bureaucracy. Reference to *Chevron v. Natural Resources Defense Council, Inc.*¹ remains the *sine qua non* of the practice of administrative law and bureaucratic politics, yet as some scholars have recently observed, the fundamental principle which *Chevron* left us—that is, “a rationale that emphasizes the executive’s democratic accountability and that sees nothing wrong with politically-inflected presidential administration of executive branch agencies”—has been eroded in part by some of the Supreme Court’s recent high-profile administrative law

¹ *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

cases.² Part of this paper is an attempt to assess the reach of this move away from a politics-based regime of regulation. If, in fact, courts and litigants are stepping into bureaucratic politics to force elected officials to defer to the policy preferences of civil servants in agencies across diverse policy areas, then not only some legal scholarship on the post-*Chevron* era is in need of revisiting, but also the political science literature on bureaucratic politics which suggests that the elected branches effectively control bureaucratic policy outputs.³ Indeed, my research concurs with those who have recently begun to question this literature in concluding that litigation is now a prime tool through which the purported monopoly of power exercised by the elected branches (and especially the president) can be resisted. The broad range of cases in which this trend is visible also strongly suggests that expertise alone is not the unique goal of this conversion. Instead, we need to think of this development more broadly in terms of bureaucratic autonomy: that is, as a move against unitary government, not against politically responsive administration. In short, the development of administrative law and bureaucratic politics strongly suggests that Madisonian

² Jody Freeman and Adrian Vermeule, “*Massachusetts v. EPA*: From Politics to Expertise,” *Supreme Court Review* (forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1008906; see also Lisa Schultz Bressman, “Deference and Democracy,” *George Washington Law Review* 75, no. 4 (2007): 761-803; Kathryn A. Watts & Amy J. Wildermuth, “*Massachusetts v. EPA*: Breaking New Ground on Issues other than Global Warming,” *Northwestern Law Review* 102, no. 1 (2007): 1-17.

³ Mathew McCubbins, Roger Noll, and Barry Weingast, “Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies,” *Virginia Law Review* 75 (1989): 431-482; Elena Kagan, “Presidential Administration,” *Harvard Law Review* 114, no. 8 (2001): 2245-2385.

pluralism is alive and well despite the warning of many scholars writing of the move to unitary government in the wake of a more powerful presidency and less divided government.⁴

In addition to elaborating on these trends, this paper also seeks to probe the causes of this change and its prospects for endurance. Other scholars who have argued that the dynamics of administrative law are changing suggest that they are probably only “temporarily” doing so,⁵ and thus these scholars implicitly link the change to attitudinal or judge-based explanations⁶: that is, *Chevron* is thought to be dissolving either because judges changed their views on *Chevron* or because judges responded to unique environmental pressures (e.g., an unprecedented attempt by President George W. Bush to institute the principles of the “administrative presidency”⁷). The corollary hypothesis is that, if litigation-fostered bureaucratic autonomy exceeds a threshold level, the elected branches will have no problem rebuking the courts and agencies who are resisting policymaking imperatives.

⁴ Theodore J. Lowi, “The 2008 James Madison Lecture—Bend Sinister: How the Constitution Saved the Republic and Lost Itself,” *PS: Political Science and Politics* 42, no. 1 (2009): 3-9; Sidney M. Milkis, “The Presidency and Political Parties,” in *The Presidency and the Political System*, ed. Michael Nelson (Washington, D.C.: CQ Press, 1992).

⁵ Freeman and Vermeule, “*Massachusetts v. EPA*,” 3.

⁶ Thomas J. Miles and Cass R. Sunstein, “The Real World of Arbitrariness Review,” *University of Chicago Law Review* 75 (2008); Thomas J. Miles and Cass R. Sunstein, “Do Judges Make Regulatory Policy? An Empirical Investigation of *Chevron*,” *University of Chicago Law Review* 73 (2006); Thomas J. Miles and Cass R. Sunstein, “Depoliticizing Administrative Law,” (forthcoming), available at <http://ssrn.com/abstract=1150404>.

⁷ Richard P. Nathan, *The Plot that Failed: Nixon and the Administrative Presidency* (New York: John Wiley and Sons, 1979); Richard P. Nathan, *The Administrative Presidency* (Prentice Hall, 1983).

Both of these hypotheses are plausible, but there is more to this story than behavioral politics: I will suggest that we can only understand the change, and the long-term prospects of the change, if we understand the institutional and organizational roots of this conversion of the purpose of judicial oversight of administrative policymaking.

The paper starts with a discussion of the development of administrative law and bureaucratic politics with special attention paid to the question of bureaucratic autonomy. In part II, I address the growing consensus among legal scholars that the *Chevron* regime—a triumph of political control of the bureaucracy—has been circumscribed in recent cases. Finally, in part III, I show what seem to be relatively pervasive and important institutional “causes” or “mechanisms” which differ from the literature reviewed in part II in their implications for influence and permanence. In describing these complex institutional practices (practices which I suggest create “litigation-fostered bureaucratic autonomy”), I draw on new-institutionalism and socio-legal theory to suggest that the post-*Chevron* moment is not an anomaly, but rather it is baked right into the cake of the American state. This core insight potentially sheds light on a wide variety of scholarly literatures dealing with the relative importance of judicial attitudes and the processes of institutional change as well as processes of modern state building, bureaucratization, legalization, and inter-branch policymaking.

I. A Brief History of Administrative Development

When the Supreme Court issued its decision in *Chevron* in 1984, most administrative law scholars immediately perceived the importance of the case. At issue in the case was a fairly technical analysis of whether or not the Environmental Protection Agency had the authority to interpret the Clean Air Act to allow a plant-wide definition of stationary sources (i.e. the “bubble concept”).⁸ It must be acknowledged that the EPA’s interpretation was by all practical standards a product of heavy-handed presidential politicking. The bubble concept was widely understood to be a pro-business policy supported by the Reagan administration. In deciding that the Environmental Protection Agency had not impermissibly interpreted the Clean Air Act, the Court offered a two-step test of bureaucratic discretion:

First, always, is the question 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.⁹

However, if the court

determines that 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.¹⁰

⁸ *Chevron v. NRDC*, 840-842.

⁹ *Ibid.*, 842-843.

¹⁰ *Ibid.*, at 843.

Taken out of context, the two-step *Chevron* test would seem to be profoundly deferential to agency discretion, especially when deliberate congressional delegation of policy-making to administrative agencies is on the rise.¹¹ Placed properly in political time and institutional context, however, a plausible argument can be made that the test guaranteed a level of presidential control over bureaucratic policy outputs.

To put *Chevron* in context, we can divide the development of administrative law into roughly four periods of development starting after the general demise of the spoils system in the late 19th century. In the first period, running from approximately the late 19th century up to the Progressive Era, there was rapid development of the administrative state but relatively significant congressional control of policy outputs.¹² In the second period, running from approximately the Progressive Era to the 1960s, reform of bureaucratic administration took place as the product of rational strategies of reform groups upset with “party-dominated public administration” and determined to enhance the efficiency, neutrality, and effectiveness of government.¹³ Indeed, the push

¹¹ John D. Huber Charles R. Shipan, *Deliberate Discretion: The Institutional Foundations of Bureaucratic Autonomy* (Cambridge: Cambridge University Press, 2002).

¹² Stephen Skowronek, *Building a New American State* (Cambridge: Cambridge University Press, 1982); Richard Stewart, “The Reformation of American Administrative Law,” *Harvard Law Review* 88, no. 8 (1975): 1667-1813; Martin Shefter, *Political Parties and the State* (Princeton: Princeton University Press, 1993), ch. 3.

¹³ Jack H. Knott and Gary J. Miller, *Reforming Bureaucracy: The Politics of Institutional Choice* (Englewood Cliffs, N.J.: Prentice Hall, 1987), 38-53; Shefter, *Political Parties and the State*; Milkis, *The Presidency and Political Parties*.

towards professionalism had begun decades earlier with the passage of the Pendleton Act of 1883, which replaced the spoils system with a professionally anchored civil service system.¹⁴ But bureaucratic autonomy did not emerge all at once due solely to some universal change like civil service reform; instead, it emerged in pockets of the administrative state as individual agencies achieved the three conditions Daniel Carpenter identifies as necessary for bureaucratic autonomy. Those three conditions for bureaucracies are a) “political differentiation from the actors who seek to control them,” b) the development of “unique organizational capacities,” and c) political legitimacy based on perceived expertise and reputational networks.¹⁵ Central to the achievement of these three conditions among certain agencies in the early decades of the twentieth century was the growth of “a mezzo level of managers and inspectors that integrated turn-of-century bureaucracies and organizational networks that assisted recruitment and reduced turnover among personnel.”¹⁶ In short, during the Progressive Era, pockets of the administrative state slowly evolved to attain the necessary organizational capacities to maintain a level of institutional continuity, competence, and divergence from the interests of elected officials. This in turn allowed these agencies to develop often surprising amounts of autonomy. The

¹⁴ Nathan, *The Plot that Failed*, 8-9.

¹⁵ Daniel P. Carpenter, *The Forging of Bureaucratic Autonomy: Reputations, Networks, and Policy Innovation in Executive Agencies, 1862-1928* (Princeton: Princeton University Press, 2001), 14.

¹⁶ *Ibid.*, 29.

development of bureaucratic autonomy reached its pinnacle in the New Deal years when President Roosevelt generally opted for creating new bureaus which were designed as “commissions or hybrid agencies like government corporations.”¹⁷ Dealing with the fallout of the Great Depression required intensified political leadership and an ethos of cooperation with businesses subject to regulation. The regulations that bureaucracies were charged with enforcing were consequently vague, often exhorting agencies to promote the nebulous concept of “the public interest” and to ensure “fair and reasonable rates.”¹⁸ The norm was for regulatory agencies to practice a “discretionary inspector-as-consultant style.”¹⁹ However, the underlying assumption of this arrangement of vague statutory commands was that the administrative agencies themselves were in a relatively early stage of development. As exemplified by the non-delegation doctrine, the constitutional expectation was that administrative agencies would be granted only so much discretion as could be linked to some legislatively dictated “intelligible principle.”²⁰ The “traditional model” of administrative law (i.e., discretion only in accord with public sanction) could survive in conjunction with relatively weak statutory specification and relatively weak judicial review only so

¹⁷ David E. Lewis, *Presidents and the Politics of Agency Design: Political Insulation in the United States Government Bureaucracy, 1946-1997* (Stanford: Stanford University Press, 2003), 7.

¹⁸ R. Shep Melnick, *Regulation and the Courts: The Case of the Clean Air Act* (Washington, D.C.: Brookings Institution, 1983), 7.

¹⁹ Eugene Bardach and Robert Kagan, *Going by the Book: The Problem of Regulatory Unreasonableness* (Philadelphia: Temple University Press, 1982).

²⁰ *J.W. Hampton, Jr. & Co. v. United States*, 274 U.S. 394, 409 (1928).

long as the bureaucracy was young enough and simple enough to be wielded by political forces.²¹ By the time of the New Deal, it became clear that the non-delegation doctrine had lost its teeth in the face of reality,²² but elected officials found ways to constrain bureaucrats. Generally, President Roosevelt used his substantial administrative talent to pack these new agencies with like-minded political administrators.²³

In the third period, running from about 1960 through 1980, bureaucratic politics and administrative law underwent radical transformations. These transformations can be understood as a backlash of the “New Politics” movement against the excesses of the Progressive/New Deal bureaucratic arrangement—an arrangement which had, to the chagrin of both liberals and conservatives, fallen into the now commonly known defects of bureaucratic organizations (i.e., regulatory capture and ossification).²⁴ The New Deal had established an administrative state which was simply too much of a behemoth to be controlled by straightforward application of the Administrative Procedure Act anymore. In addition, while the apparent discretion disorder reached its pinnacle, the intellectual fad of pluralist theory in political science eroded faith in the nebulous

²¹ Stewart, “The Reformation of American Administrative Law,” 1677.

²² Theodore J. Lowi, *The End Of Liberalism: The Second Republic of the United States* (W.W. Norton and Co., 1979); *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Yakus v. United States*, 321 U.S. 414 (1944); *Mistretta v. United States*, 488 U.S. 361 (1989).

²³ Milkis, “The Presidency and Political Parties,” 354-358; Shefter, *Political Parties and the State*, 81-86.

²⁴ Stewart, “The Reformation of American Administrative Law,” 1684-1688; Shefter, *Political Parties and the State*, 86-94.

concept of “public interest,” which had structured the traditional model of administrative law.²⁵ Clearly, something needed to change, but even the political environment in which reform was to take place presented problems to the traditional model of administrative discretion: as evinced by the battle over the Clean Air Act and the formation of the EPA, an aura of distrust between Democrats in congress and the Republican President Nixon forced both sides to avoid simply ramping up political control of the administrative state.²⁶

Within this institutional and political environment, a compromise solution to the bureaucracy problem was forged. Writing in the aftermath of the compromise, Richard Stewart wrote of this transformation of administrative law:

Faced with the seemingly intractable problem of agency discretion, courts have changed the focus of judicial review (in the process expanding and transforming traditional procedural devices) so that its dominant purpose is no longer the prevention of unauthorized intrusions on private autonomy, but the assurance of fair representation for affected interests in the exercise of the legislative power delegated to agencies.²⁷

This judicial move is particularly visible in the move to “hard look” review²⁸ and public notice and comment requirements,²⁹ and also in the expansion of access to

²⁵ Stewart, “The Reformation of American Administrative Law,” 1711-1713; Kagan, “Presidential Administration,” 2265.

²⁶ Terry M. Moe, “The Politics of Bureaucratic Structure,” in *Can the Government Govern?*, eds. John E. Chubb and Paul E. Peterson (Washington, D.C.: Brookings Institution, 1989).

²⁷ Stewart, “The Reformation of American Administrative Law,” 1712.

²⁸ *Motor Vehicles Manu. Assn. v. State Farm*, 463 U.S. 29 (1983).

²⁹ Melnick, *Regulation and the Courts*; Richard B. Stewart, “Vermont Yankee and the Evolution of Administrative Procedure,” *Harvard Law Review* 91, no. 8 (1978): 1811-1813; *Sierra Club v. Ruckelshaus*, 344 F. Supp. 253 (D.D.C. 1972); *NRDC v. EPA*, 489 F.2d 390 (5th Cir. 1974); *Kennecott Copper Corp. v. EPA*, 462 F.2d 846 (D.D.C. 1972).

the courts for interested groups.³⁰ And while courts used novel readings of the Administrative Procedure Act to expand their authority of judicial review, the elected branches not only deferred to this development, but actively encouraged it by passing new kinds of statutes with capture-proof specificity of regulations and deadlines.³¹ Under this new public interest regime of administrative law and policymaking, agencies were fairly well tethered to the dictates of the elected branches with the help of reviewing courts.

Finally, we turn to the fourth period of administrative development. By the end of the 1970s and into the 1980s, the American political scene was changing dramatically. The ascendancy of deregulation and the Reagan revolution were at least partly a backlash against the excesses of the public interest era, but instead of dismantling the legislation responsible for regulation (e.g., the Clean Air Act, the Occupational Health and Safety Act, etc.), the newly reinvigorated Republicans focused their reform efforts on asserting administrative control internally. The well-documented turn to the “administrative presidency” beginning with President Nixon³² extended to the Reagan, Bush, and Clinton administrations.³³ Such a development is hardly surprising: modern presidents

³⁰ *Sierra Club v. Morton*, 405 U.S. 727 (1972); *U.S. v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973); *Duke Power Company v. Carolina Environmental Study Group*, 438 U.S. 59 (1978).

³¹ Robert L. Rabin, “Federal Regulation in Historical Perspective,” *Stanford Law Review* 38, no. 5 (1986).

³² Nathan, *The Plot that Failed*.

³³ Peter L. Strauss, “Overseer, or ‘The Decider’? The President in Administrative Law,” *George Washington Law Review* 75, no. 4 (2007): 696-760; Kagan, “Presidential Administration.”

“have strong political incentives to bring the federal bureaucracy under their control, and future presidents of both parties can be expected to protect and elaborate upon the managerial institutions that their predecessors have built,”³⁴ and they have done so through a variety of mechanisms including political appointments,³⁵ budget control through the Office of Management and Budget,³⁶ internal politicking,³⁷ and/or flat directives to agency officials.³⁸ Writing in the wake of the Clinton administration, Harvard Law School Dean Elena Kagan reflected on the changes of the previous 20 years:

The point is not that the President rules; that would be an impossible change in a context in which Congress, bureaucratic experts, and interest groups historically have played important roles and retain powerful incentives to do so. The point is only—but this is no small ‘only’—that the President, in relation to these other actors, has attained an ever greater capacity to oversee, to supervise, and even to direct administrative action.³⁹

It was in this environment of ever greater presidential control of administrative outputs that *Chevron* was decided. Like the *Vermont Yankee* case decided a few years before it, *Chevron* and its deference standard must be understood as a victory for advocates of presidential power, not for advocates of

³⁴ Moe, “The Politics of Bureaucratic Structure.

³⁵ B. Dan Wood & Richard W. Waterman, “The Dynamics of Political Control of the Bureaucracy,” *American Political Science Review* 85, no. 3 (1991): 801-828.

³⁶ Hugh Hecl, “OMB and the Presidency,” *Public Interest* 75 (1975): 80-98; Strauss, “Overseer, or ‘The Decider’?”

³⁷ Ronald Randall, “Presidential Power versus Bureaucratic Intransigence: The Influence of the Nixon Administration on Welfare Policy,” *American Political Science Review* 73 (1979): 795-810.

³⁸ Kagan, “Presidential Administration.”

³⁹ *Ibid.*, 2317.

bureaucratic autonomy or bureaucratic expertise. There can be little doubt that, in this environment of presidential control of administrative action, *Chevron's* two-step test for judicial deference was virtually a judicially engraved license for Presidential control of the administrative state.

The unifying theme of bureaucratic development is that the administration of government services and regulation goes through definite stages of relative autonomy and relative politicization. However, even the stages in which the administrative state is relatively autonomous can be seen as deliberate autonomy—in particular, the second era of administrative development, though undoubtedly known for its use of bureaucratic expertise in regulation, was an intentional delegation on the part of progressive/New Deal coalitions which was part and parcel of executively managed re-organization, re-shuffling, and re-staffing. When the time came for elected politicians to seize back power from these agencies, they had few problems in doing so. *Chevron* is another example of how truly elusive authentic bureaucratic autonomy is: here we have a statement of bureaucratic discretion with the assumption that political powers are the true control of the system. Thus, across the history of bureaucratic development, the foundation has been political control to the detriment of authentic autonomy and discretion.

The question which this paper now turns to is whether the modern administrative arrangement, of which *Chevron* is an integral part, is still intact or

if it is crumbling before us. Being a proponent of transparency myself, I will argue that the traditional political control of the administrative state is, in fact, giving way to an arrangement of power far more balanced between elected officials and career civil servants in the bureaucracy. The reason for this change, I argue, is the behavior of courts in administrative law cases, and that change is driven by the internalization of legal capacities and strategies in agencies. Before delving into the causal hypotheses, I first turn to the case for a change in the direction of administrative law.

II. A Changing Wind? A Post-*Chevron* Era?

The fundamental purpose of administrative law has always been to constrain the discretion of the civil servants and officials of the administrative state while understanding the inherent advantages of some level of delegation of formal rulemaking authority to scientific and policy experts. The brief history of administrative law and bureaucratic politics given above should show that the ebbs and flows of this rather dynamic arrangement have never moved beyond this classical understanding of the bureaucracy problem.

Political scientists studying bureaucratic politics and delegation have long grasped this problem as well. Starting with the presupposition of principal-agent

relationship similar to Stewart’s traditional model of administrative law,⁴⁰ political scientists have not only identified some of the common pitfalls of this relationship (e.g., prisoner’s dilemmas, coordination problems, etc.), but have also empirically shown that, by and large, the “delegators” (i.e., congress and the executive) are able to circumnavigate these potential hazards through a variety of mechanisms including contract design, screening and selection mechanisms, monitoring and reporting requirements, appointment of loyal administrators, and institutional checks and balances. These mechanisms can either be ex ante, as in the case of contract design, or they can be ex post, as in the case of institutional checks.⁴¹ In fact, administrative law can be understood as a prime example of the last kind of mechanism—court review of the hard look variety or even of the *Chevron* variety (given the right political context) is an ex post check on bureaucratic control. Administrative law can also be understood as congressionally prescribed procedural or contractual checks on bureaucratic discretion: the Administrative Procedure Act and “much of administrative law” can actually be understood to have been “written for the purpose of helping elected politicians retain control of policymaking.”⁴² Even at times of relative

⁴⁰ Stewart, “The Reformation of American Administrative Law,” 1679.

⁴¹ D. Roderick Kiewiet & Matthew D. McCubbins, *The Logic of Delegation* (Chicago: University of Chicago Press, 1991).

⁴² Mathew McCubbins, Roger Noll, and Barry Weingast, “Administrative Procedures As Instruments of Political Control,” *Journal of Law, Economics, and Organization* 3 (1987): 246.

bureaucratic autonomy, elected officials have usually been able to rely on administrative law and courts as a final check on agency behavior.⁴³

Of course, as we reviewed earlier, the last thirty years or so of American politics have witnessed the astonishing maturity of presidential management of administration. In this political environment, the need for administrative law as a tool for circumscribing bureaucratic discretion is obviated, and so we end up with a decision like *Chevron* which allows effective political management of agency behavior by the elected branches in general and by the president in particular. It would probably be accurate to describe this arrangement as a new “jurisprudential regime”⁴⁴—a *Chevron* regime, if you will.

The problem with talking about the *Chevron* regime in the present tense is that courts have begun to act out of tune with this symphony of bureaucratic control. Even as early as the late 1980s, scholars began to question whether *Chevron* actually signaled a trend toward more deference to agency action (and hence more deference to the elected branches).⁴⁵ Though the durability of these deviations was in question early on, courts have since carved out more and more exceptions to the theory of executive control over agency behavior. First, in *FDA*

⁴³ *Myers v. United States* 272 U.S. 52 (1926).

⁴⁴ Mark J. Richards and Herbert M. Kritzer, “Jurisprudential Regimes in Supreme Court Decision Making,” *American Political Science Review* 96, no. 2 (2002): 305-320.

⁴⁵ Thomas W. Merrill, “Judicial Deference to Executive Precedent,” *Yale Law Journal* 101 (1992): 969; Linda R. Cohen & Matthew L. Spitzer, “Solving the ‘Chevron’ Puzzle,” *Law and Contemporary Problems* 57, no. 2 (1994): 65-110; Peter H. Schuck & E. Donald Elliott, “To the *Chevron* Station: An Empirical Study of Federal Administrative Law,” *Duke Law Journal* 984 (1990).

v. Brown & Williamson Tobacco Corp., the Supreme Court struck down the Food and Drug Administration's interpretation of the Food, Drug and Cosmetics Act, which had extended that statute's vague requirements to cover tobacco.⁴⁶ *FDA v. Brown & Williamson Tobacco Corp.* was followed by another extraordinary case, *United States v. Mead*, which denied judicial deference to agency interpretations of statutes unless the controversy stemmed from formal interpretation via notice-and-comment rulemaking, etc. Together, these two cases signaled a step back from categorical deference to agency/executive interpretation by heightening judicial scrutiny when there is the most possibility of presidential meddling in agency affairs (in informal, day-to-day business) and lowering judicial scrutiny where agency decision-making is guided by ex ante mechanisms of control like the Administrative Procedure Act.

Not surprisingly, the reaction to these decisions by the elected branches and some scholars with allegiance to the traditional model of administrative law was harsh.⁴⁷ However, the reaction was not harsh enough to trigger a judicial abeyance. Just a few years later, in the landmark *Gonzales v. Oregon*, the Supreme Court denied the president's appointed Attorney General the ability to

⁴⁶ 529 U.S. 120 (2000).

⁴⁷ *Mead*, 533 U.S. 243 (Scalia, J. dissenting); David J. Barron & Elena Kagan, "Chevron's Nondelegation Doctrine," *Supreme Court Review* 2001 (2001): 201-265.

interpret the Controlled Substances Act to criminalize physician-assisted suicide.⁴⁸

A common thread through these three cases is judicial concern over the fact that public policy questions of great import and ongoing deliberation were being closed off by overzealous executive management of agency decision-making, and so it has been hypothesized that these diversions from *Chevron* stem from the traditional model of administrative law in their protection of the “larger governmental or public interests”: in these cases, the administrations who had interpreted these statutes had subverted the public welfare.⁴⁹ While this narrow exception to *Chevron*’s reach is a plausible reconciliation of these decisions and the larger *Chevron* regime, it is problematic when one considers other evidence. First, the differences between *FDA v. Brown & Williamson Tobacco Corp.* and *Gonzales* are clear: “in the former, the Court held that the statute was clear; in the latter, it found that the statute was ambiguous. In the former, the agency had used notice-and-comment rulemaking procedures; in the latter, the agency had used an essentially procedure-less Interpretive Ruling.”⁵⁰ The Court thus was not pushing toward some uniform method of statutory interpretation. Second, and more importantly, future cases complicated the emerging major policy issue explanation. In *Massachusetts v. EPA*, the Supreme Court denied judicial

⁴⁸ 126 U.S. 904 (2006).

⁴⁹ Lisa S. Bressman, “Democracy and Deference”; Jody Freeman and Adrian Vermeule, “*Massachusetts v. EPA*: From Politics to Expertise.”

⁵⁰ Jody Freeman & Adrian Vermeule, “*Massachusetts v. EPA*: From Politics to Expertise.”

deference to the EPA's decision not to regulate greenhouse gas emissions under the Clean Air Act.⁵¹ Like in most of these other cases, the agency's "decision" not to regulate was a direct result of executive politics which, presumably under the *Chevron* tradition, would have demanded deference. Writing for the majority, Justice Stevens argued that "refusals to promulgate rules are...susceptible to judicial review, though such review is 'extremely limited' and 'highly deferential,'"⁵² but on the merits of the case, the majority decided that carbon dioxide was a pollutant under the broad definition of the Clean Air Act and that the reasons the EPA had given for denying the petition were not enough to justify the traditional deference given to agency decision-making. Most commentators noticed that, much like in the *Duke Energy*⁵³ decision issued on the very same day, the Court made sure to pay dues to *Chevron v. NRDC* and its prescription of judicial deference to agency discretion. But in *Massachusetts v. EPA*, the Court followed its restatement of the administrative law with what could hardly be called a deferential review: instead, they forced EPA to "demonstrate that [they] *could not* form a reasoned scientific judgment as to whether greenhouse gases contribute to global warming," a generally high standard given the wealth of evidence that had been amassed over the years.⁵⁴ The noticeably demanding judicial review here suggests that agencies like the EPA and their executive

⁵¹ 549 U.S. 497 (2007).

⁵² *Massachusetts v. EPA*, 25.

⁵³ *Environmental Defense v. Duke Energy*, 549 U.S. ____ (2007).

⁵⁴ Kathryn A. Watts and Amy J. Wildermuth, "*Massachusetts v. EPA*," 14.

helmsmen, though they theoretically and jurisprudentially enjoy vast administrative discretion in rulemaking, are actually susceptible to exacting requirements of justification.

Not only was the review in *Massachusetts v. EPA* different from *Gonzales* or *FDA v. Brown & Williamson Tobacco Corp.* in terms of the liberality of statutory interpretation, but it also differed from them in that here the Court was not limiting the president's ability to address major social and political questions through administrative interpretation and rulemaking; instead, the Court was actually encouraging such action. This is, of course, a major departure from *Gonzales* and *FDA* in its treatment of the "major questions" exception to *Chevron* deference,⁵⁵ but it is still fundamentally opposed to *Chevron*. And it would also probably be wrong to suggest that these are but a few isolated cases which have had no broader impact on the course of development of administrative law. Although the theory laid out in the paper is in no way dependent on volume of cases (a few big losses for a president may be far more important in the long run than many small losses), the aggregate data supports the theory that administrative law can be used in an instrumental fashion. Looking at administrative law practices as a whole, we see that litigation patterns tend to be responsive to circumstances, easing up in times of relative symbiosis between elected branches

⁵⁵ Abigail R. Moncrieff, "Reincarnating the 'Major Questions' Exception to Chevron Deference as a Doctrine of Non-Interference (Or Why *Massachusetts v. EPA* Got It Wrong)," *Administrative Law Review* 60, no. 3 (2008).

and bureaucracy and intensifying in times of conflict. Table 1 shows a clear break between Clinton era levels of administrative appeals and Bush era levels of administrative appeals, reflecting the generally greater tension between career bureaucrats in many agencies and the president under the more recent administration.⁵⁶

Table 1: Administrative Appeals in Federal Circuit Courts of Appeals, 1993-2007

<i>Year</i>	<i>Appeals</i>	<i>% Total Appeals</i>
2007	10,382	17.7%
2006	13,102	19.7%
2005	13,713	20.0%
2004	12,255	19.5%
2003	9,988	16.4%
2002	5,789	10.0%
2001	3,300	5.7%
2000	3,237	5.9%
1999	3,280	5.9%
1998	3,793	7.0%
1997	4,412	8.4%
1996	2,827	5.4%
1995	3,295	6.6%
1994	3,369	7.0%
1993	3,928	7.8%
Total	96,670	10.9%

Source: Statistics assembled by combining the data from several editions of “Judicial Business of the United States Courts,” Table B-3. All editions available at <http://www.uscourts.gov/judbususc/judbus.html>

⁵⁶ “EPA Scientists Cite Political Interference,” *CNN (Associated Press)*, April 23, 2008, <http://www.cnn.com/2008/TECH/04/23/epa.scientists.ap/index.html>

Disaggregating these statistics, we see that most circuit courts of appeals, and certainly those with a history of handling high proportions of administrative appeals, show notable rises in appeals with the exception of 2007 where some of the courts heard fewer appeals (though generally still more than in 2003) (Table 2).

Table 2: Litigation Patterns in Federal Circuit Courts of Appeals, by Circuit, 2003-2007

<i>Circuit</i>	<i>2003</i>	<i>2004</i>	<i>2005</i>	<i>2006</i>	<i>2007</i>	<i>All Years</i>
D.C.	391	474	468	420	483	2,236
1 st	153	164	260	239	239	1,055
2 nd	2,166	2,747	2,626	2,752	2,271	12,562
3 rd	552	586	764	810	665	3,359
4 th	379	443	433	406	300	1,961
5 th	485	577	650	723	542	2,977
6 th	423	421	438	474	395	2,151
7 th	293	314	325	244	209	1,385
8 th	262	204	169	157	159	951
9 th	4,361	5,655	6,833	6,040	4,485	27,374
10 th	128	132	113	110	100	583
11 th	395	538	634	727	534	2,828
Total	9,988	12,255	13,713	13,102	10,382	59,422

Source: James C. Duff, “Judicial Business of the United States Courts: 2007 Annual Report of the Director,” Table B-3, pg. 98-103.
<http://www.uscourts.gov/judbus2007/JudicialBusinesspdfversion.pdf>

A general pattern of growing use of the *Chevron* precedent and of dissensus on its proper application can be seen when we look at litigation patterns in the appellate courts since 1984 (Table 3).

Table 3: Judicial Analysis of *Chevron* Cases in the Circuit Courts of Appeals

<i>President</i>	<i>Reagan</i>	<i>Bush I</i>	<i>Clinton</i>	<i>Bush II</i>
Criticized	0	0	0	1
Limited	0	0	1	0
Distinguished	5	21	50	138
Not Followed	0	1	0	0
Followed	133	287	571	1144
N= 2352	138	309	622	1283

Source: Lexis Nexis Legal Search⁵⁷

Similar patterns emerge when we look at Supreme Court reviews in *Chevron* cases (Table 4).

Table 4: Supreme Court Analysis of *Chevron* Cases

<i>President</i>	<i>Reagan</i>	<i>Bush I</i>	<i>Clinton</i>	<i>Bush II</i>
Distinguished	2	2	1	3
Dissenting Opinion	0	0	3	8
Concurring Opinion	0	0	1	5
Followed	1	6	7	12
Explained	1	0	0	1
N= 33	3	8	8	14

Source: Lexis Nexis Legal Search⁵⁸

If we are looking only at judicial invalidations of Environmental Protection Agency interpretations of the Clean Air Act in the last few years, the examples are even more overwhelming and paint a picture quite the opposite of

⁵⁷ To compile these descriptive statistics, I first used Lexis Nexis to “Shepardize” *Chevron v. NRDC*, 467 U.S. 837 (1984). I then restricted the search to the federal circuit courts of appeals, 1-11 and the D.C. circuit. Each presidential “era” is rounded down for ease of calculation. E.g., the Bush II era is defined as 2001-2008, the portion of January before inauguration is given to the following president.

⁵⁸ The descriptive statistics were compiled in the same manner as in Table 2 with the exception that the results were only restricted by appearance before the Supreme Court.

the traditional understanding of the *Chevron* regime.⁵⁹ But even ignoring the circuit courts of appeals, where the vast majority of administrative appeals meet their end, a clear shift has occurred over the last 20 years on the Supreme Court in certiorari grants in some agencies, the EPA being a prime example (Table 5).

Table 5: U.S. Supreme Court Merits Reviews of EPA Action, 1993-2008

	<i>Bush</i>	<i>Clinton</i>
Ruling for Administration	2	0
Total Cases	4	0
Percent Total	50 %	0 %

Source: Lexis Nexis Legal Search

The Court also recently granted certiorari in three cases (including one more EPA case), *Entergy Corp. v. EPA*, *Winter v. NRDC*, *FCC v. Fox Television Stations*,⁶⁰ which raise similar questions about the propriety of granting *Chevron*-style deference to agency action in light of heavy-handed executive manipulation of longstanding agency practice.

The conflicts with the *Chevron* standard of deference are quite clear in all of these cases, but it would be wrong to say that *Chevron*'s influence has faded

⁵⁹ *Massachusetts v. EPA*, 549 U.S. ____ (2007); *Environmental Defense v. Duke Energy* 549 U.S. ____ (2007); *Northeast Maryland Waste Disposal Authority v. EPA*, 353 F.3d 936 (D.C. Cir. 2004); *Mossville Environmental Action Now v. EPA*, 370 F.3d 1232 (D.C. Cir. 2004); *New York v. EPA*, 413 F.3d 3 (D.C. Cir. 2005); *New York v. EPA*, 443 F.3d 880 (D.C. Cir. 2006); *SCAQMD v. EPA*, 472 F.3d 882 (D.C. Cir. 2006); *Sierra Club v. EPA*, 479 F.3d 875 (D.C. Cir. 2007); *Natural Resources Defense Counsel v. EPA*, 489 F.3d 1250 (D.C. Cir. 2007); *Natural Resources Defense Council v. EPA*, 489 F.3d 1364 (D.C. Cir. 2007); *New Jersey v. EPA*, No. 05-1097 (2008); *Sierra Club v. EPA*, No. 02-1135 (2008).

⁶⁰ *Entergy Corp. v. EPA*, (07-588); *Winter, et al. v. Natural Resources Defense Council, Inc., et al.* (07-1239); *FCC v. Fox Television Stations* (07-582).

entirely. Indeed, in *Environmental Defense v. Duke Energy Corp.*,⁶¹ the Court unanimously ruled that the EPA had been delegated statutory discretion to interpret the word *modification* differently in different parts of the Clean Air Act. However, a deeper look at the political circumstances surrounding the litigation reveals that the decision actually allowed the EPA to withstand aggressive efforts by the Bush administration to significantly relax regulation on power plant renovations.⁶² In this sense, even *Duke Energy*, purportedly a prime example of a “*Chevron* case,” does not seem to fit into the *Chevron* regime of political management of the administrative state.

Nearly thirty years after *Chevron* it seems clear that many of the foundations of the political accountability regime of bureaucratic politics which that case helped to create have been undermined by litigation of the sort outlined above. This observation is beginning to acquire something of common knowledge status among legal scholars, but they also tend to see the trend away from the *Chevron* regime as inevitable and reconcilable with traditional administrative law principles. First, Peter L. Strauss suggests that *Chevron* itself never was intended to create the kind of deference to overtly political direction of

⁶¹ *Environmental Defense v. Duke Energy*, 549 U.S. ____ (2007).

⁶² Brian Hansen, “EPA to proceed on NSR rule despite court decision,” *Inside Energy*, April 9, 2007, showing that the Bush administration differed with civil servants in the EPA in supporting Duke Energy Corp.’s more lenient interpretation of the Clean Air Act and that they sought to change the rules formally after the Court’s decision. The Bush administration revived its earlier attempt to change the NSR program to be more lenient which was originally stopped by the D.C. Circuit in *New York v. EPA*, 443 F.3d 880 (D.C. Cir. 2006), but was again denied when the Supreme Court declined to hear an appeal of that case after the *Duke Energy* loss. That certiorari denial was in *EPA v. New York*, 127 S. Ct. 2127.

agency action which has occurred during the very radical Bush administration.⁶³

Any surprise at some of the courts' recent actions probably stems from an exaggeration of *Chevron*'s endorsement of presidential decisionmaking: for Strauss, "While *Chevron* sensibly accepts the President's political role as mediating the difficulties of focused bureaucratic expertise, it does not purport to displace reliance on the latter—indeed, the structure of judicial review of administrative action depends, top to bottom, on the presumption that the matter being reviewed is in some respects the product of an expert, not merely a political judgment."⁶⁴ Lisa Bressman picks up on the necessary implications of this argument in arguing that *FDA*, *Gonzales*, and other cases can be reconciled with *Chevron* by acknowledging the extraordinary actions of the Bush administration and understanding that the Bush administration had betrayed public accountability in these particular cases. Thus, *Chevron*-style deference, which rests on the principle of public accountability of agency behavior, may be left intact but not applied when presidential direction does not represent a good faith effort to represent the public interest in expert decision-making. For Strauss and Bressman, public accountability must depend to some extent on technical and scientific determinations. On these accounts, there is no change—the trend of cases outlined above is merely equilibrium maintenance.

⁶³ Peter L. Strauss, "Overseer, or 'The Decider'?"

⁶⁴ *Ibid.*, 37.

Jody Freeman and Adrian Vermeule, though somewhat similar to Strauss and Bressman, come much closer to saying that these cases mark a major turn in administrative law and bureaucratic politics. For these scholars, “politics is a threat to expertise rather than its complement,” and so the recent diversions from *Chevron* are perceived as a sharp return to the former of this dichotomous pair.⁶⁵ In their concept of “expertise forcing,” Freeman and Vermeule see the development of administrative law as wavering between these two incompatible public interests. This, of course, should remind political scientists of Martin Shapiro’s distinction between synoptic decision-making (roughly parallel to expert judgment) and deliberative decision-making (roughly parallel to political judgment), both of which represent valid interests in public administration.⁶⁶ According to Freeman and Vermeule, *Massachusetts v. EPA* in particular “harkens back...to a number of action forcing decisions authored primarily by Judge Skelly Wright in the D.C. Circuit, concerning the implementation of the National Environmental Policy Act (NEPA).”⁶⁷ Under this tradition of cases, “the Court’s role is to ensure that political interference does not undermine the agency’s pursuit of its statutory duty....”⁶⁸ Jody Freeman and Adrian Vermeule see *Massachusetts v. EPA* and other recent cases as moving administrative law

⁶⁵ Freeman and Vermeule, “*Massachusetts v. EPA*,” 26.

⁶⁶ Martin Shapiro, “*Who Guards the Guardians? Judicial Control of Administration* (Athens: University of Georgia Press, 1988).

⁶⁷ Freeman and Vermeule, “*Massachusetts v. EPA*,” 27.

⁶⁸ *Ibid.*, 26.

“back to an older, pre-*Chevron* vision of administrative law in which independence and expertise are seen as opposed to, rather than defined by, political accountability, and in which the political influence over agencies by the White House is seen as a problem rather than a solution.”⁶⁹

Despite their agreement that many of the aforementioned cases depart from the basic assumption of *Chevron* in denying deference to agencies, all of these scholars have tempered their assessment of the scope of these departures. Indeed, summing up the general scholarly assessment of these cases, Freeman and Vermeule suggest that the temporary efforts of the courts to insulate agencies from a particularly aggressive president are not caused “because the Court believes that expert decisions should be completely separated from politics or because the Court naively views this problem as something new that must be nipped in the bud.” Instead, their “suggestion is simply that the pendulum may have swung too far, at least in the view of the majority Justices, in the direction of strong presidential administration, and that they wish to nudge it in the other direction.”⁷⁰ In other words, the courts have been using the same old administrative law in relatively unfamiliar ways to bolster the same old balance of expert and political interests which even the most politically aggressive administrations must acknowledge as necessary. While these scholarly treatments

⁶⁹ *Ibid.*, 26.

⁷⁰ Freeman and Vermeule, “*Massachusetts v. EPA*,” 39.

of trends in administrative law are plausible, I shall argue in the next section that there is at least one other equally plausible view.

II. “You Say It’s in the Institutions”: The Internalization of Legalism in the Administrative State

The trend of cases outlined above presents us with a series of puzzles: first, does the trend amount to a systemic change from the *Chevron* regime or from the traditional model of administrative law in general; second, what are the long-term prospects for this change; finally, what caused the change. As we have seen, some legal scholars, while agreeing that recent departures from *Chevron* amount to a coherent trend, have circumscribed these changes by arguing in one form or another that courts are simply reasserting recently neglected values of expert decision-making. The implications of this account are thus mainly short term, and the assumption is that, if the pendulum swings too far in the expert direction, courts will eventually move back in the direction of political decision-making. At the center of this account, then, are judges and their allegiance to the traditional model of administrative law (a model of law which, because of its conflicting pulls, allows ample room for strategic maneuvering). For those in the legal community, this explanation is appealing because it affirms a semblance of legal formalism. For those in the mainstream political science community, this explanation is appealing because it might be construed as affirming common

assumptions about the relevance of behavioral or strategic/economic models of bureaucratic politics. Whether one comes from a legal perspective or a political science perspective, the important conclusion here is that courts are still playing the same game in channeling the political imperatives of governing coalitions.

But the expertise forcing argument which seems to pervade most legal scholarship on the recent cases must be distinguished from a much more serious potential explanation—that is, that the courts are simply players in a rather large, perfunctory trend towards bureaucratic autonomy. It must be stated that it is important to dissociate the term *autonomy* from *expertise* since we can easily envision autonomous entities which never make “expert” decisions. For the purposes of this paper, *autonomy* simply means real ability to make relatively independent decisions or to protect standard operating procedures from external manipulation. Sometimes, what looks like outside interference on autonomy—for instance, the Supreme Court ruling against agency inaction in *Massachusetts v. EPA* or against agency action in *Duke Energy*—is in fact promotion of bureaucratic autonomy. It is no secret that the vast majority of civil servants, those employees who handle the bulk of both the rulemaking and enforcement of agency work, are usually more liberal, more Democratic, and significantly differentiated from the political appointees whose politically inflected decisions

are the ones usually reviewed by courts.⁷¹ Indeed, though a conservative, anti-regulatory counter-mobilization has occurred, it has generally failed to replace the liberal legal network that arose during the public interest oriented New Politics movement.⁷²

Of course, bureaucratic autonomy, insofar as it is incorporated into the law, could be rather ephemeral if it is merely the product of a temporary shift in formal legal jurisprudence or a product of judge ideology and strategy. This may be all there is to the story (and I will address these claims later), but we also know from a long line of historical-institutional, law and society, sociological, and organizational research that the search for the meaning of law, both on the books and in daily practice, is usually far more complex than these explanations suggest.⁷³ So far, the scholarship on the recent line of cases departing from *Chevron* has disregarded this scholarly tradition. This is unfortunate, for the complex organizational culture of a bureaucracy makes it a prime candidate for the kind of complex institutional development that these scholars have identified throughout the legal environment.

⁷¹ Notice that *U.S. v. Mead* solidified the non-reviewability of the day to day work of lower level and mid-level civil servants while encouraging the review of formal pronouncements.

⁷² Steven M. Teles, *The Rise of the Conservative Legal Movement: The Battle for Control of the Law* (Princeton: Princeton University Press, 2008).

⁷³ James G. March and Johan P. Olsen, "The New Institutionalism: Organizational Factors in Political Life," *American Political Science Review* 78 (1984): 734-749; Walter W. Powell and Paul J. DiMaggio, eds., *The New Institutionalism in Organizational Analysis* (Chicago: University of Chicago Press, 1991); Cornell W. Clayton and Howard Gillman, eds., *Supreme Court Decision-Making: New Institutional Approaches* (Chicago: University of Chicago Press, 1999); Mark C. Suchman and Lauren B. Edelman, "Legal Rational Myths: The New Institutionalism and the Law and Society Tradition," *Law and Social Inquiry* 21, no. 4 (1996): 903-941.

What do these complex institutional developments look like, and what effect might they have on the law on the books? As it turns out, these questions are interrelated and exemplify the common socio-legal perspective that organizations and individuals confront and respond to a legal environment (law on the books and the institutional configuration of rule-makers and enforcers) by consciously and subconsciously forming practices which both adhere to the law and carve out differences from it. But this is not the last step in the story: after developing idiosyncratic interpretations and practices derived from a legal environment, organizations or individuals often then influence the law itself. In short, many scholars argue that it is far too simplistic to see either legal mobilization or the law itself as dependent variable or independent variable—both our reaction to law and the law itself develop together, endogenously.⁷⁴ This endogenous causal web often takes the shape of institutional isomorphism: that is, different institutions such as agencies and courts—which are both heavily influenced by the culture, language, and practice of administrative law—engage in an iterated march toward shared understanding and practice of bureaucratic politics.⁷⁵ As some scholars of judicial politics have noted, we cannot fully understand judicial behavior and the development of specific areas of law without taking seriously the influence of notions of institutional mission and duty which

⁷⁴ Lauren B. Edelman and Mark C. Suchman, “The Legal Environments of Organizations,” *Annual Review of Sociology* 23 (1997): 484.

⁷⁵ *Ibid.*, 495-496.

grow out of institutional practices.⁷⁶ Isomorphism and convergence usually play a large role in institutional/legal development, but other patterns of development have also been highlighted which potentially shed light on the evolution of the regulatory state.⁷⁷ One influential account of institutionalism particularly amenable to the arena of law and courts is Alec Stone Sweet's game-theoretic understanding of the dynamics of judicialization whereby courts and litigants, operating in a triadic dispute resolution mode, layer new working arrangements and rules upon older ones, which leads to a sort of path dependence and legitimizing function for courts.⁷⁸ Path dependence has recently acquired significant influence in the study of regulatory and welfare politics as scholars have noted that development in these areas is not simply one thing happening after another. Rather, policy development and administrative politics tend to display high levels of "policy feedback" whereby policies or institutional structures passed or created at a critical juncture shape future policymaking

⁷⁶ Howard Gillman, "The Court as an Idea, Not a Building (or a Game): Interpretive Institutionalism and the Analysis of Supreme Court Decision-Making," in *Supreme Court Decision-Making: New Institutional Approaches*, eds. Cornell W. Clayton and Howard Gillman (Chicago: University of Chicago Press, 1999), 65-87.

⁷⁷ Karen Orren and Stephen Skowronek, *The Search for American Political Development* (Cambridge: Cambridge University Press, 2004); Jeb Barnes, "Courts and Puzzle of Institutional Stability and Change: Administrative Drift and Judicial Innovation in the Case of Asbestos," *Political Research Quarterly* (forthcoming); Jacob Hacker, "Privatizing Risk Without Privatizing the Welfare State: The Hidden Politics of Social Retrenchment in the United States," *American Political Science Review* 98, no. 2 (2004): 243-260.

⁷⁸ Alec Stone Sweet, "Judicialization and the Construction of Governance," *Comparative Political Studies* 32, no. 2 (1999): 147-184.

episodes.⁷⁹ The particularly enigmatic thing about this institutional literature is that the normal cause and effect framework of social inquiry is difficult to apply when myriad institutions and actors are simultaneously responding and acting. Nevertheless, we know that these patterns of development exist because they have been observed in individual cases.

With this theoretical framework in mind, we can turn back to the formative period of modern administrative law and the last time when major structural changes occurred in the administrative state—the third period in the earlier history (roughly 1960-1970). It was then that the well-documented rise of what Robert Kagan has called “adversarial legalism” took hold of the actual operating procedures of regulatory policy.⁸⁰ Consistent with broader organizational patterns of development, legal staffs within agencies grew not only to support and run enforcement proceedings, but also to supervise rulemaking and interpretation of relevant statutes.⁸¹ Of course, the initial development of

⁷⁹ Paul Pierson, “Increasing Returns, Path Dependence, and the Study of Politics,” *American Political Science Review* 94 (2000): 251-267; Paul Pierson, “Not Just What, but *When*: Timing and Sequence in Political Processes,” *Studies in American Political Development* 14, no. 1 (2000): 72-92; Jacob S. Hacker, *The Divided Welfare State: The Battle over Public and Private Social Benefits in the United States* (Cambridge: Cambridge University Press, 2002), 51-66.

⁸⁰ Robert A. Kagan, *Adversarial Legalism: The American Way of Law* (Cambridge: Harvard University Press, 2001).

⁸¹ Paul J. DiMaggio and Walter W. Powell, “The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields,” *American Sociological Review*, Vol. 48, No. 2 (1983): 147-160; Lauren B. Edelman and Mark C. Suchman, “When the ‘Haves’ Hold Court: Speculations on the Organizational Internalization of Law,” *Law and Society Review* 33, no. 4 (1999): 949-991.

adversarial legalism in the bureaucracy was driven by forces outside the agencies who wished to control wayward or captured agencies: the new social regulation of the 60s and 70s sought to give these ossified agencies a kick in the rear by subjecting them to clear standards and deadlines and liberalizing the rules barring court challenge. The basic idea was to subject all agency rulemaking under the Administrative Procedures Act to more stringent oversight by the public via lawyers. Lawyers for individual plaintiffs used the new citizen suit provisions of the new regulatory laws to hold agencies politically accountable, and to say that they were aggressive would probably be an understatement—indeed, Robert Kagan tells us, “It has been reported that in the hours before a new regulation is announced by some agencies, lawyers for contending interest groups (regulated enterprises or proregulation advocacy groups) wait in the hallways of different circuit courts of appeals, hoping to file their appeal first.”⁸² In responding to this influx of legal challenges to agency rulemaking and enforcement, judges began to engage in detailed review of agency action.

But the agencies did not stick myopically to their old ways—instead, they bolstered their own institutional capacities to deal with the growing adversarial legalism of regulatory policymaking. Agencies had always employed lawyers, but their role in the day-to-day business of the agency was limited. After the

⁸² Robert A. Kagan, “American Courts and the Policy Dialogue,” in *Making Policy, Making Law: An Interbranch Perspective*, eds. Mark C. Miller and Jeb Barnes (Washington, D.C.: Georgetown University Press, 2004), 18.

barrage of lawsuits began to take its toll on agency discretion, however, agencies responded by bolstering the legal component of their operations, usually through offices of general counsel within the agency. In the terminology of the law and society literature, agencies like the Environmental Protection Agency, for instance, have internalized legalistic pressures by creating numerous specialized offices of counsel for the general purpose of handling the enormous strain caused by the pervasive legal assault on the agency's actions.⁸³ A perusal of the day-to-day memoranda and business of any of these offices reveals that they are anything but isolated—unlike the lawyers of early agencies, these lawyers are immersed in the organizational culture and technical/scientific questions of the agency staffers. By and large, lawyers are present at all stages of the policymaking/enforcement process and have significant power over agency outputs. But it would be wrong to assume that the influence goes one way: like all sectors of agencies, lawyers are indeed formally supposed to represent the preferences of temporary political appointees, but the institutional reality is that lawyers in offices of general counsel

⁸³ “The Office of General Counsel (OGC) is the chief legal advisor to EPA, providing legal support for Agency rules and policies, case-by-case decisions (such as permits and response actions), and legislation. In addition, OGC lawyers, together with attorneys in the U.S. Department of Justice's Environment and Natural Resources Division, represent the Agency in court challenges to agency actions (such as regulations), appeals of enforcement cases, and Supreme Court litigation. OGC lawyers carry out these functions not only with respect to EPA's environmental programs, but also in connection with EPA's day-to-day operations, including entering into contracts, awarding grants, managing property and money, and working with EPA's employees.” The General Counsel and Deputy General Counsel are appointed by the President whenever a vacancy occurs, but the rest of the seven substantive offices are employed by civil servants. <http://www.epa.gov/ogc/index.htm> (accessed July 8, 2008).

work closely with career civil servants and absorb that distinct culture. This institutional isomorphism is all the more likely because, like the civil servants who they work with, the lawyers populating the offices of general counsel are both politically homogenous (generally liberal) and usually experienced in relevant technical fields outside of administrative law proper.⁸⁴ The case of the EPA is illustrative: former EPA Clean Air attorney John Walke estimates that fewer than 10 percent of the career civil servants at the EPA are Republican, and the result is a “huge differentiation” from the political branches in an era dominated by Republican presidents with only about 10 percent of career civil servants being Republicans.⁸⁵ And the extent of legal permeation into this institutional culture is impressive as well—as early as 1983, scholars noted that most of the assistant administrators who head the air program office of the EPA have been environmental lawyers (some even for the NRDC), and they oversee such units as the Office of Enforcement, which is populated by serious and uncompromising environmental lawyers, and the Office of General Counsel, which hires young, idealistic environmental lawyers to defend the agency from lawsuits.⁸⁶ There can be little doubt that the choice of the elected branches in the 1960s and 1970s to invest in administrative law as a means of bureaucratic

⁸⁴ Eric Schaeffer, former Director, EPA Office of Regulatory Enforcement, interview by author, February 15, 2008.

⁸⁵ John Walke, former attorney in EPA Office of General Counsel, interview by author, February 28, 2008.

⁸⁶ Melnick, “Regulation and the Courts,” 39-41.

control triggered the deep and arguably irreversible institutionalization of a bunker mentality and the legal capacity to play the game of adversarial legalism.

But the increasing legalization of the bureaucracy is, by itself, common knowledge. The much more interesting assertion is that this institutional response has something to do with the fugacious *Chevron* regime's passing. This assertion is interesting not only because, as scholars, we are interested in the true causes of social phenomena, but also because deeply ingrained institutional features are not transient, so if they are the cause of the move to more bureaucratic autonomy in recent years, we can expect this to be a permanent feature of administrative law and bureaucratic politics. In other words, the dynamics of adversarial legalism may hardwire a jurisprudence of administrative law which will likely always be in tension with the political imperatives of the elected branches.

As we have seen, law and society scholars have long understood that the development of law can be endogenous—jurisprudence can be both an independent variable causing various developments in legal practice, but it can also be a dependent variable influenced by the ground changes which it earlier engendered. But how does this mechanism work in practice? It seems to be in large part due to the combination of the courts' commitment to the principles of openness, accountability, and procedure (a product of the 1960s and 1970s) and the emergence of a partnership between agency lawyers and interest groups. In 1985, R. Shep Melnick spoke of a new "partnership" or "iron triangle," among

courts, agencies, and liberal congressional subcommittees which was engaging in a new, covert activism in the service of liberal regulatory interests and in the face of deregulatory Republican presidents.⁸⁷ Likewise, Robert F. Durant provided an early theory of the growing use of administrative law as a mechanism of resistance. He hypothesized that, as courts look at the cases before them, they demand more and more technical information, and, consequently, “the power of agency technocrats and lawyers spirals.”⁸⁸ These early dynamics of bureaucratic autonomy were presumably facilitated by the liberal preferences of judges on the D.C. Circuit Court of Appeals, but it was the mechanism of cooperation which has proved most resilient and most important to the current developments in administrative law. That mechanism was the use of leaks of internal documents or evidence of internal dissension between agency staff/lawyers and political appointees in the agencies for the purpose of highlighting politically inflected departures from normal operating procedure. When agency employees and agency lawyers did not particularly like the political projects of the president, his appointees, or the OMB, they were quick to make their preferences known and to help interest groups litigate and challenge presidents on the basis of political meddling in the process of decision-making. Examples abound: first, in *Sierra Club v. Ruckelshaus*, the D.C. Circuit Court of Appeals ruled for the Sierra Club

⁸⁷ R. Shep Melnick, “The Politics of Partnership,” *Public Administration Review* 45 (1985): 653-660.

⁸⁸ Robert F. Durant, “Whither Bureaucratic Influence? A Cautionary Note,” *Journal of Public Administration Research and Theory* 1, no. 4 (1991): 465.

in “forcing” EPA to implement a prevention of significant deterioration program (PSD) in its enforcement of the Clean Air Act, a program which was not supported by the Nixon or Ford administrations and which was not explicitly mentioned in the act. The base of the EPA, however, was cooperative and even encouraging of the court’s action, even going so far as to refuse to appeal at Nixon’s urging.⁸⁹ Another case, *Natural Resources Defense Council v. EPA*,⁹⁰ does much more to show the ways that early litigation under the Clean Air Act of 1970 created the foundations for a litigation-fostered bureaucratic autonomy which superseded or transcended the directions of the elected branches. In that case, the EPA publicly voiced its opposition to a plan supported by the House, the Nixon administration, and the Federal Energy Administration to make coal-burning power plants comply with Clean Air Act requirements by pollutant dispersion instead of implementing available but expensive technology to actually lower emissions. With the case coming at a time of worry about the Arab oil embargo of 1973, the EPA was essentially alone in its intent to stay true to the original intention of the Clean Air Act. But the courts quickly came to the rescue: the Fifth Circuit Court of Appeals “ruled that the EPA could allow polluters to substitute dispersion for emission reductions only when technological controls

⁸⁹ *Sierra Club v. Ruckelshaus*, 344 F. Supp. 253 (D.D.C. 1972); Melnick, *Regulation and the Courts*, 73-86.

⁹⁰ *NRDC v. EPA*, 489 F.2d 390 (5th Cir. 1974).

were ‘unavailable.’”⁹¹ Even though the ruling was technically against the EPA, “[the EPA] was far from displeased with the outcome,” and it eventually publicly announced its opposition to the administration’s plans to overturn the ruling.

There is good reason to believe that, in this case at the very least, the EPA actually colluded with its opposition to ensure that the litigation would go against the elected branches’ plan to promote dispersion.⁹² Finally, more hints began to emerge that a massive schism was beginning to develop between civil servants and political appointees when President Ronald Reagan appointed Anne Gorsuch to the head of the EPA. One administrator recalled that Gorsuch’s reorganization schemes left regional attorneys in the enforcement offices in “a position where they didn’t know who the hell they worked for. They couldn’t even tell what the procedures were from day to day.” And needless to say, the confusion spawned “intense resentment from the enforcement staff. [The agency’s political appointees’] motives were distrusted, their enforcement policies were disliked, and the professional competency of some was questioned.”⁹³ Consequently many of the midlevel staffers and lawyers began to feed information to congress about the disorder and intentional debilitation under Gorsuch’s command.⁹⁴ Although the lawyers and civil servants in the EPA were forced to withdraw from many

⁹¹ Melnick, *Regulation and the Courts*, 114.

⁹² Melnick, *Regulation and the Courts*, 114.

⁹³ Joel A. Mintz, *Enforcement at the EPA: High Stakes and Hard Choices* (Austin: University of Texas Press, 1985), 49-50.

⁹⁴ *Ibid.*, 50-51.

battles with Gorsuch during 1980s, it was fairly common practice for environmental groups like the Natural Resources Defense Council, the Sierra Club, and the Environmental Defense Fund to respond to the attempted hijacking of the EPA by using the EPA's own files to initiate litigation against violators that the agency decided not to pursue.

Over the years, the federal judiciary, the subcommittees of Congress, and the aggressiveness of presidents have changed drastically, but the practice of the partnership has not faded—in fact, it has intensified. This is particularly interesting because Melnick's argument for the development of litigation-fostered bureaucratic autonomy envisioned a model in which Congress and its liberal bastions of subcommittees were key players. After the 80s, the assumption of a partner in Congress has evaporated, yet the courts and agencies have not ceased playing their game. This puzzle is potentially solved by simply observing that federal appellate courts, especially the U.S. Supreme Court, cannot handle every controversy that emerges in the administrative state. The typical modern Supreme Court annual docket has less than 100 cases, and this docket must be shared with other types of cases including private cases and constitutional litigation.

Typically, deciding to decide a case requires a substantial, important, unique, and impervious controversy.⁹⁵ What agency dissension produces is exactly the kind of high-stakes public relations controversy which makes Supreme Court (and all

⁹⁵ H.W. Perry, Jr. *Deciding to Decide: Agenda Setting in the United States Supreme Court* (Cambridge: Harvard University Press, 1991).

federal courts, for that matter) attention that much more likely. By appealing to the ethos that a career civil staff possesses and crafting a case on the background of political manipulation of this ethos, litigating interest groups are able to catch the attention and appeal to the concerns of judicial actors. The difference between a successful litigation campaign and an unsuccessful one may very well be these kinds of extra-legal factors.

Turning now to recent episodes of litigation-fostered bureaucratic autonomy, we can see that agency complaints are so endemic and legal means of redressing political manipulation so available that courts essentially cannot ignore the schisms that have developed. For instance, when the George W. Bush administration came to office, attempts were made almost immediately to dismantle the EPA's New Source Review program, a longstanding Clean Air Act derived program which ensured that renovations to coal burning power plants would use the best available technology but which also laid serious costs on the energy industry.⁹⁶ At first, the Bush administration attempted to handle the dismantlement internally, but the Office of General Counsel in the EPA balked and leaked to NRDC internal documents showcasing the conflict.⁹⁷ Eric Schaeffer, the Director of the Office of Regulatory Enforcement at the EPA at the

⁹⁶ Jo Becker and Barton Gellman, "Leaving no tracks," *The Washington Post*, June 27, 2007, national edition, A01; Robert S. Devine, *Bush Versus the Environment* (New York: Anchor Books, 2004).

⁹⁷ Neela Banerjee, "Files Detail Debate in E.P.A. on Clean Air," *New York Times*, March 21, 2002.

time, said, “Most of the projects our cases targeted involved big expansion projects that pushed emission increases many times over the limits allowed by law,” and John Walke, an attorney for the EPA, expressed disbelief that industry was challenging these enforcement efforts, exclaiming, “People like me and others at EPA looked at [the power companies] as if they were delusional.”⁹⁸ Despite this, the Bush administration eventually pushed through the so-called “20 percent rule,” which exempted power plants from applying for permits through NSR when the replacement or renovation did not amount to more than 20 percent of the replacement value of the unit. Despite the EPA’s longstanding policy of discretionary exceptions to NSR on grounds of *de minimus* or administrative necessity,⁹⁹ the D.C. Circuit Court of Appeals ruled in 2006¹⁰⁰ that the Clean Air Act was clear in its language: “the term ‘modification’ means *any physical change*.”¹⁰¹ Though the ruling was, once again, technically against the EPA and technically constricting of bureaucratic discretion, the court had responded to the complaints of career bureaucrats in the Office of General Counsel and insulated them from political direction and manipulation. In the end, the administration took credit for the settlement of many of these cases, but the cases were probably only settled because of the early preparation of “the career civil servants at the Department of Justice and EPA who, despite the anti-NSR emanations from the

⁹⁸ Qtd. in Devine, *Bush Versus the Environment*, 135.

⁹⁹ *Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1980).

¹⁰⁰ *New York v. EPA*, 443 F.3d 880 (D.C. Cir. 2006).

¹⁰¹ Section 111(a)(4) of the Clean Air Act.

White House, have persisted in enforcing the law” and because of the work of Eric Schaeffer’s Office of Regulatory Enforcement, where attorneys worked 70-hour weeks to develop cases in anticipation of a hostile Bush administration.¹⁰² In an interview with Schaeffer, he confirmed that the professional staff of the EPA is “definitely feeling better after the recent court decisions.”¹⁰³ Indeed, Schaeffer suggests that internal debate between the scientists and lawyers at the EPA and the politically appointed staff is common, and that over time, scientists and lawyers overcome their initial reticence to work against their political bosses. When they do, they frequently feed information to interest groups and litigants who are challenging agency action or inaction, and when this tactic is successful (as it has been recently), it only encourages more circumvention of the political staff and more direct and public clashes.¹⁰⁴ They can and do combine this subversive technique with “slow walking,” which can create the delay necessary to prepare legal challenges to new rules or policies.¹⁰⁵

As we have seen, other high-profile administrative law cases have responded to the distress calls of career bureaucrats, sometimes expounding a strict statutory interpretation, sometimes deferring to 40 years of established

¹⁰² Devine, *Bush Versus the Environment*, 144.

¹⁰³ Eric Schaeffer, former Director, EPA Office of Regulatory Enforcement, interview by author, February 15, 2008.

¹⁰⁴ *Ibid.*

¹⁰⁵ John Walke, former attorney in EPA Office of General Counsel, interview by author, February 28, 2008.

practice in the face of clear statutory language,¹⁰⁶ and sometimes even pushing forward on issues that have no history of regulation in the agency or clear language in relevant statutes.¹⁰⁷ *Chevron* may still be on the books, but the reality is that courts are inconsistent in most things except their response to the preferences of career civil servants and lawyers in the EPA.

Thus far we have focused almost entirely on the EPA. Of course, the EPA is staffed with experts and is concerned with highly scientific questions, and so the spat of litigation here might indeed indicate a principled judicial revolt for the cause of bureaucratic expertise—that is, the expertise-forcing argument of leading legal scholars. But the same dynamics—political manipulation of longstanding bureaucratic practice being thwarted by the concerted efforts of agency professionals and agency lawyers to make their case public and use courts as tools for that purpose—appear in other arenas where expertise seems to have little to do with the decision-making. Indeed, the trend away from the *Chevron* regime is properly understood as symptomatic of larger developmental trends which affect areas of administration not necessarily under the scope of standard *Chevron* review. In particular, the slew of cases challenging President Bush’s military tribunal policy have largely been successful because of the policy disagreement stemming from military lawyers in the Department of Defense, and this has come in an area where the president arguably has his most convincing and respected

¹⁰⁶ *Environmental Defense v. Duke Energy*.

¹⁰⁷ *Massachusetts v. EPA*.

argument for political/strategic discretion in directing bureaucratic operations.¹⁰⁸ Over the course of the 20th century, civilian lawyers and military lawyers have exercised enormous power in reshaping the Articles of War, the Uniform Code of Military Justice, the Geneva Conventions, and the military justice system in general. Also, they have worked to collapse the distinction between the military justice system and the civilian justice system. Moreover, they have come to play a crucial part in the ongoing operation of this system.¹⁰⁹ In particular, “the growth of the role of JAGs has been remarkable in the past thirty years, even more so in the past decade. It has essentially gone unregulated.”¹¹⁰

Almost immediately after President Bush issued his order establishing a baseline set of procedures for trying detainees captured in the war on terror, there was substantial criticism of many of the procedures and a mad rush for influence in tweaking them. Murmurs of dissatisfaction with the Bush plans came not only from the usual suspects—civil liberties groups and moderate to liberal congress people—but also from pockets of the Bush administration itself. In particular, officials in the State Department (including Secretary of State Colin Powell), numerous military lawyers, and career attorneys in the Judge Advocate General

¹⁰⁸ John Yoo and Robert J. Delahunty, “The President’s Constitutional Authority to Conduct Military Operations Against Terrorist Organizations and the Nations that Harbor or Support Them,” *Harvard Journal of Law and Public Policy* 25, no. 2 (2002): 487-538.

¹⁰⁹ William T. Generous, Jr., *Swords and Scales: The Development of the Uniform Code of Military Justice* (Port Washington, N.Y.: Kennikat Press, 1973).

¹¹⁰ Glenn Sulmasy and John Yoo, “Challenges to Civilian Control of the Military: A Rational Choice Approach to the War on Terror,” *UCLA Law Review* 54, no. 6 (2007): 1844.

offices raised serious concerns about the lack of both consultation and congressional approval of plans for military tribunals.¹¹¹ In the very early stages, the development of the military order and the procedures for tribunals were “drafted by a small group of ideologues in the Vice President’s Office.” When the military order was finally issued, it “stunned [Secretary of State] Powell; the national security adviser, Condoleeza Rice; the highest-ranking lawyer in the CIA; and many judge advocate generals, or JAGs, the top lawyers in the military services.” The Chief Navy JAG complained that he and other JAGs were “marginalized.... They didn’t want to hear from us.”¹¹² Throughout the twentieth century, military lawyers had moved the Uniform Code of Military Justice “into line with the due-process standards of the federal courts, and senior military lawyers were proud and protective of their system.”¹¹³ One, Maj. Michael Mori, believed that the tribunals had been programmed to produce convictions, and he raised concerns that the lack of due process in these tribunals would give other hostile nations precedent to treat U.S. captives in a similarly troubling manner. Another, Lt. Cmdr. Charles Swift, “filed a petition in federal court saying that the tribunals are illegal under U.S. and international law” and argued that Bush lacked statutory authority for his plan and that “the Constitution guarantees civilian court

¹¹¹ Louis Fisher, *Military Tribunals and Presidential Power: American Revolution to the War on Terrorism* (Lawrence: University Press of Kansas, 2005), 173-174.

¹¹² Howard Ball, *Bush, the Detainees, and the Constitution: The Battle Over Presidential Power in the War on Terror* (Lawrence: University Press of Kansas, 2007), 52.

¹¹³ Tim Golden, “After Terror, a Secret Rewriting of Military Law,” *The New York Times*, October 24, 2004.

review over any proceeding in the military court system.”¹¹⁴ Despite these concerns, whereas military lawyers had been “actively involved in supervising interrogations in the Iraq war in 1991,” military lawyers and their concerns were “largely excluded” from consultation, and the Bush plan looked much the same as it did in the original order.¹¹⁵ In essence, Bush had seemingly managed to begin interrogations and tribunals without any substantive changes to his plan and without congressional authorization.

On the torture debate, as well, military lawyers proved to be a major nuisance for the administration. Beginning in 2003, a group of JAGs drew up alternative recommendations for interrogation methods and stated concerns with the administration’s novel procedures:

The common thread among our recommendations is concern for service members. OLC does not represent the services; thus, understandably, concern for service members is not reflected in their opinion. Notably, their opinion is silent on the UCMJ and foreign views of international law. The Working Group [must present] the services’ concerns that the authorization of aggressive counter-resistance techniques by service members will adversely impact the following: a. Treatment of U.S. service members by Captors and Compliance with international law; b. Criminal and Civil Liability of DOD military and civilian personnel in Domestic, Foreign, and International Forums; c. U.S. and International Public Support and respect of U.S. armed forces; d. Pride, Discipline, and Self-Respect within the U.S. armed forces; e. Human Intelligence Exploitation.¹¹⁶

¹¹⁴ Fisher, *Military Tribunals*, 185-186.

¹¹⁵ *Ibid.*, 202.

¹¹⁶ Qtd. in Ball, *Bush, the Detainees, and the Constitution*, 68.

Similarly, Maj. Gen. Jack L. Rives, deputy JAG for the Air Force, complained that “the use of [these] techniques simply is not the way U.S. armed forces have operated in recent history” and that the new policies are “contrary to military training.”¹¹⁷ As these quotations clearly demonstrate, there was a growing schism between high-level political appointees and military lawyers on interrogation policy. Indeed, the way that these JAGs referred to the armed services suggested a well-developed notion of the armed services as semi-autonomous and as having interests of their own apart from those of the administration.

When the early efforts to gain access to the policymaking process failed, some members of the military law community began to explore other options. Part of this entailed turning to litigation: cases challenging aspects of the Bush administration’s policies began to bubble up, and it was JAGs who drove this process by going “in secret to private attorneys to urge them to bring suit on behalf of detainees held at Guantanamo Bay” and then joining in the suits in federal civilian courts.¹¹⁸ Not surprisingly, many of the early cases centered around gaining a level of mandatory involvement of legal and judicial personnel. Three major cases were granted certiorari in 2003, and it was not long before

¹¹⁷ Qtd. in Ball, *Bush, the Detainees, and the Constitution*, 69.

¹¹⁸ Sulmasy and Yoo, “Challenges to Civilian Control of the Military,” 1833; Ellen Yaroshefsky, “Military Lawyering at the Edge of the Rule of Law at Guantanamo: Should Lawyers be Permitted to Violate the Law?” *Hofstra Law Review* (forthcoming), available at <http://ssrn.com/abstract=1089481>.

amicus curiae briefs were filed by military lawyers, retired JAGs, and other experts on the law of war.¹¹⁹ The results of these efforts were decisions ruling that the Bush administration could not deny U.S. citizens captured abroad the right to a trial before a neutral decisionmaker¹²⁰ and that nothing “categorically excludes aliens detained in military custody outside the United States from the ‘privilege of litigation’ in U.S. courts.”¹²¹ After *Rasul*, the District of Columbia Circuit Court of Appeals ruled in *Al Odah v. U.S.* that detainees were legally entitled to counsel in their *habeas* battles.¹²²

Taken together, these cases marked a turning point in the battle over military tribunals. Up to this point, critics within the Bush administration had been almost entirely ignored whenever they challenged the policies generated by the Office of Legal Counsel and Vice-President Cheney’s inner circle of conservative ideologues. Though this trend of exclusion continued in the months immediately following the Supreme Court cases,¹²³ compromises and rewriting of some of the most controversial provisions of the Bush procedures did eventually occur. One senior military lawyer optimistically recounted that “the results may not be very different, but the discussions have changed...and there are more

¹¹⁹ Fisher, *Military Tribunals*, 185-186; Ball, *Bush, the Detainees, and the Constitution*, 90-108.

¹²⁰ *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

¹²¹ *Rasul v. Bush*, 542 U.S. 466 (2004)

¹²² Yaroshefsky, “Military Lawyering,” 8.

¹²³ Neil A. Lewis, “Disagreement Over Detainees’ Legal Rights Simmers,” *The New York Times*, October 31, 2004.

discussions.”¹²⁴ In addition, the administration did respond to the Court’s decisions by permitting lawyers to meet with detainees (thus addressing one of the primary complaints of those within the military bureaucracy), and by setting up Combat Status Review Tribunals (CSRTs), which, although widely thought to be a “sham,” purportedly gave detainees a chance to challenge their detention.¹²⁵

Despite many of these changes from 2004-2005, military lawyers and critics of the Bush administration still clamored for greater due process rights and greater protection against torture for alien detainees. The product of this clamoring was the Supreme Court’s decision in *Hamdan v. Rumsfeld*. Perhaps the most important aspect of this case is that it probably would not have even occurred were it not for the efforts of Lieutenant Commander Charles Swift, a member of the Navy Judge Advocate General Corps, who “violated the terms of his appointment” by acting as a liaison with civilian attorneys to file a writ of *habeas corpus* under the authority of *Rasul v. Bush* and by going public with Hamdan’s case.¹²⁶ After the ruling striking down the Bush administration’s policy and forcing a re-draft in the form of the Military Commissions Act, military lawyers within and without the Department of Defense again flexed their muscles: a detailed look at the time between *Hamdan* and the MCA reveals that, in fact, the Court once again inspired significant consultation with military

¹²⁴ Tim Golden and Eric Schmitt, “Detainee Policy Sharply Divides Bush Officials,” *The New York Times*, November 2, 2005.

¹²⁵ Fisher, *Military Tribunals*, 249-250.

¹²⁶ Yaroshefsky, “Military Lawyering,” 9.

lawyers which resulted in practical changes in detainee policy. In the months after *Hamdan*, Bush advanced several new plans for tribunals, but top military lawyers again dissented *en masse*. In a Senate hearing, military lawyers voiced their concerns about the new plan's evidentiary rules, process of appeals, and implications for treatment of U.S. soldiers captured abroad.¹²⁷ Military lawyers found allies in Republican Senators Lindsey Graham (a former military judge himself), John McCain, and John Warner.¹²⁸ These three senators eventually entered into negotiations with the Bush administration, all the while being fed information and advice by military lawyers whose opinions and reputations the Senators trusted. The result was, understandably, a compromise: the Military Commissions Act passed with a habeas corpus suspending provision. However, the senators (and the military lawyers aiding them) managed to make some significant changes to the tribunal plans: language was incorporated binding the President to observe the human rights obligations in Geneva Conventions Common Article 3 (something military lawyers had fought for since the original military order authorizing tribunals), and the act adopted "a stronger prohibition on use of testimony obtained by torture of a witness," a greater right to "'examine and respond to' the evidence," and "broader discovery rights."¹²⁹ All of these

¹²⁷ Sulmasy and Yoo, "Challenges to Civilian Control of the Military," 1832.

¹²⁸ R. Jeffrey Smith, "Top Military Lawyers Oppose Plans for Special Courts," *The Washington Post*, August 3, 2006, A11.

¹²⁹ Neal Katyal, "Hamdan v. Rumsfeld: The Legal Academy Goes to Practice," *Harvard Law Review* 120 (2006): 97-98.

were major victories for military lawyers who had asked the administration for these changes since 2001.

Far from ending there, the tidal wave of litigation continued. After *Boumediene v. Bush* found the Military Commissions Act's *habeas corpus* stripping provision unconstitutional and the Detainee Treatment Act's procedures unsatisfactory, the floodgates opened and the Bush administration was forced to cope with the fact that its own lawyers had contributed to its failed attempt at radical presidential administration. The posture of the Bush administration by the end of the episode is revealed by the fact that detainees' lawyers began pushing hard to keep *habeas* and Detainee Treatment Act cases going while the Bush administration scrambled to start over completely.¹³⁰ To date, there have been over 200 *habeas corpus* cases filed in federal district courts, and the Obama administration has indicated that it intends to drastically redesign the procedures and practices of detainee justice to comport with the imperatives of human rights.¹³¹ While there are rarely clear-cut victories in American politics, there can be little doubt that the Bush administration has not been even the partial victor in this institutional clash with entrenched legal bureaucrats. Litigation and courts have provided the forum where the preferences of civil servants and other experts in the executive branch have countered the political direction of the president and

¹³⁰ Lyle Denniston, "New DTA, habeas troubles," *Scotusblog*, August 29, 2008, <http://www.scotusblog.com/wp/> (accessed September 2, 2008).

¹³¹ Mark Mazzetti and William Glaberson, "Obama to Shut Guantanamo Site and C.I.A. Prisons," *New York Times*, January 22, 2009.

have successfully forged arguably authentically autonomous responses to new policy issues such as global warming and the war on terror.

Together, these stories add to the growing story of administrative law writ large—that is, the retreat from *Chevron*'s principle of political administration—and they also point the way to new institutional causes. Tracing the particular paths of litigation has revealed the now commonplace differentiation of legal staffs from political appointees and the institutionalization and interaction of those legal staffs within the day-to-day work of career civil servants. Part of this differentiation is undoubtedly driven by what Jack L. Goldsmith, former assistant Attorney General in the Office of Legal Counsel (a branch of the Justice Department crucially involved in military law matters during the Bush administration), has called “law-induced bureaucratic risk-aversion.”¹³² In short, even if the staff of the DoD and OLC are not liberal during any given administration, law permeates the work of these agencies and creates cross-cutting incentives to resist political direction and rely on status quo policies. Furthermore, it has revealed that legal staffs commonly act on that differentiation by a mixed strategy of public relations and support of litigation. This mechanism, it appears, has come to be somewhat of a permanent feature and natural development of administrative politics, and as such its importance should not be overlooked.

¹³² Jack L. Goldsmith, *The Terror Presidency: Law and Judgment Inside the Bush Administration* (W.W. Norton, 2007), 96.

In addition to this process tracing, we can further the case for litigation-fostered bureaucratic autonomy by eliminating the other most plausible explanations for the recent trends in administrative law and politics. First, as we have seen, the trends away from political administration have occurred in both policy areas where the president has unique claims to expertise and policy areas where he does not, thus casting serious doubt on the hypothesis that the courts are simply forcing a return to equilibrium between the dichotomous poles of expertise and political responsiveness. Second, with the extraordinary amount of attention in the media given to President George W. Bush's bureaucratic politics,¹³³ it is easy to assume that these cases (particularly, the more salient recent cases) are simply a partisan response against a particularly aggressive and conservative president. However, the Bush administration's efforts to control the policy outputs of agencies like the EPA were hardly unique or correlated with partisanship: even Democratic president Bill Clinton sought to control the administrative state and often found himself in protracted battles with some agencies. Indeed, the *Mead* and *FDA* cases stemmed from Clinton's legacy of administrative direction. Thus, as complete reconciliations of the *Chevron* regime and these recent diversions from it, the "extraordinary issues" and "extraordinarily aggressive president" explanations fall short. While the general trend against categorical judicial deference to agency/executive promulgations of

¹³³ Becker and Gellman, "Leaving no tracks"; Devine, *Bush Versus the Environment*.

policy is unmistakable over the last twenty years and especially in more recent years, it would probably be wrong to say that the Court has been standing up for public accountability in the face of some demonized executive such as George W. Bush, although that case has been made elsewhere.¹³⁴

Finally, not only are there no partisan or ideological patterns at the presidential level, but there are also seemingly no overwhelming partisan or ideological patterns at the judicial level. This claim to some extent runs up against the flurry of empirical work by Thomas Miles and Cass Sunstein, but there are reasons to be skeptical of the purely attitudinal model these scholars have advocated. The first and most intuitive reason is that it is difficult to square the judiciary's increasing oversight of presidential policymaking, especially during George W. Bush's terms, with the fact that the judiciary as a whole has become, if anything, far more conservative and Republican since *Chevron*. Second, other statistical analyses have argued for the interaction of legal factors and ideology in *Chevron* cases.¹³⁵ Furthermore, a close look at the findings in this literature shows that the swing justices are much less predictably attitudinal than the extreme justices, and furthermore that the Supreme Court is, understandably, much more attitudinal than the appeals courts, where many more administrative law cases are heard. Finally, the methodology used in the Miles and Sunstein

¹³⁴ Bressman, "Deference and Democracy."

¹³⁵ Mark J. Richards, and Joseph L. Smith, and Herbert M. Kritzer, "Does Chevron Matter?" *Law & Policy* 28 (2006): 444-469.

literature is questionable on the coding of the ideological direction of the agency policy in question. They use the general ideological direction of the challenging party as an indicator of the ideological direction of the agency policy. But such a coding scheme does not do enough justice to the complexities of individual cases and the fact that litigation has essentially become inevitable on even mundane details of agency rules. As D.C. Circuit Court of Appeals Judge Patricia Wald once wrote, “A large proportion of our cases (particularly administrative law cases) have no apparent ideology to support or reject at all....For my part, I cannot even imagine having personal feelings about the appropriate regulatory standards for ‘retrofitted cell-burners’ as opposed to ‘wall-fired electric utility boilers’....”¹³⁶ Moreover, when we look to individual cases of great import, we see a fundamentally less divisive pattern emerging. The D.C. District Circuit Court of Appeals, in particular, has been fairly non-ideological and uniform in its retreat from *Chevron*, and since that court is an important gatekeeper in the development of administrative law, this development is not to be overlooked. For instance, in a pair of high-profile cases stemming from EPA rulemaking under the Clean Air Act during the George W. Bush administration, Republican-appointed judges Sentelle, Henderson, Randolph, and even George W. Bush nominee Janice Rogers Brown, agreed that EPA had not adequately justified final rulemaking on certain issues, often showing a level of shock at the lack of justification offered by

¹³⁶ Patricia Wald, “A Response to Tiller and Cross,” *Columbia Law Review* 99 (1999): 237.

the agency.¹³⁷ At the Supreme Court level, as well, the partisan and ideological divisions which usually pervade the rulings are gone—indeed, it seems just as likely that Republican justices will strike down presidentially determined agency rules as Democratic justices. Take, for instance, the 8-1 decision in *Mead* or the 9-0 decision in *Duke Energy*. Indeed, there seems to be something in particular about administrative law which makes behavioral or attitudinal explanations questionable, though not necessarily wrong in all situations, on their face.

IV. Conclusion

Taken together, all of the evidence for an institutional cause and all of the evidence against a behavioral cause suggest that the law is changing at least in part because of integral and permanent features of administrative politics narrowly and American politics more broadly. Perhaps, with all of this knowledge of the institutional features of administrative law, we will not be surprised by Justice Stevens' retreat from his own opinion in *Chevron*: institutional pressures overlap with behavioral or ideological preferences, but in the long run it is hard to disregard them. Institutions not only structure and limit preference maximizing, but, perhaps more importantly, they “are also a source of distinctive political purposes, goals, and preferences. In fact, it is tempting to

¹³⁷ *Northeast Maryland Waste Disposal Authority v. EPA*, 353 F.3d 936 (D.C. Cir. 2004); *Mossville Environmental Action Now v. EPA*, 370 F.3d 1232 (D.C. Cir. 2004).

argue that what makes something a recognizable ‘institution’ is not the hard reality of a building but instead some discrete and discernible habits of thought, including a set of attitudes about the appropriate functions to be performed by people associated with the institution and the relationship between these responsibilities and those performed by other institutions....”¹³⁸ This is not to say that the judges do not know what they are doing or that they have no control, the kind of argument typical of Marxist historicism and structural-functional sociology; instead, judges are active participants in a constitutive process combining institutional influences and individual agency. The fundamental argument in this paper is simply that contemporary accounts of the state of *Chevron* and its importance for administrative law have discounted a whole type of explanatory variable—a type which appears to be a permanent feature of administrative law and politics—in their emphasis on behavioral, strategic, and formal legal explanations and are therefore missing a large part of the story and the implications of the development of the state. In short, “In explaining why legal change occurs, we must focus on the supply side (litigants), rather than simply the demand side (courts),” and it is only when we consider these rather stickier political and institutional dynamics that we can fully understand where administrative law is going.¹³⁹ The theory laid out in this paper suggests that we would do well to pay more attention to the power of institutional “support

¹³⁸ Gillman and Clayton, *Supreme Court Decision-Making*, 5.

¹³⁹ Teles, *The Rise of the Conservative Legal Movement*, 11.

structures” and those people and groups who leverage the law in mobilizing for institutional purposes.¹⁴⁰ Focusing on behavioral, strategic, or formal legal influences on judges in recent cases, while undoubtedly important, is likely to underestimate the permanence of this shift away from *Chevron* and to misdiagnose the trend as a principled assertion of the importance of expertise by courts. Thus, though this paper has been narrowly concerned with administrative law and bureaucratic politics, the argument hopefully shows the theoretical and methodological importance of new institutionalist approaches to a complete study of law and courts in particular and political phenomena in general.¹⁴¹

To conclude the empirical analysis, it seems that legal scholars, positive political theorists, and judicial behaviorists could all add much to their accounts of administrative law and politics by looking to the institutional practices which often work under the radar screen and to the bases of these practices. An institutional approach is a good check on our intuition because of its inherently cautious posture regarding change. This paper represents a first step towards that goal, and other research I have done utilizing similar theoretical underpinnings to examine cases of agencies where litigation-fostered bureaucratic autonomy has not emerged (i.e., the Federal Trade Commission and the Bureau of Land

¹⁴⁰ Charles R. Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (Chicago: University of Chicago Press, 1998).

¹⁴¹ Gillman and Clayton, *Supreme Court Decision-Making*; Rogers M. Smith, “Political Jurisprudence, the ‘New Institutionalism,’ and the Future of Public Law,” *American Political Science Review* 82 (1988): 89-108; March and Olsen, “The New Institutionalism”; Powell and DiMaggio, *The New Institutionalism in Organizational Analysis*.

Management) help show why some agencies display these trends and some do not, thus adding nuance to the institutional argument. At any rate, if I am right that some level of bureaucratic autonomy is hardwired into the institutions of the modern state, then a potentially very interesting puzzle is why *Chevron* occurred at all. But that is a puzzle for another time.

There is, however, one last puzzle which we can begin to think about. If we suspend our judgment on the viability of the theory of bureaucratic autonomy laid out above and simply accept the possibility that the dynamics of bureaucratic autonomy inhere in our institutions and emerge under the pressures of aggressive presidential management of public policy outputs, then a problem of governance and democratic theory inevitably emerges. From a progressive standpoint, one might be inclined to applaud the trends of bureaucratic autonomy I have outlined above as they have operated in a decidedly irresponsible and heavy-handed Bush administration. On the other hand, in light of the sweeping changes in the elected branches following the 2008 elections, the situation is much more problematic. Although we can certainly expect the Obama administration and Congress to be much more inclined to agree with career civil servants and lawyers in certain agencies like the EPA, there can be little doubt that President Obama will have to try to force the administrative state to carry out some initiatives which it does not support. This is likely to be especially true in cases of more “conservative” or naturally industry friendly agencies and departments which have been silent

during the Bush administration. So although litigation-fostered bureaucratic autonomy may play less of a role in the Obama administration, it will probably not disappear, and we can thus expect it to play a major role in determining the extent to which the new Democratic majority is able to implement its vision. As Martin Shefter has argued,

Changes in relative power of party and bureaucracy in the United States are intimately related to the process of critical realignment in American politics. Critical elections bring to power new political coalitions, some or all of whose members wish to use public authority for new purposes. By altering the relationship between, and the internal structure of, party and bureaucracy, elements of the new majority coalition seek to undermine the position of politicians who held power during the earlier party system, to seize control over the government, and to turn it to the purposes they want it to serve.¹⁴²

If we temper our urge apply the terminology of the critical realignment literature to the present electoral revival of both the Democratic Party and parties in general, we can see that the core insight here is quite applicable: the state holds the key to policy, and policy is key to party development. The Obama administration undoubtedly understands this, and they have already begun to examine the bureaucracy and plan a strategy for the successful direction of it.¹⁴³ The appointment of Cass Sunstein, one of America's leading regulatory law

¹⁴² Shefter, *Political Parties and the State*, 63.

¹⁴³ Kenneth P. Vogel and Lisa Lerer, "Techies Tapped to Scour Bureaucracy," *Politico*, November 12, 2008. <http://www.politico.com/news/stories/1108/15571.html>.

scholars, to head the Office of Information and Regulatory Affairs¹⁴⁴ (a job dubbed the “regulatory czar”) indicates that the Obama administration intends to engage in aggressive administrative policymaking; as Michael A. Livermore rightly notes, Sunstein is “too talented to be wasted in a business-as-usual role in the next administration.”¹⁴⁵ Though Sunstein is regarded as a liberal and as a supporter of regulation, he is also known for believing that there is a place for cost-benefit analysis and regulatory oversight by the presidential administration—a belief that is likely to set the stage for plenty of battles between the administrative state and the administration in the coming years. Even the Bush administration seems to have learned a lesson from years of troubled administrative management. In seeking to make several lame duck rule changes in the Code of Federal Regulations to require more adversarial administrative procedures,¹⁴⁶ the Bush administration might be seen as wielding the power of the new dynamics of bureaucratic autonomy to make the Obama administration’s task more difficult and subject to review by courts and interest groups.

This dilemma is not new, and it will certainly not admit of easy resolution in a paper like this. Whether or not the Obama administration chooses to continue

¹⁴⁴ Ezra Klein, “Cass Sunstein Prepares to Nudge,” *The American Prospect*, January 8, 2009. http://www.prospect.org/csnc/blogs/ezraklein_archive?month=01&year=2009&base_name=cass_sunstein_prepares_to_nudg

¹⁴⁵ Michael A. Livermore, “Should Environmentalists Fear Cass Sunstein?” *The New Republic*, January 12, 2009. <http://blogs.tnr.com/tnr/blogs/environmentandenergy/archive/2009/01/12/should-environmentalists-fear-cass-sunstein.aspx>

¹⁴⁶ Robert Pear, “Bush Aides Rush to Enact a Rule Obama Opposes,” *The New York Times*, November 29, 2008.

the trend toward the administrative presidency model will probably hinge on the Democratic Party's prognosis for electoral success in coming years. Ultimately, the best solution might simply be for the Obama administration to be balanced and pragmatic in its approach. There is certainly a place for political responsiveness in the administrative state lest the policymaking process succumb to the influence of iron triangles and relatively undemocratic tribunals in the halls of America's appellate courts, but there is also certainly a place for continuity, expertise, and autonomy in our state institutions that can withstand easy assault by the passions of politics. A properly functioning dialectic between these poles probably serves us better than one extreme or the other.