When Do Agencies Have Agency? Bureaucratic Noncompliance and Dynamic Lawmaking in United States Statutory Law, 1973-2010

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ABSTRACT

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This dissertation provides a novel evaluation of the extent to which, and the conditions under which United States administrative agencies are able to push policy toward their preferences rather than being wholly faithful to their legislative principals, in ways that I refer to as *noncompliance*. I evaluate this bureaucratic behavior in the context of the Environmental Protection Agency and the Department of Interior from 1973 to 2010. I collected extensive original data on institutional responses to these agency actions, and using these new data found robust support for the core separation-of-powers hypotheses that legislative-executive conflict, polarization in Congress, and disagreement with the delegating legislation powerfully contribute to agencies stepping outside their discretionary windows rather than exercising regulatory compliance. To evaluate the policy consequences of this bureaucratic behavior with respect to policy volatility and long-term bureaucratic discretion to implement public policy, I created an additional original dataset of statutory amendments to the legislation under the jurisdiction of the Environmental Protection Agency. I find strong support for noncompliance in the prior period leading Congress to considerably revise agency discretion in the way of adding specificity to the texts or imposing additional oversight provisions that constrain agency actions moving forward. Thus, agencies' willingness to step outside of their discretionary windows so as to achieve shorter-term policy goals has important longer-term consequences with respect to their range of discretion and the scope of administrative capacity in a world of bureaucratic governance. The dissertation has broad implications for our understanding of the factors shaping *de facto* policy outcomes in a conflictual separation-of-powers setting, and the evolving scope of the American administrative state.

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Chapter 1: Bureauracratic Noncompliance in the Separation of Powers System

The needs of mass administration make it today completely indispensable. The choice is only between bureaucracy and dilettantism in the field of administration." - Max Weber (1921)

A complex problem at the heart of American political science is that of the implementation of the policies set by members of Congress engaging in such dynamics as logrolling and bargaining to secure resources for their districts, in ways leading to laws becoming highly complex and fractured, and as Wilson (1989: 297-301) characterized American policy implementation, a "barroom brawl." Amid the birth of the modern regulatory state, congressional delegation can be seen as inevitable in order for Congress to play a central role in American society with the provision of sweeping social and economic programs – as well as efficient in taking advantage of agencies' substantive and technical expertise – though some (e.g., Wilson 1989) see delegation as constraining congressional control over the ultimate implementation of the laws it passes. It is this pattern of regulation and delegation that led Lowi to declare that law has become "a series of written instructions to administrators rather than a series of commands to citizens" (Lowi 2009: 106), and claims that such delegations to bureaucracy are contrary to the public good given the influence of organized interest groups.[1] Thus, these patterns in congressional lawmaking in recent decades has produced disparate views with respect to the role of interest groups and to what extent they have captured the agencies that they are intended to regulate (Huntington 1952), are dominated by powerful committees in Congress (Weingast & Moran 1983), or advantaging certain groups over others (Moe 1989).

The United States government experienced two major periods of extraordinary growth

[1]However, see Wood & Waterman (1994), who view delegation as inevitable and the ongoing influence of interest groups as indicative of a healthy democracy.

in the twentieth century: the New Deal effort to regulate the economy out of the Great Depression, and the 1960s efforts to eliminate poverty, pollution, and inequity, with both periods contributing in important ways to American political and legal history. Roosevelt and those engaged in the New Deal reshaped the character of American politics and the modern presidency, with the 1930s yielding a rebirth of issues politics and ideological splits, as well as the growth of policy domains in which the government was actively involved (Leuchtenburg 1963: 326). In taking on this broad issue agenda, the Roosevelt Administration vastly expanded the President's legislative functions in addition to the creation of the Executive Office of the President, expanding the role of the executive branch in policymaking (Id at 327) and yielding an "elephantine growth of the federal government" amid the crises that local and state governments had been facing (Id at 333). Indeed, not only had the federal government vastly expanded its reach, but few questioned the right of the government – more specifically, the administrative apparatus – to intervene in a variety of domains in which it had not previously been involved, and even developed consensus around the "conviction that government both should and could act to forestall future breakdowns" (Id at 335). Thus, there became not just a resignation but an *expectation* of sweeping government involvement across policy realms, with that regulation carried out through the swelling American administrative state.

With the expansion of national policy programs and the growth of legal complexity in recent decades (see, e.g., Schuck 1992) and the vital impact that bureaucracy has on our daily lives (*e.g.*, Brehm & Gates 1999), it is all the more crucial to examine with close scrutiny the extent to which congressional delegation and mandates map on to agency actions in practice. Such issues strike to the core of representation and its limits in a setting potentially conducive to drift. Little work to date has undertaken this question, and this dissertation seeks to fill that deficit through a combination of quantitative and qualitative historical qualitative methods to uncover these inter-branch battles over implementation and

the policy outcomes that emerge. A common justification for bureaucratic policymaking is that bureaucrats possess and utilize greater expertise than one can reasonably find in the president, judges, and legislators, a fact that is all the more important amid more technically challenging policy matters taken on by the state. If at the heart of the critiques of congressional delegation or "abdication" is a concern about the nature and quality of representation afforded the public – with legislators directly accountable to the electorate while agencies are operated by political appointees and civil servants – then what emerges is a dialogue about the important relationship between representation and administration. With much scholarship on delegation assuming Congress to have a role in overseeing agency actions (e.g., McCubbins & Schwartz 1984; McNollgast 1987, 1989; Epstein & O'Halloran 1994, 1996, 1999), we must consider closely the extent to which we ultimately observe democratic responsiveness in statebuilding when Congress is operating under more constrained political conditions.

The chapters that follow argue that a number of little-recognized conditions expand bureaucratic capacity to shift (and sustain) policy at or near the agency's preferences, and that these inter-branch battles over statutory implementation have powerful effects in shaping the location and duration of key policy domains.

Modern State-Building in the Separation of Powers System

Since the passage of the Interstate Commerce Act of 1887 – and particularly since Roosevelt's New Deal, which witnessed the creation of dozens of administrative agencies and numerous pieces of highly significant legislation – the American administrative state has witnessed a marked growth in size and scope, touching virtually every aspect of social and economic policy with the passage of such laws as the Federal Trade Commission Act, the Food, Drug, and Cosmetic Act, the Fair Labor Standards Act, the Banking Act, and the Agricultural Adjustment Act, to name just a few. Such developments led Lowi to observe (disdainfully) that the"political pressures of social unrest forces Congress and the president

into premature formulations that make delegation of power inevitable" (2009: 125), though with the consequence of what he terms "interest group liberalism," or the clientelism emerging from that broad expansion of the state. And with such expansions of policy programs can come constituent expectations about the continued provision of such programs, suggesting a path dependent quality to this state development. Figure 1 plots the total civilian employment within the federal executive branch from 1940 to 2014[2], with a clear upward trend throughout the time series, indicating an expansion in the size of government and the number of those contributing toward the policies it produces. Such a trend is largely mirrored in the Department of Interior, one of the agencies that I evaluate in this dissertation, though there is a visible decline in its scale from approximately 1990 forward, despite the sharp growth in the earlier decades.

Needless to say, the nature of domestic policy regulation – both social and economic – has been far from static, with much policy innovation and reshaping of enforcement contributing toward a multiplicity of avenues through which rights are asserted by private actors (Farhang 2010), businesses, and states. Novak (2008) calls attention to the importance of considering American state development outside of the narrow categories such as classical liberalism versus modern social democracy. Instead, he raises important other sources of state power, which he defines as a "product of legal processes of extraordinary depth, diversity, and durability" that includes rulemaking, executive orders, federal statutes, state legislation, private litigation, among other sources of power (2008: 768). Thus, the complexity of lawmaking and implementation in the American separation of powers context necessitates a recognition of the diversity of the regulatory processes at work in shaping contemporary policy outcomes, in particular given the reality that with the ability to not only promulgate rules but also to sponsor legislative proposals and launch experimental programs, federal

[2]These data came from the Historical Workforce Tables provided by the United States Office of Personnel Management.

bureaucrats aren't simply administering policy but rather are playing an important role in shaping it as well (Carpenter 2005).

While much ink has been spilled addressing questions of state formation in comparative analyses, we still know far too little about the *evolution* of contemporary state capacity amid major legal and policy developments. That is, with a growing scope of policies legislated by Congress and implemented through agencies, our conception of the state itself should likewise be dynamic rather than static in nature. Skowronek describes the modern state as an "internal governmental reconstruction worked out through incremental political reform" (1982: 285), with the gradual accretion of broader administrative forms and procedures, though he laments that the modern American state failed to create a vital role for the judiciary in this new political economy (Id at 287). Derthick & Quirk (1985: 30) note modern presidential support for deregulatory policy, with President Jimmy Carter claiming that the nation was suffocating from red tape, and his successor President Ronald Reagan pledging swift action against what he perceived as overregulation. Among the strategies employed by presidents Ford, Carter, and Reagan were the development of ecoomic impact statement requirements of agencies, along with centralizing agency review in the Office of Management and Budget (Id at 30-31). However, despite a common overarching goal of reducing red tape, a disparity between the Democratic and Republican presidents was whether there was an effort at extending "regulatory relief" efforts to the new policy regimes of health, safety, and environmental protection (Id at 33).

Harris & Milkis (1996) likewise address efforts at deregulation, particularly under the Reagan Administration, and though their restriction to qualitative analysis on only two agencies limits the extent to which we can get leverage from this study in a generalizeable fashion, they provide valuable information about the mechanisms by which groups have attempted to undercut state capacity in modern social policy. Both the Federal Trade Commission and the Environmental Protection Agency fell prey to the Reagan Administration's efforts

to undo the accomplishments of the public lobby regime that had brought them to power (1996: 358) as well as the growing public concern with "big government" and the large bureaucratic structure that accompanied this expanding administrative state (see also Hacker & Pierson 2010).[3] This example of the Environmental Protection Agency is often cited as exemplary of the deregulatory efforts of the 1980s – though highly salient to both parties since its formation in 1970 – and is a prime example on which this dissertation focuses. While agencies' expert knowledge has been drawn upon as a prime justification for delegation, this is particularly true in the environmental policy context given agencies' greater depth of knowledge than courts with respect to the technical details over which conflicts arise.

While there is ample interest in understanding the development of the American state, there is not necessarily consensus as to how best to characterize its continuation over time. Novak (2008: 759) calls attention to the important shift in American politics scholarship toward, in analyzing twentieth century American administration and bureaucracy, casting aside discussion of a weak state tradition in favor of arguments for more centralization. And despite Skowronek's (1982) observation about the courts being "swamped" by the expansion of bureaucratic authority, Novak rightly observes that a number of the most far-reaching policy initiatives in recent decades have relied heavily on regulation through the courts. Indeed, one of the most crucial aspects of the Civil Rights Act of 1964 was its creation of a private right of action over violations of Title VII's provisions prohibiting employment discrimination. While this implementation strategy of private enforcement was originally a compromise brokered to permit the Act's passage, it would ultimately prove highly potent in ensuring the provision of equal protection in employment, in addition to importantly influencing subsequent civil rights legislation (e.g., Americans with Disabilities Act). Moreover, the Clean Air Act's provision of citizen suits empowered individuals and organizations – re-

[3]However, others draw attention to the limitations of conservative legal movements against liberalism given this backlash's roots in the American legal system, a liberal movement (Teles 2010).

gardless of standing – to sue regulated entities to comply with the statutory provisions and to compel the implementing agency, the EPA, to enforce the Act. Such provisions would soon be incorporated into subsequent environmental legislation, thus vastly expanding through the use of courts the universe of monitors of environmental implementation. It is this use of private enforcement in combination with, or even in lieu of, administrative implementation that Farhang (2010) refers to as the "litigation state."

Novak (2012) argues further that one of the most marked indicators of the transformation of the American state was the explosion of federal and state legislation in the late 19th century through the New Deal. After all, legislation has been the dominant form of lawmaking in the 20th century, and Eskridge & Ferejohn (2010) hold that statutes have been the dominant mode of the development of American democracy, with the Constitution serving as a vision that is advanced through the development of statutory law. While the United States Constitution establishes a basic governmental structure, "the biggest change in the Constitutional structure has been the creation of the modern administrative state, through congressional delegations of *lawmaking* authority to independent agencies" in the writing of statutes (Eskridge & Ferejohn 2010: 10).

While a rich literature to date has evaluated systematically the conditions conducive to passage of legislation (e.g., Brady & Volden 2006; Krehbiel 1998), as well as the nature of voting patterns on those laws, the study of statutes to date has neglected their dynamic dimension. I argue that this dynamic component is a critical dimension of how law, policy, and the American state develop over time, with this conception of lawmaking capturing better the realities of the increasingly complex, amendment-based nature of modern statutes, as well as the ongoing nature of inter-branch interactions in shaping policy outcomes. Indeed, in a complex and growing state, and with increasing partisan division at the elite level over policymaking (McCarty, Poole, & Rosenthal 2006), the project argues that if we want to understand not simply the predictors of legislative outputs, but the *policies* we ultimately

observe, considering these ongoing inter-branch tensions over implementation is essential. Thus, in the chapters that follow, I seek to build on these conceptions of the state and its regulatory capacity, and examine the evolution of its reach given the understudied dynamic inter-branch interactions that reshape legislative police power (Novak 2012: 41), bureaucratic discretion, the role and powers of courts, and the certainty with which regulated entities can go about the business of domestic policymaking.

What is Noncompliance?

At the heart of this project's analysis is the important relationship between representation and administration. Epstein & O'Halloran (1994, 1996, 1999) and Huber & Shipan (2002) provide key models of statutory discretion granted agencies by Congress, building on Hőlmstrom's model in which the principal delegates a subset of the policy space $\mathbb{R}$, thus creating a discretionary window in which the agency chooses its preferred policy. Such models speak to the core bureaucratic policymaking question of how Congress can capitalize on agency expertise while still achieving policies that are consistent with the legislature's preferences. A complication to this delegation can potentially be the difficulty of retracting discretion once it has been allotted due to the complexity of the American separation of powers system, thus leaving room for bureaucratic drift (Volden 2002). That is, the executive will not want to give up administrative power when the agency reflects its preferences, and given the the executive's veto power over legislative proposals, there exists an asymmetry between granting discretion and subsequently restricting that discretion (Id at 115).

The ways in which the democratically-elected Congress chooses to structure administrative procedures impacts both the agency's political accountability and the technical accuracy of its decisionmaking, with procedures promoting agencies' acquisition of technical competence having the added consequence of raising the potential for bureaucratic drift away from legislative preferences (Bawn 1995). In a world of perfect bureaucratic accountability, they would make the same decisions as would the principals if they held the information held by

the bureaucrats – thus, the agent chooses the "best" result on behalf of its political principal (Gailmard & Patty 2013: 4). While Congress – the directly elected branch – delegates to administrative agencies, it maintains a number of tools at its disposal in order to induce compliance in agencies and thus ensure better representation in implementation. For example, it can adjust reauthorization cycles for agencies or programs, potentially going so far as to require annual reauthorizations and thus further constraining the agency. It maintains the "power of the purse," and thus can reduce the aount of funding afforded the agency, in turn limiting the extent of the agency's discretion. It can hold oversight hearings to investigate agency actions, or require audits of the agency activity through inspectors general or the General Accounting Office (GAO). It can impose administrative procedures that limit bureaucratic autonomy in implementation, such as the imposition of requirements that the agency report to Congress or consult with other administrative agencies before taking action (McNollgast 1987). And perhaps most extremely, it can remove officials from office. These various powers at Congress's disposal help to facilitate responsiveness in statebuilding in a world of bureaucratic governance. Maskin & Tirole (2004) likewise find that elected officials, rather than unelected agents, engaging in policymaking directly provides to voters the advantage of ex post removal of officials producing unfavorable policies, as well as providing incentive for the elected politician to exert effort on behalf of the electorate, though these advantages are conditioned by the electorate's ability to effectively provide this monitoring of the policymaker.

The many veto players at work in the American political process virtually guarantee that the key actors in the branches will have divergent preferences over policy. After all, justices of the Supreme Court are nominated by the president and confirmed by the Senate, thus requiring some threshold level of compromise in order to ensure confirmation. The same is true of agency heads, who implement policy within the executive branch but whose

preferences may not entirely cohere with those of the president.[4] Moreover, in order to ensure passage of legislation, there mut be some degree of overlapping preferences between the chambers of Congress, and supermajority institutions (e.g., the filibuster) can incite greater conflict within Congress and require greater degrees of bargaining in order to move policy. Thus, both within Congress and when looking to the other branches, the separation-of-powers system in the United States is highly conducive to the persistence of ideological conflict. In evaluating bureaucratic behavior in policymaking, I adopt Wilson's (1989) assumption that bureaucrats hold preferences about their personal condition – such as self-promotion, power, prestige, and financial reward – and about the policy in which they are engaged. Thus, noncompliance grows out of these combined incentives over both political and policy influence.

Given the challenges inherent in passing legislation of significant impact, namely the passage of legislation fraught with uncertainty over the policy being set, and complexity arising as legislators seek to buy support from others (see Moe 1989), it is little wonder that there is ample dissatisfaction over the policy outcomes emerging from the American bureaucracy. Such difficulties are only amplified amid statutory goals that are "frequently vague and nonoperational," making rational decisionmaking on the part of the agency a difficult endeavor (Gawthrop 1969: 111). The statutes that emerge – for reasons tied either to the bargaining processes of Congress or a lack of consensus over the proper policy – have a degree of permissiveness in their delegations to administrative agencies. Moreover, on a more pragmatic note, there are congressional incentives to provide bureaucrats with the ability to respond flexibly to unique situations where there is not a clear precedent (Lipsky 1980: 105). However, given the ample separation-of-powers conflict over ideology, as well as institutional prerogatives for power, there are conditions under which agencies cross a boundary – that

[4]See Gailmard & Patty (2007), who argue that the president has incentives to allow bureaucrats to develop expertise and thus carry out better policy. However, those bureaucrats willing to invest in becoming experts are those who themselves have stronger policy preferences, thus being considered the "zealots" in the American bureaucracy.

is, stepping outside of their discretionary windows – in a way that I refer to as *bureaucratic noncompliance*.[5]

The notion that agencies might not – as the dominant models of bureaucracy suggest – efficiently and effectively implement their target policies has not gone entirely unnoticed, with Huber & McCarty (2004) evaluating errors in agency implementation and and arguing that such errors make it more difficult for principals to detect whether the agent is choosing a policy that it has not approved (see also McCarty 2011, *working paper*) and thus falls within the scope of noncompliance. Carpenter (2003) notes that bureaucratic agencies often demonstrate reluctance to reach regulatory decisions, with extensive variability among agencies with respect to the time that they take to grant permits, issue licenses, adopt new policies, prosecute cases, and approve products, even when faced with the same statutory, structural, and procedural environments in which they are operating. Carpenter argues that agency inducement of such regulatory delay allows the agency to obtain valuable information about the implications of its decisions, as well as potential reputation costs that would emerge, though there are costs associated with agencies' failure to take prompt action (e.g., failure to adequately respond to a crisis or demand). Further, Brehm & Gates (1999) argue that understanding compliance is necessary in order to understand issues of control and oversight, with Congress and the President unable to control policy administration if the implementers (bureaucrats) have discretion to an extent that they cannot be effectively managed.[6]. There is, of course, the complication of precisely *with what* the agency is not complying, given that "few public policies are immune from political drift, and many are bombarded by it" (Callander & Krehbiel 2014: 819). While congressional coalitions may work to stack the deck against a future administration through ex ante constraints such as

[5]While Lipsky (1980: 49) notes that goal ambiguity is "intrinsic" to street-level bureaucracies, with "ephemeral" tasks delegated to them, I focus here on clear statutory mandates or bounded windows of discretion.

[6]Further, adverse selection problems can arise given that Congress not only is constrained in its inability to monitor all agency activities once it has delegated authority, but Congress cannot accurately identify the agency's true type (Id at 191).

reporting requirements or sunset provisions, "if this coalition is replaced, then the new principals will not be able to force the bureaucrats to obey their wishes" (Tsebelis 2002: 237), potentially necessitating the passage of new legislation to shift the policy location toward the preferences of the new legislative principal. To do so, however, becomes increasingly costly amid higher levels of legislative conflict and polarization, leaving limited room for departure from the status quo. Thus, Tsebelis (2004) argues, bureaucratic independence from the current arrangement of veto players increases with the number and ideological distance among those players (Id), a claim that I too put forward and find support for.[7]

The expectation given some understandings of the judiciary is that courts interpreting statutes would expect compliance with the enacting Congress, which produces the statutory text to which regulated entities – as well as agencies regulating them – are held accountable. Yet given the various models of congressional relationships with bureaucracy, there is reason to expect that agencies would see value in implementing in accordance with the preferences of their current principal – the contemporary Congress – rather than upholding outdated statutory provisions. After all, it is the Congress currently in power that is empowered to punish an agency for what it perceives as transgressions, and there is a legitimate question as to whether the 108th Congress would seek to uphold the statutory bargain struck by the 88th Congress, as opposed to seeking to push policy toward its own preferences. Thus, agencies can fail to comply with either the text written by the authorizing Congress – which raises questions of to what extent we observe the *rule of law* as opposed to the substitution of bureaucratic preferences – or with the contemporary Congress to which it can be held accountable, which is consistent with the more common delegation and bureaucratic control stories of American institutions. To which of these political principals agencies are most attentive (and under what conditions) is an issue not confronted directly by the delegation literature, and one that this project seeks to explore. Because no work to date has sought to

[7]However, there is the potential that fixing these statutes and regulations can compromise the government's performance as well as its ability to act as a representative institution (Callander & Krehbiel 2014).

measure bureaucratic noncompliance, I create an original measure of agency curbing activity from Congress, which captures congressional identification of deviations from its preferred policy implementation, as well as a measure of agency losses in the DC Circuit, which captures the extent to which agencies are found in court to have deviated from the statutory texts that they are tasked with implementing. What then emerges is a clearer conceptual understanding of bureaucratic implementation amid a tug-of-war between congressional and judicial interpretations of agency authority and responsibility to regulate.

The challenge of adjudicating among different interpretations of the agency's statutory obligations can be seen plainly in Congress's passage of the Clean Air Act Amendments of 1990, Section 182 of which contained the important error of aiming for too small a target with respect to achieving progress in reductions. The Environmental Protection Agency, tasked with carrying into effect the Clean Air Act of 1990, was faced with the dilemma of whether to apply a textualist reading to Section 182 and thus maintaining the lower occupancy standard or whether to apply a broader reading of the statute so as to adopt what it viewed as a more sensible regulatory approach (Herz 1992: 193). Part of the decisionmaking calculus on the part of the agency is the prediction of whether the court would apply a textualist reading of the statute should litigation be pursued. By pursuing the facially more reasonable regulatory strategy, the agency must depart from the statutory language in favor of a more purposive reading of the Act, albeit at the risk of being deemed noncompliant with the statute should the agency find itself in court. Yet by pursuing a textualist strategy, the policy outcome is at odds with the legislative goals underlying the statute as a whole, and the question that follows in the post-*Chevron* period is whether the Court will deem the agency's action to be based on a reasonable statutory interpretation as opposed to being in conflict with unambiguous legislative text.

Deviations from statutes and congressional preferences can be found from both the left and the right, across a number of salient policy domains. Carpenter (2010) calls attention to

two such episodes within the Food and Drug Administration, from different political parties and each resulting in ultimate rejection of the agency's efforts. The first (Democratic) move by the FDA was made by then-FDA Commissioner David Kessler, who in 1994 sought unsuccessfully to regulate by rulemaking tobacco amid reports that cigarette manufacturers were manipulating the nicotine levels of cigarettes. The FDA concluded that under the Federal Food, Drug, and Cosmetic Act, nicotine was a drug and that cigarettes and smokeless tobacco were devices used to deliver that drug to the body, thus falling within the domain of its authority to regulate under the FDCA. Kessler's regulatory efforts were challenged in court and in 2000, the Supreme Court held in *FDA v. Brown & Williamson Tobacco Corp* that the Food and Drug Administration lacked the statutory authority to regulate tobacco under the Food, Drug, and Cosmetic Act (2010: 745). It would not be until 2009 that Congress formally delgated to the FDA that regulatory capacity.

Lest one believe that extensions beyond statutory authority be specific to the traditionally more pro-regulation Democratic actors, conservative and libertarian forces sought to extend the FDA's power over pharmaceuticals on a federalist dimension in 2001 with the introduction of state tort preemption. However, as with the FDA's more liberal effort at tobacco regulation, in *Wyeth v. Levine* (2009), the Supreme Court struck down the FDA's federalist claims by a vote of 6 to 3, rejecting the notion that the FDA's enabling act preempted state-level failure-to-warn litigation (Carpenter 2010: 747).

One can scarcely search records of the Environmental Protection Agency without finding numerous accounts of states and interest groups suing the agency to mandate enforcement of environmental standards. Apart from sheer partisan-related dissatisfaction with agency actions, the 1980s and the subsequent years have been marked by flurries of lawsuits challenging the validity of EPA enforcement actions and the slowness of the pace at which the EPA was acting. Such suits were brought by environmental organizations such as the Coalition for Clean Air and the Sierra Club, which sought to force the EPA to assume responsibility for

local enforcement of the Clean Air Act, and by states objecting to inadequate environmental protection from the Agency.

To take an example, we find in *Natural Resources Defense Council v. Train*[8] (1976) a challenge brought under Section 108 of the Clean Air Act, which EPA Administrator Russell Train interpreted as discretionary authority to promulgate national ambient air quality standards with respect to various pollutants. As a consequence of this interpretation of the language as discretionary, he failed to establish those standards. Looking to the relevant precedents, the court found no support for Train's argument that the EPA was not obligated to promulgate ambient air quality standards, and that the legislative history of the Clean Air Act was clearly contrary to the EPA's interpretation: "The structure of the Clean Air Act as amended in 1970, its legislative history, and the judicial gloss placed upon the Act leave no room for an interpretation which makes the issuance of air quality standards for lead under [Section]108 discretionary."[9] Thus, the EPA had acted contrary to both the statutory text and the legislative history in failing to regulate according to Section 108. Such cases, though infrequent relative to the broader swath of regulatory activity that is carried out daily, are at the heart of the dissertation.

Moreover, in her 2003 testimony before the Senate Subcommittee on Fisheries, Wildlife, and Water, Professor Rena Steinzor on behalf of the Center for Progressive Regulation[10] noted that routine enforcement by the Environmental Protection Agency was at its lowest ebb in a decade, with declines in enforcement effectiveness from both litigation and penalties assessed, with further deregulation on the horizon. Indeed, she cited, the number of EPA

[8]545 F.2nd 320.

[9]It is worth noting also that a plain text reading of Section 108 reveals mandatory, not discretionary language directed at the Administrator: "For the purpose of establishing national primary and secondary ambient air quality standards, the Administrator shall within 30 days after December 31, 1970, publish, and shall from time to time thereafter revise, a list which includes each air pollutant (A) which in his judgment has an adverse effect on public health or welfare..." Such language lends further support to the claim that such cases are not simply challenges of interpretation of intentionally vague statutes.

[10]Steinzor, Rena. Testimony before the United States Senate Subcommittee on Fisheries, Wildlife, and Water. September 16, 2003.

inspections and enforcement staff had fallen under the Bush Administration to the lowest level since the agency's establishment, and those found in violation of the environmental statutes were paying 77% less than in previous years. Thus, there was a clear partisan-driven effort on the part of the agency to regulate below the level set by the statute and in years previous.

While not specifically aimed at issues of compliance per se, the growth of environmental regulation in the 1970s led to extensive discussion of disparate impact of environmental harms, in violation of the Equal Protection Clause of the Fourteenth Amendment of the Constitution as well as Title VI of the Civil Right Act of 1964. Legal challenges over agencies' permission of industries' perpetuation of environmental harms that disproportionately expose minorities to environmental risks and harms have been particularly challenging given the requirement of demonstrating discriminatory *intent* as opposed to simply a discriminatory *effect*. For example, despite the district court acknowledging in *Bean v. Southwestern Waste Management Corp*[11] that a state agency's permit to allow a solid waste facility in a given community would affect the entire community's land values, tax base, aesthetics, and the health of its inhabitants, the court rejected the challenge despite the land in question being in a community with approximately a 60% minority population and noted that it would be expected that solid waste sites would be placed in locations away from densely populated regions. Thus, while the impact of these solid waste sites were likely to have greater impacts on minority communities, there was insufficient proof that it was a product of purposive racial discrimination (Brougher 2013). The National Environmental Policy Act (NEPA) allows individuals adversely affected by agency actions to bring legal challenges in court under the Administrative Procedure Act,[12] which provides for a private right of action,

[11] 482 F. Supp. 673, 677.

[12] The Administrative Procedure Act (APA), passed in 1946, created the basic framework of American administrative law governing agency actions and was the product of struggles between regulating and regulated interests with respect to the New Deal agencies and concerns about the extent of power with which they were endowed. However, Congress has in more recent decades enacted statutes that mandated rulemaking procedures to supplement or supercede the APA (Lubbers 2006: 3, 5).

should it appear that the agency failed to satisfy the statutory requirement of providing detailed environmental impact statements prior to making its decisions (Id at 7).[13] However, the flexible language of NEPA's requirements of environmental impact statements has led to potentially excessive discretion in their use of delegated authority, allowing agencies to incorporate into their decisionmaking and actions discriminatory principles in violation of the Equal Protection Clause and Title VI (Id at 9).

In addition to the legal challenges ultimately finding their way into the appellate courts, one can find even more accounts of noncompliance when turning to earlier stages of opposition to agency behavior, in the form of notices of intent to sue. Such documents serve as last resort actions taken by plaintiffs before going to court, addressing the (alleged) malfeasance on the part of the administrative agency. For example, on February 11, 2015, the Earthrise Law Center of Lewis & Clark Law School submitted to the Environmental Protection Agency Administrator Gina McCarthy a 60-day notice of intent to sue, due to the Agency's failure to perform its mandatory duties specified in Section 303(c)(4) of the Clean Water Act (CWA), with respect to the promulgation of aquatic life toxics criteria for the State of Oregon. Upon Oregon's revision of aquatic life toxic criteria in 2013, the EPA had "approved 38 criteria values associated with 14 toxic pollutants while simultaneously disapproving 45 criteria values associated with 16 toxic pollutants," and in response to the EPA's formal disapproval, the Oregon Department of Environmental Quality adopted revisions. However, the revisions made still failed to address seven disapproved criteria values associated with four toxic pollutants relevant to the Endangered Species Act, which is implemented jointly by the Environmental Protection Agency and the Department of Interior.

According to the CWA, if a given state fails after 90 days to adopt changes to water quality standards, the EPA has a nondiscretionary duty to promulgate replacement standards on

[13]In his Executive Order 12898 in 1994, President Bill Clinton would expand environmental justice goals beyond the Environmental Protection Agency, requiring that all federal agencies work toward environmental justice by identifying and addressing, to the extent possible, the environmental impacts of their programs.

behalf of the state. Apart from the State of Oregon lacking a specific plan to take further action to regulate those substances, the EPA had failed to promulgate replacement criteria as required under Section 303(c)(4) of the Clean Water Act. Such failure to take prompt action was not only with respect to mandatory duties under the Act – thus a clear failure to comply with statutory obligations – but also was argued by the Earthrise Law Center to pose considerable concerns for Oregon's water and wildlife. This instance is merely one of many in which such groups have provided such 60-day notices of intention to sue the Agency, including for failure to promulgate rules by deadlines, failure to maintain compliance with permit requirements, and failure to satisfy other mandatory obligations established in a number of the statutes under its jurisdiction.[14]

In addition to these interest group allegations of bureaucratic misbehavior, hundreds of lawsuits since the EPA's inception were resolved with judicial holdings that the EPA had issued arbitrary and capricious rules that were in contradiction of the statutes it implements.[15] Moreover, in the aftermath of Congress's passage of the Resource Conservation and Recovery Act (RCRA) of 1976 – a significant statute that established a regulatory framework for the handling of hazardous substances and solid wastes – petroleum and mining industries raised allegations that the Environmental Protection Agency's regulations were introducing overbearing safety requirements that subjected the companies to excessively high standards in the handling of such materials. The Court of Appeals would subsequently find on August 2, 1987 that in imposing the requirements that certain chemicals be considered hazardous – and thus subject to those higher standards – the EPA had exceeded its statutory authority

[14]For example, on February 10, 2015, the Conservation Law Foundation worked to sue the EPA for its failure to notify stormwater dischargers that they must obtain effluent discharge permits under the Clean Water Act; on September 2, 2014, the WildEarth Guardians worked to sue the EPA for causing unreasonable and intentional delay in responding to Colorado's failure to administer its permitting program; and on April 28, 2014, the Sierra Club worked to sue the EPA for its failure to promulgate a Federal Implementation Plan (FIP) within two years of its partial disapproval of Arkansas' revised Regional Haze (RH) and Interstate Transport State Implementation Plans (SIPs).

[15]While Administrative Procedure Act (APA) cases were noted in the data collection, they were not counted as *noncompliance* unless there was a substantive violation declared by the court.

to regulate under RCRA. Thus, I can confirm that bureaucratic noncompliance – whether in the form of exceeding regulatory authority or failing to take mandatory actions – is behavior sufficiently prevalent such that much can be gained by understanding better the forces driving it and the policy consequences that it triggers in the American regulatory state.

Noncompliance in Action

Whether the agency properly construed its obligations under the Clean Air Act was a matter that came before the DC Circuit in *American Trucking Association v. United States Environmental Protection Agency* (175 F.3d 1027), with the per curiam decision rendered by the court on May 14, 1999.[16]

At stake was Section 109 of the Clean Air Act, the beginning which provides that the Administrator of the EPA "publish proposed regulations prescribing a national primary ambient air quality standard and a national secondary ambient air quality standard for each air pollutant for which air quality criteria have been issued prior to such date" (42 U.S.C. 7409). Consistent with this requirement, the EPA issued in July 1997 final rules that revised the primary and secondary national ambient air quality standards (NAAQS) for particulate matter and ozone. However, the DC Circuit held that the "construction of the Clean Air Act on which EPA relied in promulgating the NAAQS at issue here effects an unconstitutional delegation of legislative power," and that the EPA "appear[ed] to have articulated no 'intelligible principle' to channel its application" of public health concerns in setting NAAQS. Thus, they remanded the case for the EPA to develop a construction of the Clean Air Act that was constitutional. The DC Circuit held further that Section 109 did not permit the EPA to consider costs in promulgating NAAQS, and that its choice of certain substances to be designated as particulate matter was arbitrary and capricious.[17] The fact

[16]The decision was rendered by a mixed panel of judges, with Reagan-appointed judges Williams and Ginsburg,and Clinton-appointed judge Tatel. However, despite the per curiam nature of the opinion filed, Judge Tatel submitted a separate opinion dissenting from Part 1 of the decision.

[17]Arbitrary and capricious is a legal ruling in which the court holds that an agency action is invalid because

that this decision was ultimately overturned in 2001 by the Supreme Court in *Whitman v. American Trucking Association*, with the majority opinion by Justice Antonin Scalia, calls attention to the complexity of these cases and the difficulty in determining definitively the precise bounds on bureaucratic discretion that Congress affords agencies in delegating.

While it is a simpler matter to evaluate the presence (or lack thereof) of noncompliance with respect to mandatory agency actions, this is a more complex task in the absence of agency forcing provisions. That is, when can we tell whether agencies are noncompliant in exercising their discretionary authority?

Such an issue came before the DC Circuit in *Ethyl Corporation v. Environmental Protection Agency* (918 F.2d 225), decided per curium on November 28, 1990.[18] Under the Resource Conservation and Recovery Act of 1976, the EPA was granted the authority to regulate solid and hazardous wastes, the latter of which were defined as a subset of "solid wastes," which were defined to include only those products that were actually discarded. Ethyl Corporation brought a legal challenge against the EPA, which had promulgated rules regulating TBBPA product slurry and byproduct brine as hazardous waste K131, holding that the EPA had erroneously characterized these substances as discarded wastes that fell within its jurisdiction because they were not discarded, but rather *recycled* products over which the EPA lacked authority to regulate. The DC Circuit held in favor of Ethyl Corporation, writing that TBBPA slurry is a "commercially useful product that is neither discarded nor a waste, and the byproduct brine is immediately recycled in the promine production operation," thus falling outside the scope of "solid wastes" within as defined in RCRA. Thus, given the discretionary authority to regulate a certain class of substances, the EPA regulated those substances that were beyond the scope of its jurisdiction given Congress's definition

it was made on unreasonable grounds or didn't adequately consider various circumstances. Court evaluations of whether agency actions are arbitrary and capricious is part of step two of the *Chevron* review.

[18] As with *American Trucking*, this decision was rendered by a mixed panel, with one Democratic appointee (Ruth Bader Ginsburg, nominated to the DC Circuit Court of Appeals by President Jimmy Carter) and two Republican appointees (President George H.W. Bush appointee Judge A. Raymond Randolph and President Ronald Reagan appointee Judge Laurence Silberman).

of solid wastes in the delegating legislation. While some might view such a case as mere disagreement over statutory interpretation, the clarity of the RCRA definitions and the nature of the regulated products suggests that there was little ambiguity with respect to whether the EPA's authorization to regulate solid waste under RCRA extended to these entities, and that the agency had overstepped its discretionary window.

The above discussion acknowledges that a broad swath of activity can fall within the realm of noncompliance as I evaluate it in this dissertation, and questions can reasonably arise as to the extent to which they can properly be characterized as being under the same umbrella of "noncompliance." On the one hand, one might consider noncompliance to be an agency failing to achieve a mandatory policy goal – perhaps better characterized as a point on a line in policy space falling from a left-to-right or more regulatory to deregulatory continuum – that was compelled by Congress (*e.g.*, "the Administrator shall prohibit the use of..."). On the other hand, one might consider noncompliance also to be the agency's moving beyond the discretionary window that Congress has allotted. That is, rather than mandating a certain policy choice, the agency might choose a policy that is outside the various options that Congress has deemed permissible for the agency to enact. This dilemma of measurement captures the important question of whether agency forcing provisions and agency punishment for foot-dragging ought indeed to be classified as the same overarching type of behavior.

Because in this project I consider noncompliance to be agency efforts to maximize discretion in ways that work to pull policy toward their own preferences rather than strictly following legislative dictates and/or statutory text, I consider both classes of action to fall within the realm of noncompliance. However, the question remains as to whether they should properly be pooled in the analysis as opposed to disaggregated. The advantage to disaggregating these forms of bureaucratic action is the abiltiy to decipher the conditions under which agencies will adopt one such path over the other. However, there are important limitations to such an approach, which govern the project largely pooling all such bureaucratic

behavior under the umbrella of noncompliance, given the small-N problems that arise from too much disaggregation.

There is the further challenge of litigants' selection to pursue cases in the DC Circuit Court of Appeals: while it is a simpler matter to provide evidence of agencies overstepping their bounds (that is, failure to achieve the point on the line in policy space), defining discretionary windows and agency actions in relation to them is a harder task to acheive in court. Thus, there is a more limited about of litigation on those grounds, resulting in small-N problems with respect to the quantitative analysis. However, in the qualitative evaluations I do consider cases of both overregulation and underregulation, and as robustness checks in the analysis of congressional constraints on agencies, I provide model specifications that disaggregate requirements and prohibitions, which I argue capture concerns with respect to whether the agency is failing to meet mandatory obligations (policy points) or exceeding discretionary windows (ranges of discretion).

Dimensions of Noncompliance

Just as we can expect that legal opinions will have greater or less significant consequences, or that the voting public will be more or less persuaded by negative advertising, so too can we expect that an agency will be more or less compliant, and that there will be variation in the *extent* of noncompliance. Such a metric has value so as to enable us to answer such questions as, When will it make sense for Congress to exert the effort in intervening in this noncompliance? Not just whether, but *to what extent* are individuals are industries affected (and in particular, harmed) by these bureaucratic actions? Are the legislative and judicial remedies with respect to the agency reasonable given the extent to which the agency strayed from its responsibilities or authority under the delegating legislation? Due to the scholarly inattention to the domain of bureaucratic noncompliance, there is not a clear roadmap for evaluating this.

There have, however, been attempts at grasping significance in other domains, which

can help to inform how we evaluate the extent of bureaucratic noncompliance. I argue that there are three core mechanisms that should indicate to us the gravity of the noncompliant activity, as opposed to its potential triviality.

1. *Noncompliance in Significant Legislation.* A number of scholars (Mayhew 1991; Cameron 2000; Lapinski & Clinton 2006) have taken great efforts toward identifying the pool of significant laws from the broader set of public laws passed by Congress, and in the case of Cameron (2000) and Lapinski & Clinton (2006), finding some way of ranking not just their status as significant laws, but also their *degree* of significance, as opposed to being important but not highly significant, or merely ordinary legislation. One can expect that an agency skirting the edge of its authority in implementing a law that has been deemed to be of little importance relative to the rest of the body of laws passed by Congress should not be as consequential as if the agency were to fail to comply with its obligations under the Clean Air Act, a highly significant law and the most important one under the jurisdiction of the Environmental Protection Agency. Thus, the significance of the law being implemented should have a bearing on the significance of the violation (or potential violation) on the part of the agency.

2. *Scope of Those Affected by the Noncompliance.* While some bureaucratic actions affect a wide swath of activity, other decisions have implications for fewer individuals or organizations. For example, while air regulation (e.g., the Clean Air Act) is an issue of national, even global significance, policies affecting water tend to be more at the state or local level, and disputes over land allocations and preservation are most definitely of a more local character. While it is undeniably the case that noncompliance can *greatly* affect a smaller number of individuals or organizations, or only *mildly* affect a larger population, the scope of the impact of the agency's noncompliant behavior does serve as a reasonable proxy for the significance of the action taken.

3. *Visibility of the Noncompliance.* The third and final metric by which I argue that

one can evaluate the significance of noncompliant implementation behavior is the extent to which the noncompliance is visible. Just as a law's significance can be evaluated on the basis of the extent to which it was covered in news outlets or more politics-specific venues such as *Congressional Quarterly (CQ)*, or the impact of court cases evaluated on the basis of the volume of their citations, one can consider the extent to which the media addresses a case of noncompliance as being at least somewhat indicative of the extent and meaningfulness of the (potential) transgression. That is, we would not expect the *New York Times* to allocate extensive coverage with respect to a relatively trivial deadline, but we might expect the *New York Times* to extensively cover an agency's failure to promulgate necessary rules under the Clean Air Act.

While I do not attempt in this dissertation to measure degrees of noncompliance – though it is a worthwhile venture for future related work – I do evaluate whether or not the noncompliance is with respect to the implementation of significant legislation using the set of significant laws identified by David Mayhew (1991), in addition to discerning the conditions under which that noncompliance will have heightened impact and visibility.

Understanding Agency Ideology: Noncompliance *by whom*?

Having discussed bureaucratic noncompliance – both what I mean by it and how we can evaluate its impact – it is worth considering *by whom* we are evaluating this noncompliant bureaucratic behavior. While justifications for delegation often emphasize bureaucrats' greater policy expertise and administrative capacity, there is the additional ideology-related consideration that "[i]f agents care about the content of policy, they will value the opportunity to influence it," (Gailmard & Patty 2013: 25), a factor that implicates the driving forces behind agencies' policy adoption in the United States and the ultimate extent of democratic accountability obtained in the process. Such ideology is acknowledged in Wilson's (1989) analysis of the American bureaucracy, noting that higher-level federal bureaucrats are more

liberal than the population at large, and far more so than those in the business climate with which they interact (1989: 65), though he notes at among senior agency executives there was ideological variation across agencies (Id at 66).

While the president puts forth nominations for cabinet secretaries (*e.g.*, Secretary of Interior, Secretary of Labor) and other high-level posts (*e.g.* Administrator of the EPA), such nominees must be confirmed by the Senate, thus requiring at least some degree of political compromise that may result in an agency head having preferences not wholly consistent with the nominating president. The existence of independent agencies provides for the potential for greater disconnects in preferences given their insulating features such as bipartisan commissions with fixed terms and insulation against removal. And underneath the level of political appointees is a larger civil service, with some staff serving under multiple executive administrations. Thus, there is the additional complicating potential for ideological heterogeneity within an agency or, in the case of civil servants (careerists), a lack of policy motivation altogether. However, Howell & Moe (1999) model an executive who is able to set bureaucratic preferences until those actions are overturned by Congress or the courts. Moreover, as Gailmard & Patty (2013: 37) note, given the marked wage imbalance between private labor markets and government employment, one can expect that even those in careerist positions will pursue such a career not for the monetary gains, but rather for the potential to influence policy outcomes even from the lower ranks. Such a view is consistent with Carpenter's claim that "[b]ureaucrats are politicians, and bureaucracies are organizations of political actors" (2001: 353). But given the different layers of political appointees and staffers, it is important that we make clear the setting in which we are predicting noncompliance motivated by separation of powers conflict. Such an argument is further supported by Wilson's (1989) claim regarding the development of bureaucratic culture, with the bureaucrats' political views tending to correspond with the overall political orientation of the agency: "Bureaucracies will in time acquire a distinctive personality or

culture that will shape the attitudes of people who join these organization" (Wilson 1989: 68). Thus, not only may bureaucrats inherently have political preferences that align with the work with which they are engaged, but they may, according to Wilson's theory, select into agencies that are consistent with their ideology, while the agency "produc[es] certain attitudes in its members" (Id).

This is not to say that there is perfect alignment between all bureaucrats and the institutions in which they are situated. There is the alternative possibility that those views made *public* are those that reflect the preferences of the more ideological agency heads, while not necessarily reflecting the preferred positions of those at the lower ranks. Responding to the marked influence of interest groups and lobbyists, which in many cases led to the suppression or distortion of EPA scientists' findings, in 2007 the Union of Concerned Scientists (UCS) joined forces with the Center for Survey Statistics at Iowa State University to distribute a 44-question survey to nearly 5,500 EPA scientists on the subject of political interference in their scientific work for the Agency, the use of science in EPA decisionmaking, communication barriers in the Agency, employee morale, and their perception of the EPA's effectiveness (Union of Concerned Scientists).[19] The UCS survey resulted in a 29% response rate, with 1,586 completed surveys returned from scientists in all of the EPA offices and regions. The respondents reported the following:[20]

- 60% of respondents had at least one personal experience with political interference in the past five years.
- 43% of EPA scientists with more than 10 years of experience at the agency said that political interference was more prevalent in the past five years than in the previous five-year period.

[19]The survey sample was identified from EPA websites, consultations with current and former EPA employees, and internet searches.

[20]See Union of Concerned Scientists, "Interference at the EPA: Science and Politics at the U.S. Environmental Protection Agency" (2008) for a full report.

- 7% had frequently or occasionally been told to inappropriately exclude or alter technical information from scientific reports by the EPA.
- 16% had personally experienced frequent or occasional situations in which scientists actively objected to, resigned from, or removed themselves from EPA projects due to political pressures to change reports of scientific findings.
- 18% had personally experienced frequent or occasional situations in which their scientific findings had been changed or edited in substantial ways.
- 22% had personally experienced frequent or occasional isntances of their data only being revealed selectively or incompletely in ways that justified a specific regulatory outcome.
- 13% had personally experienced frequent or occasional pressure to ignore regulatory impacts on sensitive populations.
- 24% had personally experienced unreasonable disappearance or delay in the release of their reports and scientific materials.
- 31% had personally experienced EPA leadership mischaracterizing scientists' findings.
- 43% knew of many or some cases in which EPA political appointees had become inappropriately involved in scientific decisionmaking in the Agency.

While Gawthrop (1969: 112) characterizes it as "inevitable" that top-level administrative executives will become wholly dependent on their subordinate administrative officials in order to effectuate their responsibilities, these survey findings collectively point to a picture of an administrative agency whose scientists – that is, the careerists within the agency as opposed to the political appointees – are largely constrained by the preferences of those at the level of the appointed leadership, which appears from these findings quite willing to suppress

potentially valuable information so as to support its policy positions. Thus, whether the truth is closer to Wilson's characterization of bureaucrats in effect selecting into ideologically-aligned agencies and thus having preferences consistent with the often quite liberal agency heads, or closer to the survey findings that suggest the squelching of ideological disagreement within the agency, what does appear clear is that the policy adoptions ultimately made reflect the preferences of political appointees at the top of the hierarchy.

Such behavior can also be found in the Department of Interior, which was alleged by its own Scientific Integrity Officers to have presented distorted summaries of studies and with critical omissions and repeated inaccuracies all slanted in one direction with respect to a pending decision to remove dams in the Klamath River.[21] Moreover, according to a 2012 survey conducted by the Public Employees for Environmental Responsibility, in which the staff of the Interior Department's Office of Inspector General (IG) were surveyed and 82% responded, a growing number of investigators view the Office as actively working to avoid embarrassing the administration rather than exercising political independence. Indeed, when asked whether the IG conducted its work "free from improper influence" from the DOI, nearly one in seven respondents said no and more than a quarter declined to respond, with less than 60% saying yes.[22] These survey findings were consistent with Congress's and PEER's critiques that acting Inspector General Mary Kendall had compromised the IG's political independence in order to please political superiors. Given such staff statements as "There are at least perceptions the acting IG and COS [Chief of Staff] did not do the right thing, i.e., improperly squashed investigations, and have not been forthright with Congress," (Id) there is legitimate evidence that those in multiple capacities in the Department of Interior are working to support the goals of those at the upper eschelon (potentially in ways

[21] "Interior Denies Spinning Klamath Science: Complaint Deemed Factual but Inaccuracies Excused as 'Normal Practice.'" March 25, 2013. Press Release by PEER (Public Employees for Environmental Responsibility).

[22] PEER noted that these survey responses reflected less political independence in the IG than in the previous two years ("Rising Doubts on Independence of Interior Inspector General: Staff Survey Shows Only 60% Believe IG Operates 'Free from Improper Influence.'" October 9, 2012. Press Release by PEER.

contributing toward noncompliant activity), leaving limited latitude for even an ideologically heterogeneous coalition in the agency to stray far from those preferences.

Thus, despite Lipsky's characterization of street-level bureaucrats as "exercis[ing] wide discretion in decisions about citizens with whom they interact. Then, when taken in concert, their individual actions add up to agency behavior" (1980: 13),[23] at least within domain of the agencies on which I focus, and taking into consideration the potential policy motivations of careerists with more lucrative options in the private sector, those bureaucrats operating at the lower ranks appear to be both policy-motivated and operating with discretionary windows that are highly constrained by those at the upper eschelons of their respective agencies.[24]

The UCS noted in its report further that the White House Office of Management and Budget (OMB) – in particular its Office of Information and Regulatory Affairs (OIRA) – has played in increasingly prominent role with respect to the creation, review, and approval of regulatory decisions made by the EPA, using its influence to force the EPA to modify or withdraw many of its rules and policies since the Reagan Administration. In addition to merely reviewing EPA policies, the OMB additionally moved to micromanage the science underlying EPA decisionmaking, such as imposing extensive constraints on how agencies should conduct scientific analyses and even going so far as to manipulate scientific knowledge and the basis for EPA rules (UCS Report, "Interference at the EPA"). This provides further evidence of the close linkage between the policy choices ultimately made by the agency and the preferences of the White House.[25]

While Administrators of the EPA do not necessarily squeak through Senate confirmations

[23]The survey findings are also rather at odds with Gawthrop's (1969: 113) claim that subordinate bureaucrats may be biased by their motivations for advancement, as well as have an interest in discounting unfavorable information, though he notes that the latter claim was untested.

[24]One noteworthy exception to this is the process of "burrowing" – that is the transfer of political appointees into career positions so as to constrain future administrations' regulatory capacity.

[25]The high level of White House influence on EPA decisionmaking also provides greater support for the validity of using presidential ideology as a proxy for the agency's preferences, as I discuss in greater depth in the chapters that follow.

by narrow margins,[26] they have not been without ample controversy during their tenures as administrators. Only months after the Reagan Administration's narrowly avoiding a House of Representatives citation of contempt of Congress on the part of Secretary of Interior James G. Watt, who had refused to disclose required papers, EPA Administrator Anne M. Gorsuch was held in contempt of Congress by a vote of 259-105 for her failure to turn over required documents on the subject of hazardous waste cleanup under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980. Representative James J. Florio (D-NJ) held that the Reagan EPA had markedly slowed the legal enforcement of the hazardous waste laws passed by Congress, with dramatic reductions in prosecutions by the Agency. The congressional vote in favor of holding Gorsuch in contempt followed effective party line votes against Gorsuch in the House Public Works Subcommittee on Investigations and Oversight (9-2 vote) and the House Public Works Committee (27-11 vote) given her failure to comply with a congressional subpoena. [27] Moreover, Reagan's 1981 nomination of James Watt to be Secretary of Interior solidified the Administration's positions with respect to environmental deregulation, and though he garnered the support of 83 Senators, all 12 voting against Watt were Democrats, with no Republicans voting against his confirmation.[28] Such dynamics collectively suggest high levels of contentiousness as well as partisanship in the relevant agency leadership.

Central Hypotheses

Here I turn to the main claims of the dissertation, which I test in the chapters that follow. Cameron's (2000) treatment of veto bargaining is instructive in highlighting the potentially marked significance of bureaucratic noncompliance despite its potentially limited

[26]The July 2013 confirmation of Gina McCarthy as Administrator of the EPA garnered modest bi-partisan support with an ultimate Senate confirmation vote of 59-40, and the April 2005 appointment of Stephen Johnson was approved with a Senate vote of 61-37.

[27]See "Gorsuch Cited for Contempt of Congress." In *CQ Almanac, 1982*, 38th ed., 451-55. Washington, DC: Congressional Quarterly.

[28]See "Nomination of James Watt to be Secretary of Interior," http://scorecard.lcv.org/roll-call-vote/1981-13-nomination-james-watt-be-secretary-interior.

appearance in inter-branch interactions over statutory implementation. Cameron lays out a five-step sequential veto bargaining (SVB) model according to which institutional actors gauge one another's preferences and adjust behavior accordingly with respect to whether to pass or veto legislation (particularly within the context of significant legislation). Thus, while veto bargaining is in fact a common occurrence that permeates legislative-executive interactions, we rarely observe actual instances of vetoes, given their effective representation of the equilibrium breaking down amid uncertainty over the preferences of other actors. This is, then, a study of the politics of negative power.

Similarly, we cannot infer that bureaucratic noncompliance is insignificant because of the potentially only infrequent explicit punishments for that bureaucratic behavior, given that much of the separation-of-powers dynamics shaping agency implementation are in fact *unobserved*. If the agency is likely to suffer severe costs of not complying – such as the reduction of budget or the retraction of enforcement powers – then in equilibrium it will remain in check with respect to its observable behavior. The interesting inter-branch interactions come into play under conditions of reduced costs of noncompliance, such that the players' incentives are reshaped and the opportunities for the agency to shift policy come to expand greatly. That is, bureaucratic power expands under those conditions that are not conducive to punishment from the legislative branch given higher levels of partisan conflict and the multiplicity of sources of oversight. Agencies can thus pull policy toward their preferences – irrespective of the statute in force – under these conditions, and *if* agencies have judged correctly the political conditions in which they are operating, then in equilibrium we should not expect to observe acts of punishment of agencies. Likewise, instances of punishment for bureaucratic noncompliance can be thought of as off-equilibrium paths, with agencies potentially misjudging the likelihood with which they will indeed suffer costs for their regulatory actions. Observations of bureaucratic noncompliance may thus only scratch the surface of the extent to which this phenomenon plays out, and the extent to which its possibility shapes

other institutions' behavior. This presents a number of empirical challenges with which I grapple in the chapters that follow.

This project puts forward and tests a number of key hypotheses aimed at understanding better the dynamics at work in policy implementation and lawmaking in the complex and often divisive American separation of powers system. It goes without saying that an agency will not defect when it expects to suffer great costs of noncompliance, or when those costs exceed the potential gains. Administrators are known to be highly attuned to the political conditions in which they operate, with Melnick (1994: 241) noting the arsenal that Congress is capable of employing against administrators deviating from their preferences, such that bureau chiefs are constantly looking over their shoulders at congressional action in their domains of policy and operation.

In the chapters that follow, I argue that noncompliance rises under conditions of greater ideological divergence between the legislative and executive branches, and when there is greater partisan division within Congress, which raises the transaction costs of passing legislation to punish a noncompliant agency. The modal political configuration in the United States since the late 1960s has been divided government – that is, at least one chamber of Congress being controlled by a party other than that of the president – and a consequence of this political environment is congressional delegation to an agency (or agencies) committed to potentially quite different sets of policies. Under conditions of heightened legislative-executive conflict, agencies will be less satisfied with the policies preferred by Congress, and will have the most to gain from working more actively to shift the policy location toward the ideal point of the executive branch. But given the agency's desire not to suffer punishment for its regulatory behavior, its inclination to shift the policy location is conditioned upon the ease with which Congress is able to pass laws that would have the effect of reducing the agency's capacity or discretion.[29]

[29]It will also be conditioned upon the existing enforcement apparatus, given the difficulty of defecting when implementation is already highly fragmented across multiple administrative actors rather than concentrated

A rich literature on Congress has explored the causes and consequences of gridlock, which arises given key individual legislators' preferences relative to the location of the status quo (see, e.g., Krehbiel 1998; Brady & Volden 2008), as well as the important role of the filibuster as a tool to embolden minorities to block legislation that does not have supermajority support in the Senate (Wawro & Schickler 2006). Thus, amid narrow partisan majorities or greater partisan differences within or across the chambers of Congress, there is compromised ability to pass legislation that would shift the policy location (or to punish an agency for its transgressions). Given the fair assumption of agencies' awareness of these political conditions in Congress, I expect that these higher levels of gridlock will be associated with lower levels of compliance.

I expect further that bureaucratic noncompliance will be negatively associated with concentrated oversight mechanisms, with fragmented checks on bureaucratic power contributing toward more freedom to shift the policy location. Oversight challenges can arise from having multiple principals, among them information leakages and collective action problems that compromise collective control over agents (Gailmard 2009). Such collective action problems can lead to the underprovision of congression oversight of agencies, whether it be "fire alarm" or "police patrol" (see McCubbins & Schwartz 1984). And as congressional oversight of administrative agencies breaks down, so too does the extent of representation in administration.

Given this limitation in effective oversight, one might expect that having more actors with power or influence over an agency (e.g., congressional committees and subcommittees, the president, interest groups) should reduce subversion costs and thus increase the range of non-delegated policy where agencies can implement without a high likelihood of pun-

in a single executive agency. Huber & McCarty's (2004) characterization of bureaucratic capacity is one aimed at the agency's ability to accomplish its intended actions, which can be thought of in terms of resources or competence. The enforcement structure in which the agency is implementing and the level of autonomy that it affords the agency should be highly influential here as well (see Farhang & Yaver 2015 for a discussion of administrative fragmentation).

ishment. Bawn (1995) raises as a limitation her own analysis that her model treats the legislature as a single decisionmaker with coherent preferences, whereas more recent work on legislative-executive has examined multiple legislative principals (e.g., House, Senate, committees) exercising influence over the executive branch. And as Clinton et al (2012) demonstrate, fragmentation of legislative oversight of agencies among committees is quite striking, which we can expect is one of many examples of the limitations on bureaucratic control that in turn shape agency behavior. I discuss the role of oversight in greater detail below.

The Role of Third-Party Oversight of Agencies

The conventional wisdom with regard to bureaucratic responsiveness versus drift is that the agency will comply with the statute for fear of being punished. Examining the factors that raise or lower the likelihood of Congress exacting a punishment against the agency is informative in helping to illuminate the conditions under which agencies might have greater-than-recognized opportunities to shape policy consistent with their preferences. But Congress does not act alone in lawmaking or in its oversight of those tasked with implementing its laws. In addition to interest groups having clear investment in pressing their preferred policies – and preventing a "runaway bureaucracy" from shifting policy contrary to their preferences – the judiciary also provides an important source of independent oversight of both Congress and the agencies to whom it delegates statutory implementation authority. Thus, Melnick (1994: 236) calls attention to the critical importance of placing statutory interpretation within the context of separation of powers and responsibility among all three branches of the federal government, with both courts and administrators having marked impacts on the development and implementation of congressional programs.

The structural complexity and numerous veto players that pervade the United States policymaking process and thus the constraints in moving policy from the status quo have lead some to characterize the American state as weak, even "stateless." But while the early

regulatory state was seen as a mere "patchwork" that only later came to be organized around national administrative capacities (Skowronek 1981), scholars more recently have turned toward rethinking the notion of the American state and the more diverse forms of law and policymaking that fall within its realm, with Novak going so far as to declare the "weak" American state to be a mere fiction given the "extraordinary aggrandizement of power within the American regime" (2008: 771).

I argue that both interest groups and the judiciary provide important sources of external oversight of administrative agencies, thus shaping the extent to which administrative actors are kept in check with respect to the delegating statutes as opposed to operating with greater latitude as policymakers within the executive branch.

Interest Group Mobilization

In his famous 1965 treatise on interest group mobilization, Mancur Olson argues that smaller interest groups can organize collectively if the group's majority stands to gain more from a collective good than they lose through the costs of organizing, but that with larger interest groups come greater incentives to "free ride" on others' efforts to provide public goods so as to enjoy the benefits (the provision of the public good, which cannot be denied if the group is successful) without paying the costs. Collective action problems are produced when the majority of citizens adhere to this strategy, which in the context of this policy domain can lead to the underprovision of environmental protection efforts. Such challenges are particularly prominent in the context of larger scale, more global policy matters in which individual efforts are less likely to produce recognizeable results. Derthick & Quirk characterize the politics of deregulation as being a study of "how particularlistic, well-organized interests can be subordinated to diffuse, far more encompassing, but ill-organized interests" (1985: 13), with its prevalence spreading widely since the mid-1970s amid portrayals of regulatory agencies as excessively subject to the preferences of regulated interests (Id at 42).

While mobilization around environmental policy would, according to this theory, be

difficult given the nature of the goods at stake, the domain of environmental policy has been a locus of partisan conflict and interest group activity from both the left and the right. Looking within the context of financial regulation but consistent with my argument, McCarty (2011: 20) argues that the firm possesses strong incentives to influence the agency's ideal point so as to achieve policy outcomes more proximate to its preferences. However, he argues, the way that interest groups go about achieving its preferred policy is not by working to directly influence the agency's preferences, but rather to incentivize the agency to make policy choices that are more favorable to the firm. If the agency is indeed responsive to industry preferences, there is reason to suggest that agencies' inclination may be to act in ways not driven centrally by the delegating statutory text. McCarty's model indicates the possibility of important linkages between policy complexity and regulatory capture by interest groups (Id at 22), a claim that has clear relevance to the notoriously complex realm of environmental policy.[30]

A prominent role in which administrative agencies are engaged in rulemaking, the legitimacy of which rests in no small part on the linkages to public participation and consensual processes for the development of rules such that the relevant parties view the rules as reasonable (Kerwin 1994: 161). And indeed, public participation in rulemaking processes can aid agencies with respect to researching the subjects of regulation, and determining the public sentiment among affected communities. However, with these advantages of quality and consensus-building around rulemaking – which can in turn translate to higher probabilities of success in ultimate promulgation – comes the added complexity of of *with whom* the agency is interacting in forming these decisions (Id at 163). The requirement of public participation would become codified in the Administrative Procedure Act of 1946, which provided for the rather minimalist requirement of "notice and comment" provisions" whereby there would be

[30]Comparison of compliance in bureaucratic implementation in more versus less complex policy domains would be a fruitful avenue for further inquiry given the potential variation in regulatory capture and (potentially) in turn, noncompliance.

some form of consultation between agencies and the public. Such public participation was particularly relevant in the aftermath of the expansions of government – in particular, social regulation – marked by the 1960s and 1970s, such that organized interests were motivated to engage in collective action to shape policy. However, the APA provided that such public participation would not be necessary amid emergency situations or when the agency viewed it in the public interest not to conduct such procedures.

A key question to the study of representation is whose voices are amplified through interest groups engaged in the policymaking process. A related concern is that of regulatory capture, which occurs when an administrative agency acts to advance the specialized concerns of the interest groups most influencing it. That is, interest groups with high stakes with respect to a given policy outcome are likely to focus their resources on attempting to shape outcomes consistent with their preferences, while the mass public may not be at all attuned to this particular issue and thus will ignore it altogether. Administrative agencies are characterized as "captured" when interest groups' resources succeed in "capturing" the agency's key member(s), resulting in the implementation of the interest group's preferred policy. Such dynamics have immense normative implications with respect to the extent to which policy outcomes are being directed by the rule of law laid out by democratically elected legislators, as opposed to a small subset of well-resourced organizations with high stakes in the policy at hand. Thus, there are questions as to the extent to which the statutory provisions for some measure of public participation helped to involve those who were previously left unrepresented, or whether we still see emerging a picture of agencies engaging in limited notice and comment proceedings and continuing to be influenced strongly by powerful interests, many of them the very subjects of their regulation.[31]

As key figures in policy implementation, administrative agencies come into frequent con-

[31]Kerwin (1994: 175) notes, for example, that while agencies typically observed the sixty-day period for notice and comments, its ultimate effect on the public tended to be marginal given the complex and highly technical nature of many of the rules being promulgated in this broadened regulatory setting.

tact with the interest groups engaged in the policies within their jurisdictions, whether through hearings or notice and comment rulemaking proceedings. Since the APA, Congress has continued to work to statutorily strengthen the role of public participation in agency decisionmaking and been a major force in promoting such participation in rulemaking (Kerwin 1994: 173), with the National Environmental Policy Act (NEPA) of 1969 providing for full disclosure of government decisionmaking criteria as well as extensive public involvement, though as I address in the pages below, there was little in the way of litigation were such requirements inadequately satisfied (and in turn, more limited credibility of the threat to punish an agency more reluctant to engage the citizenry or interest groups). Addressing the important relationship between interest groups and administrative agencies, Gordon and Hafer (2005) hold that corporations use political expenditures as a way to "flex their muscles" to regulators with whom they would be willing to fight over the reach of regulatory intervention, which in turn yields reductions in enforcement activity with respect to those corporations. That is, the agency suffers extensive costs – both time and resources – in responding to appeals of agency actions, and thus will, if given a credible signal of impending resistance, choose instead to regulate less or regulate elsewhere.

Of course, interest group presence can have any of a number of different effects on agency behavior. On the one hand, they can follow the expectations of Gordon and Hafer's (2005) study[32] in that they push the agency to act consistent with their preferences, *irrespective of the statutory dictates* given the costliness of encountering legal challenges from key corporations. On the other hand, that interest group presence can provide an added monitoring effect, with more actors mobilized to enforce agency compliance in its implementation. While the conventional wisdom is that the primary interest groups with which agencies are engaged are business groups, the multiplicity of actors invested in particular outcomes can have the

[32]Looking within the context of the Nuclear Regulatory Commission, Gordon & Hafer (2005) construct a model in which the regulated entity chooses the extent to which it will comply with regulatory requirements and to what extent it will signal its type through the investment of its money.

effect of maintaining a watchful eye on the agency's actions. Which of these interest group forces will prevail is not immediately clear, and may be driven by the composition of the interest groups that are active in the policy domain, whether predominantly pro-business, public interest, or a close division between the two. A well-funded army of corporate special interests may well have the might to pull policy toward their preferences – leading one to observe noncompliance – whereas a more diverse group of special interests or else a large coalescing of public interests may send signals to the agency that its implementation actions are being monitored closely, with potential (costly) legal ramifications for defection.

While the regulatory responses are somewhat different with respect to private actors, the logic of seeking to avoid the costs of legal entanglements still holds, serving as an important check on the ways in which the agency implements the laws under its jurisdiction.

Judicial Oversight

An issue at the heart of this dissertation is the assurance (or lack thereof) of bureaucratic accountability to the other political branches and the conditions under which some interests and preferences are ultimately better represented than others. While in the context of rulemaking, the judiciary aims for rulemaking to be done in a manner consistent with constitutional principles and both substantive and procedural law, when thinking about the oversight role of the judiciary there is is the complicating factor that judges themselves are "creatures of the political system" and review agency rulemaking "through the prism of [their] beliefs" (Kerwin 1994: 250). And while the process of judicail appointments is *highly* politicized (and becoming even more so – see Binder & Maltzman 2009), upon appointment to the bench, judges become the least constrained among public officials, though some (e.g., Cllark 2011) point to evidence of public opinion concerns that do influence their decisionmaking.

The extent to which the judiciary holds the role of veto player in the American political process varies depending on the nature of the legal issue at stake, with statutory interpre-

tations able to be overriden through the (admittedly rare) process of legislative overrides (Barnes 2004), but constitutional interpretation by the judiciary reining supreme over legislation (Tsebelis 2002: 226). Given the various roles that courts can play in arbitrating disputes over policymaking and discretion, as well as deeper constitutional challenges, "the legislatures are always aware that their actions can be overruled by constitutional courts, and sometimes even ask the courts for instructios in order to immunize their decisions from judicial abrogation" (Id). Thus, constitutional courts (*e.g.*, the Supreme Court) serve the role as key veto players in the separation-of-powers lawmaking game, though there are reasonable questions as to the *credibility* of the threat of override given partisan divisions on the Court or the location of its median member relative to the preferences of the other veto players in the political process.[33]

Contrary to many political science analyses of the politics and ideology virtually inherent in the American judicial system, DC Circuit Judge Harry T. Edwards once implied that courts are aloof from politics because the greatly important issues are not part of the court's agenda – rather, courts merely construe statutes, review regulatory actions taken by administrators, and superintend district courts (Banks 1999: 51). Edwards held that ideology does not yield judicial conflict or policymaking because on the DC Circuit on which he sat, judges agree with respect to a majority of the cases, providing evidence that judges are highly constrained by the rule of law as opposed to having the flexibility to inject political views into decisionmaking (Id). However, such a characterization of courts may in fact be deemed naive, underestimating the impact of politics on circuit courts, with Abner Mikva providing the challenge, "Pick a controversial subject in our democracy, and you can find at least two points of view expressed by judges of the DC Circuit" (Id at 51-52).[34] Thus, while the DC Circuit Court of Appeals holds the rank of being the key court superintending national

[33]There is the additional complexity that courts may strike down legislation for substantive or for procedural matters, thus providing for potentially less predictability in their interpretation of government action.

[34]There is the further complication that justices' decisionmaking can potentially also be influenced and constrained by public opinion given the desire to maintain institutional legitimacy (Clark 2011).

regulation, even the judges themselves disagree on the extent to which their ideologies are in fact reflected in their interpretations and decisions on the cases before them. Nevertheless, its importance as a monitor of agency actions and the policies that emerge as a consequence cannot be understated, providing the potential for critical third-party oversight of agency actions while also providing potential signals to agencies of the extent to which they might be likely to be aggressive versus lenient in reviewing that regulatory activity.

The impact of congressional provision of private rights of action on public policy outcomes cannot be overstated. The tool of litigation as a mode of statutory enforcement is available to those holding that the government is under-regulating relative to the statutes drafted by Congress, as well as those viewing the government as overregulating – that is, zealous. Kerwin (1994) 251-52) holds that the very existence of the judiciary and threat of litigation itself provides an important deterrent effect with respect to rulemaking behavior given that those affected by rules may have the resources to sue, which imposes costs on the agency. Thus, there is reason to suspect that the statutory provisions alone, and not the volume of litigation, may predict bureaucratic behavior with respect to carrying laws into effect.

Apart from seeking to obtain justice in a specific case, the bringing of a lawsuit (assuming standing in the American legal system) has important policy implications for the broader regulatory landscape given that the parties' request for legal policy change goes far beyond achieving a favorable result simply for themselves. While focusing on the presidency rather than broader executive branch administrative apparatus, Whittington (2009) holds that courts provide a potential mechanism for constraining the actions of the executive branch, lending credence to the notion that the judiciary's role in a policy and the agency implementing it should have a meaningful impact on implementation behavior.[35] Farhang (2010) calls attention to the development of the "litigation state," with Congress working

[35]Whittington holds that because political regimes of the last century have been characterized by greater ideological diversity, such conflicts over the law are more likely, and the role carved out for judicial authority is expanded.

actively to mobilize private litigants to assert their claims – providing for such provisions as fee-shifting and changes to damages awarded in ways that made litigation a more profitable strategy for plaintffs – when they were concerned about bureaucratic drift amid centralized administrative enforcement. This brings to light both the reasonableness of concern about the shifting of policy given the preferences of ideologically distant administrators, as well as the expanding role for private litigants in the implementation setting. And the simple presence of courts holding this monitoring function has been argued to "foster[] a healthy respect for the myriad of legal principles and issues that attach to rulemaking" in addition to pushing agencies to consider more squarely the views of potential plaintiffs should they find themselves in court (Kerwin 1994: 252). The more careful consideration of such perspectives can in turn have the effect of influencing the vigor of implementation and the distance between the policies as set statutorily by Congress and the policies as implemented by agencies.

The movement toward litigation through a "sue and settle" process[36] is one quite familiar to the environmental policy context, with the Environmental Protection Agency and the Department of Interior's Fish and Wildlife Services being the leaders among federal agencies with respect to the settling rather than defending of cases brought by advocacy groups, and other agencies such as the United States Forest Service, the Bureau of Land Management, the National Park Service, the US Department of Agriculture, the US Department of Commerce, and the Army Corps of Engineers also engaging in this tactic.[37] In addition to the EPA and bureaus of the Department of Interior being the frequent agencies involved in this dynamic, the most common advocacy group plaintiffs likewise are in the environmental domain, such

[36]Sue and settle is defined as the condition under which a given agency "intentionally relinquishes its statutory discretion by accepting lawsuits from outside groups which effectively dictate the priorities and duties of the agency through legally binding, court-approved settlements negotiated behind closed doors – with no participation by other affected parties or the public" ("Sue and Settle: Regulating Behind Closed Doors." 2013 Report by the United States Chamber of Commerce, p. 11.).

[37]See "Sue and Settle: Regulating Behind Closed Doors." 2013 Report by the United States Chamber of Commerce.

as the Sierra Club, WildEarth Guardians, Natural Resources Defense Council. Such sue and settle cases span a range of different issues, with *League of Wildnerness Defenders-Blue Mountains Biodiversity Project v. Kevin Martin* (D. Or.) addressing whether the US Forest Services's authorization of the Wildcat Fuels Reduction and Vegetation Management Project in the Umatilla National Forest was in violation of NEPA and the Administrative Procedure Act,[38], *Center for Biological Diversity v. Kempthorne* (N.D. Cal.) focusing on the December 2008 amendments to the Section 7 consultation rules under the Endangered Species Act and the decision to exempt greenhouse gas emitters from regulation under the Endangered Species Act,[39] and *Ohio Valley Environmental Coalition v. Army Corps of Engineers* (US Supreme Court) addressing Clean Water Act guidance with respect to mountaintop removal mining permits, which were alleged not to account for the impact on stream function.[40] Because the sue and settle process involves negotiations between administrative agencies and advocacy groups before the public has an opportunity to see the issue at stake, it has been critiqued as not just increasing special interests' role in policymaking, but also undercutting agencies' compliance with the Administrative Procedure Act, whose goal was largely to promote transparency and public participation in administrative rulemaking.[41]

Melnick (1994) addresses the monumental significance of statutory interpretation in modern lawmaking, including but extending well beyond the domain of civil rights policy. He writes that in the aftermath of *Griggs v. Duke Power Co.* (1971) – a landmark Supreme Court case that embraced the "disparate impact" framework with respect to Title VII cases under the Civil Rights Act – "it would be many years before Congress would again go through the trauma of writing legislation on this controversial topic. In the meantime the

[38]The case was settled on December 30, 2009, with the US Forest Service agreeing to withdraw its decision notice for the project and both parties agreeing to dismiss the case.

[39]The case was settled on May 14, 2009, with the Department of Interior unilaterally revoking the Section 7 rule and reverting back to the prior language, after which the parties to the lawsuit dismissed the case.

[40]The case was resolved on July 30, 2010, with the EPA issuing guidance while the suit was pending in the US Supreme Court, effectively settling the case.

[41]See "Sue and Settle: Regulating Behind Closed Doors." 2013 Report by the United States Chamber of Commerce, p. 6.

courts would define the crucial statutory phrases" (1994: 5). Harris & Milkis (1996) likewise call attention to the important role of courts, the decisions of which were reinforced by congressional mobilization of private rights of action in environmental policy. The litigants bringing forward these claims were seen as new kinds of public servants – private attorneys general – in representing the grievances of many, and even losing suits serving the function of bringing to light the mobilization around issues (Olson 1991: 64).

It was with mobilizing purpose that Congress created citizen suits, first appearing in the Clean Air Act of 1963, empowering any individual to have standing in court to sue any individual, *including the administrator*, for failure to comply with provisions of the law. The use of this tool can be quite potent. For example, in 1992 the Ohio Environmental Protection Agency issued an order mandating Hamilton County's remedying of illegal sewer overflows, which remain largely unchanged for the next ten years until December 2001, when the Sierra Club filed a citizen suit and intervened in the consolidated state and federal actions against the defendants (Metropolitan Sewer District, Hamilton County Board of County Comissioners, and the City of Cincinnati), ultimately meeting with success in obtaining and designing an effective resolution to the issue at hand.[42] Thus, citizen suits have the potential to foster concrete results and public benefits amid a government's failure to respond adequately to given issue, with these provisions providing "private citizens... [with] a second level of enforcement and can serve as a check to ensure the state and federal governments are diligent in prosecuting..." (*Sierra Club v. Board of County Commissioners of Hamilton County, Ohio*, 504 F.3d 634 (6th Cir. 2007).

Whether policy enforcement is sought through litigation is of course far from random, with Congress working actively to mobilize those litigants, who in turn make rational calculations about whether or not to pursue those rights in court (Farhang 2010). And even setting aside the institutional incentives crafted by Congress, a number of factors converge

[42] Altman, David, Amy M. Hartford, & Justin D. Newman. "Citizen Enforcement of Environmental Laws." D. David Altman Co., LPA. pp. 1-2.

to contribute toward a system in which the "haves" disproportionately come out ahead given their experience as repeat players in the legal setting (Galanter 1974), making policymaking through litigation potentially unsatisfying.

I argue in the following chapters that courts play a number of key roles in shaping bureaucratic compliance (or lack thereof) in contemporary implemenation. First, as Whittington and others note, they provide a key source of third-party oversight, which one could say was reduced in the aftermath of *Chevron U.S.A., Inc. v. National Resources Defense Council* (1984) given its declaration of deference toward the decisions of administrative agencies.[43] The expression of *Chevron* deference has been touted as freeing up agencies to update the meaning and reach of significant statutes in light of new scientific information, though it carries the added consequence of subjecting agencies to greater political pressures, with presidents more single-mindedly seeking to control agencies (Eskridge & Ferejohn 2010: 278). Moreover, in his June 14, 2000 testimony on the constitution's nondelegation doctrine, attorney Alan Charles Raul raised concerns that courts might be (at best) inconsistent in their guarding of congressional prerogatives to make legislative decisions, in turn granting agencies excessive discretion in their decisionmaking.[44]

This thus marks an important changepoint in the relationship among agencies, the president, courts, and Congress. Second (though relatedly), the congressional provision of citizen suits empowered ordinary citizens to have standing to challenge administrative agencies in court – which is of course costly for the agency whether with respect to settlement or resolving disputes in court – thus shaping agency incentives in policymaking.

In sum, theory suggests that third-party oversight of administrative agencies – whether through long-standing interest group presence or the mobilization of private litigants and

[43] However, some scholars, e.g., Merrill (1992), dispute the ultimate impact of *Chevron* deference on the subsequent trajectory of administrative law.

[44] "Does Congress Delegate Too Much Power to Agencies and What Should be Done About It?" Hearing before the Subcommittee on National Economic Growth, Natural Resources, and Regultory Affairs of the Committee on Government Reform, House of Representatives, 106th Congress, 2nd session, June 14, 2000.

judicial review – should have the effect of keeping the agency compliant given the desire to avoid costly litigation. However, given the costliness of engaging in that legal action and the variation in effectiveness of that oversight (due to the nature of the policy, extent of the monetary resources, etc.), there is important variation in to what extent these monitoring tools ultimately are effective in preventing bureaucratic noncompliance.

Policy Shift through Noncompliance: Temporary or Enduring?

While it is a relatively simple task to identify the factors that lead to relative increases or decreases in bureaucratic compliance, it is not as straightforward to identify the factors leading to that policy change being temporary or enduring. In the case of the FDA's regulation of tobacco, discussed briefly above, the agency's authority to regulate in this domain was overruled by the Supreme Court, which held that the FDA was unable to prove that the impact of tobacco products on the body was "intended" under the Federal Food, Drug, and Cosmetic Act of 1938. Given the Court's holding that the FDA had transgressed its regulatory authority, policy reverted back to its prior state rather than being sustained at that higher level of regulation of this substance.

Yet the Environmental Protection Agency's underenforcement of environmental statutes did not result in such a roll-back of policy. While the Supreme Court typically grants cert to around two environmental cases per year, Farber (1996) observes that the holdings have not had a substantial impact on the status of US environmental law and regulation, and have not offered guidance in shaping the scope of environmental statutes. Farber adds that when the Court has taken up environmental cases of broader significance as opposed to narrower applications of the law, the Court has made particular efforts to distance itself from the act of making environmental policy (Id at 555), thus handing down narrower rulings. What's more, it was amid the Reagan Administration's "regulatory relief" efforts and thus the massive deregulaton of environmental protection efforts that the Court stated expressly in *Chevron* that it would exercise deference toward agency decisionmaking (1) where the intent

of Congress was ambiguous; and (2) where the interpretation was reasonable or permissible. Thus, the agency's efforts at underenforcement were sustained, at least in the short term.

So what explains these patterns? It is not immediately clear. A significant component is the agency's decision whether to regulate more or less than the policy that is set by the statute. As discussed above, the conceptualization of noncompliance that this project adopts centers on the agency's decision to maximize its discretion by pulling policy toward its preferences in ways that deviate from the statutory text. Thus, the definition itself does not distinguish between the exceeding of authority and the failure to enforce a statute. However, there are reasons to expect that, while both serving as examples of noncompliance, they might play out somewhat differently in the separation-of-powers framework. Ting (2001) holds that Congress can make infeasible agency actions with which it disapproves by exercising its power of the purse. After all, effective agency regulation requires a monetary investment, with those allocations coming from the legislature. One of the most powerful tools at Congress's disposal is known to be the power of the purse, which can shape regulatory behavior in ways consistent with Congress's goals. Given the financial reality of regulation being costly, the tactic of funding retraction can be effective in controlling an agency seeking to overregulate the statutory policy set by Congress.

However, the reduction of federal funds does not preclude an agency from declining to enforce the provisions of a delegating statute: the agency remains empowered to sit on its hands. Thus, there is a fundamentally different challenge of controlling an agent seeking to do *less* than its principal's prescription. If we expect that on balance, Democrats will be more pro-regulation and Republicans more deregulatory in their approach, then this logic suggests that there are asymmetric dynamics of bureaucratic control of Democratic and Republican administrators, with the implementation of Republican administrators being more difficult for Congress to control and Democratic administrators potentially more prone to punishment. Moreover, given the asymmetry in Congress's ability to punish these different

types of implementation behavior, we can expect higher threshold levels of partisan conflict and compromised oversight before the agency views noncompliance as an attractive policymaking option.

While it is thus reasonable to expect that the agency's preferred policy will be stable when it is below the policy set by the statute, underregulation should not be considered a sufficient condition for agency success in shifting policy toward its preferences, nor should we expect that an agency necessarily will fail in stepping farther beyond the location of the delegating statute. Understanding the conditions driving agencies into each of the cells in Table 1 – and understanding the consequences of policy evolution amid these inter-branch battles over implementation – is at the heart of this dissertation.

Noncompliance and the Evolution of Bureaucratic Autonomy

While some have characterized the American state as being brought to life with the New Deal, some scholars of American statebuilding (e.g., Skowronek 1982, Skocpol 1992, Carpenter 2001) have taken issue with such a characterization, instead evaluating significant developments in statebuilding in earlier decades. With bureaucratic autonomy a central part of early state development (Carpenter 2000, 2001), we ought to consider the role of bureaucratic noncompliance as a consequence of previously established autonomy, and potentially as a threat to future autonomy. Within the context of the United States Post Office, Carpenter holds that the "crux of the state-building legacy lay in policy innovation" (2000: 122) and entrepreneurship, with subsequent reputation building transforming delegation patterns between politicians and bureaucracy at the turn of the century (Id at 125). This notion of autonomy is a form of deference that "prevails when a politically differentiated agency takes self-consistent action that neither politicians nor organized interests prefer but that they either cannot or will not overturn or constrain in the future" (Carpenter 2001: 17), though it is important to note that his definition of autonomy is not one of unfettered agency policy-

making, but rather agencies' ability to use their recognized capacities to change the public's agendas and preferences. Bureaucratic autonomy does not require perfect congruence of preferences, but in order to earn deference from other actors, it does require the development of a politically-forged organizational reputation for efficicacy, uniqueness of service, moral protection, and expertise. And it is this very autonomy that facilitated early state-building in the United States for those agencies successful in this endeavor.

Though Carpenter's (2000, 2001) analysis provides an excellent treatment of the development of autonomy in a new agency – that is, the ways in which the agency builds its reputation for efficiency and innovation in implementation – it is ultimately unclear how the dynamics of reputation and autonomy continue to play out in a well-established agency that has engaged in repeated play with Congress and the courts. Are these reputations path-dependant, or can they evolve as agencies work to *continue* to earn that autonomy in carrying out tasks delegated to them? If bureaucratic autonomy is built out of stable legitimacy and coalition-building and not occasional administrative fiat (2001: 354), noncompliance appears to be a challenge to its continuation.

An important question is raised, then, if through shrewdness and organizational efficiency an agency carves out for itself an autonomous role in policymaking and a future coalition exploits that freedom to move policy *irrespective of the statute*, what is the nature of the agency's continued autonomy (or lack thereof), and how do lawmaking strategies – and thus the continuation of state capacity – adapt over time as a consequence? This does not pose a challenge to Carpenter's (2001) thesis, but raises important questions as to the ultimate (and thus far, unexamined) consequences of the bureaucratic behavior under his microscope. With ample ongoing separation-of-powers conflict and changing preferences over time, we may be skeptical of claims of path dependence in this role of bureaucratic policymaking. Given Carpenter's observation that long-term discretion is based upon reputation or observed capacity of the agency, there is reason to expect there to be fluidity in the autonomy granted

over time when there is variation in noncompliance. Absent a more dynamic conception of the state and the legislation that regulates it, these questions have thus far remained unanswered. These are the very tasks that this project takes up.

Bringing Congress Back in: Dynamic Conceptions of Lawmaking

In many cases, contemporary lawmaking is fundamentally different from that which can be observed in earlier decades. Rather than creating new legal and bureaucratic structure – such as with the Food, Drug, and Cosmetic Act of 1938, the Securities Exchange Act of 1934, or the Interstate Commerce Act of 1887 – Congress extends and reworks an existing administrative and legal apparatus in laws such as the FDA Modernization Act of 1997 and the Railroad Revitalization and Regulatory Reform Act of 1976, both of which built importantly on the landmark statutes that preceded them. As such, it is imperative that we consider not just the original legislative bargains struck, but also how they have *evolved* in their substance and structure given the inter-branch battles at work in implementing those laws. That is, how do agency transgressions in implementing shape the form in which those laws endure, and what are the implications with respect to future administrative capacity (not to mention, the location of the policy itself)?

While legislators drafting statutes are constrained by the nature of political conditions at the time of enactment and lack perfect information about how its design will play out, future coalitions have opportunities to breathe new life into these laws. Indeed, if congressional delegation to administrative agencies has an effect of leaving it to agencies to fill in the gaps of statutes through, for example, the promulgation of rules, then statutes will have an inherently dynamic nature in practice, and empirical evidence confirms that continued congressional attention to many statutes contributes to evolving *de jure* policy as well. Moreover, the very nature of U.S. statutory interpretation facilitates this dynamic process, with private parties' interpretations of statutes able to be corrected by implementing administrators, whose decisions can be reversed by judges, whose statutory interpretations can be overriden

by Congress (Eskridge & Ferejohn 2010: 272). Thus, both the text and its interpretation can be in play repeatedly over time.

Patashnik provides one of lone treatments of the after-effects of major acts of U.S. lawmaking, though his study emphasizes the durability of policy reform, holding that "[r]reforms endure not because they are 'frozen in place' or because their background conditions do not change. Rather, they endure because they reconfigure the political dynamic" (2008: 155). Patashnik offers two compelling reasons to study the evolution of general-interest policy reforms: to better understand the consequences of prior efforts at policy reform, and to improve the direction of future policymaking (2008: 11). Thus, understanding these processes helps to better illuminate not just why policy programs have succeeded or failed in the past, but also to better anticipate future sustainability. Of course, the question that this dissertation explores is not one aimed centrally at policy sustainability, but rather the reconfiguration of implementation strategy and the resulting policy shifts in the ongoing inter-branch battles that are waged. However, understanding the broader policy dynamics underlying general interest reforms (and their disintegration) is highly informative in this lawmaking study.

If we expect Congress to punish bureaucratic noncompliance upon observing it, then there are a number of important questions about the longer-term ramifications of these inter-branch interactions. First, how does congressional punishment for noncompliance in one domain affect the agency's behavior in another? Does the agency learn from this statutory curbing of its behavior and adapt its implementation – suggesting somewhat of a ripple effect – or is the punishment confined to the transgression observed? We know precious little about the downstream effects of bureaucratic control, and how constraints on some agency behaviors affect the broader implementation agenda and the resulting policy outcomes. This cannot be answered fully within the confines of this project, but is a crucial question given the prevalence of agency actions that extend beyond their discretionary windows, and the vast opportunities for agencies to be influenced by one another given recent decades' patterns

in fragmented legislative designs (Farhang & Yaver 2015).

Additionally, how do punishments for noncompliance affect longer-term administrative capacity and state-building? Does it simply reshape the tools with which agencies work to accomplish its policy ends, or does it have the effect of actually reining in the reach of the regulatory state? By understanding better the ways in which Congress revisits legislation given variation in agency compliance and transgressions in implementation, we can work to answer these important questions of law, policy, and American state development.

Importance of Statutory Complexity

If it is true, as *Federalist Paper 37* declares, that laws are always "more or less obscure or equivocal until their meaning be liquidated and ascertained by a series of particular discussions and adjudications," then the resolution of those policy issues is crucial. Melnick characterizes political systems as differing in the ways in which power is statutorily distributed between judges and administrators in the separation-of-powers setting (1994: 8). Because policy reforms are rarely self-implementing and require important follow-up from administrative and other actors, including administrative rulemaking and the monitoring of regulated actors (Patashnik 2008: 156), it is all the more important to consider the implementation dynamics and not simply the processes at work in the legislative passage. This is particularly true of lawmaking in recent decades, which is characterized by increasing levels of not just detail, but complexity (Schuck 1992), which Herz attributes in part to the growth in congressional staff over time (1992: 177) as well as to offset the incentives created by the Supreme Court's move toward increased judicial deference with the articulation of the *Chevron* doctrine (Herz 1992: 179).

Many legal norms have evolved from relatively precise and determinate rules to more ambiguous standards, with the movement toward administrative rulemaking being closely connected to increased administrative discretion, the exercise of which creates greater legal complexity (Schuck 1992: 9). It is this legal complexity that magnifies transaction costs

in lawmaking because it generates uncertainty: such laws are more costly and cumbersome to administer, more difficult for lawmakers to formulate and agree upon, and more difficult to reform once established. Thus, complexity magnifies the costs of compliance (Id at 18). Legal complexity could in a sense be viewed as inevitable given the increasing complexity of life and democratic politics (Kagan 2009: 3), with policy domain and social context having key roles in determining the level of complexity of the law. That is, the American economy has become more interdependent and the scope of the state more vast.[45] Barnes likewise addresses the growing complexity and *interdependence* of federal laws, which likely has increased the extent of conflict among statutes (2004: 35), which can in turn raise the costs that the agency must undergo in order to comply. Coming back to the quintessential question of distributive politics, there are important questions as to who benefits (and how) from the pervasive (and potentially growing) complexity of American law, given the policy consequences that follow.

The consistently high levels of partisan conflict in the United States not only raises numerous issues to high levels of salience but also leads Kagan (2009) to describe the United States as a "perfect storm" of constitutional and political conditions contributing toward statutory complexity and fragmentation of implementation power. Farhang & Yaver (2015) find that this fragmentation of authority across multiple actors and agencies is powerfully associated with the growth of divided government since the late 1960s, as well as patterns of electoral uncertainty, in both cases with congressional coalitions designing legislation in a manner to guard against drift, whether from the executive branch or from a future congressional coalition. To what extent the law that ultimately is crafted is coherent and cohesive has potentially quite important effects with respect to how these laws are put into action by the administrative agents of Congress. After all, even in the case of an agency that seeks to

[45]Schuck (1992: 25) also attributes the growth in legal complexity to the development of social conditions that are more difficult to regulate and control, as well as a higher level of education and professionalism, which raises the tolerance for complexity in social institutions including the American legal system.

implement a law faithfully, the added degree of uncertainty as to the meaning of the statute creates more risk of policy outcomes deviating from legislative intent (such as it is). This becomes all the more problematic when legislative and executive preferences are no longer congruent, such that administrators have added incentive to shift the policy location toward their ideal point, and courts are given greater monitoring roles over agencies in working to ensure compliance. Thus, we observe under such circumstances not only potentially less compliance from agencies, but also less long-term stability in policymaking, which in turn has important implications for the scope of state regulatory capacity over time.

These issues of growing statutory specificity are particularly prominent within the domain of environmental policy, which is the focus of this dissertation. The White House Office of Management and Budget (OMB) has taken on an active role in overseeing, and often compromising, regulatory actions taken by the Environmental Protection Agency, a dynamic that has exacerbated legislative-executive conflict over environmental policymaking due to the apparent inconsistency between the OMB's mission and the statutory mandates to which the EPA is held accountable by Congress and the courts (Herz 1992: 180). The motivation for Congress to draft more specific – and in turn, constraining – statutes in this realm is made even more prominent given interest groups' distrust of the EPA and thus pressure on Congress to use specific (and favorable) language in the delegating legislation (Id). Such statutory detail and complexity can be seen quite prominently in the Clean Air Act Amendments of 1990, a significant piece of legislation that was both extensive in length – nearly four times the length of the Clean Air Act Amendments of 1977 – and in its micromanagement of EPA actions.

Given Congress's institutional prerogatives for power and for its laws to parallel the observed policy outcomes, the uncertainty and other challenges caused by statutory complexity should create added incentives to revisit its laws, thus better clarifying and updating where policy should be set. Indeed, Melnick holds that litigation rises "not when administrators act

lawlessly but when both administrators and judges are compelled to read between the lines of statutes produced by factious legislators" (1994: 241). While Melnick does not provide an empirical analysis of noncompliance, he argues that administrators "almost always complied" with respect to laws that were clear and detailed (Id), suggesting that a meaningful contribution toward noncompliance is the complexity and vagueness of the statutes that agencies are tasked with implementing. I argue instead that there are a number of factors contributing toward intentional efforts to shift policy from the statute's location toward administrative preferences, but nevertheless his claim calls attention to the importance of considering the nature of the laws being written in understanding both agency implementation and the subsequent lawmaking that takes place.

Plan of the Dissertation

I have outlined above questions that this dissertation raises and their importance to the broader issues of policymaking and administrative state development in the United States. I argue that given varied conditions in partisan conflict between the branches and within the legislature, agencies' incentives with respect to whether or not to comply with the delegating statutes are fundamentally reshaped in ways not recognized in the political science literature to date. While oversight mechanisms can work to keep these agencies in check, the multiplicity of oversight actors can create further opportunities for agencies to exploit coordination problems and set policies closer to their preferences. The complexity of contemporary lawmaking can have the effect of contributing toward the noncompliance of even a well-intentioned agency given the uncertainty of the meaning of the statutes and the authority that they delegate. These deviations from the authorizing statutes can compromise potentially well-established bureaucratic autonomy as Congress observes that its trusted agents are no longer using that latitude consistent with its preferences. And relatedly, given the ample potential for these agency defections, Congress can carve out for itself a more active role in the lawmaking game by continuing to revise policy substance and implementation

to better control its agents.

Chapter 2 provides a more thorough discussion of the theory of the dissertation, articulating the incentives and the preferences of the institutions at work in regulating policy in the United States. I demonstrate theoretically and empirically that there are a number of legal and political conditions that have important effects on the benefits and feasibility of moving policy toward agencies' preferred policy location. After all, congressional punishment for agency trangressions requires some threshold level of coalition support and homogeneity of preferences within and across the chambers of Congress, which theory holds is compromised under conditions of partisan conflict and dispersion of oversight authority.

The project will proceed with a number of large-N statistical tests of the theory presented in Chapter 2, applied within two federal agencies: the Environmental Protection Agency and the Department of Interior.[46] This analysis serves as the first rigorous attempt to analyze empirically the conditions under which agencies deviate from the delegating statutes to adapt policy consistent with their preferences, and uses a novel, original dataset with which to test these theories.

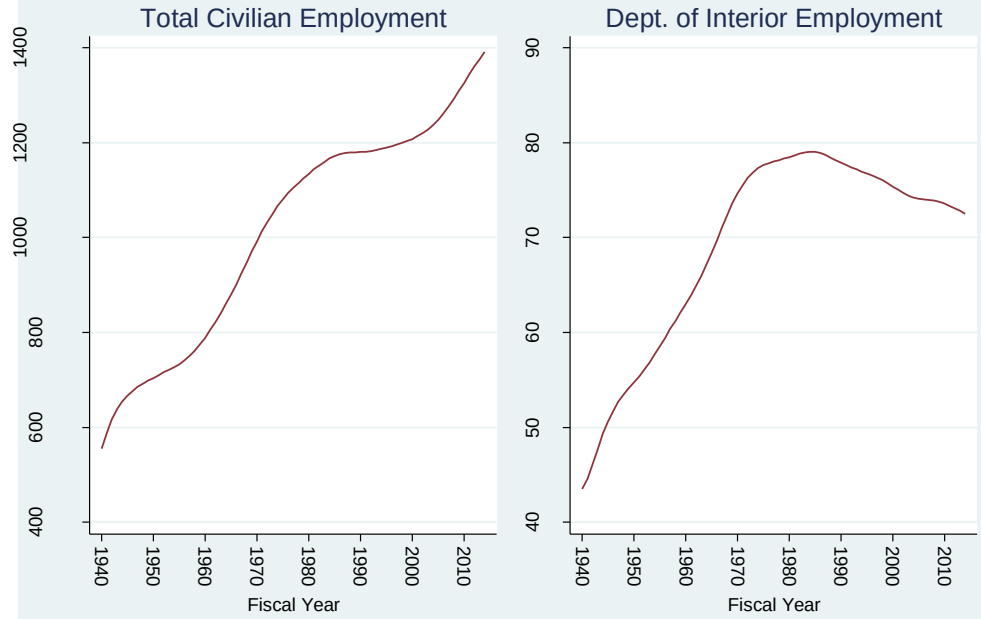
Chapter 6 provides the first metric by which to examine long-ranging patterns in policy movement by through statutory amendments over time, demonstrating the *consequences* of this bureaucratic behavior on subsequent policymaking through statute. The data provide support for the hypotheses discussed above, raising both broader questions of implementation such as the ripple effects of noncompliance in one domain and punishment (or lack thereof) for that behavior, as well as normative questions about the scope of the true rule of law in the United States. Given the complexity of these lawmaking processes and thus the value of understanding the more nuanced processes at work, to further test the hypotheses I supplement the quantitative analysis with in-depth process tracing in a small number of qualitative case studies of statutes under the agencies' jurisdiction, emphasizing statutes implemented

[46]Future work will extend the analysis to include also the Internal Revenue Service.

by multiple agencies. Doing so allows me to evaluate the effects of political conflict as well as bureaucratic design and ideology on the patterns and persistence of noncompliance, holding constant the policy substance.

By examining bureaucratic noncompliance over a period of approximately forty years within the agencies – thus spanning a wide variety of legal and institutional conflict conditions – we can understand the sources and dynamics underlying important adaptations to policy and administrative capacity in the modern American administrative state. The project provides important new insights about the rule of law in a world of bureaucratic governance, as well as the little-recognized conditions under which bureaucratic control breaks down.

Figure 1: Executive Branch Employment (in thousands)



Source: Historical Workforce Tables, United States Office of Personnel Management

Table 1: Forms of Agency Deviations in Implementation

	Over-regulating	Under-regulating
Succeed		EPA, EEOC
Fail	FDA	

Chapter 2: A Theory of Noncompliance

Despite regulation originating in the laws passed by Congress, a number of presidents in recent decades have made regulatory reform a core part of their domestic policy agendas, in part in response to purported excesses of bureaucracy. A fairly common story of delegation is as follows: Congress delegates to executive branch agencies (or to courts) because amid a growing administrative state, there are limits to the extent of policymaking that it can pursue on its own and moreover, it can capitalize on the expertise that agencies hold in more technical domains of policy. In making such delegations, Congress imposes a set of administrative procedures – for example, time-limited authority (sunset provisions) and requirements that the agency report to Congress before taking certain regulatory actions – so as to facilitate its monitoring of the agency and thus to limit the potential for bureaucratic drift (McNollgast 1987, 1989). Agencies are rational, strategic actors with both preferences over policy and institutional prerogatives for some degree of autonomy in implementation, and thus they will seek to avoid punishment at the hands of the other institutional actors. Thus, while the agencies' preferences may differ from those of the legislature, it will act so as to avoid punishment, resulting in compliance – that is, the policy choice set by the agency will be within its discretionary window ($p^A \leq d$).

To be sure, this story is a common one amid this era dominated by conditions of divided government. The United States separation-of-powers system virtually guarantees at least some level of preference divergence among the various institutional actors. Congress and the President may not have political preferences that align, a trend that has been all the more prevalent since the late 1960s. Thus, not only does this raise the potential for new waves of partisan conflict over confirmations, but there is a diminished likelihood that the appointees of the president will have preferences that map perfectly on to those he holds. This process is also true of Supreme Court appointees, who furthermore are given life tenure and remain on the Court for longer periods of time than was the case previously, such that there is more

opportunity for judicial divergence from the opinion of those elected into office by the public more recently.

Likewise, Congress can statutorily create independent agencies, which are much more insulated from both presidential *and congressional* influence as compared with executive bureaus (Lewis 2003). Such agencies have institutional features including having a bipartisan board that shares power over the agency and whose terms typically are staggered, and limits on the president's and Congress's authority to remove commissioners. This can have the normatively desirable effect of producing administrative policymaking that is not as directly driven by partisan preferences (though to say that they are purely insulated would be a marked exaggeration).[47] Yet in the absence of more formalized controls on behavior, there becomes a heightened potential for ideological drift in those agencies. And when we compound these facts with lifetime appointments on the judiciary and thus often imperfect associations between judicial and executive and legislative preferences, one finds a number of avenues through which partisan conflict can emerge, and even explode.

Even within Congress, the modal argument has been that there has been ever-increasing polarization within Congress (McCarty, Poole, & Rosenthal 2006). Wawro and Schickler (2006) note that given the ideological orientation of the contemporary Congress, it is now a de facto requirement that significant bills obtain supermajority support in order to achieve final passage. Lee (2009) observes that in addition to observing the now commonplace polarization on issues of major policy substance, it has become the case that partisan conflict extends even to those issues not traditionally associated with party lines,[48] leading her to conclude that the tensions are driven not so much by ideology, but rather by partisan affiliation. And as Epstein & O'Halloran (1999), Maltzman & Shipan (2008), and others have noted, it is

[47]Examples of such independent agencies include the Equal Employment Opportunity Commission, the National Labor Relations Board, the Federal Communications Commission, and the Federal Election Commission.

[48]In fact, she finds that there is even *greater* polarization along these other, more procedural issues as opposed to the commonly salient policy matters such as health care or environmental policy.

under these highly conflictual partisan environments that there are higher transaction costs in engaging in lawmaking – with more extensive gridlock between key members of Congress and thus less opportunity to move the status quo policy – as well as ex-post oversight.

These conditions of legislative conflict have been shown to have marked effects upon statutory design, with Maltzman & Shipan (2008) finding less statutory durability when laws were crafted out of compromise in conflictual environment as indicated by Common Space NOMINATE distance between the enacting House and Senate. A considerable limitation to their analysis, however, is their restriction to considering the time from enactment until the first statutory amendment, and not the overarching direction of the policy over time. Farhang & Yaver (2015) find that divided government is strongly and positively associated with congressional fragmentation of administrative power across numerous actors and agencies, which should have the effect of reducing the ability of the president – as well as future legislative coalitions – to reshape policy. Thus, what emerges from these conditions of divided government is a stickiness of the status quo (see also Moe 1989). Some (e.g., Schuck 1992) have also observed a growing degree of complexity in American law, looking to the density, technicality, and uncertainty of laws and rules, along with statutes distributing power across different decision processes. The interpretation of these complex statutes is highly important in modern lawmaking, with many administrators left to read "between the lines" (Melnick 1994), which has a rather natural effect of empowering bureaucrats as well as contributing to greater uncertainty in the legal landscape.

Given this complexity and changing partisan configurations over time, it behooves us to consider the conditions under which Congress (the principal) is *unable* to induce compliance in its administrative agents. I refer to this process as *bureaucratic noncompliance*, which is agency efforts to maximize discretion in ways that deviate from 1.) statutory directives, and/or 2.) the current Congress's preferences over implementation. While these efforts need not necessarily be intentional, I focus here on bureaucratic behavior that is aimed at shifting

policy from the status quo toward the agency's preferences over policy.

A Tale of Two Congresses

Discussing bureaucratic noncompliance begs the question, noncompliance *with what*? Looking within a narrow window of time can make quite plain the principal-agent accountability set-up with respect to new legislation, such that the Congress in power is the Congress that provided for that delegated discretion. However, it often is the case that agencies are tasked with implementing laws passed several Congresses prior, by Congresses that may have a markedly different ideological distribution than that currently in power, and without necessarily further updating the statute.[49] That is, while the Congress currently empowered to punish the agency may have preferences that cohere with the delegating Congress, it is hardly a given, nor is it a given that a contemporary Congress will be committed to upholding a legislative bargain from several Congresses previous. This potentially marked disconnect in legislative preferences can have the effect of yielding an important – and little-discussed – tension between the ideals of ex ante constraints set forth by the delegating Congress, and the ex post realities of policymaking in a highly volatile partisan environment characterized by changing political conditions over time. Additionally, there is the uncertainty of to what bargain the *judiciary* will hold the agency accountable in evaluating its bureaucratic implementation.

Thus, we have an important – though scarcely studied – wrinkle in American policy implementation, which is that while the United States Congress as an institution is stable, it does not serve as a stable principal in the sense of its ideological composition, which changes every two years (to varying degrees). Such problems of instability in principal-agent relationships were called attention to by Huber and Lupia (2001), who address cabinet

[49] A similar argument is made in the context of the judiciary, with evaluations of interpretations of the *enacting Supreme Court* decision by a *contemporary lower court*, with the intermediate actors of *subsequent Supreme Courts* and *subsequent lower courts* also able to interpret and shape precedent (Westerlund et al 2010: 893-94).

ministeries that are unstable such that the delegating principal does not ultimately perform the monitoring functions over the agent. Amid these information problems, the resulting instability has the effect of transferring power to bureaucrats (Id at 26) and furthermore, even without principal-agent information challenges, the uncertainty about turnover creates even greater difficulties in bureaucratic control. This is, I argue, not unlike the United States case given the presence of midterm elections every two years, some of which result in little ideological change, others of which do not affect partisan control but do affect supermajoritarian institutions (e.g., the filibuster), and others of which result in radical swings in preferences. As such, it is important that we turn our attention to "*delegation as it is practiced*" as opposed to "*delegation as it is portrayed* in many formal models" (Id at 18, emphasis in original text), and the challenges of democratic accountability that arise in this setting.

To take a simple example, the Communications Act was passed by the 73rd Congress in 1934 under the (Democratic) Roosevelt Administration, and has since been amended extensively to account for new and changing technologies through which to disseminate information. Both chambers of the enacting Congress were heavily Democratic, boasting supermajorities. In the 98th Congress, the Cable Communications Act of 1984 was passed. Here, the (Republican) president in power is Ronald Reagan, the Senate is controlled also by the Republican Party, but the House of Representatives is controlled by the Democrats. This presents a unique and potentially quite challenging partisan configuration given the necessity that House and Senate versions of bills be reconciled in conference committee, and thus poses an added burden to compromise in order to achieve final passage. With a Republican president and a Republican higher chamber of the legislature tasked with implementing – or revising – New Deal-era legislation, one might expect that Reagan-appointed Federal Communications Comission (FCC) members might have exercised greater fidelity to the Reagan Administration and Senate's communications policy preferences, or at least have

different interpretations of their authority as opposed to the interpretation circa 1934.[50] Moreover, the FCC was faced with the task of continuing to regulate communications policy under the Clinton Administration but extending beyond the Republican takeover of the 104th Congress with the "Contract with America." In 1996, America would see the passage of the Telecommunications Act of 1996, which was considered to be the first significant overhaul of telecommunications law since the enactment of the Communications Act of 1934. Thus, what we have observed is marked change in the preferences and broader partisan configurations across a time horizon of over 60 years, all while tasked with interpreting and continuing to implement the Communications Act of 1934 and its subsequent amendments. If these changes in overall partisan preferences are associated with differences in interpretations of the Act and its proper reach under the administration of the FCC, then this should signal a need for greater attention to these different interpretations and to which one we should expect fidelity in implementation.

I argue that these different legislatures – the enacting Congress (and the legislation it passed) and the one presently in power – creates a multiple principals problem in United States lawmaking and policy implementation. Such an argument is consistent with Ferejohn and Shipan (1990), who examine the effects of judicial review in the separation-of-powers system, holding that statutory judicial review can be a "'democratic' device that induces the agency to be more responsive to congressional preferences than it would be without such a mechanism," but that this fidelity is with respect to the preferences of the current Congress and *not* the preferences of the enacting legislature (1990: 17). The relationship between Congress and agencies typically presumes some form of a principal-agent relationship, and an extensive formal theory literature has worked to understand the various problems that arise as a consequence of having not one, but *multiple* principals. Moe (1984, 1987) finds

[50]It is important to note, however, that the FCC is an independent agency and thus is more removed from presidential influence than are executive bureaus given, for example, party balancing requirements among commissioners.

that in the highly contentious separation of powers system of the United States, administrative agencies inevitably find themselves operating in an environment of warring principals, with extensive interest group mobilization, congressional oversight committees competing for influence, as well as ideological divergence between Congress and the President amid divided government, which has become particularly common since the late 1960s.

Volden (2002) examines grants of bureaucratic discretion that requires both legislative proposal and presidential approval – thus with two principals not necessarily in concert with one another – and finds that while there typically is an assumption that bureaucratic discretion reflects the interests of its principals, that model breaks down when there are multiple principals who must agree on those grants of authority (Gailmard and Patty 2012: 367). Moreover, Gailmard (2009) notes that the principals' oversight capacity becomes compromised and costly under such conditions given the potential for information leakages when one principal reveals information to all principals, in addition to generating collective action problems in monitoring. His model does not emphasize ideological distance among principals, which may well exist and exacerbate the challenges of bureaucratic control, but rather demonstrates that "multiplicity alone is sufficient to induce control loss" (2009: 182). This finding, along with the additional challenges discussed above, suggest that there may be far-reaching effects of these multiple legislative principals in my analysis. And if, as in the context of judicial review, fidelity is largely to the current legislative principal as opposed to the statutory text (Ferejohn & Shipan 1990), the stage may be set for a great deal of policy volatility and uncertainty as agencies become caught in a tug-of-war between legislative and judicial interpretations of the agency's statutory authority and obligations. Such dynamics can importantly contribute to agency actions that are noncompliant, and which are not explained by existing models of delegation.

Of course, a valid question is whether this noncompliant is strategic or unintentional. The National Academy of Public Administration (NAPA) organized a panel of sixteen senior

government executives at the level of assistant secretary, and issued a report stating, "Over many years, government has become entwined in elaborate management control systems and the accretion of progressively more detailed administrative procedures. This development has not produced superior management. Instead, it has produced managerial overburden" (Wilson 1989: 369). Such overburden, with "procedures overwhelm[ing] substance" (Id) can have the potential to lead to noncompliance more incidentally as a consequence of increasing expectations of agencies given choices of legislative design (potentially with the very goal of hampering effective administration) and the growth of delegation in policymaking. While out of step with statutory mandates, the nature of this technically speaking noncompliance is somewhat different in that it is not addressing strategic behavior aimed at securing a different policy outcome than that which Congress set forth.

A challenge in the dissertation is the disentangling of compliance that is with the aim of shifting the policy toward the agency's preference when dissatisfied with its location, and that which evolves out of bureaucratic administration challenges such as overburdening or underfunding. The focus of this study is intentional efforts on the part of the agency to capitalize on what it perceives as greater ranges of implementation latitude to pull policy toward its ideal point, potentially in noncompliant manners.[51] One way that I work to address the fact that "noncompliance" may simply be insufficient resources is the inclusion of variables tracking the agency's annual budget and workforce, with the assumption that those effects should be powerful and significant if they are in fact driving the bureaucratic behavior that is out of step with that set by Congress, or with the current Congress's

[51]For example, on October 22, 2002, the organization Safe Food and Fertilizer challenged the EPA's rule issued on July 24, 2002, which held that zinc-containing hazardous wastes would be excluded from the definition of solid waste used as fertilizer so long as they met certain metal concentration standards. The organization challenged the rule in the DC Circuit Court of Appeals with the assistance of the Western Environmental Law Center, challenging both the content of the rule and the EPA's authority to promulgate such a rule under the Resource Conservation and Recovery Act (RCRA) of 1976, which was passed with the aim of ending reliance on land disposal, requiring that hazardous wastes be disposed in a manner that protected human health and the environment, and be accounted for from start to finish" (Anonymous. "Challenging the EPA fertilizer rule." *Earth Island Journal* 18(3): 16).

preferences over that implementation.[52] While imperfect, I argue that the inclusion of this information helps to reflect the extent to which the agency is equipped (in terms of resources) to be compliant. What this fails to capture is more complex dynamics of bargaining over statute-writing, which may result in statutory designs that are difficult, if not impossible, to implement effectively or reliably, and which is consistent with Wilson's claim that the American separation-of-powers system is evidence that the United States government was not designed to be efficient or powerful, contributing to "clumsy and adversarial regulation" (1989: 377). For such detail in the process of crafting legislation so as to be effective or ineffective with respect to the agency's implementation latitude, I turn to legislative histories.

However, as a preliminary evaluation of the effect of laws being written in ways that promote noncompliant bureaucratic behavior by the agency, I present in Figure 1 lowess smoothers of the volume of agency curbing activity (normalized so that the values would fall between 0 and 1 and thus be on a comparable scale) and the rate of lawsuit losses by the EPA, both with respect to the Clean Air Act. The dotted vertical lines indicate the Congresses in which the Clean Air Act Amendments of 1977 (95th Congress) and 1990 (101st Congress) were passed. Thus, here we have a long-standing policy – the Clean Air Act – being revisiited in significant ways with the potential to instigate challenges in effective enforcement.[53] If congressional coalitions were colliding in ways so as to render the law difficult if not impossible to implement faithfully given the new tasks and responsibilities being laid out in the amendments, we might expect to see an upward trend in agency curbing activity and lawsuit losses following the passage of these amending laws.[54] However, Figure 1 provides mixed support, with an upward trend in congressional efforts to curb the agency's

[52]Because these data were provided at the year level, I averaged years to convert the data to be at the Congress level.

[53]The particulars of these data are discussed in detail in Chapter 4.

[54]Evaluating legislative activity within the immediate vicinity of these "shocks" of passed delegating legislation is a potentially fruitful avenue for further inquiry so as to better gauge the extent to which the agency curbing legislation reflects congressional statutory designs that are designed to be inefficient, or a reflection of the agency's actual regulatory behavior and the compliance thereof.

capacity before declining considerably, and a *downward* trend in EPA losses in the aftermath of the 1977 Clean Air Act Amendments. And while agency curbing peaks in the late 1990s and 2000s – thus in the aftermath of the 1990 Clean Air Act Amendments, this effect does not take place until years after the Act's passage,[55] and the lawsuit losses reflect a plateau and decline in loss rate in the aftermath of the 1990 Amendments. Overall, then, it is not entirely clear that the bureaucratic behavior that looks like noncompliance is merely a product of congressional bargaining processes that (potentially strategically) tie the hands of implementers, and may in fact be a reflection of the agency's strategic efforts to influence the policy location relative to where the other institutions have set it.

The Calculus of Noncompliance

Looking to policy implementation amid the complexities of the American separation-of-powers process, we can think of an administrative agency's compliance calculus as being a function of 1.) the potential benefits that the agency would reap from shifting the policy location from the status quo to its ideal point (b), 2.) the probability of success in shifting the policy location (p),[56], 3.) the likelihood of the principals' ability to impose those costs (l), and 4.) the potential costs that would be incurred for subverting (c). Thus, the expected value of noncompliance can be construed simplistically as $EV = b(p) - l(c)$, though there remains some level of uncertainty with respect to the policy or the willingness of other institutional actors to intervene. The agency exercises noncompliance when that expected value is positive – that is, when the benefits outweigh the costs. The factor here that the previous models have failed adequately to explore is the likelihood of suffering the costs of noncompliance, as there is an assumption that the potential to impose costs should in itself

[55]One potential explanation is that some of the rules that the EPA was tasked with implementing had deadlines that were not for a couple of years after the law's enactment, and that other goals needed to be achieved with longer time horizons.

[56]For example, if an agency is not well-resourced, then its capacity to reshape the policy agenda will be diminished.

shape the agency's implementation behavior. This dissertation seeks to correct that deficit, and to probe the consequences of little-discussed opportunities for agencies to expand their policymaking latitude.

The first task is to decompose each of these factors driving agency incentives, which I do in greater detail below. To take simplified examples of these interactions, however, we can think of the following scenarios:

1. *High benefit of noncompliance, high costs of noncompliance, but low likelihood of actually suffering those costs.* In this case, the agency would stand to gain much by pulling the policy location toward its preferences given such factors as salience or preference divergence (e.g., its ideal point is far from the location of the statute), and while the agency's principal would like to impose high costs upon observing noncompliance, such costs are difficult if not impossible to impose (e.g., due to extensive legislative division). Thus, the agency may accept the risk of acting in accordance with its own policy preferences, even if that means deviating from the statutory text.

2. *High benefit of noncompliance, high likelihood of punishment, and high costs.* This is a case in which both the agency and its principal(s) are heavily invested in the policy and in disagreement over its policy location, but the agency is in a weak position to set the policy agenda given Congress's credible ability to take action to punish noncompliance. Thus, the agency should comply.

3. *High benefit of noncompliance, high likelihood of punishment, low costs.* It is not immediately clear what would happen in this case, given that the agency has a strong preference for moving policy toward its own preferences, and it faces a lower cost with great certainty of actually facing those costs. In this case, we might expect that – consistent with Gailmard's (2002) model of subversion – the agent would step below the discretionary window, but not so far as to reach its preferred policy given the higher costs associated with making greater deviations from the statutory text.

4. *Low benefit of noncompliance, low likelihood of punishment, and low costs.* This represents a case in which while there may well be preference divergence over policy (or the policy is not of high significance relative to other policy matters on the agenda), it is not so great that the agency reaps large benefits from moving away from the status quo location, or that the principal is willing to investigate the agency's actions and impose punishment for its actions. Thus, we would not expect that this would be a set of conditions in which there would be extensive partisan conflict over compliance or lack thereof.

In each of these cases, we can see quite plainly that as the likelihood of punishment converges to 0 – such as under conditions of utmost gridlock in Congress – the agency's willingness to step outside of its discretionary bounds increases markedly, but it becomes *highly* risk averse when those overseeing its behavior are well-positioned to punish it.

Figure 2 presents simple (and admittedly, highly stylized) spatial models of the potential composition of preferences among an administrative agency (A), the delegating legislation (L) passed by the enacting Congress, the contemporary House median (H_m), and the contemporary Senate median (S_m). In Case 1, we have a centrist statute, an agency whose ideal point is slightly to the left of the statute, and the House and Senate medians both to the right of the statute. Thus, the Congress currently empowered to punish the agency is relatively unified in its preferences, which are in the opposite direction from the status quo as is the agency's preference over policy. Moreover, the agency's preferred location is relatively close to the location of the delegating statute, leaving it relatively satisfied with the enacted policy and with little room to shift policy. That is, the agency does not suffer great policy losses by being faithful in its implementation of the statutory text, and by moving policy away from the status quo, Congress will be both motivated and capable of punishing the agency for its actions. This results in not only a low benefit reaped from moving policy at all, but a high likelihood of punishment, which the agency prefers to avoid. As a consequence, with this political configuration we should observe bureaucratic *compliance*.

In Case 2, we have a centrist delegating statute, an agency and House median to the right of the statute, and a Senate median that is to the left of the statute. The agency's ideal point in this case is much farther from the location of the law and as a consequence, it has little to gain from engaging in rote implementation of the statutory text, instead gaining much greater policy rewards from pulling policy toward its preferences in ways that I refer to as noncompliance. Moreover, the House and Senate medians are divided in this case, with the Senate dissatisfied with any policy change that the agency would attempt, and the House far more satisfied should the agency pull policy toward its preferences (even achieving its ideal point). Because the American bicameral system requires some threshold degree of preference overlap between the chambers in order to pass legislation, in this configuration it would be highly difficult for the Senate to credibly commit to punishing the agency for its regulatory behavior through the passage of legislation. With Congress's hands effectively tied, the agency is in a relatively unconstrained state and thus has the latitude to shift policy to its preferred location, resulting in *noncompliance*.[57]

Finally, in Case 3 we have an agency to the left of the statute as well as both the House and Senate medians. Unlike in Case 1, where we also see the agency opposite the House and Senate from the statute, in Case 3 we have the agency's preference far from the statute, giving it incentive to shift policy away from the status quo rather than implementing it faithfully. However, with Congress still in a position of relative strength to punish the agency, the likelihood of suffering costs is escalated, thus inducing *compliance* in the agency. Thus, we have here a case in which the agency will be dissatisfied but constrained by the partisan configuration in which it is operating.

Understanding Credible Threats of Agency Punishment

If the common delegation story is one that relies heavily upon fideilty to text as well

[57]In such a case, however, the agency's willingness to subvert the delegating statute should also be affected by the preferences of the judiciary and in turn to what extent it will expect adherence to a bargain struck by an earlier legislature (see, e.g., Landes & Posner 1975).

as the potential for congressional punishment of an agency that begins to drift from the policy set by the legislature, then it is incumbent upon us to consider the likelihood that such punishment would – or even *could* – occur. After all, congressional punishment of an agency requires a threshold level of preference cohesion sufficient to pass a bill that would constrain funds or implementation capacity (or both). In order to achieve legislative passage, a bill must proceed through the following hurdles: legislation must be introduced, it must be referred to a congressional committee and potentially a subcommittee (contingent on the merits of the bill), in the case of the House of Representatives it must go through the Rules Committee as well, it must receive a majority committee vote, it must receive a majority floor vote, and in the case of the Senate it must not be filibustered. Differences between the House and Senate versions must be resolved, which can be a particular challenge amid a divided Congress, and the president must sign the bill into law. Each of these steps serves as a veto point in the legislative process, which can compromise the successful passage of policy even under conditions of relatively cohesive preferences.

A large and growing political science literature suggests that elite polarization between the parties is strikingly high (see, e.g., McCarty, Poole, & Rosenthal 2006; Layman, Carsey & Horowitz 2006; Lee 2005), though there are debates as to the extent to which this polarization trickles down to the electorate as opposed to being confined to political elites. Layman and Carsey (2002) observe that the Democratic and Republican parties have grown increasingly polarized on all of the major policy dimensions in American politics, a division to which they refer as "conflict extension." Gelman et al (2008) find that voters are polarized in different ways in different states, with some regions displaying more class divisions and others displaying more striking party lines. McCarty, Poole, and Rosenthal (2006) use NOMINATE scores to show that while polarization had been high in early periods as well, it rose in the 1970s onward, a pattern that Jacobson (2000) finds as well in his analysis, though as for determining the causes of this growth in polarization at elite versus mass levels, Jacobson

holds that the processes of polarization are "inherently interactive."

This increased partisan conflict in the US has important consequences for the production of new laws by Congress, with respect to both their number and their design. Wawro & Schickler (2010) note that compared with the nineteenth and early twentieth centuries, when the threat posed by the minority party was far more limited, not only has minority obstruction been a more formidable problem in recent decades, with the filibuster now being viewed as a much more legitimate tactic and the costs of engaging in them quite reduced, supermajority support is now a de facto requirement in order to pass legislation of significance. Sinclair (2002) likewise highlights how obstruction itself has become virtually costless, as the minority no longer has to hold the floor for an extended period in order to block action. While Mayhew (1991) holds famously that divided government does not in fact yield significantly lower production of significant laws per Congress,[58] Brady & Volden (2006) note that the preferences of key members of Congress and supermajority institutions (the Senate filibuster and the presidential veto) provide meaningful contributions to gridlock in Congress. They argue that what it takes to effectively change policy hangs on knowing the policy preferences of those members of both chambers of Congress near the median and determining how close the status quo is to these crucial member' preferences. Much like Krehbiel's (1998) argument, gridlock can be overcome only when the status quo is further from crucial members' preferences than are the alternative policies proposed by the President or other key players.

These potentially profound disruptions on the legislative process inevitably trickle over to the legislature's ability to effectively control its agents – that is, the administrative apparatus. A restriction of bureaucratic capacity to implement a policy – such as dramatically reducing its budget or shifting its authority to another agency – would undoubtedly have the level

[58]There is, however, the limitation that his study assesses relative rather than absolute levels of legislative significance, which has the effect of biasing his study toward a null effect on the study of meaningful legislative productivity.

of controversy sufficient to provoke a response from the opposing political party given its impact on the policy that would emerge. After all, in the absence of funds, governmental functioning becomes difficult if not impossible, making this congressional tool of the power of the purse all the more potent with respect to bureaucratic control. Given the highly public nature of complaints of gridlock in Congress, with the mass media making it widely-known when partisan conflict is precluding the passage of important laws, it is not a difficult stretch to assume that actors within the bureaucracy will be well aware of Congress's overall unity or disunity with respect to voting.[59] Moreover, Clinton, Lewis, and Selin (2013) note through the use of expert surveys that Congress is less influential vis-a-vis the executive branch when more committees are engaged in oversight of the agency, and that having greater numbers of overseeing committees may compromise congressional ability to respond to bureaucratic behavior. They find marked variation in the number of committees exercising active oversight of certain agencies, and while their study is confined to the 110th Congress, I expect that this trend has been increasing over time, making recent years more ripe for disruptions in bureaicratic control and in turn, the relationship between representation and administration.

I make the assumption that actors within agencies – at least at the upper echelons, such as cabinet secretaries and assistant secretaries – have ideological preferences, an assumption that follows from the ideal point estimation literature that seeks to measure agency preferences. Classic models of inter-branch conflict (e.g., Epstein and O'Halloran 1999) rely upon assumptions about congruence versus divergence in preferences among the branches of government, and Clinton and Lewis (2008) use expert surveys on agency ideology and characteristics to use a multirater item-response model that generates ideal point estimates for 82 administrative agencies, ranking them from most liberal to most conservative.[60] Indeed,

[59] Clark (2011) notes in his analysis of congressional Court-curbing activity that the Court is in fact aware of congressional efforts, however unsuccessful, at curbing the Court's capacity. I expect that agency awareness of these potential legislative constraints will be even higher given the greater potential for passage, or at least the less symbolic nature of such proposals.

[60] An important limitation to their analysis is the time-invariant nature of their agency ideology estimates, with the implication being that the Environmental Protection Agency under the leadership of Anne Gorsuch

as the legislature incentivizes the development of expertise, those bureaucrats who will exert the effort in becoming experts in their field should be those who have strong preferences (Gailmard & Patty 2007), in addition to which those bureaucrats should be constrained by the preferences of those at the higher ranks within the agency. Given agencies' political preferences, their awareness of legislative conflict should shape their implementation actions with respect to the statutes under their jurisdictions so as to avoid suffering the costs of punishment from political principals.

Additional Sources of Oversight

Threats of punishment can, of course, come from a number of other avenues, namely from interest groups and through court action. Gordon & Hafer (2005) find that agencies exercise a lower propensity to investigate the actions of corporations that "flex their muscles" through financial contributions intended to signal a willingness to challenge agency actions with which they are displeased. Given agencies' purported desire to avoid suffering those costs of litigation, they thus reshape their vigor of enforcement for reasons unrelated to the statutory text by which they legally are bound. This suggests a meaningful level of variation in the agency's fidelity to the text's mandates that it investigate compliance and potential noncompliance from regulated entities (and punish those in violation), particularly when it is being heavily influenced by interest group activity. And given that interest groups are likely to be highly mobilized around issues of great policy importance and salience – those issues on which I focus my analysis – I expect their effects on agency activity to likewise be large in magnitude.

In 1984, the Supreme Court decided the landmark administrative law case *Chevron v. Natural Resources Defense Council*, in which the Court articulated a position of deference

(1981-83) and that under the leadership of Lisa Jackson (2009-13) are given the same ideological preferences, and likewise with the preferences of Secretaries of Interior James Watt (1981-83) and Bruce Babbitt (1993-2000), despite the substantive policy importance of the President's choice of political appointees to cabinet posts.

to administrative agency decisions given agencies' purportedly greater levels of expertise. Such a contention is not without merit, particularly in the complex policy domains of environmental and financial regulation, on which this study focuses. The *Chevron* doctrine proceeds in two steps: first, the Court determines the congressional intent and to what extent Congress clearly indicated the agencies' interpretation of its authority, and second, once the Court has found no clear congressional intent in the statute, it determines whether the agency's interpretation is reasonable or permissible. Considering the effect of this decision, a simple difference-in-means test indicates that the rate of bureaucratic noncompliance (the measurement of which will be discussed in greater detail below) more than doubles in the post-*Chevron* period, significant at the $p < .001$ level, a preliminary finding consistent with my claim that an agency will experience weaker control amid this period of reduced judicial scrutiny of its decisions. Consistent with this, Yackee & Yackee (2010: 266) characterize the post-*Chevron* period as reducing opportunities for judicial interference in the regulatory process and providing agencies with advantage of favorable standards of review should they find themselves in court. Moreover, the legal counsels of administrative agencies appear to be cognizant of this advantage that they came to enjoy in the aftermath of the *Chevron* and *United States v. Mead*[61] (2001) Court holdings, with a general counsel advising his agency to regulate through the formal notice and comment procedure rather than less formal mechanisms so as to ensure that the agency would be given a deferential standard of review in the event of litigation (Id). This provides further evidence of the self-consciousness with with agencies can be found to act in effort to maximize their latitude vis-a-vis the judiciary in carrying out statutory implementation, and in turn the reduced level of constraint in which

[61]In *United States v. Mead* (2001), the Supreme Court took up the question of where the *Chevron* doctrine should be applied, and concluded that the *Chevron* test should be applied only in the case where Congress delegated interpretive authority to the agency with respect to the given statutory provision, and the agency has made an appropriate formal ruling with a "lawmaking pretense" (Brady 2011) The Court subsequently determined in *National Cable and Telecommunications Association v. Brand X* (2005) that while there are conditions under which judicial deference to agency decisionmaking is clearly appropriate, such deference is not required with respect to agency interpretations of whether or not it is owed said judicial deference.

they may know that they are operating in the post-*Chevron* period of this study.

Kurzweil (2007) notes that at the Supreme Court level, justices' appeals to the *Chevron* doctrine appear motivated more by separation of powers concerns about judicial interference in delegated powers as opposed to being driven by agency expertise. However, he notes that the Court of Appeals relies heavily on agency expertise in determining the degree of deference that agency interpretations should be afforded. Thus, while legal and political science scholars have debated the ultimate effects of the adoption of the *Chevron* doctrine on the Supreme Court, the potentially marked impact of *Chevron* at the Court of Appeals level is highly important given its status as being the last venue of appeal for most claims. The most relevant court for the purposes of this project is the DC Circuit Court of Appeals, which is responsible for directly reviewing administrative decisions and rules promulgated by any federal agency, often without a prior review by the district court. Thus, irrespective of a direct change in Supreme Court invoking of the *Chevron* doctrine and thus reshaping the scope of deference afforded to agency actions, agencies should be responsive to the Court of Appeals', and in particular the DC Circuit's adoption of this lower standard of review. Such a claim is consistent with Ferejohn and Shipan's (1990) results which suggest that judicial review can have the effect of moving the equilibrium policy outcome toward the median member of Congress (and conversely, that the reduction of judicial review post-*Chevron* should weaken the ties between the median legislator and the policy location).

Moreover, a strategy that Congress historically has employed to effect policy change through circumvention of the executive branch is the mobilization of private litigants (Farhang 2008, 2010). By incentivizing private suits, Congress can help to facilitate the assertion of rights under the statutes irrespective of potential bureaucratic drift, and Farhang shows that the presence of divided government powerfully contributes toward congressional use of this enforcement strategy that circumvents agency implementation. Thus, amid a weakly enforcing Equal Employment Opportunity Commission, discrimination need not necessarily

go unchecked provided that individuals prosecute in court those violations, a process that can be incentivized through congressional manipulation of the plaintiff's potential benefits (e.g., damages that can be won if prevailing), their probability of success (e.g., the burden of proof) and the costs associated with litigation (e.g., attorney's fees). Further, historical patterns of divided government and legislative-executive conflict, which have become all the more common since the late 1960s, are linked strongly with the "coincident growth of the role of litigation and courts in the implementation and elaboration of federal statutory policy" (Farhang 2008: 821).

A particular form of private lawsuits are those known as citizen suits, whereby private parties are empowered to sue an administrative agency for failure to act, *irrespective of whether they themselves were harmed by the infraction.* This form of litigation is a marked departure from other cases of lawsuits, which require that the litigant have standing, or a personal stake in the outcome of a case, in order to sue. Thus, these citizen suits are a significant tool at the disposal of private parties against administrative agencies who are viewed as being out of accordance with the statutes that they are tasked with implementing.

If it is in fact the case that in certain domains of law (e.g., environmental policy), this adjustment to standing leads to greater litigation against the regulating entities, then these provisions should operate as a significant constraint on the agency's sense of autonomy in implementing so as to avoid the burdens of litigation and settlement.[62] That is, it plays the important role of third-party monitoring of agency action (and more specifically, statutory compliance in policymaking). This claim is consistent with McCubbins and Schwartz (1984), who argue that Congress holds a rational preference in favor of "fire alarm" oversight, whereby other parties (e.g., individuals and interest groups) raise fire alarms over agency

[62]The vast majority of cases brought before the agency are resolved through settlement, though a number do reach the Court of Appeals, in particular the DC Circuit. However, it is crucial to note that those cases settled are largely those focusing on the meeting (or missing) of statutorily-provided deadlines for taking regulatory actions. Such agency actions (or rather, failures to act) are difficult to classify as noncompliance as I characterize it, given their potential association mainly with agency resources and workload as opposed to efforts to shift the policy location.

enforcement (or potentially lack thereof) rather than Congress itself combing through all administrative behavior in search of violations given the high costs and limited payoffs associated with such "police patrol" monitoring. And once successful appeals have been made by individuals and organizations invested in the regulatory outcomes, Congress can be made aware of the violations that are occurring and bring itself back into play in the lawmaking game, such as through the process of statutory amendments, which I evaluate in Chapter 5.

I have identified above one critical source of constraint on agency action, litigation (or the threat thereof), as a key locus of opportunity to prevent agencies from directing policy toward their preferred outcomes when contrary to the statutes or the preferences of the key players in power. With higher levels of external oversight through the judiciary, the agency should exercise greater caution in its enforcement of the statutes within its jurisdiction, relative those areas less prone to lawsuits against agencies (for example, lower salience issues or those policies in which courts traditionally have not been involved).[63] Transaction costs in lawmaking are reshaped given variation in partisan conflict and the margin of control of congressional seats. Thus, on which end of the spectrum these key variables fall ought to have profound effects on the extent to which agencies feel compelled to comply as opposed to having leverage in reshaping the policy landscape in accordance with their own preferences. This is precisely the subject of my inquiry in the chapters that follow.

Asymmetries in Bureaucratic Control

Critical to the study of delegation in lawmaking is understanding the reach – and in turn, the limitations – of democratic accountability as the directly elected branch houses authority in expert bureaucrats. Such an evaluation demands examining what we mean by noncompliance. That is, in addition to adjudicating between compliance with statutory text and responsiveness to current congressional preferences over that statute's implementation,

[63]This is not to say that courts are unable to insert themselves into policy domains traditionally dominated by administrative agencies.

there is the additional need to consider how we conceive of delegations, whether as policy choices – points on a line that ranges from left to right or from more pro-regulation to more deregulatory and that the agency must achieve in order to be compliant – or as windows of discretion within which the agency should operate but may in some cases step beyond. Callander & Krehbiel (2014) allow for the legislature to select a particular policy that the agency must implement (a case that they characterize as *constrained delegation*, or a *decree*), or may delegate to the agency some authority over that policy choice (a case that they characterize as *unconstrained delegation*), with the agency selecting a policy that is compliant with the statute. Thus, they recognize that there is not a single type of delegation d, and I take both types of delegation into account in my evaluation of compliance.

Examples of specific statutory language may help to clarify what compliance in each case looks like. In the case of congressional prohibition with respect to the agency, non-compliance is quite straightforward. Section 101 of the Clean Air Act Amendments of 1990 (P.L. 101-549) provides that "The Administrator shall not promulgate any redesignation of any area (or portion thereof) from nonattainment to unclassifiable." Thus, should the EPA Administrator's rule include such a redesignation, that would constitute an act of statutory noncompliance. In some cases, Congress compels action of the Administrator, often within a specified time frame, such that failure to satisfy the obligation – which could be characterized as a policy point – could likewise be construed as noncompliant. The Clean Air Act Amendments of 1990 also provide that "Within 3 years after the enactment of the Clean Air Act Amendments of 1990, the Administrator shall issue technical documents which identify alternative controls for all categories of stationary sources of volatile organic compounds and oxides of nitrogen which emit, or have the potential to emit 25 tons per year or more of such air pollutant. The Administrator shall revise and update such documents as the Administrator determines necessary." With the exception of the Administrator's ability to exercise discretion with respect to the later updating of the technical documents, Congress is in this

case specifying a particular policy that the Administrator must fulfill within three years, an example that falls within Callander & Krehbiel's conception of constrained deligation, and deviation from this policy point is outside of the Administrator's authority.

A somewhat less stringent command of the Administrator can be found in Section 108 of the Amendments, in which it was provided that "[t]he Administrator shall promulgate regulations within 18 months after the date of the enactment of the Clean Air Act Amendments of 1990, specifying those provisions of this Act for which it is appropriate to treat Indian tribes as States." Such a provision imposes clear constraints on the Administrator, such that failure to promulgate the regulations on this matter within 18 months would constitute a violation, but the Administrator's rules are promulgated for the conditions under which it is "appropriate," thus provinding somewhat less constraint on the agency's authority as in the previous case, with any litigation likely to focus on whether the agency reasonably construed when Indian tribes could be treated as States. Thus, noncompliance here can come in the form of failure to satisfy the mandatory requirement that it promulgate the rule within the specified time frame, or in the failure to interpret the statute reasonably, such as consistent with the legislative history and intent.

The most complex case is that in which Congress is delegating discretionary authority to the agency, as in the 1990 Amendments provision that "[t]he Administrator may, in the Administrator's discretion, promulgate regulations requiring manufacturers to install such onboard diagnostic systems on heavy-duty vehicles and engines." Here, statutory noncompliance would be the promulgation of those rules to a broader class of vehicles than those that Congress permitted in this provision.

While above I defined noncompliance as actions that deviate from the statutory text or the current legislative principal's preferences over the statutory implementation, given these important distinctions between mandates setting particular policies and the allocation of discretionary authority, there is a further need to decompose noncompliance into actions

that seek higher (that is, over-regulating) or lower (under-regulating) policies than those that would be deemed compliant. Bureaucratic policymaking may be relatively unresponsive to the rewards offered by principals, given the number of tasks and principals that these agencies face (Dixit 1995). This points to a significant problem of bureaucratic control by democratically elected officials. If a prime way in which Congress can punish a noncompliant agency is to retract federal funding with which to operate, and if we expect that the Democratic Party will on balance be more pro-regulatory and the Republican Party more deregulatory, there is a significant possibility of asymmetric processes – and potential – for bureaucratic control depending on the party controlling the executive branch.

After all, conducting vigorous investigations into private actors' statutory compliance and promulgating numerous rules according to the Administrative Procedures Act requires costly effort as well as monetary resources, which come from Congress. This suggests that in order to preclude regulatory actions with which it disagrees, a feasible mode of congressional control of the agency is to exercise the power of the purse. However, such a method would seem to be appropriate only for agencies seeking to regulate *beyond* the bounds of the statute, behavior which would be more characteristic of Democratic administrations, which tend on balance to be more in favor of an expansive regulatory state.

Returning to the question of whether congressional delegations are set policy points or discretionary windows, one potential way to conceptualize this is in terms of whether Congress mandated that the agency take a particular action (*e.g.*, "The Secretary shall promulgate by January 1, 2015 rules reducing the emissions permissible in new vehicles..."), in which case the failure to take a mandatory action could be thought of as a failure to achieve the policy ideal point that Congress established statutorily, or whether the agency was *authorized* to regulate one subset of behavior but the agency promulgated rules that were broader and touched on more subjects than the statute technically provided for. Agencies commonly are given broad discretionary authority to promulgate rules that they deem necessary to exer-

cise the functions statutorily set by Congress, such as to protect human health and welfare. In this case, we can think of Congress allotting the agency some range of discretion, perhaps quite limited to a certain class of activities, with extensions beyond that discretionary window constituting noncompliant behavior on the part of the administrative agency.

Inherent in the literature of bureaucratic control by Congress is a tension between congressional ability to influence the agency through the appropriation of funding, and their means of controlling those agencies in their policymaking once they are empowered. Ting (2001) provides a useful formal analysis of this process of congressional cutting of agencies budgets with the aim of making an agency's desired policy infeasible. However, he finds ultimately that while Congress does have this power to restrict agency budgets, doing so can also compromise Congress's own policy goals. But consistent with expectations, the dynamics of bureaucratic control and resulting policy do, in his model, vary depending on whether the principal's policy agenda is more or less ambitious vis-a-vis the agent.

This leads us to the notion that Democratic and Republican-controlled agencies can function differently with respect to oversight mechanisms from Congress and the judiciary, given the relative consistency of Democratic agencies being more pro-regulation and Republican agencies being more deregulatory. While the termination of funds can make infeasible agency actions that seek to extend beyond the bounds of a statute, such a punishment is unlikely to be effective with respect to an agency seeking to drag its feet rather than regulate actively. Moreover, environmental law experts and employees of the Environmental Protection Agency have confirmed that challenges to agency inaction are almost always resolved behind closed doors through settlement, with courts coming into play almost exclusively with respect to agency actions that have already been taken, with Democratic-controlled agencies more prone to regulate, particularly in this domain. If we return to the original framework of the expected benefit of noncompliance, the implication here is that the likelihood (and thus in turn the cost function) of punishment for noncompliance is higher with respect to

Democratic than with respect to Republican agencies, which may shape the strategies of bureaucratic control that are employed.

Legislative Design and Bureaucratic Behavior

Above I have examined the institutional factors that constrain or expand administrative capacity to shift the policy location toward their preferences. Here I examine the impact of statutory design on agency actions. This marks an important departure from the extant literature, which emphasizes the *causes* rather than the *consequences* of these legislative choices in statute writing.

Either as a consequence of agency behaviors or in anticipation of bureaucratic drift amid conditions of heightened political conflict, Congress has been shown to strategically design statutes in ways that impose boundaries on agencies' delegated windows of discretion (see, e.g., Huber and Shipan 2002; Farhang 2013), and which I argue affects the agency's calculus by shaping the parameter p, or its probability of achieving its intended outcome. McNollgast (1987, 1989) provide seminal analyses of congressional use of administrative procedures in statutes to facilitate bureaucratic oversight and to guard against drift. Huber and Shipan (2002) conduct a comparative analysis of statutes and find that under conditions of greater ideological conflict, legislatures provide greater detail statutorily, with the theory being that laying out greater detail leaves less room for bureaucrats to exercise discretion given the more limited extent to which the agency can fill in the gaps of the statute.[64]

Farhang (2013) examines the specificity with which Congress lays out policy substance when delegating implementation authority to courts as opposed to administrative agencies. Congressional provision of greater specificity is interpreted as Congress playing a greater role in policymaking – that is, it is specifying more of the details itself with respect to the content of rules and their proper application – and in turn leaving more limited latitude for

[64]A limitation to their analysis, however, is their inclusion of *all* statutory text, as opposed to constraining the analysis to that text which specifically addresses policy substance.

the implementer(s). He finds that the choice of venue – courts versus agencies – is a powerful predictor of the degree of specificity of the legislation, with Congress leaving greater room for agency discretion but providing markedly greater detail when implementation was being carried out through courts by way of private litigation. Such a finding is consistent with the notion that delegation to administrative agencies stems at least in part from their specialized knowledge, whereas courts do not possess such expertise and thus may not be as trustworthy implementers of a less specific statute.

Moreover, Farhang and Yaver (2015) provide novel data on congressional fragmentation of administrative authority across different actors and agencies, and the structuring of turf wars by way of overlapping jurisdiction over policy, and use the data to test hypotheses linking fragmentation to divided government and electoral uncertainty. Laws on the low end of the fragmentation spectrum have centralized implementation in one or two agencies, while laws on the high end of the fragmentation spectrum have numerous actors within and across agencies, as well as instances in which multiple administrative actors share policy tasks over the same policy space (for example, joint rulemaking). They find robust evidence in support of their claims that the presence of divided government powerfully predicts congressional motivation to divide power across numerous venues in order to insulate policy against bureaucratic drift and require greater coordination on the part of the executive branch in order to move policy. Moreover, they find that congressional coalitions that are electorally vulnerable are more likely to divide power in order to create a "sticky" status quo rather than enabling a future coalition to change the course of policy. Thus, if Congress is successful in achieving its goals with respect to insulating policy against drift and tying the hands of future implementers, higher levels of fragmentation should be associated with greater constraint in moving policy in subsequent periods.

I argue that these choices of design both emerge as a consequence of these divisive political conditions *and shape future* legislative-executive interactions in policy implementation.

Thus, while an excellent body of literature has worked to explain the *predictors* of features of legislative design, this dissertation instead provides the first systematic analysis of the *consequences* of those decisions with respect to agencies' subsequent behavior. After all, while little empirical work has provided evidence of this, it is within statutorily-specified parameters that agencies, courts, and interest groups operate in the policymaking landscape. If, as Farhang (2010, 2013) demonstrates, Congress strategically chooses whether to delegate to courts or agencies (or both) and to what extent, we can expect that policymaking carried out through one venue versus the other might well produce different observable outcomes, particularly given the purportedly strategic behavior on the part of prospective litigants. Moreover, if we accept the premise that agencies might operate differently were it given more expansive ranges of authority as opposed to narrower windows of discretion and autonomy, then these choices of statutory design – whether in the form of discretion or the fragmentation of authority – likewise will have important ramifications with respect to the ultimate implementation, despite the political science literature's virtual inattention to these questions of policy *outcomes*.

Thus, assuming that Congress is successfully fragmenting power given its policy motivations – that is, successfully producing a meaningful decrease in bureaucratic autonomy in implementation – I expect that higher levels of administrative fragmentation will not only raise the costs that are associated with moving the policy location (that is, it will have to expend more effort to do so), but will importantly reduce the likelihood of the agency achieving its intended outcome, given that an agency would be forced to act in concert with other administrative actors who may not share their preferences over policy.[65] After all, if a liberal agency is placed in a joint rulemaking capacity with a right-leaning agency, it will be

[65] A limitation to the fragmentation measure employed by Farhang and Yaver (2015) is their restriction to actors carrying out implementation functions, and not those actors with whom implementers must consult and/or receive approval. Thus, there is a systematic underestimation of the degree of fragmentation of administrative authority, making the use of this measure in fact a harder test of the theories of its causes and consequences.

unlikely to obtain its ideal point, and will rather aim for a policy closer to the center. Moreover, even in the absence of tremendous heterogeneity of preferences among implementing actors, coordination challenges alone can reduce the control that any one actor will have in setting policy. Agencies are themselves aware of these limitations that they face in these implementation frameworks, and should adapt their implementation behavior accordingly.

Bringing Congress Back In

This manuscript's attention to the dynamic inter-play among the branches is hardly restricted to examining agencies' implementation of the statutes under their jurisdiction. After all, if Congress is dissatisfied with administrative behavior, it may – and indeed, *should* – work to bring itself back into additional iterations of the lawmaking game so as to relocate the policy positions. This reinforces the project's attention to the dynamic nature of policymaking, with many analyses restricted to at most two periods – the congressional delegation and the agency action – while this project evaluates a minimum of three periods (the congressional delegation, the agency action, and the congressional response(s)).

That Congress amends its laws has not gone entirely unnoticed by political scientists. Maltzman and Shipan (2008) do not consider ongoing inter-branch interactions, but they do assess the predictors of policy durability as indicated by the time between initial passage and the next amendment that was passed. A severe limitation to such an analysis is that there is not attention paid to the *extent* of that amendment activity, let alone the extent to which this interplay continues beyond the time to the first amendment. For example, one might imagine a circumstance in which a law is quite durable but required some statutory clarification by Congress as to the meaning of particular provisions that previously were found to be vague, after which little if any ongoing congressional attention was made necessary. Such a circumstance would imply relatively low inter-branch conflict with respect to the statutory implementation, but might according to their study be seen as a legislative bargain that was not durable if the clarification was made shortly after the statute's initial passage.

One can also imagine a quite different set of circumstances, in which Congress continually revises the legislation from year to year, such as the many revisions to the Clean Water Act. This would, in contrast with the first example, suggest changing and conflicting preferences and/or outright noncompliance on the part of the implementing agency or agencies. Their analysis, while providing some insight into the predictors of statutory changes, does not allow for the disentangling of these quite different separation-of-powers regimes.

As an aberration to the inattention to lawmaking dynamics, Clinton (2012) provides an excellent treatment of amendments to the Fair Labor Standards Act, originally passed in 1938 as part of Roosevelt's New Deal program, by applying the Bayesian approach employed by Clinton, Jackman, and Rivers (2004) and finding that major policy change is observed less commonly than the formal predictions suggest. There is, however, a challenge that the method was applied to a particular domain of law in which quantifying change is more easily done, with raises of the minimum wage and maximum hours both constituting clear increases in the expansiveness of the labor regulation. Moreover, the policy heterogeneity and omnibus nature of laws of recent decades raises important complications to the study of statutory amendments, which cannot be resolved by focusing exclusively on roll call votes on a particular issue. To address this challenge, I present in chapter 4 a novel metric of statutory change through amendment using the entire universe of cases in which Congress returned to a given statute.

Upon observing implementation, there are a number of ways in which Congress can conceivably work to better control agencies and in doing so, better ensure that policy outputs reflect its preferences. As discussed above, congressional fragmentation is designed with the aim of limiting bureaucratic autonomy in implementation given the added need to coordinate with other actors and agencies, or having jurisdiction over only a piece of a law's enforcement. Thus, as Congress observes a law's implementation after its initial passage, among its options in future legislative action is the further fragmentation of authority such as by

allowing another agency to make rules in the statute. Likewise, the imposition of additional administrative procedures – for example, requirements that the agency report to Congress or consult with other agencies before taking major actions – serves the similar purpose of increasing the degree of statutorily designed constraint and oversight that should insulate the policy location from further bureaucratic drift.

Moreover, as Huber and Shipan (2002) demonstrate in a comparative perspective, legislatures can work to constrain the executive branch amid heightened conflict by providing greater statutory detail, thus affording less discretion for bureaucrats in their implementation. By estimating the amount of statutory specificity, the theory holds that we can ascertain approximately to what extent Congress is writing down policy itself versus allowing the executive branch to fill in the policy details as it sees fit. Though I argue that the provision of greater detail in subsequent statutory activity should reduce agency discretion over the statute, I adopt Farhang's (2013) narrower definition of policy detail, looking exclusively at the statutory language that was policy-related, as opposed to all of the text of the laws.

The use of specificity as a tool with which to constrain implementers appears to prevail across post-war significant legislation (Farhang 2013), lending credence to my claim that by revising statutes so as to make the body of the texts more specific and detailed, Congress can reduce the windows in which agencies are interpreting the reach of their authority. I thus expect there to be a positive association between heightened inter-branch conflict and greater degrees of statutory specificity added when Congress chooses to amend the delegating statute.

Implications

The implications of bureaucratic noncompliance in implementation are vast and unexplored. A rich literature has established that Congress makes concerted efforts to keep agency actions in check and thus not too far from their own preferences (see, e.g., McNollGast 1987,

1989; Epstein & O'Halloran 1989; Huber & Shipan 2002), though there is a suggestion that once that initial power is delegated to the agency, it is very difficult to retract that authority given the complexities of the US separation-of-powers system (Volden 2002). That is, there is an implicit path-dependence with respect to congressional delegation of authority, such that bureaucratic power can only remain stable or increase, but not be meaningfully reduced once it has been allocated to a given implementer or set of implementers.

This implies that within the range of conditions that motivate agencies to pull policy toward their preferences without facing high risks of punishment, agency behavior may well warrant congressional response but those responses may in fact be ineffective in the long term. This leads us to important questions of what, ultimately, is determining the longer-term course of US public policy, if it is not (at least under a certain set of increasingly-prevalent conditions) the US Congress and the voters to whom it is held accountable. And relatedly, if we care about policy outcomes an not just statutory mandates, then these moments of heightened bureaucratic autonomy and noncompliance call attention to the need for more careful attention to the quality of the policy produced and who wins or loses as a consequence of these dynamics. The winners and losers of politics is a fundamental issue at the heart of the study of distributive politics, and while it is far from easy to determine these outcomes given bureaucratic behavior, there is much to be gained by estimating systematically the resulting policy locations relative to those groups with vested interests in the outcomes.

I argue that while to be sure there are numerous difficulties in passing legislation to curb agency capacity – particularly under the partisan conditions in which we would expect bureaucrats to be most inclined to maximize their discretion and potentially overstep their bounds – Congress does in fact have a number of tools that enable it to better control agencies once it observes its prior efforts at bureaucratic control breaking down. Were Congress a stable principal with consistent preferences over time, this would seem to suggest a four period legislative-executive game. That is, in the first period, Congress delegates to the

agency and in the second period, the agency defects so that policy will be more consistent with its own preferences. In the third period, Congress observes this and learns about the agency's willingness and ability to deviate from the statute, and it revises the law in a way that curbs bureaucratic discretion. Finally, the agency observes Congress's ability to punish, and thus complies moving forward.

Yet a core assumption I make throughout this manuscript is that while the American institutional structure and rules by which it is governed are stable, the preferences and incentives can change quite markedly over time. This reshapes the way that this game is played because there is considerably less opportunity for learning about the preferences and capacity of the other actors when making legal and policy decisions from one iteration of the game to the next.

Conclusion

Here I have laid out the strategic framework that I expect administrative agencies – in particular, the Environmental Protection Agency and the Department of Interior – to follow in deciding whether or not to comply with the statutes that they are tasked with implementing over time. Examining policymaking in a dynamic rather than a static setting, I argue that the changing partisan configurations in which administrative agencies come to operate over time can importantly reshape their incentives in implementation (in particular with respect to the EPA, rulemaking). In contrast with the modal theories of delegation and their predictions of compliance, I expect that when agencies disagree with the current policy agenda, they will be motivated to reshape policy consistent with their ideology in ways that I refer to as noncompliance – whether by failing to satisfy mandatory obligations or by steping beyond the edges of the discretionary windows afforded them – though that motivation is conditioned by the likelihood that they will be punished for that regulatory behavior giventhe distance that the agency is moving policy, the unity with which the contemporary Congress can act in response to the agency's actions, and the extent to which the judiciary and those

utilizing the judicial system (*e.g.,* interest groups and other potential litigants) are likely to provide a potent threat against the agency by engaging in costly litigation that might result in holdings adverse to the agency. The likelihood of the judiciary providing such a constraining rule is moderated by the congressional provision of citizen suits and the extent to which it is likely to exercise deference toward agency decisionmaking. I hold further that agencies will be less accountable and more risk-accepting with respect to noncompliance under conditions of heightened polarization and gridlock within Congress, such that Congress can no longer credibly threaten to punish the agency for what it deems to be noncompliant behavior.

I expect that there will be particularly great opportunities for these dynamics to play out under conditions in which there is disagreement between the enacting Congress, which drafts the statutory text interpreted by courts, and the contemporary Congress that is capable of assessing punishment for deviations from preferred implementation. This dynamic places the agency in the unfortunate position of adjudicating between multiple competing principles overseeing their policy implementation over long time horizon, a challenge that has been given limited empirical attention in the American Politics literature to date but which importantly shapes the post-delegation outcomes observed. Such conditions can place agencies in effectively a rock and a hard place, with fidelity to one legislative principal effectively requiring non-responsiveness to the other, with the currently-empowered Congress and DC Circuit judging the regulatory outcomes that emerge in this setting. And as Congress views agency implementation of its statutes, it has a number of tools at its disposal (conditional on the political environment) to reenter the lawmaking game and re-set the agenda, better controlling the implementing agency (agencies), which in turn shapes future administrative capacity and the actions they carry out.

Figure 1: Clean Air Act Noncompliance Over Time

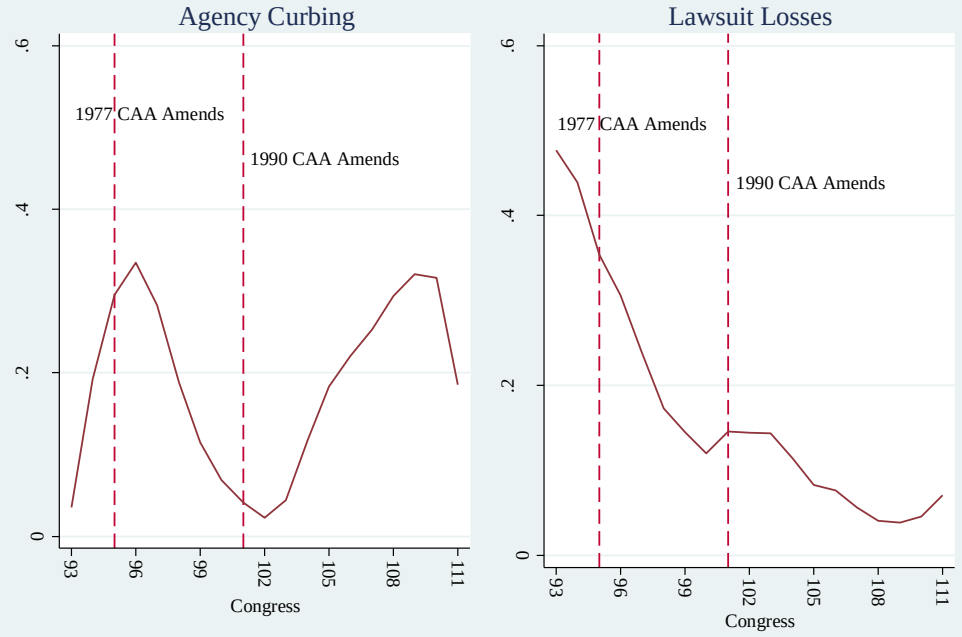


Figure 2: The Calculus of Noncompliance

A: Agency

L: Law

H_m: House median

S_m: Senate median

Case 1: Low benefit, high likelihood of punishment ⇒ compliance

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A L S_m H_m

Case 2: High benefit, low likelihood of punishment ⇒ noncompliance

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S_m L A H_m

Case 3: High benefit, high likelihood of punishment ⇒ compliance

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A L S_m H_m

Chapter 3: Bureaucratic Policymaking and the Environment

In the preceding chapters, I laid out the core theory of the dissertation, which evaluates the effects of legislative-executive conflict, intra-branch conflict within Congress, judicial oversight, and multiple principals problems in reshaping administrative agencies' incentives to comply with the delegating legislation. I turn now to the particular domain in which I am evaluating these dynamics, which is environmental policy.

In the dissertation, I carry out extensive quantitative, as well as qualitative, within-case analysis of two agencies – the Environmental Protection Agency and the Department of Interior – in addition to making cross-case comparisons given the differences between agencies on key variables of interest. The selection of a small number of cases presents a number of challenges in that they are used to highlight the features of a broader population, thus standing for a population of cases much larger than the cases (in this case, agencies) themselves (see, e.g., Seawright & Gerring 2008). Case study selection must thus meet the twin objectives of achiving both a representative sample as well as obtaining useful variation on the dimensions that are of theoretical interest, with the ultimate goal of understanding a larger class of similar units (in this case, agencies) (Id at 296). Combining quantitative analysis and process tracing through qualitative research allows for a more comprehensive picture of the many moving parts at work, and helps to offset the limitations of each research method when used in isolation.[66] To provide generalizability of the findings, there is value in obtaining variation in the agencies on which I base the large-N and qualitative case analyses, an approach that Searight and Gerring refer to as *diverse cases* representing the full range of values characterzing a given X/Y relationship (2008: 300).

While emphasizing environmental policy in this dissertation, inter-branch conflict and

[66]For example, Gerring notes that while large-N, cross-case studies allow for the estimation of *causal effects* – that is, the magnitude of the effect of X on Y and the relative precision with which it is estimated – such analysis is less illuminating in drawing out *causal mechanisms* (2007: 44).

subsequent noncompliance can be found across a number of policy domains and time frames, though it is not typically framed in the language of compliance. Johnson (2011) examines the role of race in the agricultural welfare state, holding that the Jim Crow South and even in policymaking in the 21st century, the United States Department of Agriculture (USDA) partook in highly racialized policies in the provision of agricultural subsidies, with African American farmers receiving substantially less federal support despite the Civil Rights Act's (1964) prohibition against discrimination on the base of race or color. Such acts of racial discrimination were highlighted in the class action suit *Pigford, Brewington v. Glickman and the USDA* (1999), which was brought on behalf of black farmers who claimed that since the 1960s, they had been denied loans and other financial assistance that had been extended to white farmers. Amid these discriminatory subsidy practices, the number of black farmers declined from 184,000 in 1964 to less than 19,000 in 1997 (Johnson 2011: 143), though some of these discriminatory effects are attributable to the delegation of federal authority to state and local authorities, some of whom exhibited persistent racial prejudices (Id at 160). Carpenter (2010) observes then Food and Drug Administrator David Kessler's regulation of tobacco under the Food, Drug, and Cosmetic Act during the Clinton Administration, and the subsequent case of *F.D.A. v. Brown & Williamson* (2000), in which the Supreme Court held that the FDA lacked explicit statutory authority to regulate tobacco. Thus, this interplay of agencies' skirting the edges of their statutory and constitutional authority can be seen in diverse domestic policy settings, with a number of administrative agencies falling within the scope conditions of the theory.

In his well-cited (1972) article, Lowi provides a typology of policy processes, dividing policy into the categories of *regulatory*, *distributive*, *redistributive*, and *constituent*, with these different dimensions of policy affecting administrative patterns in policymaking and forming nearly the full range of possibilities of policy types that one might observe in tracking the development and evolution of policy over time. Regulatory policy works to govern business

conduct, markets, or to protect the public welfare and interest, working toward the passage and enforcement of legal regulations and often reflecting the politics of interest group pluralism. Distributive policies are aimed at the proper distribution of goods and services among different segments of the population, and are meant for particular sections of society. They often reinforce political logrolling that helps to ensure congressional members' reelection. Thus, in the politics of distributive policy, a government has an asset in its possession that it distributes in a manner that it sees fit with its conception of justice, and among Lowi's policy types it tends to be the least contentious. Lowi's conception of constituent policy involves a top-down policymaking process that is dominated by elected officials and agencies. Redistributive policy involves the transfer and redistribution of resources or wealth or property among groups, and is characterized by class politics, with the key question being who wins and who loses and at whose expense. Redistributive programs often come from distinct groups and lead to higher levels of contentiousness than do other categories of policy that Lowi identifies, given the levels of discontent that can potentially emerge around them (Chalekian 2014). Lowi (1972) demonstrates how these different policy types influence party politics and can be influenced by interest group organizations, and there is reason to expect that the forces influencing these different dimensions of policymaking might have key differences that allow for useful variation in analyzing agency cases.

To evaluate these questions of noncompliance in implementation and congressional revision of statutes in response to that bureaucratic behavior, I select administrative agencies from different policy categories, with the Environmental Protection Agency being regulatory and the Department of Interior being distributive in nature.[67] Below I discuss the particular cases in which I analyze these dynamics.

Noncompliance and Environmental Policy

The regulatory agency that I select is the Environmental Protection Agency, which is in a

[67]In future work I will extend analysis to the redistributive agency of the Internal Revenue Service.

sense the natural setting in which to evaluate such questions of noncompliance in bureaucratic policymaking, and which serves as a *typical case* with respect to the study of noncompliance given the richness of information inherent in this case, also characterized as a *positive case* that is "constituted by the phenomenon that the reacher seeks to explain" (Goertz 2006: 159).[68] Seawright and Gerring note that typical cases can also be considered *representative* cases, exemplifying a stable, cross-case relationship, and in which the puzzle that is of theoretical interest lies *within* the case (2008: 299). Of course, selection effects can arise in qualitative research when choosing a case based on the value of the dependent variable. King, Keohane & Verba (1994) address a particular form of selection bias in case selection when the researcher truncates the full range of the dependent variable in the case selection, a concern that can be avoided here given the extensive variation in both partisan control and vigor of enforcement (or lack thereof) by the agency over the course of the 1973 to 2010 time series.

The EPA is an instrumental case in that while it is the centerpiece of the dissertation project, I argue that the findings with respect to this agency can be used to extrapolate to a broader policy context in separation-of-powers interactions, and while the EPA exemplifies the dynamics of bureaucratic noncompliance that motivate the study, it provides insights into the reach of the broader theory. Moe calls attention to the inefficiencies built into the structure of the EPA, which he holds was "never designed as a coherent organization. Its presidential creators pulled together disparate programmatic units under one roof, viewing this as a first step toward a coherent organizational structure... Throughout its life, the EPA has been hobbled by its programmatic inheritance" (1989, 317; see also Wood 1992).

The distributive politics agency that I select is the Department of Interior, which presents a useful case comparison with the EPA and falls within the *most similar* case type according to Gerring's (2007) typology of case selection given its similarity with the EPA on a number

[68]Gerring defines typical cases as one or more typical examples of a given cross-case relationship and which, by definition, are representative (2007: 89).

of core variables other than bureaucratic structure[69] and ideological orientation, and the significant amount of both overlapping and non-overlapping policy space with respect to statutory delegations. Here,while not representing the full range of values characterizing the X/Y relationship as with the diverse cases approach (Seawright & Gerring 2008: 300), the cases are different on factors of interest (e.g., bureaucratic structure and ideology) and similar on other possible causal factors (Gerring 2007: 131). These agencies form the basis of my environmental policy analysis.

Environmental policy, implemented in large part by the Environmental Protection Agency, is one of high salience at the local, national, and global levels, and one that demands both extensive public attention as well as government resources, with an estimation of over $80 billion in public expenditures spent toward air and water regulation between 2000 and 2012 alone, not including the additional expenditures of private industries (Rosenbaum 2014: 197). Moreover, in the environmental policy context we find numerous historical episodes of inter-branch conflict over the proper vigor of enforcement levels. For example, the Environmental Protection Agency came under heavy scrutiny from environmental organizations under the Reagan Administration, alleging failure to enforce the Clean Air Act, which is arguably the most significant law that falls under its jurisdiction.[70] The Clean Air Act provides a particularly interesting case for evaluating inter-branch conflict over implementation given the large role that it has taken on with respect to regulating climate change, an issue beyond the Act's original scope. Moreover, a challenge rather unique to environmental policy in that air and water quality (among other environmental issues) affect *all* citizens is that there is not a natural constituency as might be the case with, for example, the National Labor Relations

[69]Berry and Gersen (2010: 19) find that agency design affects both legislative and presidential influence of the agency's spending decisions, with the extent of high-level personnel politicization impacting in important ways the extent of the agency's political responsiveness, which is importantly linked to this dissertation's conceptualization of compliance, or lack thereof.

[70]In 1986, the EPA was also faced with a number of charges of knowingly failing to comply with the Endangered Species Act, ignoring the Fish and Wildlife Service's alerts about the harms of various pesticides placing protected plants and animals in jeopardy.

Board.

The Environmental Protection Agency is the main agency tasked with coordinating, promoting, and managing the federal government's efforts to control pollution and prevent environmental degradation. It works to preserve the purity and quality of air, land, and water, to improve public health, and to stimulate further environmental research (Hill and Hill 2004: 364). It is the leading governmental agency with respect to environmental protection, and with a federal office in Washington DC and 10 regional offices, it coordinates with state and local governments, industries, and other agencies to maximize compliance with EPA rules. It is headed by a president-appointed and Senate-confirmed administrator, who is supported by a deputy administrator and several assistant administrators. Despite the sweeping effects of the issues under the EPA's jurisdiction, the EPA has become highly politicized, wish sharp swings in policy direction and vigor with changes in the party of the president. Hill and Hill (2004: 364) attribute this in part to the fact that the EPA's offices contain a number of president-approved and Senate-confirmed appointees in its offices, such that most of the agency's direction is being shaped by political appointees, with careerists simply tasked with addresssing the more technical aspects of the policies.

The distributive politics agency, the Department of Interior (DOI), contains eight bureaus which act as the United States' main conservation energy to protect and provide access to natural and cultural resources and heritage, in addition to conducting scientific research, managing natural resources, and working on fish and wildlife protection (Hill and Hill 2004: 230). The DOI, created in 1849, has its secretary appointed by the president and approved by the Senate, and assistant secretaries responsible for wildlife and parks, land and mineral management, Indian Affairs, science, with the cabinet divided into a number of distinct bureaus under the overarching jurisdiction of the Secretary of Interior (Id).

While environmental policy is an issue typically considered to be "owned" by the Democratic Party and the groups with which it is aligned, there is ideological variation both across

these agencies as well as within the agencies over time. Clinton and Lewis (2008) use expert surveys of administrative agency preferences and utilize a multirater item response model to rank from most liberal to most conservative 82 executive agencies that existed between 1988 and 2005. According to their methodology, The Department of Interior ranked as the 21st most conservative among the these 82 agencies, which is consistent with conventional perceptions of the DOI as being quite a conservative bureau. Moreover, Berry and Gerson's (2010) analysis of Democratic tilt among distributive agencies places the Department of Interior as one of the only agencies leaning in favor of Republicans with respect to the agency's allocations going toward Democrat-represented districts. In contrast, the Environmental Protection Agency ranked as the 13th most liberal among these 82 agencies, and ranks higher on Berry and Gerson's (2010) scale of politicization, which they define as the "average number of political appointees divided by the sum of the average number of political appointees plus the average number of SES personnel in the agency" (2010: 32). Thus, here we have two environmental agencies falling on opposite ends of Clinton and Lewis's (2008) ideological ranking, and while there are a number of substantively different environmental issues taken on by these two respective agencies, they are broadly within the same policy domain and thus are likely to have oversight by the same or similar congressional committees and interest groups.

These agencies provide valuable variation in agency ideology and structure – with the EPA being a relatively new (founded in 1970), structurally unified, and traditionally left-wing independent agency, and the Department of Interior being a much older (founded in 1849), hierarchically structured, and traditionally right-wing executive bureau – while holding constant the policy domain (environment) and in some cases thanks to congressional structuring of overlapping jurisdiction, holding constant the particular laws themselves.

However, apart from being focused on policy domains in which there is high salience and thus greater potential for ideological clashes over policy (whether or not that conflict actually

occurs), this theory is hardly specific to environmental policy. Providing a third case study that is markedly different – and yet with the same potential for these inter-branch dynamics to play out – allows me to have better confidence in the study's external validity, and to understand better how institutional conflict varies (or doesn't) across different policy domains. It is with this goal in mind that I turn in future work to the Internal Revenue Service (IRS), which is the redistributive agency that I evaluate. Financial regulation, notoriously complex and fragmented (and thus presenting a number of opportunities for the breakdown of bureaucratic control that motivates this study), is a policy domain more commonly considered to be aligned with the Republican Party and conservative interests, thus providing valuable variation relative to the environmental cases discussed above.

This case selection strategy allows me to evaluate noncompliance across agencies in each of the different categories of policy discussed by Lowi (1972), with additional variation in policy substance and ideology, while also allowing for some degree of overlapping policy jurisdiction, the implementation of which I evaluate qualitatively in evaluating and comparing bureaucratic behavior.

Noncompliance and the EPA

Command and control regulation follows a clear legislative pathway in environmental regulation: (1) regulation toward goals that Congress has identified; (2) identify criteria to set pollution standards; (3) set quality standards for all of those pollutants being regulated; (4) set emission standards for regulated pollutants; and (5) ensure that those quality and emission standards are carried into effect (Rosenbaum 2014: 198). However, the technical nature of environmental policy makes more complex these regulatory dynamics and the ways in which political forces and institutions operate, with particular terms or objectives sometimes left unclear. Moreover, there is a mix of discretionary and non-discretionary provisions, which impacts the propensity of the administrative agency to fight to achieve environmental compliance on the part of states and private entities. Among the mandates

of the Clean Air Act, as well as the 1977 amendments, are the compulsion that the EPA establish the maximum permissible ambient air concentrations for pollutants that are harmful to human and/or environmental health (including carbon monoxide, hydrocarbons, lead, nitrogen oxide, particulates, ozone, and sulfur oxides) and the mandate that the EPA set maximimum emission standards for new stationary sources, in addition to other requirements that that states establish implementation plans for the achievement of federal standards and the creation of a timetable for achieving auto and truck emission controls. The Clean Air Act Amendments of 1990 contained a number of new provisions and deadlines, primarily adding to the original Clean Air Act's titles on acid precipitation and ozone protection as well as substantially amending other portions of the Act. Among those amendments were the establishment of new classifications of areas failing to meet national air quality standards, the establishment of more than 90 new truck and auto emission standards, the requirement that the EPA create national emission standards for hazardous air pollutants for all major sources of hazardous or toxic air pollutants and 189 listed chemicals, the creation of a new emissions trading program for sulfur oxides, and a schedule for phasing out the use of ozone-depleting chemicals (Rosenbaum 2014: 207-2010). It is worth noting that for the purpose of this dissertation, I focus on mandatory requirements of the agency and the extent to which the agency itself complies with those regulatory duties.

One can scarcely search records of the EPA without finding numerous accounts of states and interest groups suing the agency to mandate enforcement of environmental standards over recent decades. Such conflicts reached a notable peak amid President Ronald Reagan's "regulatory relief" efforts, which sought to markedly scale back federal regulatory efforts in this domain. Reagan sought to withdraw the administrative enforcement machinery, dramatically reducing the EPA's budget and staffing as well as seeking to cut back on private environmental lawsuits that could threaten the administration's efforts to more vigorously regulate environmental policy (Farhang 2011, 676). Landy et al observe that administrative

turbulence between 1980 and 1982 led to sharp curtailment of environmental enforcement efforts, with a 50% decline in the number of cases that the EPA referred to the Justice Department and approximately a 33% decline in the number of enforcement orders that the EPA issued (1990, 249). It was during this same period that the EPA actively sought to shift environmental enforcement from the federal government to the states (Id at 272). In August 1986, the Environmental Protection Agency was charged with violating the Endangered Species Act by knowingly failing to protected endangered animals and plants from harmful pesticides, despite the US Department of Interior's Fish and Wild Life Service's provision to the EPA of a formal opinion as to the harm caused by specific insecticides (*Houston Chronicle*). What's more, the Agency openly confessed to its noncompliance with the ESA, with EPA Assistant Administrator for Oesticides and Toxic Substances John A. Moore saying plainly, "There is no question about it, we didn't comply with the requirements of the law... I do not dispute the findings" (Id).

Wood & Waterman (1993) call attention to the importance of understanding bureaucratic adaptation in the EPA, arguing that bureaucratic behavior can be shaped by discrete events, progressive events, and other sweeping shifts in the policy environment in which the agencies operate. While they are correct to comment that "[p]ast models of politics and the bureaucracy ignored the complex stimulus environment of the bureaucracy" (1993, 499), their restriction of analysis to referrals for litigation[71] leaves many important questions unanswered, such as other institutions' responses to the agency outputs that they identify.

The EPA's implementation, as with much environmental policy, provides for a division of responsibility among federal, state, and local regulators. This dynamics promotes a strong federalist quality to the nature of the political battles fought in this terrain, with regulated interests more likely to push for a major state or local role in carrying out enforcement given the expectation that it works to their advantage more so than having implementation

[71]They acknowledge directly that it captures only a single dimension of enforcement, and not the important roles of the legislature and courts in monitoring compliance or lack thereof.

concentrated in the EPA's national and regional offices, and local regulatory agencies predisposed toward accommodating those regulated interests (Rosenbaum 2014: 224). Such a disjointed structure has additionally led to conflicting federal, state, and local views on the proper scope of the regulation.

While the EPA's implementation in the 1980s typifies the regulatory behavior under my microscope, its enforcement has not perpetually waned, with Democratic administrations typically seeking to make the agency less anemic in its regulatory capacity. In his October 21, 2008 letter to then EPA Administrator Stephen L. Johnson, House Oversight Committee Chair Henry Waxman noted hat the EPA had lost two thirds of its Clean Air Act cases, whether in whole or in part, in the DC Circuit Court of Appeals, which in many of those cases "severely rebuked EPA for an apparently willful disregard for the plain language of the governing law," and Waxman went on to find that the Agency's frequently majing such decisions not withstanding judicial scrutiny was a marked waste of taxpayer dollars and government resources under the Bush Administration. Apart from the resource constraints imposed by the noncompliant rules adopted, those rules were, reported by the *Los Angeles Times* to be developed by attorneys representing the industries being regulated, and adopted by political appointees over the objections of EPA career attorneys and despite the fact that its language would ultimately be found to be contrary to the statute's plain language (Waxman letter to Johnson, October 21, 2008). Thus, in addition to being highly salient, there is substantial variation in partisan composition and regulatory support for the agency over time, allowing me to assess the effects of inter-branch conflict on implementation behavior and to test the core hypotheses.

In the chapters that follow, I turn to the empirical estimations of noncompliance in the Environmental Protection Agency and the Department of Interior, and the conditions under which and the manner in which Congress responds to this implementation behavior by these agencies.

Chapter 4: When Do Agencies Have Agency?

The Limits of Compliance in the EPA

"I think that 1970 will be known as the year of the beginning, in which we really began to move on the problems of clean air and clean water and open spaces for the future generations of America." – President Richard M. Nixon on the 1970 Clean Air Act

On May 4, 1979, Joseph Dowd, the Senior Vice President and General Counsel of American Electric Power Service Corporation, appeared on behalf of the Utility Air Regulatory Group to provide comments at a public hearing at the Environmental Protection Agency. Among other complaints, he argued that the Environmental Protection Agency's rules under Section 120 of the Clean Air Act were far too sweeping relative to the statutory delegation which required that the EPA's regulations be as discriminating as the statute, and failed adequately to define the compliance to which the Agency would be holding industries accountable. He noted also that the Agency's 13-month delay in promulgating those rules had the implications of limiting the opportunity for public comment as provided for under the Administrative Procedure Act, and limiting opportunities for judicial review of the Agency's actions (EPA Public Hearing on Section 120 Proposed Regulations, May 4, 1979). Such a concern about the Environmental Protection Agency's regulatory behavior is but one of many raised over recent decades as to the reach of the statutory delegations to the Agency, and the manner in which the Agency utilized its delegated powers.

With the development of the modern regulatory state came great expectations about the role of government in providing services to its citizens, leading to a marked increase in regulation and congressional delegation to better facilitate that policymaking. Indeed, bureaucratic policymaking is the hallmark of modern American government, with bureaucracy touching on virtually every facet of contemporary law and policy. Much attention has been paid to inter-branch conflict and delegation in lawmaking, addressing congressional strategy

in allocating discretion to agencies as well as to courts given concerns about *bureaucratic drift* (*e.g.*, Epstein & O'Halloran 1999; Huber & Shipan 2002; Farhang 2010). Yet for all this discussion of conditions underlying congressional delegation to other institutional actors, there has been little scholarly attention to statutory implementation and the *consequences* of these delegation decisions and the potential disconnects between the *ex ante* oversight in place and the *ex post* realities of policymaking amid extensive partisan conflict given *coalition drift*. To correct this deficit, this chapter addresses the following core question: Under what institutional conditions is Congress unable to induce compliance with legislative dictates in contemporary statutory implementation carried out by the Environmental Protection Agency?

The growth of the administrative state and complex policy agendas has made delegation virtually inevitable, given both the limitations of what Congress itself can achieve and the administrative expertise on which Congress can capitalize post-enactment. While Congress reaps a number of advantages in making such delegations, such strategies raise important democratic theory questions about policymaking in the modern administrative state. In structuring these choices of legislative design, Congress can acquire that expertise itself through committees, it can delegate to an administrative agency (Epstein & O'Halloran 1999) or to multiple administrative agencies (Farhang & Yaver 2015), or it can delegate to courts, such as through the provision of private enforcement (Farhang 2010). Each such choice provides a set of advantages in obtaining efficient policymaking, but there is the tension that there is the additional normative desirability of maintaining accountability and a set of policies that reflect majoritarian will, as reflected by Congress. Accountability problems can arise if there are conflicts between the goals of Congress and the administrative entity, which can potentially motivate bureaucratic drift. Thus, these regulatory actions result in Congress creating for itself a problem of agency (McCubbins 1995: 724), which can be mitigated through structural arrangements and procedural requirements whose policy

consequences remain virtually unknown. The question then arises, If Congress passes a law and the bureaucracy is not bound by it, in what sense is law supreme and bind the executive, and in what sense does popular will determine the general course of public policy? This brings to light the central linkage between representation and administration, and the extent to which disconnects may arise amid certain political configurations in ways that I refer to as *bureaucratic noncompliance*.

This chapter thus focuses on the agency's choice of how much to comply with its discretionary limits in this partisan setting. While I do not claim that noncompliance is necessarily pervasive, given concerns about compliance and the ways that Congress can work to attain it (*e.g.*, Miller 1977; McCubbins & Schwartz 1984; McCubbins 1985; McNollgast 1987), there is ample reason to explore the conditions under which inducements of compliance may be less effective, making agencies more than mere rote implementers of the policies delegated to them. For example, the predominant political conditions of polarization (McCarty, Poole, & Rosenthal 2006) and gridlock in recent decades elevates the transaction costs associated with lawmaking. Such inter-branch dynamics, as well as coalition drift, can open new doors for agencies to be more active policymakers than previously acknowledged and result in less effective constraints on the range of possible administrative actions.

The extant literature's failure to link delegation choices to the ultimate implementation outcomes is a severe shortcoming if we want to understand the effects of partisan configurations on observed policy choices. The chapter sheds important new light on the rule of law in this world of bureaucratic governance and the mechanisms underlying policy changes in the American political process. Because studies of bureaucratic compliance largely emphasize only formally the institutions' strategies, to evaluate this empirically I developed a large-scale dataset with which to provide new insights into these implementation choices. Applying these questions of compliance to the Environmental Protection Agency (EPA) from 1973 to 2010, the chapter argues that given varied conditions in legislative-executive

conflict, divisions within the legislature, competing political principals, and reduced external oversight of agency actions, agencies' incentives to comply with the delegating statutes are fundamentally reshaped, allowing them to take more active policymaking roles should they so desire.

I begin by discussing the limitations of prior delegation analyses, and relatedly my conceptualization of bureaucratic noncompliance and the implementation strategies involved. I proceed with a brief discussion of my selection of the case of the EPA, and move on to discuss my core separation-of-powers hypotheses of when noncompliance should be more versus less pervasive. I test these hypotheses with original data drawn from several thousand bill introductions and several hundred DC Circuit court cases, with both datasets capturing institutional interventions into bureaucratic implementation. I find strong support for the claim that inter-branch partisan conflict and partisan division within Congress powerfully compromise Congress's ability to induce compliance in its administrative agents, *unless* the party opposing the president is well-equipped to pass punitive legislation. While the presence of competing legislative principals powerfully predicts noncompliance, there is less clear support for the hypotheses concerning the role of courts in monitoring bureaucratic behavior.

The Potential Limits of Compliance

To ensure efficient policymaking that also reflects the will of those legislators directly accountable to the voters, scholars have sought to understand the relationship between democratic theory and administrative policymaking, and the factors that shape the nature of the policies carried into effect. Congress has a number of tools at its disposal to help it to induce compliance in administrative recipients of delegation – for example, it can mandate annual reauthorization cycles for its programs, excercise the power of the purse, hold oversight hearings with respect to agency implementation, and can impose administrative procedures (*e.g.* reporting and consultation requirements) that limit bureaucratic discretion (McNollgast 1987; Epstein & O'Halloran 1999). Yet while these models shed light on *why*

and *under what conditions* Congress would seek to impose such constraints on the recipients of delegation, they do not tell us necessarily to what extent, or under what conditions these tools are more or less effective. Should these constraints be rendered ineffective, we may expect a rise in the process to which I refer as *bureaucratic noncompliance*, or those agency actions that seek to maximize discretion in ways that deviate from legislative dictates. Thus, acts of bureaucratic noncompliance work to pull policy toward the agency's preferences.

While much scholarship on separation of powers in lawmaking emphasizes laws' institutional design, there remains a problematic assumption that agencies are effectively constrained by the delegating statutes, even though they may in truth be capable of skirting the edges of their discretionary windows, even surpassing those bounds on authority. Indeed, Congressman Henry A. Waxman noted to then-EPA Admininistrator Stephen Johnson that the EPA's "[r]epeated losses on plain language grounds suggest a reckless determination to pursue the Administration's policy objectives regardless of legal limits" (Letter from Henry Waxman to Stephen Johnson, October 21, 2008). A typical delegation model might claim that Congress will (1) delegate regulatory authority to an agency but in doing so it will (2) impose procedural controls to constrain the agency's actions, and (3) the agency, rational and with institutional prerogatives for power, will comply in order to avoid punishment. However, a number of important conditions reshape the likelihood of the agency suffering consequences for defections, and as the chapter discusses below, there is merit in considering when there is *not* a credible threat of punishment, reducing the likelihood of suffering costs for shifting policy toward the agency's preferences in ways that I refer to as noncompliance.

Moreover, many significant laws being implemented today were passed several Congresses ago, and the policy preferences of these Congresses may be highly divergent, leading to potentially substantial coalition drift. This calls into question the appropriate administrative implementation given the preferences of the legislative principal(s). So while extant delegation analyses (*e.g.*, Epstein & O'Halloran 1999; Huber & Shipan 2002) take great strides in

explicating the strategies resulting in the nature of the delegating statutes, to understand better the policy outcomes we observe, this chapter argues that we must consider not just delegation, but *implementation* in a dynamic political environment.

The many veto players at work in the American political process virtually guarantee that key political actors will have divergent preferences over policy. The chapter's emphasis on noncompliance seeks to explain agencies' incentives and their responses to the partisan arrangements in which they operate. I assume that bureaucrats hold preferences about their personal condition – such as self-promotion, power, prestige, and financial reward – and about the policy in which they are engaged (*e.g.*, Wilson 1989; Gailmard & Patty 2007).[72] In turn, noncompliance by these politicized agency heads grows out of their combined incentives over both political and policy influence, resulting in agencies carving out greater opportunities to be active policymakers relative to the status quo policy location.

This chapter departs from a number of conventional delegation models that assume faithful agency execution of legislative dictates, and rather is in concert with the few models that allow for bureaucratic noncompliance, or subversion. Gailmard (2002) examines a legislature's delegation of implementation power to an imperfectly-controlled bureaucrat who can subvert the legislature by stepping beyond the bounds of explicitly delegated authority. Agencies can choose policies beyond what the legislature authorized, but the farther beyond the bounds of delegated authority, the greater the likelihood of being exposed, and the higher the potential costs. Similarly, Huber & McCarty (2004) allow that the policy that the bureaucrat sets may or may not comply with the statute, though they do not require that such noncompliance be intentional on the part of the bureaucrat (see also Miller 1977). While overt acts of punishment for noncompliance may at first blush appear rare, because of

[72]This claim is further substantiated by Congressman Waxman's correspondence with EPA Administrator Stephen Johnson on October 21, 2008, holding that the EPA Administrator, in conjunction with the White House OMB, had ignored legal counsel in its deregulatory activities with respect to the Clean Air Act. Thus, while there may be heterogeneous preferences among civil servants, their choices appear to be heavily constrained by the preferences of the top political appointees and the White House that appointed them.

punishment's off-equilibrium nature,[73] there is likely to be a plethora of unobserved agency noncompliance in which agencies *successfully* shift policy consistent with their preferences.

Discussing bureaucratic noncompliance begs the question, noncompliance *with what*? A little-discussed principal agent problem in statutory implementation is that while Congress writes the laws and provides for ex ante constraints on agency latitude, the authorizing Congress does not engage in much of the ex post monitoring of the agents to whom it delegates because coalitions change (to varying degrees) every two years.[74] This legislative turnover and thus coalition drift creates in fact *two* legislative principals, one of which lays out provisions for ex ante bureaucratic control in drafting the authorizing legislation (e.g., reporting and consultation requirements), while the subsequent legislative principal engages in ex post control consistent with their policy preferences, but potentially at the cost of enforcing the precise letter of the law, a tension that this chapter addresses.

It is for this reason that I conceptualize and measure two distinct types of bureaucratic noncompliance. First, it can constitute acts that maximize agency discretion in ways that deviate from the delegating statutory text. Second, it can constitute acts that maximize agency discretion in ways that deviate from the current Congress's preferences over that statute's implementation. The conventional expectation is that courts interpreting statutes would expect compliance with the enacting Congress – that is, the statutory text.[75] Yet agencies might see value in implementing in accordance with the preferences of their current principals – the contemporary Congress – rather than upholding outdated statutory provisions. After all, the current Congress is capable of punishing an agency for what it perceives as transgressions, and there is a legitimate question as to whether a legislature would exer-

[73]That is, anticipation effects preclude us from observing much of the noncompliance that does – or *could* – occur (see, *e.g.,* Cameron 2000).

[74]This phenomenon is analogous to delegation by cabinet ministers in parliamentary systems, in which the principal delegating to the bureaucrat is, unlike a common assumption in delegation models of the United States, not a *stable* principal (Huber & Lupia 2001: 19).

[75]Landes & Posner (1975) hold that courts "do not enforce the moral law or ideals of neutrality, justice, or fairness; they enforce the 'deals' made by effective interest groups with earlier legislatures."

cise a commitment to upholding a past bargain as opposed to pushing policy toward its own preferences. Thus, agencies can fail to comply with either the text written by the authorizing Congress – which raises questions of to what extent we observe the rule of law versus the substitution of bureaucratic preferences, and to which they will be held accountable in court – or with the contemporary Congress to which it can be held accountable, which is consistent with the more common bureaucratic control stories of American institutions. To address this tug-of-war between judicial and congressional interpretations of agency latitude in policymaking, I provide in this chapter one measure that captures congressional interventions into agency policymaking that is out of concert with its preferences over statutory implementation, and the other that captures judicial interventions into agency policymaking for purported noncompliance with the statutory text. For the sake of clarity, I refer to noncompliance with the statutory text – that is, with congressional mandates of the agency or windows of discretion – as *statutory noncompliance*.

The concept of statutory noncompliance can be made clearer with the provision of a concrete example. In 1986, Congress passed the Superfund Amendments and Reauthorization Act to amend the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980 in effort to regulate the transportation and storage of substances that were potentially harmful to public health and welfare. Enforcement authority in the Act was housed largely in the EPA, which among other things was tasked with promulgating by 1988 a rule regarding the provision of notice when substances being transported were harmful. Consistent with the statutory directive, the EPA proposed in January 1988 a rule regarding this notice provision. However, it was not until 1990 – two years after the deadline – that the agency promulgated a final rule, which instead revisited the statutory language and determined that it would only apply the notice requirement to a narrower range of conditions. Thus, the scope of its regulation was vastly narrowed relative to what the statute had initially provided for. As a consequence of this agency action, in *Hercules, Inc. v.*

Environmental Protection Agency (1991), the DC Circuit Court of Appeals determined that the agency had read into the statute a drastic limitation that not only did not appear in the words that Congress chose, but that also flew in the face of the legislative history. Thus, this case provides a clear example of noncompliance: a congressional mandate of regulatory action by the agency, the agency's proper interpretation of its authority and determining that it would regulate only a subset of that which Congress compelled, and the judiciary's determination that the agency was out of compliance with the delegating statute. This is precisely the phenomenon that I explore here.

The Strategy of Noncompliance

Theory suggests that agencies will comply with the statute rather than defect and suffer adverse consequences such as the retraction of enforcement powers or funds with which to operate. Yet a number of factors fundamentally alter agencies' incentives, affecting both compliance and the likelihood of being punished for that subversion. In the absence of a high likelihood of punishment, the congressional majority and the administrative agency may be playing a fundamentally different game with different choice sets available in policymaking. Moreover, as Gailmard & Patty (2007) hold, those developing expertise and building careers in civil service are those who have unusually strong policy preferences, which I argue can contribute to divergence between the authority delegated and the policy outcomes observed.

The value of noncompliance in policymaking is a function of the agency's expected benefit if prevailing in moving policy toward its preferences, as well as the costs of not complying given a variable likelihood of suffering those consequences. I expect that the likelihood of exercising statutory noncompliance will be increasing in the distance between the agency's preferences and the location of the delegating statute. If the agency and the statute are aligned – for example, both liberal – the agency has little to gain from stepping outside its discretionary window because it can approximate its own ideal point. However, as these preferences diverge, the agency has less to gain by being a rote implementer of the statute

because to do so would result in a vastly different policy outcome than that preferred by the agency. Thus, the benefit of statutory noncompliance in this case would be high.

I argue that the likelihood of noncompliance – both statutory noncompliance and with respect to the current Congress – is decreasing in congressional incentives for private enforcement, in particular in the form of citizen suit litigation, which provide private citizens standing to sue actors in violation of the acts *as well as administrative entities* for their regulatory actions or inactions, and have broadly-construed attorney's fees and injunctive relief for the prevailing party.[76] Such provisions typically contain language such as, "Except as provided in subsection (b) of this section and section 309(g)(6), any citizen may commence a civil action on his own behalf – (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this Act or (b) an order issued by the Administrator or a State with respect to such a standard or limitation, or (2) *against the Administrator where there is alleged a failure of the Administrator to perform any act of duty under this Act which is not discretionary with the Administrator*" (Clean Water Act, Sec. 505, emphasis added). By mobilizing additional coalitions to monitor agency actions, the agency should be in a more constrained condition, more vulnerable to costly litigation should it step outside the bounds of its regulatory authority.

The likelihood of noncompliance with the current Congress should be increasing in legislative conflict given the greater transaction costs associated with passing legislation under those conditions. That is, when Congress is a more constrained actor, the likelihood of punishment declines in ways that render the suffering of costs potentially negligible.

The likelihood of noncompliance with the current Congress should be increasing in

[76]The 1990s and 2000s exhibited a marked rise in citizen suit litigation in environmental regulation, with Congress providing in the Clean Air Act for "private attorneys general" and citizen suits from both environmental groups and other citizens accelerating markedly in response to this delegation (May 2003).

legislative-executive conflict. If the agency and the current Congress are ideologically aligned – for example, both liberal – the agency has little to gain from exercising noncompliance because by being a faithful agent to this legislative principal, it will approximate its own ideal point. However, as the preferences of the agency and the current Congress grow farther and farther apart – for example, a liberal agency and a conservative Congress – the agency has little to gain from being a faithful agent to this legislature, and has a much greater benefit of stepping outside of its discretionary window in order to achieve a policy it deems better. However, and quite crucially, this is conditional upon the strength of the opposing political party. In the case of a liberal agency and a conservative Congress where the conservatives maintain a thin majority or a large minority, Congress is not in a strong position of power to punish the agency for taking actions not in concert with its preferred implementation, and thus not only is the benefit of noncompliance high, but the likelihood of suffering costs is low. However, in the case of this ideological divergence but a conservative congressional coalition that holds large and powerful majorities, the legislature will be both motivated and capable of exercising punishment toward the agency, rendering the agency constrained (and compliant) in its actions.

The Challenges of Measuring Noncompliance

While a number of scholars have addressed theoretically the importance of compliance and the strategies at Congress's disposal to ensure compliance with the administrative entities to which it delegates, there do not exist measures that capture over long periods of the dynamic of noncompliance as I have conceptualized it above. An inherent challenge in the measurement of noncompliance – and indeed, much separation-of-powers behavior – is that there are a number of highly salient *unobserved* strategic calculations on the part of the institutional actors. For example, while veto bargaining dynamics are highly important in shaping the laws that emerge through the veto gates, we do not often observe actual instances of vetoes given congressional anticipation of the president's actions, and the president's

anticipation of veto overrides (Cameron 2000). Likewise, the institution of the filibuster importantly shapes the nature of the laws that are put forward in the United States Senate given the frequent need for supermajority support (Wawro & Schickler 2006), even in the absence of the actual use of this tool.

The same is true of bureaucratic noncompliance, with the agency's strategic calculation of where its preferred policy location is, but also the preferences of Congress and the extent to which the chambers are united or hampered by partisan division, as well as the likelihood of being sanctioned in court. Observed punishment for noncompliance can thus be construed as off-equilibrium action. Such limitations present challenges to in what Goertz (2006: 95) refers to as "concept-measure consistency," or the extent to which the measure faithfully characterizes the underlying concept that we seek to explain (see also Adcock & Collier 2001). Evaluating such consistency requires that one consider whether key aspects of the concept are omitted from the measure, and whether the measure also includes inappropriate elements (Id at 96). By such metrics, an accurate and consistent metric of noncompliance would be difficult, if not impossible to achieve given the extent of anticipation effects among the branches and the cost-benefit analyses in which instititutional actors engage in deciding whether to punish noncompliant behavior.

However, if we observe perfect statutory compliance, we should not expect to observe numerous judicial determinations that the agency was not compliant. Likewise, if we observe perfect compliance with the current Congress's preferences over implementation, we should not expect to observe numerous instances of congressional coalitions working to strip the agency of its capacity. Yet as in *Hercules, Inc. v. Environmental Protection Agency* and as I discuss in greater depth below, in approximately one fourth of the cases in which the EPA was sued in the DC Circuit Court of Appeals, the agency loses on substantive grounds based on assertions of violations of clear statutory text. This then presents a puzzle as to what explains these instances of agency punishment. Because of the challenges inher-

ent in measuring bureaucratic noncompliance directly in this context of ample unobserved strategic behavior, I instead address this phenomenon indirectly by evaluating judicial and congressional interventions into bureaucratic policymaking. I argue that by evaluating these off-equilibrium actions in the separation-of-powers system, we can better grasp the limits to Congress's ability to effectively induce compliance in the agency to which it delegates.

Hypotheses about Bureaucratic Noncompliance

A rich literature has called attention to congressional efforts to reduce administrative discretion amid divided government and electoral uncertainty so as to guard against bureaucratic drift (*e.g.*, Moe 1989; Epstein & O'Halloran 1999; Huber & Shipan 2002; Farhang 2010). Beyond ideological differences between Congress and the executive branch, legislators are influenced more by particularistic than national interests and are more subject to interest group pressure, potentially leading to divergent preferences over regulatory implementation even within the same party (Moe 1989). Thus, legislators and the interest groups that influence them strive to create agency structures calculated to implement their policy preferences while tightly constraining discretion so as to better insulate against executive subversion. Given concerns about subversion amid inter-branch disagreement, I expect that agencies will be most inclined to seek to shift policy from the statute toward their preferred implementation under conditions of heightened legislative-executive ideological distance, conditional upon the strength of the opposing legislative coalition. Thus:

H_1: There will be more noncompliance with the current Congress when there is higher ideological divergence between the legislative and executive branches, except *when the opposing political party holds a large majority of seats in Congress.*

A number of factors affect the likelihood of identifying and punishing acts of noncompliance. While Gailmard (2002) identifies subversion costs as lawsuits or the loss of budgets or status, this project considers also the statutory adjustment of discretionary windows, which relies upon a congressional coalition eager and able to pass new legislation. A rich literature

on Congress has explored the causes and consequences of legislative conflict, which arises given key individual legislators' preferences relative to the location of the status quo (e.g., Brady & Volden 2006; Krehbiel 1998), as well as the use of the filibuster to embolden minorities to block legislation lacking supermajority support in the Senate (Wawro & Schickler 2006). Given the numerous veto points in the legislative process, lawmaking becomes increasingly costly when there are diverse preferences over policy. Thus, amid narrow partisan majorities or greater partisan differences within or across the chambers of Congress, there is compromised ability to pass legislation to shift policy from the status quo. In these cases, agencies may perceive a reduced threat of statutory punishment given the elevated transaction costs of lawmaking and Congress's inability to credibly threaten to introduce punitive legislation (see also Ferejohn & Shipan 1990). Thus:

H_2: There will be more noncompliance with the current Congress when the transaction costs of lawmaking are raised by ideological disagreement within Congress.

Challenges in oversight can arise from having multiple principals, with information leakages and collective action problems compromising collective control over agents, and leading to the potential underprovision of congressional oversight (Gailmard 2009). Given this limitation in effective oversight, one might expect that having more actors with power or influence over an agency (*e.g.*, congressional committees, the president, interest groups) should reduce subversion costs and thus increase the latitude with which agencies can set policy without a high likelihood of punishment.[77] Such challenges of multiple principals can arise not only within, but also *across* Congresses when there is extensive coalition drift over time.

H_3: There will be more bureaucratic and statutory noncompliance when there are multiple competing political principals seeking to influence the agency.

[77]The presence of multiple political principals can potentially reduce incentive to deviate, given the increased number of monitors capable of detecting noncompliance. Yet when the principals are in ideological tension with one another, the conflicting goals and pressures on the agency should sway the agency's implementation strategy in ways more likely to induce noncompliance.

Just as fragmented congressional oversight of agencies can lead to inefficiency and at times conflicting policy goals, the extent of vigorous judicial oversight should likewise shape the agency's incentive to comply. I expect that noncompliance will increase in the aftermath of the Supreme Court's landmark administrative law decision of *Chevron U.S.A., Inc. vs. National Resources Defense Council* (1984), which broadened the extent of judicial deference to agency decisions (1) where the intent of Congress was ambiguous; and (2) where the interpretation was reasonable or permissible. This limited the legislature's ability to rely upon a third party (the judiciary) to control bureaucracy, which can in turn create new opportunities for agencies to move policy toward their preferences. The deference jurisprudence developed under the *Chevron* doctrine can reshape the ways in which statutes are elaborated and enforced, impacting both delegation and administrative implementation.

While *Chevron* arguably compromised stringent external oversight by the judiciary, the frequent delegation to private litigants within the domain of environmental policy – and in particular in the form of citizien suits – may act as meaningful check not just on the targets of regulation, but also on administrative agencies seeking to avoid the burdens of legal suits (see, *e.g.*, Farhang 2011):

H_4: There will be less bureaucratic and statutory noncompliance in the presence of greater third-party oversight provided through the judicial branch.

In addition to considering the political configuration in which the agency is operating, the extent to which the agency will be a faithful implementer of the delegating statutes should be shaped by the extent to which it agrees with the policy location that it sets. An agency should be more inclined toward compliance when its ideological location is more proximate to its own, such that it believes in the policy that it is tasked with implementing. Thus:

H_5: There will be more statutory noncompliance when there is greater ideological distance between the statute's location and the agency's ideology.

In sum, the chapter argues that the extent of ideological disagreement, the ability of

Congress to punish the agency, and the extent of effective oversight by other institutional actors fundamentally reshape agencies' incentives to pull policy toward their preferences rather than engaging in "rote implementation."

Other Predictors of Noncompliance

The above hypotheses capture the dominant institutional dynamics that I expect to shape agency compliance (or lack thereof), but they are by no means exclusive. An aspect of the agency's noncompliance calculus is its probability of successfully pulling policy toward its preferences. I treat administrative capacity as the agency's ability to effectuate policy consistent with its policy preferences in the separation-of-powers system, and it can vary given – among other things – the manner in which Congress structures policy implementation. Congressional dispersing of power across multiple actors should operate as a meaningful constraint on agency behavior, forcing compromise among administrators with different preferences and interests (Farhang & Yaver 2015), as well as creating competition among them. Amid this more fragmented political environment, agencies enjoy less autoomy and is in a "much less happy state of affairs" given its preference for "its tasks [to be] simple, its rivals nonexistent, and the constraints minimal," without other agencies engaged in its same policy goals (Wilson 1989: 181). If this legislative strategy of fragmentation is effective, administrative actors will be better constrained rather than leaving marked room for drift in policymaking. I thus expect there to be a negative association between fragmentation of implementation power and agency deviations from legislative dictates.

Furthermore, with greater policy salience and significance, the stakes in policy implementation are raised relative to ordinary legislation over which we may be less likely to observe institutional conflict. And while this will have the likely effect of increasing monitoring of agencies' implementation, I argue that it will nevertheless be within this policy domain that we are most likely to observe agencies having strong preferences over implementation, and where ideological disagreements are most likely to play out.

Below I provide empirical tests of these hypotheses within the context of the Environmental Protection Agency.

Empirical Model

The Dependent Variable: Bureaucratic Noncompliance. Measuring noncompliance as I have conceptualized it is no easy task, and no empirical work to date has sought to capture systematically over time the behavior that I address here. To test the core hypotheses discussed above, I provide two novel and distinct measures of this phenomenon – one to measure congressional intervention in agency actions given its preferred statutory implementation, and one to measure judicial interventions over implementation of the statutory text (with the assumption that it is indicative of statutory noncompliance) – with the hope that understanding the patterns and extent of these off-equilibrium outcomes will give us valuable new insights about the limits of Congress's effectiveness in inducing compliance in the agency to which it delegates.

The first measure, *agency curbing*, captures congressional dissatisfaction with the EPA's implementation. Following Clark's (2011) court curbing measure, I conducted THOMAS searches for each of the 26 statutes implemented by the EPA from 1973 to 2010, which returned a total of 11,272 bill introductions. Table 1 summarizes these 26 statutes, which were identified from the EPA's website.

I restrict analysis to the 5,169 bills introduced by members of the president's party, with the expectation that constraints by the president's core supporters will provide the least noisy signal of agency defection from the current Congress's preferences. Such an argument is consistent with claims of "counter-preference signals," with Chiang & Knight (2011) finding greater influence of liberal endorsements of conservatives and vice versa, and Beim, Hirsch & Kastellec's finding in the context of the United States Court of Appeals that "whistleblowers who are closer to the panel majority who nevertheless choose to dissent will be much more

Table 1: Environmental Protection Agency-Implemented Statutes

Law Name	Policy Domain	Citizen Suits
Atomic Energy Act	Energy	No
CERCLA	Toxic Substances	No
Clean Air Act	Air	Yes
Clean Water Act	Water	No
Emergency Planning and Community Right-to-Know Act	Toxic Substances	No
Endangered Species Act	Public Land/Animals	Yes
Energy Independence and Security Act	Energy	Yes
Energy Policy Act	Energy	No
Federal Food, Drug, and Cosmetic Act	Public Health/Safety	No
Federal Insecticide, Fungicide, and Rodenticide Act	Public Health/Safety	No
Federal Water Pollution Control Act	Water	Yes
Food Quality Protection Act	Public Health/Safety	No
Marine Protection, Research, and Sanctuaries Act	Water	Yes
National Environmental Policy Act	Public Land/Animals	No
National Technology Transfer and Advancement Act	Energy	No
Noise Control Act	Public Land/Animals	Yes
Nuclear Waste Policy Act	Toxic Substances	No
Ocean Dumping Act	Water	No
Oil Pollution Act	Toxic Substances	No
Occupational Safety and Health Act	Public Health/Safety	Yes
Pesticide Registration Improvement Act	Toxic Substances	No
Pollution Prevention Act	Toxic Substances	No
Resource Conservation and Recovery Act	Toxic Substances	No
Safe Drinking Water Act	Water	Yes
Superfund Amendments and Reauthorization Act	Toxic Substances	Yes
Toxic Substances Control Act	Toxic Substances	Yes

credible messengers of severe non-compliance" (2014: 10) than are whistleblowers who are the farthest ideologically from the panel median.

I then hand-coded these 5,169 Congressional Research Service (CRS) summaries to identify the bills that sought to control the EPA's behavior by (1) requiring that the EPA take new mandatory regulatory actions (*e.g.,* issuing new rules or sanctions for violations), (2) prohibiting the EPA from taking certain regulatory actions or otherwise withdrawing EPA authority (*e.g.*, rescinding EPA funds or transferring its authority to another agency), and/or (3) imposing new oversight procedures (*e.g.*, reporting or consultation requirements).

Those bills designated as containing *requirements* included those bills requiring the EPA to promulgate rules, set standards, enforce violations, or approve permits, and they contained language such as, "Requires EPA to implement strategies for chemical testing and risk assessment," "Instructs the EPA Administrator to issue guidance annually identifying the makes and model numbers of low greenhouse gas emitting vehicles," or "Amends the Clean Air Act to direct the EPA Administrator to revise regulations." Those bills designated as containing *prohibitions* included the formal congressional disapproval of EPA rules, the prohibition against imposing sanctions or enforcing provisions, the transferring of enforcement authority from the EPA to another administrative agency, the delay of EPA rules, the mobilization of litigants against the agency, or the rescinding of funds with which to implement its programs, and these bills contained language such as, "Amends the Emergency Planning and Community Right-to-Know Act of 1986 to repeal provisions authorizing the Administrator of the Environmental Protection Agency (EPA) to modify the frequency of submitting toxic chemical release forms," or "Disapproves the rule submitted by the Environmental Protection Agency (EPA) on December 15, 2009, relating to the endangerment finding and the cause or contribute findings for greenhouse gases under the Clean Air Act." Those bills designated as containing *oversight* provisions included reporting requirements, consultation requirements, spending limits, time limits, public hearings, and direct oversight,

and contained language such as, "Requires the Administrator to report on or before January 1, of each year to the President and to Congress regarding the receipts and expenditures and works of all State and regional environmental centers," or "Requires the EPA Administrator to arrange with the Secretaries of Education and of Energy to study how sustainable building features such as energy efficiency affect multiple perceived indoor environmental quality stressors on students in K-12 schools." If a bill made any one, or any combination of these efforts, it was considered an agency curbing bill. 1,361 such bills were introduced by the president's co-partisans over the course of the 1973 to 2010 time series. A random sample of 100 bills were double coded for reliability, and there was virtually no inconsistency in the codes assigned.[78]

Importantly, a number of bills were introduced over the course of the time series that addressed the powers and responsibilities of the Environmental Protection Agency that were not counted as agency curbing bills. Among those bills relevant to the EPA that were not considered relevant were appropriations bills not specifically involving a reduction of funds to the EPA or the programs within it, the authorization but not requirement that the EPA take regulatory action (that is, discretionary provisions), the establishment of offices within the EPA but not requiring that the EPA itself take regulatory action, requirements of actors other than the EPA (e.g., an environmental protection requirement in an EPA statute that was directed instead at a state agency), the requirement that other administrative entities consult with the EPA and not that the EPA initiate the consultation, or the mentioning of the EPA in passing but not actually regulating it. Many such bills were introduced, in particular those granting only discretionary authority, which was not counted because it was construed as adding to, rather than reducing bureaucratic capacity to regulate.

While there is reason to suspect that requiring an agency to take on new regulatory

[78] 97 of the 100 bills were assigned the same codes in both rounds of coding, suggesting both high reliability and a randomness in any errors in the data.

tasks might not necessarily operate as punishment of the administrative agency,[79] Figure 1, which is a lowess plot of the average agency curbing level by Congress (both the composite measure and the individual indicators of curbing activity), confirms that the three agency curbing variables exhibit similar patterns over the sample time series albeit with somewhat different frequencies of occurrance. The performance of principal components factor analysis revealed that the variables loaded on a single factor with an eigenvalue of 2.05 for the first factor, with individual factor loadings of 0.87, 0.79, and 0.80, showing that the three items are highly associated with the underlying factor and at similar levels.

This lends credence to my claim that the three variables are tapping into a single core dimension, which I argue is congressional punishment over perceived transgressions of its preferences over implementation. The pooling of the variables is supported further by averaging the standardized *requirements*, *prohibitions*, and *oversight* variables, which produced a Cronbach's alpha of .80. The Cronbach's alpha measures the internal consistency of a scale, or the extent to which the items comprising the scale capture the same underlying concept, and .8 is considered sufficient for the use of a composite measure (DeVillis 2012). Thus, in both approaches to evaluating the internal consistency among the variables, the data prove to be reliably tapping into a single dimension. The claim is supported further by the fact that the requirements included in this variable are all mandatory rather than discretionary, and thus contribute toward the micromanagement of the agency's regulatory actions (which is clearer in the case of prohibitions and oversight) as opposed to contributing to the agency's latitude.[80] I thus created an *agency curbing* factor score[81], which I then weighted by the average cosponsorship support so as to afford greater weight to those bills garnering

[79]That is, Congress may be signalling intentional foot-dragging by the agency, but it may also simply desire that the agency take on greater regulatory responsibility, albeit mandatory rather than discretionary.

[80]Fewer than 20% of the agency curbing bills also contained discretion-granting provisions, which bolsters the claim that these bills are overwhelmingly comprised of efforts aimed specifically to limit administrative latitude.

[81]Creating a composite measure by averaging the standardized variables produced comparable results.

widespread support than to bills in which a lone legislator expressed dissatisfaction with the agency's implementation. The average number of cosponsors for curbing bills was 5.8, though I normalized the cosponsorship measure to fall between the values of 0 and 1. While I also conducted a separate analysis of those bills that *only* sought to prohibit or further oversee agency actions – that is, those curbing bills that did not contain *any* requirements at all – the infrequency of those occurrences (269 bills over the entire time series) rendered the variable with very limited variation (and sometimes none) within the panels, making very difficult the interpretation of the results (however, see Appendix Table A1 and the accompanying discussion).

While I argue that those bills introduced by the president's co-partisans should be the least noisy signal of congressional dissatisfaction with bureaucratic implementation, there is the additional possibility that one might want to evaluate agency curbing efforts made by members of the majority party of Congress. Here, one can plausibly argue that while members of the minority party might be less expected to be successful and thus might be more willing to engage in cheap talk behavior less reflective of a broader congressional coalition, majority party members may be more invested in the legislative agenda and inclined toward legislative sincerity. In Figure 2, I present a time series plot of agency curbing actions against the EPA with respect to the Clean Air Act (left) as well as the Federal Water Pollution Control Act (right), comparing the curbing patterns of the president's co-partisans and members of the majority party. Both the Clean Air Act and the Federal Water Pollution Control Act had fairly high rates of both same sponsor curbing and majority sponsor curbing, with a total of 406 same sponsor and 528 majority sponsor curbing bills with respect to the Clean Air Act (out of a total of 1434 bill introductions, 880 of which were curbing bills), and a total of 206 same sponsor and 319 majority sponsor curbing bills with respect to the Federal Water Pollution Control Act (out of a total of 1,454 bill introductions, 437 of which were curbing bills). While there are notable increases in majority sponsor curbing (relative

to same sponsor curbing) in the 100-101st and the 104th Congresses, the overall patterns between the two time series are relatively consistent with one another in the Clean Air Act. Likewise, apart from more marked deviations in the 103rd, 106th, and 110th Congresses, the Federal Water Pollution Control Act time series also follow each other fairly closely, providing greater support that the patterns are not vastly dissimilar with respect to their overall volume and persistence, and the results do not hinge on the analysis's restriction to same sponsor curbing bills.

Agency Curbing in Action

The varied reasons for congressional bill introductions makes useful the more in-depth discussion of the legislative constraints made against those within the Environmental Protection Agency in response to its implementation decisions. Looking within the context of the 104th Congress – that immediately following the Contract with America and thus the marked turnover of partisan control of Congress in the 1994 congressional midterm elections – one finds John Warner, the Republican Senator from Virginia, introducing on February 16, 1995 S. 440, The National Highway System Designation Act of 1995, which originated in the Senate Environment and Public Works and its Subcommittee on Transportation and Infrastructure and garnered the support of 33 congressional cosponsors.

Among other provisions, the bill prohibited the Administrator of the Environmental Protection Agency from requiring a state's adoption or implementation of enhanced vehicle inspection and maintenance programs in order to comply with the Clean Air Act. Moreover, the bill prohibited the EPA Administrator from disapproving or applying automatic discounts to state implementation plans based on policies, regulations, or guidelines that provided for discounts of emissions credits that were based on certain inspection and maintenance programs. The bill further prohibited the federal government at large from taking actions to prepare or implement regulations concerning rights-of-way in public lands until

September 1996. The bill ultimately became Public Law 104-59, thus enacting into law these ultimate constraints on the EPA's range of implementation options, with specific targets at EPA behavior suggesting clear sources of dissatisfaction with the agency's choices in carrying the delegating legislation into effect.

Of course. this example does not derive from the behavior of the president's co-partisans, but rather from a member of the Republican Party under a Democratic executive branch. However, one finds in looking to the 103rd Congress – controlled by the Democratic Party and under the Democratic Clinton Administration – that Democratic Congressman William Huston Natcher (KY-2) introduced on February 1, 1994 H.R. 3759, the Emergency Supplemental Appropriations Act of 1994, which among other things delayed the availability of amounts for state revolving funds administered by the Environmental Protection Agency and rescinded funds made available to the Environmental Protection Agency and a small number of additional administrative agencies. On Februrary 12, 1994, the bill was enacted into law as Public Law 103-211 after being agreed to in the House conference report's roll call number 27 by a vote of 245 to 65.[82]

Collectively, these two cases of bill introductions on the part of Democratic and Republican legislators suggest not simply a blanket attack on the administrative agency given its opposition to broad-based policy, but rather a careful attention to the policy choices adopted by the agency and the legislators' efforts to curb the agency's capacity to continue to carry them into effect. Such decisions on the part of legislators form the basis of the agency curbing data on which I base the analysis in this dissertation.

Evaluating Statutory Noncompliance

The estimation of statutory noncompliance requires the evaluation of the meaning of the

[82]While prohibiting the allocation of funds toward the EPA, a traditionally more liberally-aligned agency, the bill granted authority to other administrative agencies including the Department of Defense, suggesting that what was at work was not a blanket attack on the executive branch but rather a more targeted effort at the agency itself.

delegating statutes and to what extent they extend obligations and authority to agencies, an interpretive role often left to judges. After all, amid the expansion of federal bureaucracies and the potential for inter-branch and intra-branch policy collisions, "private parties usually find ways to bring such disputes to court. Federal judges must then try to sort out the conflicting legislative mandates," with judges left to assume the role of "traffic cop" (Melnick 1994: 34).[83] To measure judicial interventions in agency implementation, I identified through Lexis searches of each of the 26 statutes implemented in whole or in part by the EPA the 567 DC Circuit cases from 1973 through 2010 in which the EPA was the defendant.[84] Banks (1999) notes that despite their considerable importance as Article III constitutional courts, the United State Court of Appeals are "described, paradoxically, as the courts that 'nobody knows'" (1999: 1), though it is often the court of last resort in American cases being litigated. Banks notes in the context of the DC Circuit that amid the rampant growth of regulation that characterized the 1970s, the court had focused its efforts toward constraining with the hard-look doctrine[85] administrative agencies' legal and policy initiatives given agencies' increasingly sweeping power to act legislatively (Id at 2). Banks characterizes the DC Circuit as becoming a "de facto, quasi-specialized administrative law court of last resort" (Id at 3), not to mention a court that developed a conservative reputation with the addition of Reagan appointees.

Going beyond the discussion of pure ideological features of judges, Canon and Johnson note that while "judges try to mute the influence of their attitudes," they are unable to

[83]While Melnick (1994) notes that courts are the venue in which these disputes are settled, he also claims that like the rest of the American political system, the judiciary is highly divided both with respect to ideology and with respect to the judicial philosophies of activism versus restraint (1994: 35-36) and calls attention to their activism within the context of AFDC cases (Id at 97).

[84]A limitation of this analysis is the exclusion of settlements, though they are largely due to failure to meet deadlines as a consequence of insufficient resources with which to comply with statutes, as opposed to active efforts to expand discretionary windows. Thus, such settlements are not of theoretical interest.

[85]The hard look doctrine is a principle of administrative law declaring that a court should review agency decisions with great care so as to ensure that those decisions were based on reasoned decisionmaking, with courts interfering should it become apparent that the agency had not taken a "hard look" at the salient problems at hand, and with "arbitrary or capricious" actions made invalid.

escape their implicit views on justice and social order, as well their views on the what the proper role of judges should be in the separation of powers system, which in turn affects the decisions rendered (1999: 46). Moreover, they are attuned to the political environment in which they operate, in that while judges technically are meant to make decisions based on legal facts and precedent as opposed to the political environment, judges carry the incentive to maintain respect and avoid being criticized for their decisions, such that judges may be "sensitive to social and political considerations in their environment as they interpret higher court policies" (Id at 52). Thus, there are institutional and societal pressures that may be conducive to judges producing decisions based on factors other than the text itself (see also Binder & Maltzman 2009).

Herz (1992) writes on the subject of judicial exercising of textualism that new textualists' message is very simple: "[F]ocus on the text, nothing but the text, and no,"thing but the text of a legal document," without any consideration of extra-textual evidence that favors a contrary legislative intent (1992: 184). Of course, legal and political science scholars acknowledge the limits of textualism, or the extent to which it can reliably yield the same interpretation among different judges, with Eskridge & Ferejohn (2010) noting that the remains, especially with respect to the larger policy areas, a lack of interpretive closure despite the fact that "the statutory text, its purpose and legislative history, and its context within particularly statutory schemes remain the critical tools for figuring out how to apply statutes" (2010: 465). It is this persistent statutory ambiguity – combined with political scientists' widely documented accounts of judicial ideology at the appellate and Supreme Court levels of the judiciary – that leads to concerns about treating the judiciary as the appropriate institution to which to turn with respect to resolving matters of legal interpretation of cases over which Congress and the agency have failed to resolve the proper policy interpretation and implementation choice. And while judges claim to be deferential to agencies' statutory interpretations, a pattern that was defended in *Chevron v. Natural Resources Defense*

Council (1984), Eskridge & Ferejohn find that "judges are not as deferential as they claim to be," thus leaving a greater role for ideology (2010: 24). However, despite this concern about judicial biases in their exercise of deference toward agency actions, Westerlund et al (2010) find that the ideological makeup of a Court of Appeals panel does not affect its treatment of Supreme Court precedent, even controlling for ideological distance between the levels of the judicial hierarchy, suggesting a smaller role of judicial ideology at the appellate level than some might suspect. Thus, while there are certainly inconsistent political and legal accounts of the extent of ideological decisionmaking on the US Court of Appeals, there appears to be evidence sufficient to suspect that at least some of what drives DC Circuit judges' rendering of decisions is based on the content of the text and good-faith efforts to interpret it properly. It is for this reason that I rely on DC Circuit opinions with which to evaluate bureaucratic compliance with the delegating statutes.

To be sure, it is not always the case that those statutes delegating to the Environmental Protection Agency contain agency-forcing provisions. That is, there are a number of case in which the agency is permitted, but not required, to carry out various regulatory tasks. It is in such cases that one would observe litigation that centers not on the failure to take on mandatory regulatory tasks, but rather the slowness with which the agency is carrying out regulatory tasks that are seen as being within its jurisdiction – even obligation – despite the potential absence of a particular time frame within which to act. Such is the case when interest groups accuse the EPA of dragging its feet with respect to tasks that technically are discretionary in nature but that nevertheless are construed as within the agency's core mission, to protect the environment such as through the preservation of air and water quality. Another dimension in which litigation can arise in such a context absent agency forcing provisions is those cases in which the agency is authorized (though again, not *required*) to take regulatory actions in defense of environmental protection (for example, protection of public lands or water), and in which industries take aim at the agency in court given

allegations that the EPA is being overly vigorous in its protection of these resources, thus being unfair to the companies with vested interests in these environmental and energy issues.

I hand-coded each majority opinion to determine whether the agency lost on substantive grounds. While the district courts are typically the first venue of litigation, suits against administrative agencies often go straight to the appellate courts, with the DC Circuit being the main circuit addressing Administrative Procedure Act cases, making this the appropriate level of analysis. The predominant reasons for the EPA's loss was the issuing of rules or enforcement that were inconsistent with the delegating statutes, or intentionally causing unreasonable delay in taking mandatory actions.[86] I excluded from the noncompliance measure those cases that were decided on procedural grounds (*e.g.*, standing or notice and comment procedures) so as to focus on matters of substantive policy. The vast majority of these cases were unanimous, as is typically the case at the appellate level, and there were very few cases that contained dissenting opinions.[87]

A clear limitation to this the measure is that it effectively treats DC Circuit judges as neutral arbiters of agency actions as opposed to treating them as ideological and able to read multiple views into text. Eskridge & Ferejohn note that Americans commonly view judicial review as important because it preserves constitutional rights and governance, and thus "the most accessible theory is that judges should apply the text and principles of the sacred text of our civic religion" (2010: 437). Given this, many of the most noteworthy justices of American history (e.g., John Marshall, Oliver Wendell Holmes Jr., Louis Brandeis, Hugo Black) advocated such a text-based or structural approach to constitutional interpretation. Moreover, they add, legal academics typically advocate in favor of theories of constitutional interpretation that are rooted in the document's text, structure, and principles (Id at 438).

[86]Among the language determined to count as noncompliance were "regulation violated Clean Air Act" (*American Corn Growers Association v. EPA*, 2002), "EPA abused its discretion in promulgating Tribe's redesignation" (*Administrator, State of Ariz. v. EPA*, 1998), and "[EPA's rule] was unreasonable and arbitrary" (*Kennecott Corp. v. EPA*, 1979).

[87]Exclusion of those cases involving dissents did not substantively affect the results.

Of course, this does not address the challenges of determining how long a text should be read, how to address ambiguities, and how we should resolve conflicts when two judges see "plain meaning" of a law but would produce opposite outcomes. I am unable to resolve such issues of textualism here. However, by relying on strict textual analyses of the agency's authority and the extent of (non)compliance that it exercised and by relying on the judge to explicate the clear statutory obligation that was not met or the clear statutory provision that was breached by an action taken, I placed a heavy burden on the court to demonstrate noncompliance and thus sought to strip away, to the greatest degree possible, the effect of ideology. Using these criteria, I found that the EPA lost 129 (or approximately 23%) of these cases. This measure *EPA suits lost* is the percentage of EPA losses per law per Congress (see Table 2A in the Appendix for summary statistics).[88]

Measures of Institutional Conflict. *Legislative-executive distance* is a continuous variable measuring the NOMINATE distance between the President and the median floor member (Poole & Rosenthal 1997).[89] Lower values are associated with greater ideological proximity between the branches, indicating unified government, whereas larger values are associated with divided government with heightened disagreement between the President and Congress.*Margin of control* is absolute value of the margin by which the majority party controls the seats in Congress, such that larger values indicate a wider majority while values closer to zero indicate an evenly divided Congress. With a large margin of control in Congress, a party has lower transaction costs in passing curbing legislation. The value does not alone distinguish between whether that majority is that of the president or his opposition.[90] I interact *margin of control* with *legislative-executive distance* because I expect

[88]Using a count rather than percentage of suits lost produces comparable results.

[89]Using the president's NOMINATE score to approximate agency ideology is imperfect, but the time-invariant nature of the Clinton & Lewis (2008) scores and the limited range of the Chen et al (2014) scores makes the president's ideal point the closest available approximation of the agency's ideal point, particularly given that the EPA is not an independent agency but rather is headed by a political appointee.

[90]Thus, a large *margin of control* value could indicate one of two conditions: divided government with the opposing party in a very strong position of control in Congress, or unified government in which the President

that the effects of extensive inter-branch ideological disagreement will be conditioned by the extent to which the majority coalition is in power and positioned (as well as motivated) to pass punitive legislation with respect to the agency. I expect the independent effect of *Legislative-Executive Distance* to be positive conditional upon the level of *margin of control*, but given the higher likelihood of punishment with a large *margin of control* in the majority party of Congress, I expect the interaction effect to be negative.

To estimate legislative division, I use the measure *chamber distance*, which is the first-dimension Common Space NOMINATE distance between the House and Senate medians. Because successful policy adoption requires some overlap in preferences among key political actors in both of the chambers of Congress, greater distance between the chambers will yield higher transaction costs in passing legislation, creating greater opportunities for the EPA to shift policy toward its preferences. Thus, I expect the effect to be significant and positive.

To estimate the *statute-agency ideological distance*, I computed the absolute value of the NOMINATE distance between the median member voting in favor of the delegating statute and the median floor member of the contemporary Congress.

Other Political Environment Variables. Because of the potentially meaningful effects of interest group lobbying in shaping bureaucratic implementation, I include from the Policy Agendas project the annual number of *environmental interest groups*.[91] Gordon & Hafer (2005) call attention to interest group pressures and their "flexing of muscles," holding that companies' communication of intentions to fight agency decisions may lead agencies to regulate less or regulate elsewhere, despite statutory directives. Thus, multiple competing principals – Congress and interest groups – may drive agencies toward noncompliance.

To estimate further the potential problems arising from multiple principals, I include the variable *distance between congresses*, which is the absolute value of the distance between

commands strength in both the executive and legislative branches. The variable serves as a constraint on agency policymaking in the former case of divided government, while it enhances bureaucratic latitude when the branches are united in their preferences over policy.

[91] I divided the value by 100 to allow for easier interpretation.

the authorizing Congress's first-dimension NOMINATE median legislator and that of the contemporary Congress. This allows me to estimate to what extent coalition drift drives the agency to exercise noncompliance with the statutory text in effort to be responsive to the current Congress, or alternatively defecting from the current Congress in effort to exercise fidelity to the delegating statute. To control for *DC Circuit ideology*, I identified the median judge's ideal point utilizing the Giles, Hettinger, and Pepper (2001) ideology scores of judges, which are based on the judge's appointing president and/or home state senators, thus exploiting the norm of senatorial courtesy. Epstein et al (2007) find that the Giles et al measure 'exhibits face, convergent, and construct validity and outperforms other common neasyresm such as the party of the appointing President or the ideology of the state from which the judge is selected" (Epstein et al 2007: 4-5). [92]

Because partisan ideology should predict well the direction in which the agency would opt to push policy (whether higher or lower than the statute), I include the dummy variable *Democratic President*. I expect that the party of the president can be treated as a proxy for these preferences over implementation, particularly given the Democratic Party's historically strong ties to environmental policy as well as a more broadly pro-regulatory agenda. Given the greater ease of punishing an agent seeking to over-enforce rather than seeking to under-enforce, I expect the coefficient to be significant and positive.

To account for the possibility that agency enforcement is driven not by ideological preferences over policy but rather resource constraints on effective implementation, I control for the *EPA budget* for the fiscal year, using data made public by the agency.[93] Given the

[92]Evaluating instead the NOMINATE distance between the median judge and the median floor member, and the NOMINATE distance between the median judge and the president, did not substantively affect the results. Using the cruder measure of a dummy variable for Democratic or Republican control of the DC Circuit likewise produced comparable results.

[93]I divided this variable by $100,000,000 to ease interpretation. Replacing this budget variable with a trend of the size of the EPA workforce over time produces slightly weaker, though largely consistent results, and the effect of *Workforce* is insignificant. The inclusion of both variables simultaneously produces results highly comparable to those presented in the main models below, though simultaneously controlling for them induces the problem of multicollinearity due their correlation of .94.

natural ebbs and flows in the extent of environmental regulation over time in ways that are not relevant to my theory (e.g., an oil spill), I control for the *total EPA legislating*, which is the number of bills introduced that addressed the Environmental Protection Agency in some way, and the *total EPA litigation*, which is the total number of DC Circuit suits pertaining to these laws. To evaluate whether the period following *Chevron v. NRDC* (1984) was associated with greater agency maximizing of discretion, I include the dummy variable *Post-*Chevron, which takes the value of 1 after the 1984 case and 0 otherwise.[94] The evaluation of the pre- and post-*Chevron* provides, I argue, an important (potential) structural break in the data such that consistent with studies employing regression discontinuity design (RDD), we should be able to see a "treatment effect" of being in the aftermath of the deferential review advocated by *Chevron*.[95]

Finally, to model the nonlinear pattern of bureaucratic noncompliance over time, I include smooth cubic splines. The procedure, which produces one less variable than there are knots, produces a continuous smooth function that is linear before the first knot, is a piecewise cubic polynomial between successive knots, and is linear after the last knot. Performing sensitivity analysis to vary the number of knots did not meaningfully affect the main results.

Law-Level Measures. For each of the 26 statutes implemented in whole or in part by the EPA, I determined the level of administrative *fragmentation*, which is a factor score comprising the numbers of implementing administrative actors and agencies, and the number of instances of overlapping jurisdiction over policy space in each of the laws. These actors and entities were identified based on the text of the law and whether they were involved in implementing core regulatory functions (rulemaking, sanctions, hearings, and/or lawsuits).[96]

[94] Also relevant is *I.N.S. v. Chadha* (1983), pertaining to the legislative veto, though it fell within the same Congress as *Chevron* and thus the effects cannot be disentangled using this cutpoint.

[95] However, a simple difference-in-means test reveals that there is a small and statistically insignificant difference in agency curbing between the two periods, and plotting the data with a vertical marker on the x-axis for the time at which *Chevron* took place (the 98th Congress) produces mixed findings and in some cases none at all. Thus, evaluating this effect at the bivariate level does not produce results, and the data are not sufficient in size to carry out a proper RDD design within the vicinity of this assignment variable.

[96] Averaging the standardized scores performed equivalently.

Farhang & Yaver (2015) argue that congressional fragmentation of the state constrains the executive branch given the need to coordinate across numerous actors and agencies, in addition to facilitating the legislature's goal of maintaining a "sticky" status quo. Thus, I expect higher levels of fragmentation to be associated with more constraints on the EPA's implementation, and in turn less noncompliance.

I identified from the text of the delegating statutes whether the law provided for *citizen suits*, which I expect to constrain bureaucratic behavior. There is potential endogeneity involved in evaluating the impact of citizen suit litigation provisions when those provisions may have been inserted into legislation with the precise concern that agencies might be less inclined toward compliance with those particular statutes. To evaluate this further, I evaluated the various differences between laws passed with versus without citizen suit litigation. Laws providing for citizen suits are distributed widely across time of passage, policy topics, and levels of statutory significance, in ways not systematically distinct from non-citizen suit laws (though citizen suit laws do appear somewhat more frequently in the later decades of the data).[97] Thus, it does not appear to be the case from this cursory analysis that the differences in the details of the statutes themselves (which could potentially shape its vulnerability with respect to precluding bureaucratic drift) were the driving forces behind Congress's inclusion of these provisions.

A question remains, of course, to what extent the statutory provision of citizen suits alone is enough to shape bureaucratic behavior, or whether the frequent use of this legal strategy would be necessary in order to ensure better compliance.[98] If it is indeed the case

[97] A limitation here is that many citizen suits are mobilized not under specific statutes, but rather under the Equal Access to Justice Act. However, I argue that the statutory provision for these legal strategies in the context of specific statutes does provide some useful indication of the likelihood of the mobilization of organized interests in court with respect to these statutes' proper implementation.

[98] The use of citizen suit litigation in the environmental context has been rather limited when compared to an area such as claims of employment discrimination under Title VII of the Civil Rights Act of 1964. After the passage of the Clean Water Act, the number of suits filed by environmental groups was scarce, with many organizations lacking the resources to identify violations let alone to bring a case (Environmental Law Institute 1984.

that citizen suits are merely a possibility *on paper*, then capturing the effect of citizen suit mobilization presents a hard test for the theory. And while one might expect there to be a correlation between the statutory provision of citizen suits and activity in the DC Circuit, it is neither a given that organizations will in fact utilize this tool, nor that suits brought will make it to the DC Circuit as opposed to ending through settlement. I assigned policy codes to each of the 26 laws under the EPA's jurisdiction, falling into the following categories: Air, Water, Public Health and Safety, Public Land and Animals, Energy, and Hazardous Waste. Each of these policy categories was coded as a dummy variable, and I included these as policy fixed effects in the models presented below. Finally, *significant law* is a dummy variable taking the value of 1 if it was identified by Mayhew (2005) as significant, and 0 otherwise.[99].

Estimation Method. The data are organized by statute by Congress, with 26 laws over 19 Congresses (93rd to the 111th). This data structure enables me to estimate over time the institutional and law-level characteristics that shape agency implementation behavior.

Given this data structure, it is appropriate to use a time series cross-sectional model, whereby the data consist of comparable time series data observed on different units (statutes), allowing one to test theories of both cross-sectional and cross-temporal variation. A challenge in applying this procedure to the EPA data is that some of the laws under the EPA's jurisdiction were passed recently, thus leaving fewer observations for those units and giving greater weight to older laws than to those that are newer. Given Beck's (2010) recommendation of cross-validation of units within time-series cross-sectional data, I compared the full dataset to the the data from laws enacted between the 93rd and the 111th Congress, as well as to the laws enacted from the 93rd Congress or earlier (that is, those laws with balanced panels). I find that the results from the 93rd-forward laws closely parallel the results of

[99]An exception is the Federal Food, Drug, and Cosmetic Act (1938), which was passed before the start of Mayhew's study but has a high level of significance, as indicated by its Lapinski & Clinton (2006) significance score of 0.819. Thus, I treat the law as significant.

the full estimation, and while the strength of the specification with older laws is of a weaker level of significance (with results around p=.10), the direction of the effects remain the same. Thus, the results do not appear to be driven simply by a subsample of the laws within my analysis. To address the potential effects of outliers given the relatively small number of units in the sample, I performed the resampling technique of jackknife estimation,[100] and the main substantive findings were consistent.

The dependent variable *agency curbing* is the factor score weighted by cosponsorship support, and ranges from 0 to 0.92 with a mean of 0.22. The dependent variable of *EPA lawsuits lost* is the percentage of DC Circuit cases that the EPA lost on substantive grounds, and it ranges from 0 to 1 with a mean of 0.16. I estimate the effects using Ordinary Least Squares with panel-corrected standard errors (PCSEs) to account for contemporaneous correlation.[101] To account for variable litigation periods – that is, variation in the time between the agency's statutory noncompliance and the DC Circuit's rendering of a decision on that behavior – as a robustness check I present alongside these main results in Table 2 an alternative specification that lags the *EPA lawsuits* measure by one period (*EPA lawsuits* $lost_{t-1}$).[102]

Because performing statistical analysis of relationships between nonstationary time series can lead to spurious results, I use a Fisher-type test to test to confirm whether the dataset contains a unit root. I find overwhelming evidence against the null hypothesis of a unit root with respect to all variables except for *environmental groups* and *distance between congresses*, which I first-differenced to render stationary. Performance of the Wooldridge test for autocorrelation in panel data produced a highly significant test statistic, indicating the

[100] Jacknife is a resampling technique whereby to estimate a parameter, one systematically omits the ith observation and averages each subsample estimator.

[101] While the *EPA lawsuits* variable is not strictly speaking continuous, it is widely dispersed between 0 and 1, and alternatively using a negative binomial specification of the count of lawsuits lost does not produce meaningfully different results.

[102] While the cases in the sample overwhelmingly were argued in the same Congress as when the cases were decided, the time between the case's initiation and its being argued is more varied.

presence of first-order autocorrelation, for which PCSEs do not correct. After examining the autocorrelations across different panels, I specify in the model that there is AR(1) correlation within the panels and that the coefficient of the AR(1) process is specific to each panel.[103]

Findings of Noncompliance with Current Congress

I begin by discussing the model estimating the conditions driving agencies to deviate from Congress's preferred implementation, as indicated by the *agency curbing* composite measure. The models are OLS and thus the coefficients can be interpreted directly. I focus here on the main variables of theoretical interest, though the full estimations are presented in Table 2.

In evaluating the effects of interactions, one cannot consider the constitutive terms of the model as the effects of X on Y as one does in linear models because the assumption in interacting these variables is that the effect of a variable is conditional upon another variable (see, e.g., Brambor et al 2006). Thus, the coefficients on *legislative-executive distance* and *margin of control* cannot be construed as the unconditional effects on noncompliance so measured. I find in model 1 that when the *margin of control* is equal to zero, the conditional effect of a unit increase in *legislative-executive distance* is associated with a 0.44-unit increase in agency curbing, a value that ranges from 0 to 0.92. Rather than focusing on the significant and positive independent effect of *margin of control*, the more meaningful term is the interaction, given that a large partisan majority in the president's party would not be expected to serve as a threat to the agency, whereas under conditions of inter-branch conflict *and* a large majority in Congress, there will be both ideological disagreement and an opposing party well-positioned to punish an agency seeking to move policy toward its own preferred location. The interaction is powerful and negative – with a standard deviation

[103]Utilizing a lagged dependent variable specification to address autocorrelation produced similar results with repect to a number of the core variables of theoretical interest. However, see Achen (2001) on the problems associated with LDV's.

Table 2: Predictors of Bureaucratic Noncompliance, 1973-2010

	(1) Curbing	(2) Losses	(3) Losses_{t-1}
Legislative-Executive Distance	0.438***		
	(0.129)		
Margin of Control	1.822***		
	(0.370)		
LE Distance x Margin	-3.024***		
	(0.697)		
Chamber Distance	0.137*		
	(0.063)		
Statute-Agency Distance		0.144***	0.077**
		(0.018)	(0.024)
Distance Between Congresses	0.161**	0.243***	0.008
	(0.066)	(0.026)	(0.036)
Citizen Suits	-0.013	-0.011**	-0.025***
	(0.020)	(0.004)	(0.007)
Democratic President	0.017	0.004	0.158***
	(0.011)	(0.005)	(0.006)
Environmental Groups	-0.002*	0.022***	-0.032***
	(0.001)	(0.001)	(0.000)
DC Circuit Ideology	-0.231**	1.406***	-0.445***
	(0.074)	(0.025)	(0.012)
Post-*Chevron*	-0.015†	-0.105***	0.005†
	(0.008)	(0.008)	(0.003)
Significant Law	0.047***	-0.014**	-0.008***
	(0.009)	(0.004)	(0.001)
Statutory Fragmentation	-0.000	0.004**	0.007**
	(0.006)	(0.001)	(0.003)
EPA Budget	0.000	0.006***	0.009***
	(0.000)	(0.000)	(0.000)
Total EPA Legislation	0.001***		
	(0.000)		
Total EPA Lawsuits		-0.010***	0.013***
		(0.001)	(0.000)
Intercept	-2.752***	11.050***	8.479***
	(0.818)	(0.186)	(0.102)
Policy Fixed Effects	✓	✓	✓
Splines	✓	✓	✓
R^2	0.26	0.87	0.87
Total Observations	372	372	372

$^{***}p < .001,^{**}\, p < .01,^{*}\, p < .05,^{\dagger}\, p < .10$

increase in the interaction term producing a 0.11-standard deviation decline in curbing – which is consistent with my expectation that amid partisan conflict with the opposing party holding a large majority, the high risk of punishment will make noncompliance an unlikely avenue for the agency to take in equilibrium. That is, under this arrangement, Congress appears well-equipped to induce compliance in the agency.

Because of the complexity of interpreting interactions in which both variables are continuous, I present in Figure 3 a plot of the interaction effects at different levels of *margin of control*. While the plot does not include confidence intervals around the point estimates, what one can see is that there is – consistent with the effect presented in the regression result – a markedly negative slope when the margin of control is at its higher values, and it is not until the Congress is more evenly divided that the slope flattens or moves upward. This is consistent with my expectation that the effect of legislative-executive disagreement over policy will be conditional upon the strength of the coalition in Congress and thus its ability to pass punitive legislation should it so desire.

Consistent with my expectation that divisions between the chambers of Congress would be associated with increased bureaucratic noncompliance by the EPA, I find a positive effect of *chamber distance*, with a unit increase in chamber distance associated with a .14-unit increase in agency curbing.[104] The effect of *NOMINATE distance between Congresses* appears to be significantly associated with agency curbing from the current Congress. That is, by exercising greater fidelity to the statutory text passed by an ideologically distant Congress, the current Congress expresses greater disapproval of the agency's actions. Increases in the extent of environmental interest group activity appears to be associated with less noncompliance, though the substantive effect is small. Thus, the effect of having multiple competing principals appears to prodiuce an inconsistent effect on the agency's implementation and

[104]This effect of legislative division is consistent when looking instead to the NOMINATE distance between the medians of the majority and minority parties.

how it is received by other institutional actors.

Congressional provision for citizen suits does not appear to effectively constrain agency actions, despite the theory that the agency may be inclined to seek to avoid costly litigation from this broader pool of potential litigants. Moreover, contrary to my expectations, adjustment to judicial deference in the aftermath of *Chevron* appears to have a modestly significant and *negative* effect on noncompliance, though the substantive effect is small, with a move from the pre-to-post-*Chevron* period associated with only a 0.02-unit decline in agency curbing. The lack of a significant finding with respect to the EPA's budget suggests that these acts of noncompliance with the current Congress are not driven primarily by the agency's resource constraints as opposed to disagreements over matters of substantive policy.

As a robustness check in Table A3, I estimate additional OLS models with PCSEs combined with Prais Winsten, with the dependent variable of agency curbing weighted instead by the proportion of agency curbing bills per law per Congress on which some legislative action was taken[105] (model 1), and by the average number of committees to which the agency curbing bills were referred (model 2). Providing these additional specifications enables me to better ensure that my findings do not rely on the assumption that the number of cosponsors per bill is an adequate indication of legislative sincerity or the seriousness with which a bill was considered by congressional coalitions. That is, while some pieces of legislation pass through both chambers of Congress and are signed into law by the President without a single cosponsor, other laws garner the support of 200 cosponsors without achieving final passage. Thus, cosponsorship provides an only imperfect signal of congressional support for a given piece of legislation. Thus, as additional metrics of the seriousness with which congressional coalitions worked to constrain the EPA (and the credibility of such a threat against the agency), I also evaluate the rate at which these agency curbing bills received some legislative action and the rate at which bills were taken under consideration by multiple congressional

[105]That is, this is the percentage of bills for which the date of last action was not the same as the date of the bill's initial introduction.

committees.

While only 6.9% of agency curbing bills introduced by the president's co-partisans ultimately passed, 61% had some legislative action taken on them, with wide variation in the length of those legislative cycles. And while multiple referral was a practice made more common in recent decades as opposed to the earlier period of this analysis, there were on average almost two committees though as many as 13 engaged in agency curbing legislation. While inflation in the number of committees could be attributable to other aspects of the legislation – for example, when agency curbing provisions were nestled within omnibus budget reconciliation acts touching on many distinct policy domains – it provides yet another indication of the body of legislators taking under consideration provisions aimed at constraining the agency's regulatory latitude. Consistent with the main findings discussed above, I find in both specifications that there is a significant and positive independent effect of *legislative-executive distance* when the margin of control is set to zero, while the interaction between the two is significant and negative. Greater *chamber distance* is also positively associated with the growth in agency curbing behavior, such that greater legislative divisiveness continues to appear to be associated with the agency's greater propensity to act out of accordance with the current Congress's preferences over implementation. However, the effects of *distance between Congresses* and congressional provision of *citizen suits* do not reach conventional levels of statistical significance.

As an additional robustness check in Table A4, I estimate additional OLS models with PCSEs combined with Prais Winsten, with the dependent variables of the individual types of agency curbing bills introduced, weighted by their cosponsorship support. I argue that all three of these measures – *requirements*, *prohibitions*, and *oversight* – are, in conceptually distinct ways, constraining the agency so that it no longer has free reign in its implementation, a claim that is supported by the variables all loading heavily on a single factor and exhibiting similar patterns over time. However, there is reason to suppose that different patterns

could emerge when compelling as opposed to prohibiting regulatory action by the agency. However, both the *requirements* and *prohibitions* models – though not *oversight* – display patterns consistent with those when using the composite measure: an increase in congressional constraints on the agency amid greater legislative-executive distance, but a significant and negative interaction term. While the effect of *chamber distance* is only sustained in the *prohibitions* model, the effect of greater ideological distance between the enacting and contemporary Congresses remains significant and positive with respect to Congress's introduction of requirements and prohibitions against the agency. Thus, while there is not total consistency across all three variables, the consistency with respect to the *requirements* and *prohibitions* variables bolters support for the chapter's main findings on conditions under which congressional coalitions will seek to curb the agency's latitude in regulating.

Noncompliance with Statutes Enforced by Courts

The above analysis of agency curbing sheds important new light on agency deviations from congressional preferences in statutory implementation, but does not answer clearly the rule of law question regarding the agency's adherence to statutory text. For that, I turn to the *EPA suits lost* dependent variable, the results of which are presented in Table 2 alongside the agency curbing specification. I expect that considering these substantive lawsuit losses against the EPA will provide novel insights about adherence to statutory text given variation in political and legal conditions, with the DC Circuit Court of Appeals able to assess whether the agency contravened its regulatory authority under the delegating statutes.

In model 2, I find that a unit increase in *statute-agency distance* – that is, the extent of disagreement between the policy set by the enacting coalition and the agency – is associated with a 0.14-unit increase the EPA's loss rate, significant at the .001 level. I likewise find this significant and positive effect of *statute-agency distance* in model 3, bolstering support for the claim that the agency will exercise less fidelity to the statutory text when it is not ideologically aligned with the policy that it sets. Consistent with the finding with respect

to agency curbing activity, I find that greater ideological distance between the enacting and contemporary Congresses is associated with not just greater legislative constraints on the agency, but also greater loss rates in court. That is, when adjudicating among ideologically distinct legislative principals, the EPA appears to ultimately face greater constraints from both the legislative and judicial branches: fidelity to the statutory text results in a contemporary Congress that expresses opposition to the policy implementation, while responsiveness to the contemporary Congress results in higher levels of statutory noncompliance. Thus, amid these dueling political principals, the agency appears to be caught between a rock and a hard place, highly vulnerable to punishment by the other branches. It should be noted, however, that this finding is not robust to the lagged lawsuit specification presented in model 3, though the direction remains positively signed.

Consistent with Hypothesis 4, in both models 2 and 3, congressional provision for citizen suit litigation against the agency has a statistically significant and negative effect on bureaucratic noncompliance, suggesting that the greater pool of potential plaintiffs induces some degree of constraint on the agency, though the substantive effect is modest. Consistent with the model discussed above, the post-*Chevron* period appears in both models to be associated with *less* noncompliance, a finding that departs from my expectation that enhanced judicial deference to agency actions would amplify agency latitude and inclination to maximize or overstep discretionary bounds of implementation authority. Of course, one explanation with respect to the lawsuit measure is that this period may be associated with the court's reduced probability of exercising judicial review of agency actions within the subset of cases on which I base this analysis. More consistent with expectations with respect to judicial deference, replacing the post-*Chevron* dummy variable with a post-*Lujan v. Defenders of Wildlife* (1992) dummy variable. Lujan v. Defenders of Wildlife (1992) was a significant Supreme Court case that narrowed the range of conditions under which plaintiffs

have standing to sue.[106] Thus, the post-*Lujan* period should be associated with a reduced threat of potential plaintiffs having standing to sue the EPA. The *Lujan* variable produces comparable results on the key variables of theoretical interest and a positively-signed and significant coefficient on this dummy variable. Thus, when there is a lesser probability that an individual will be permitted to sue the agency, the agency acts less consistently with the statutory text and more consistently with its own preferences over policy. Future work will explore more closely the historical dynamics around these jurisprudential changes and the subsequent standards of review. While the direction of the effect of environmental interest group presence is inconsistent across specifications, the substantive effects remain modest, with a standard deviation increase in interest groups associated with only a .01 standard deviation increase in noncompliance in model 2, and a .17 standard deviation decrease in noncompliance in model 3. Thus, the substantive effect of interest group monitoring of the agency – though also presumably seeking to influence its policy choices – is ultimately unclear.

Thus, both lawsuit specifications produced reults highly consistent with Hypothesis 5, that the agency's statutory compliance will be shaped by its agreement with the policies they set, and the main lawsuit model (model 2) provided further confirmation of the hypothesis that multiple legislative principals will result in an agency that acts in ways that are out of compliance with either the current Congress's preferences (as indicated in model 1) and/or with the statutory text enforced by courts (as indicated in model 3). While the lawsuit models produce internally consistent findings with respect to the effects of citizen suits and *Chevron*, their small effects and their inconsistency with model 1 provides reason

[106]The *Lujan* case was brought about due to a 1986 Endangered Species Act (ESA) amendment's creation of a geographic restriction on the applicability of the ESA, holding that it only applied to the United States or on the high seas. The Court rejected the plaintiffs' argument that they were in an "ecosystem nexus" in which anyone part of a "continuuous ecosystem" that was adversely affected by a government-funded activity should have standing to sue. And given the Court's fixation on the production of "actual or imminent" injuries on the plaintiff, it was made clear that fewer environmental claims could reasonably be brought before the Court.

to exercise caution in interpreting the results. However, overall the models provide support for the claims that the extent of legislative-executive disagreement, moderated by the strength of congressional opposition, legislative division, and inconsistency between multiple principals importantly reshape the agency's incentives in implementation with respect to the current Congress's preferences, and that agreement with the delegating statute and that same inconsistency among legislative principals produces inconsistency with the letter of the law. Moreover, the inconsistent effects of the agency's budget on congressional and judicial responses to the agency's implementation suggests that while resource constraints on the agency may provide *some* explanation for these acts of noncompliance, it can hardly explain the broader patterns of noncompliance that the data reveal.

Conclusions

This chapter provides a novel large-scale examination of agency noncompliance and sheds new light on the extent of the rule of law in a world of bureaucratic governance. It provides robust support for the theory that amid diverging legislative-executive preferences, the EPA takes more actions that deviate from Congress's preferred implementation of the delegating statutes in order to pull policy toward its preferred location, *unless* the likelihood of punishment is perceived as being great. It finds that the agency's own preferences over policy importantly shape the extent to which it is in fact a faithful implementer of that statute, again providing support for the argument that agency ideology plays a crucial – though little-acknowledged – role in the execution of statutes *even with the provision of ex ante constraints* given oversight challenges produced by ongoing coalition drift. The project sheds important new light on longer-term ramifications of bureaucratic autonomy, suggesting that while there may be a number of reasons why an agency can initially carve out a space for its autonomous policymaking, that autonomy is far from path-dependent if it deviates too far from the preferences of other institutional actors. Thus, in an era of nearly-constant partisan division as well as marked coalition drift over time, there are clear reasons to rethink the

traditional delegation story and look farther downstream at the policy outcomes that we ultimately observe upon implementation.

This paper was motivated by the the desire to understand empirically the limits of Congress's ability to effectively induce compliance in those to whom it delegates – with much theory and little empirical support in extant analyses of the policy effects of congressional oversight and constraint. While compliance may be normatively desirable given policy's better reflection on the preferences of directly elected legislators, the complexities inherent in policymaking, and the changing preferences among the branches over time, reshape agencies' inclination and latitude to exercise strict adherence to the statutory text or to the Congress currently in power. These agency actions call attention to an important distinction between the ideals of ex ante constraints on the agency and the ex post implementation that we ultimately observe, with the magnitude of this disconnect shaped importantly by the partisan configuration in which the institutions operate.

The issue of noncompliance was addressed here only indirectly. The tests above capture congressional and judicial interventions into agency policymaking – interventions that ought not occur if the agency is exercising perfect fidelity to the current Congress or to the statutory text respectively. However, by identifying a set of conditions under which compliance was not induced in the agency, the project provides valuable new insights into the limits of congressional oversight of post-enactment processes, and the conditions under which bureaucratic control breaks down.

Figure 1: Agency Curbing Bills Over Time

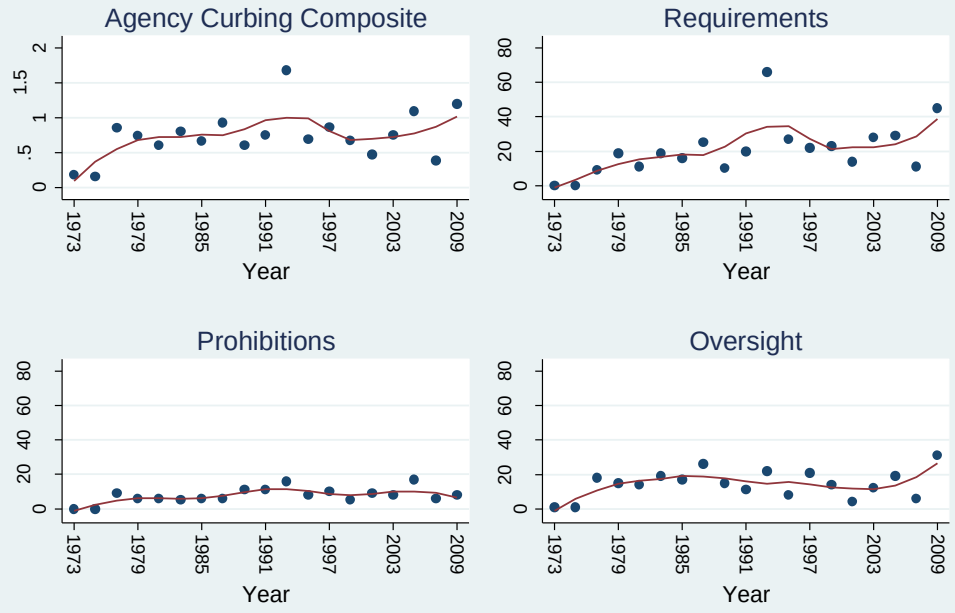


Figure 2: Number of EPA Curbing Bills Per Congress

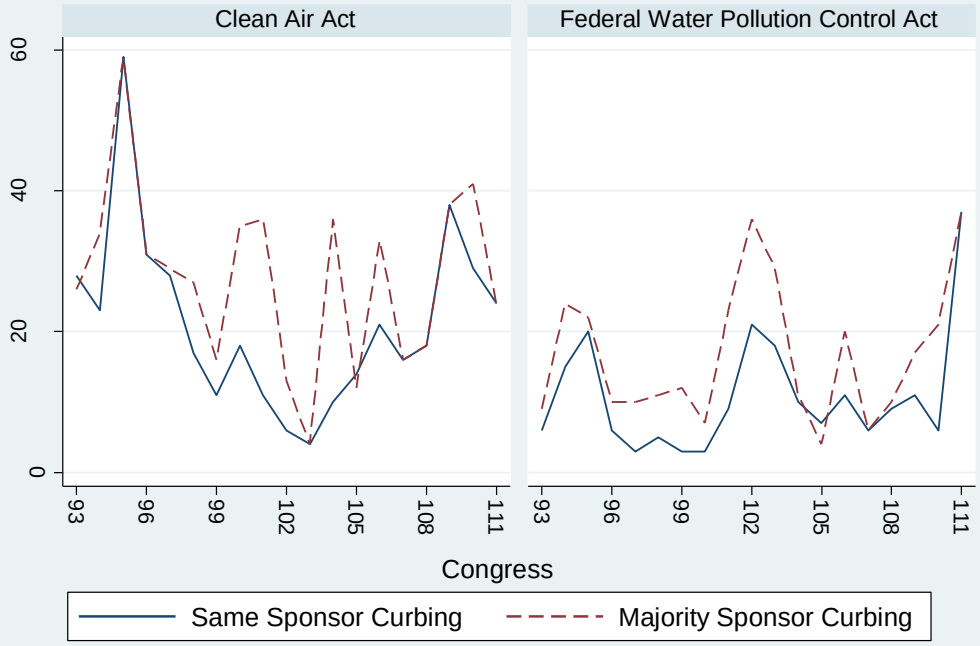
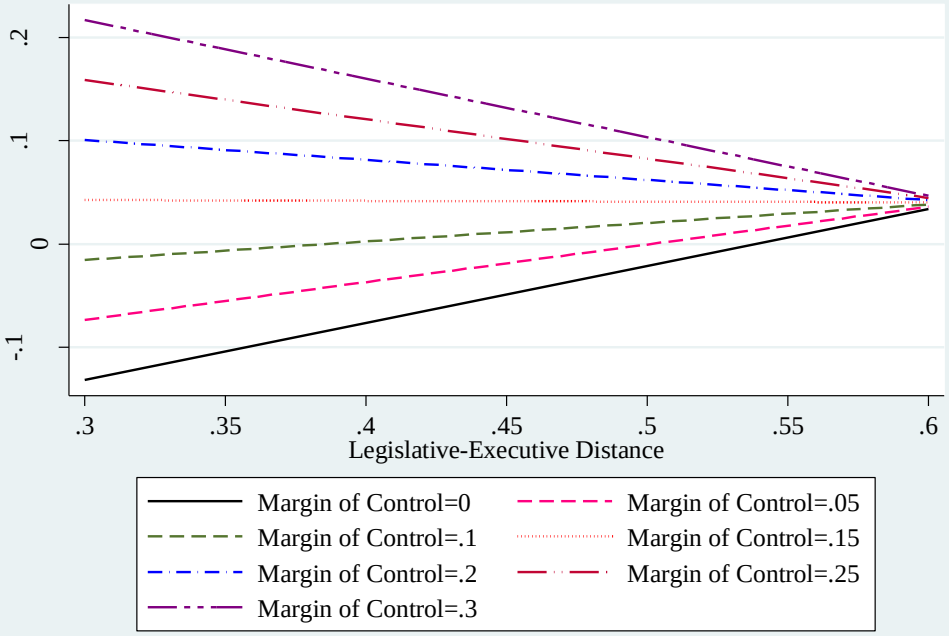


Figure 3: Interactions Between LE Distance and Margin of Control



Appendix

Because of the potential value in understanding the precise factors contributing toward congressional efforts to simply prohibit or further oversee the Environmental Protection Agency, and alongside those choices in no way adding to the Agency's regulatory agenda, I created a dummy variable for whether there were only *prohibitions* and/or oversight provisions, but no *frequirements* in the bill, and I summed these bills by law by Congress as before. There were 269 such bills introduced by members of the president's party. However, when looking at the law-Congress level, one finds that they are included in only 114 of the 398 observations, and they are entirely absent from 4 of the 26 laws, thus creating for those cases only a dependent variable of zeros. Thus, there are limitations in what we can glean from such an analysis.

Nonetheless, I used the count variable of *constraints without requirements*, which is widely dispersed and thus more fitting for a negative binomial than for a poisson model specification.[107] Performance of a Wooldridge test ruled out the presence of AR(1) autocorrelation. I thus ran panel negative binomial models with unit (law) random effects. The results are presented in Table 1A, though to interpret the effects one must simulate marginal effects due to the non-linear nature of this model. Interestingly, the effect of *legislative-executive distance* switches to the negative direction, which is inconsistent with all of the prior specifications discussed above, and the interaction term, though not statistically significant, is also incorrectly signed. However, the effect of *chamber distance* on the agency's propensity to provoke responses remains statistically significant and positive. The effects of *distance between Congresses* and *citizen suits* become insignificant here. While these results are thus less consistent with the main models discussed above, and it is worth considering why from

[107] 284 of the observations are 0, there are 50 instances with a count of 1, 32 instances with a count of 2, 12 instances with a count of 3, 9 instances with a count of 4, 6 instances with a count of 5, 1 instance with a count of 6, 1 instance with a count of 8, 1 instance with a count of 10, 1 instance with a count of 13, and 1 instance with a count of 16. Such data naturally produced a very high variance, whereas Poisson dispersion requires that the variance equal the mean.

a substantive standpoint this variable might in fact produce different results than one obtains when pooling all of the different types of regulatory constraints aganist the agency, the rather scarce amount of data limits the extent to which we can make meaningful inferences from these findngs. Extending this analysis to more environmental laws – that is, pooling these laws with those of implemented by the Department of Interior – might provide an opportunity explore further, and with more data, the differences between curbing that includes compulsions to act and curbing that is restricted to precluding action.

Table A1: NBREG Model of Constraints without Requirements

	(1)
Legislative-Executive Distance	-17.988†
	(10.343)
Margin of Control	-43.586
	(34.641)
LE Distance x Margin	82.076
	(56.623)
Chamber Distance	7.332**
	(2.682)
Distance Between Congresses	1.958
	(3.070)
Citizen Suits	-0.046
	(0.430)
Democratic President	0.680
	(0.549)
Environmental Groups	-0.044
	(0.038)
DC Circuit Ideology	1.119
	(7.288)
Post-*Chevron*	1.047
	(1.372)
Significant Law	0.250
	(0.424)
Statutory Fragmentation	0.362
	(0.245)
EPA Budget	0.000
	(0.000)
Total EPA Legislating	0.018***
	(0.004)
Electoral Uncertainty	15.300
	(11.580)
Intercept	60.133
	(79.601)
Splines	✓
Total Observations	372

$^{***}p < .001, ^{**}p < .01, ^{*}p < .05, ^{\dagger}p < .10$

Table A2: Summary Statistics

	Mean	SD	Min	Max
Dependent Variables				
Lawsuit Losses	0.16	0.21	0	1
Requirements	0.23	0.59	0	4.39
Prohibitions	0.10	0.38	0	5.03
Oversight	0.12	0.36	0	5
Agency Curbing	0.22	0.09	0	0.92
Political Environment Variables				
Floor-President Distance	0.48	0.08	0.31	0.60
Margin of Control	0.10	0.09	0	0.29
LE Distance x Margin	0.05	0.04	0	0.14
Chamber Distance	0.02	0.02	0.00	0.05
Distance Between Congresses	.06	.04	0	.17
Environmental Groups	-7.45	53.45	-141.25	34.92
Total EPA Legislating	213.57	123.57	0	395
Total EPA Lawsuits	16.39	10.02	1	46
DC Circuit Ideology	0.06	0.14	-0.25	0.25
EPA Budget	61.18	20.83	7.35	89.71
Law Characteristics				
Fragmentation	0	0.88	-1.38	2.97
Significant	0.53	0.50	0	1

Table A3: Predictors of Agency Curbing, Assigning New Weights

	(1) Legislative Action	(2) Avg. Number Committees
Legislative-Executive Distance	2.763***	6.421*
	(0.697)	(2.721)
Margin of Control	16.050***	22.729*
	(3.088)	(9.754)
LE Distance x Margin	-25.251***	-33.438*
	(4.604)	(15.344)
Chamber Distance	1.006***	2.041*
	(0.291)	(0.942)
Distance Between Congresses	1.638	1.555
	(1.232)	(2.004)
Citizen Suits	-0.108	-0.511
	(0.143)	(0.282)
Democratic President	-0.050	0.379
	(0.088)	(0.229)
Environmental Groups	-0.013***	-0.015
	(0.004)	(0.014)
DC Circuit Ideology	-3.791***	-5.765*
	(1.001)	(2.655)
Post-*Chevron*	-0.302*	-0.434
	(0.143)	(0.339)
Significant Law	0.140	0.322
	(0.216)	(0.247)
Statutory Fragmentation	0.058	0.355***
	(0.045)	(0.044)
EPA Budget	-0.000	-0.000
	(0.000)	(0.000)
Total EPA Legislating	0.005*	0.014**
	(0.002)	(0.005)
Electoral Uncertainty	-2.620*	-4.430
	(1.346)	(3.179)
Intercept	0.000	-46.945
	(.)	(28.946)
Policy Fixed Effects	✓	✓
Splines	✓	✓
R^2	0.36	0.39
Total Observations	372	372

$^{***}p < .001, ^{**}p < .01, ^{*}p < .05$

Table A4: Individual Agency Curbing Actions

	(1) Requirements	(2) Prohibitions	(3) Oversight
Legislative-Executive Distance	1.713†	1.329*	0.253
	(1.026)	(0.675)	(0.440)
Margin of Control	10.298***	6.574***	-0.028
	(2.797)	(1.974)	(1.305)
LE Distance x Margin	-17.892***	-10.359**	1.142
	(5.228)	(3.721)	(2.447)
Chamber Distance	0.004	0.508*	-0.014
	(0.486)	(0.232)	(0.215)
Distance Between Congresses	1.425**	1.343***	-0.204
	(0.505)	(0.164)	(0.438)
Citizen Suits	-0.170***	-0.017	-0.071
	(0.052)	(0.049)	(0.084)
Democratic President	0.051	-0.027	0.091*
	(0.083)	(0.061)	(0.040)
Environmental Groups	-0.019**	-0.009*	-0.004
	(0.007)	(0.004)	(0.003)
DC Circuit Ideology	-1.120*	-1.206**	-0.930***
	(0.537)	(0.368)	(0.230)
Post-*Chevron*	-0.057	-0.060	0.052
	(0.085)	(0.084)	(0.042)
Significant Law	0.438***	0.162***	0.379***
	(0.076)	(0.028)	(0.054)
Statutory Fragmentation	-0.038*	-0.071†	-0.028
	(0.019)	(0.041)	(0.040)
EPA Budget	0.005	0.000	-0.000
	(0.000)	(0.000)	(0.000)
Total EPA Legislating	0.003***	0.003***	0.002**
	(0.001)	(0.000)	(0.001)
Intercept	0.000	-13.445**	0.000
	(.)	(4.360)	(.)
Policy Fixed Effects	✓	✓	✓
Splines	✓	✓	✓
R^2	0.34	0.20	0.27
Total Observations	372	372	372

$^{***}p < .001, ^{**}p < .01, ^{*}p < .05, ^{\dagger}p < .10$

Agency Curbing Codebook

Went to the legislative database THOMAS: http://thomas.loc.gov/home/LegislativeData.php

I conducted THOMAS searches for each of the 26 statutes implemented in whole or in part by the EPA. E.g., searching "Clean Air Act" in the 93rd Congress, 94th Congress, and so on through the 111th Congress. There were no restrictions on whether it eventually became a public law or the committee from which it originated. Assigned to the label "agency curbing" those bills compelling regulatory action (requirements), prohibiting regulatory action or otherwise stripping agency latitude/authority (prohibitions), or increasing oversight over agency actions (oversight).

Collected for each bill the following variables:

Law Name: Name of the original law (e.g., Clean Air Act, Clean Water Act)

Congress: Congress of the amending bill

Bill Number: Bill number of the amending bill (e.g., HR 1)

House Origin: 1 if originating in the House, 0 if originating in the Senate

Introduced: Date of the bill's introduction

Year: Year of the bill's introduction

Democratic President: 1 if bill was introduced during a Democratic administration, 0 if under a Republican administration

Description: Short description of the content of the bill (e.g., "rules re: toxins in water, report requirement")

Rulemaking: 1 if at least some of the provisions targeting the agency's authority/obligations pertained to acts of rulemaking, 0 otherwise

Enforcement: 1 if at least some of the provisions targeting the agency's authority/obligations pertained to acts of enforcement (e.g., issuing sanctions, compelling compliance of regulated entities), 0 otherwise

Not relevant: 1 if no curbing provisions in the bill, 0 otherwise

Rulemaking or Implementation Requirement: 1 if the bill contained at least one provision that the agency take new regulatory actions, 0 otherwise.

- Ex. 1: "Directs the Administrator of the Environmental Protection Agency, by regulation and after a hearing, to disallow such deduction with respect to any solid waste material."
- Ex. 2: "Directs the Administrator of the Environmental Protection Agency, under the Clean Air Act, to promulgate Federal standards of performance for emission control devices or systems designed to prevent or reduce air pollution emissions from used vehicles."

Grants: 1 if the bill contained at least one provision that the agency issue grants to programs, states, or other regulated sectors, 0 otherwise.

- Ex. 1: "Requires the Administrator of the Environmental Protection Agency (EPA) to establish a grant program for projects to: (1) reduce free-flowing elemental mercury and mercury-added products from the environment; (2) safely dispose of or recycle mercury..."

Prohibition: 1 if the bill contained at least one provision that prohibited the agency from taking some regulatory action (e.g., prohibiting the agency from promulgating certain rules), retracted existing funds/resources/authority (e.g., reducing funds, transferring authority from the agency to another agency), or mobilized others to sue the agency (e.g., adding citizen suit provisions), 0 otherwise

- Ex. 1: "A bill to amend the Clean Air Act to prohibit the Environmental Protection Agency from requiring motor vehicle inspection and maintenance."
- Ex. 2: "Removes authority of the Administrator of the Environmental Protection Agency to waive the reformulated gasoline oxygen content requirement for an ozone nonattainment area."

Oversight: 1 of the bill contained at least one provision that imposed another oversight provision/provisions (e.g., report requirement, consultation requirement), 0 otherwise

- Ex. 1: "Requires the Administrator to report on or before January 1, of each year to the President and to Congress regarding the receipts and expenditures."
- Ex. 2: "Requires the Administrator of the Environmental Protection Agency (EPA) to consult with the Secretary regarding each feature of the proposed new or amended Record of Decision for operable unit 6 of the California Gulch National Priorities List Site that may require any alteration to, or otherwise affect the operation and maintenance of, the Tunnel or the water treatment plant."

Bill Name: Title of the amending bill

Sponsor: Name of the sponsor of the amending bill, along with their state and district if applicable (e.g., Barbara Boxer (CA), Jerry McNerney (CA-11))

Democratic Sponsor: 1 if the bill sponsor is a Democrat, 0 if the bill sponsor is a Republican

Same Sponsor: 1 if the President and the bill sponsor are of the same political party, 0 if they are of different parties

Majority Sponsor: 1 if bill sponsor is in the majority of her chamber, 0 otherwise

Committees: List of the committees to which the amending bill was referred (e.g., "Senate Environment and Public Works, Senate Energy and Natural Resources, Senate Appropriations")

Number of Committees: Count of the number of committees to which the bill was referred

Latest Action: Date of the last action taken on the bill

Public Law: PL number (e.g., 93-460) that the bill became, if applicable

Chapter 5: Evaluating Noncompliance in the Department of Interior

"Simply stated, short of a crime, anything goes at the highest levels of the Department of Interior." – Earl Devaney, Former Dept. of Interior Inspector General

While I evaluated in the previous chapter the manner in which the Environmental Protection Agency complied – or opted strategically *not* to comply – with congressional mandates in a dynamic separation of powers setting, those results are not necessarily generalizeable to other agencies of different preferences or bureaucratic organization. It is for that reason that I turn now to the Department of Interior (DOI).

The Department of Interior was statutorily created as a cabinet-level department on March 3, 1849, the last day of the 30th Congress, has long been regarded by the Supreme Court as America's trustee of public land assets (*Knight v. United States Land Association* (1891)), and is one of America's oldest and most important federal agencies. Unlike the Administrator of the EPA, there is a stronger geographic component to DOI leadership, with the Secretary of the Interior traditionally being a westerner, which is a concession to western states, where most public lands are located, though since the 1980s the relationship between the pro-environment community and the DOI has been combative as it adjudicates between those seeking to conserve resources and those seeking ample access to them (Rosenbaum 2014: 107-08).

While the Secretary of Interior has vast influence over the allocation of public natural resources in the United States, the actions of the DOI have tended to garner limited visibility among the general public as opposed to simply those who have direct stakes in a given conflict (Coggins & Nagel 1990: 475). As with the the case of the Environmental Protection Agency, the Department of Interior's responsibilities are both vast and highly varied, with the statutes under its jurisdiction covering a wide spectrum of policy domains. Historically

considered among the more conservative agencies (Clinton & Lewis 2008), the Department of Interior is comprised of nine separate bureaus: the Fish and Wildlife Service (FWS), United States Geological Service (USGS), Bureau of Land Management (BLM), Bureau of Indian Affairs (BIA), Bureau of Ocean Energy Management (BOEM), Bureau of Reclamation (BL), Bureau of Safety and Envronmental Enforcement (BSEE), National Park Service (NPS), and Office of Surface Mining Reclamation and Enforcement (OSMRE). A number of these agency sub-units were created much later than the original Department itself as the agency became better empowered to manage public lands and wildlife refuges and to oversee titles to federal lands. While these bureaus comprising the Department of Interior carry different statutory responsibilities (e.g., wildlife protection), they do not operate as independent agencies, but rather are part of a hierarchical structure with the Secretary of Interior as the most senior member. In addition to these nine bureaus, the DOI also contains numerous offices falling under tthe Office of the Secretary; the Assistant Secretary for Policy, Management, and Budget; the Solicitor's Office; and the Office of Inspector General. Thus, unlike the EPA, the fragmented nature of the DOI creates different opportunities for conflict with relevant interest groups and committees, as well as potentially less latitude in implementation should conflictss arise *among the bureaus themselves* (for example, competing for limited resources). As a consequence of this disjointed bureaucratic structure, Coggins & Nagel note that the history of DOI implementation has been characterized by "lax administration of public land laws, interjurisdictional squabbles, lack of coordination, increasing agency specialization, and informal alliances with resource developers" (1990: 479-80) that is perpetuated by the Department's status as a "mixed bag of agencies, each subject to mixed mandates" (Id at 485) that the Secretary is forced to mediate.

As Strauss (1974) notes, while mining laws were administered through the Department of Interior's Bureau of Land Management, the Bureau carried with it numerous other policymaking responsibilities, many of which were considered of greater importance than mining

implementation.[108] Thus, within delegated authority, there is an implicit hierarchy of policymaking priorities within an agency and potentially across units within the agency such that competing priorities can lead to under- or over-enforcement relative to the statutory provisions laid out by Congress.

Turning to the agency's early roots, Carpenter attributes the early challenges of American land reclamation policy to the Department of Interior's "stifling administrative structure, exacerbated by program leadership that emphasized administrative isolation and extreme centralization," along with the overcommitment of the Reclamation Service to numerous costly projects (2001: 338). Given the Reclamation Service's administrative transgressions, among them failing to to inform settlers of mounting costs of construction and maintenance, relations between Interior and Congress came to decline in the early twentieth century (Id at 346). Carpenter ultimately characterizes "adminsitrative debility" as best characterizing its decline in the service's discretion from 1910 to 1914, with the Reclamation Extension Act of 1914 passed only due to Congress's hands being tied after it had invested such extensive funds into the program (Id at 351).

A striking distinction between the EPA and DOI in its statutory implementation – and relatedly, its entrenchment with various special interests hypothesized by some (e.g., Gordon & Hafer 2005) to influence the vigor of bureaucratic enforcement – is that within the domain of mining policy, the DOI's Bureau of Land Management does not engage primarily with large corporations capable of attaining extensive legal experience and advising and which are characteristic of the "haves" as opposed to the "have-nots" in Galanter's (1974) depiction of large interests' benefits reaped in the American legal system. Rather, the Bureau engages in this domain with small miners with limited such resources, and ultimately experiences that lead them to suspect the agency of being arbitrary in its implementation and "undeserving" of its influence (Strauss 1974: 1237). The Bureau of Land Management has received the

[108]The Bureau of Land Management is in charge of more land than the remaining eight DOI bureaus combined.

additional critique that it is emblematic of the agency capture phenomenon, with BLM operations in important ways controlled by the entities that were meant to be the subject of its regulation, with its efforts to avoid conflict with the "regulated" entitles leading the BLM to act in ways out of concert with the delegating legislation (Coggins & Nagel 1990: 483).

With the Clean Air Act Amendments of 1990 – the last significant legislative change to the Act – came provisions for the phase-out of ozone-depleting chemicals, and a number of new frameworks build to promote much-needed air quality reforms, such as the promotion of energy conservation and the reduction of energy waste. Within these 315 pages of the Statutes at Large were 86 distinct regulatory commands of private entities now needed to comply with requirements concerning nonattainment areas, the introduction or use of certain fuels or fuel additives, vehicle emissions, and permitting requirements, among other things (Farhang & Yaver 2015). While the Administrator of the EPA was empowered to hold administrative adjudications and to issue cease and desist orders or petition the court for injunctive relief against violators, the primary vehicle through which the Environmental Protection Agency was expected to enforce environmental compliance was the promulgation of rules.[109]

While the Environmental Protection Agency governs the various statutes under its jurisdiction in large part through its rulemaking authority – for example, promulgating rules regarding the maximum level of toxin permissible in a body of water, or the maximum exhaust levels permissible from certain types of automobiles – the Department of Interior's use of its rulemaking powers was "viewed by nearly all as insufficient" (Strauss 1974: 1237), with rules aimed more at routine matters of implementation as opposed to policy formula-

[109]It is worth noting that while much rulemaking authority traditionally is of a discretionary nature, most of the rulemaking delegations to the EPA in the Clean Air Act Amendments of 1990, over which the Department of Interior also has some jurisdiction, are in fact *mandatory* rulemaking provisions and specific in nature, such that Congress is prescribing that on which the Agency must promulgate rules as opposed to providing that the Agency shall promulgate "the rules necessary to carry out the Act."

tion as was the case with the EPA.[110] Indeed, within the context of the Energy Policy Act, over which the Environmental Protection Agency and the Department of Interior both have some regulatory jurisdiction, while the Secretary of Interior was provided with some mandatory rulemaking responsibilities governing geothermal leases (Energy Policy Act of 2005, sec. 233), the primary tools it was provided with in the Act were administrative sanctions. Yet rulemaking is considered a more efficient tool for policymaking relative to administrative adjudication given the greater ease with Congress and individuals can obtain information and exercise oversight with respect to a body of promulgated rules as opposed to series of adjudications that may not be consistent across presidential administrations and changes in admnistration priorities (Id at 1238). Moreover, agencies typically enjoy a high level of discretion in their rulemaking activities, both with respect to timing as well as the content of the policy that they create (O'Connell 2011: 482).[111]

Among the most significant laws in which the Department of Interior is charged with implementing is the Endangered Species Act, which U.C. Hastings College of Law Professor John D. Leshy characterized as having a "clear and overriding purpose – to protect the diversity of life on earth."[112] While the Act provides for citizen suits – thus allowing for litigation against both private parties and the government to enforce compliance – Leshy noted that the Act is largely enforced effectively and with only rare resorts to court. When litigation was the enforcement route, the most common defendant was the United States government due to alleged inadequate compliance, with relative balance between charges

[110]Nou & Stiglitz (2015) note that while the Environmental Protection Agency alone proposed over 9,000 rules between 1983 and 2014, the Department of Interior – combining all of its bureaus – proposed only approximately 3,000 during this same period.

[111]There are, of course, a number of constraints on rulemaking, such as the imposition of the deadlines before which rules must be promulgated, or more detailed specifications as to the content of those rules such that the agency's discretion here is more bounded. Moreover, political transitions can further constrain the range of options available to politicized agencies (O'Connell 2011: 483).

[112]See "The Endangered Species Act: How Litigation is Costing Jobs and Impeding True Recovery Efforts." Statement of John D. Leshy, Professor of Law at U.C. Hastings College of Law. *Oversight hearing before the U.S. House of Representatives Committee on Natural Resources.*112th Congress, First Session. December 6, 2011.

of over-regulating and under-regulating and the executive branch typically prevailing given its "relatively conscientious" job of implementing the Act, and losses occurring typically when the government simply made mistakes.[113] Thus, the ESA is a statute characterized by experts as having a straightforward statutory mandate of the Department of Interior, with government losses not typically a reflection of nefarious acts on the part of the agency but rather a consequence of high-profile court cases skewing public perceptions. A complication with respect to litigation in the ESA – and potentially citizen suits more broadly – is the potential for counterproductivity, with the Fish and Wildlife Service arguing in its October 2006 critical habitat designation for the Alameda whipsnake claiming that the need to devote resources to litigation was inducing delays in listing endangered species.[114] As a consequence of these legal costs, the Fish and Wildlife Service petitioned Congress to reduce its authority with respect to endangered species designations so as to limit the litigation incentives of environmental groups (Id). Whether or not a consequence of potentially "excessive" litigation, of all of the species that had been listed between 1973 (the ESA's inception) and December 2011, only 20 species were recovered, making for only a 1% recovery rate,[115] suggesting some potential ineffiency (and at times outright underenforcement) in the Service's implementation of the Act, and a need for Congress to revisit its enforcement.

On April 30, 2014, the American Bird Conservatory (ABC) filed a 60-day notice of intent to sue the Fish and Wildlife Service (FWS) within the Department of Interior due to its alleged violations in enforcing the National Environmental Policy Act (NEPA), the En-

[113]Leshy characterizes the decionmaker in these cases, the courts, as a "neutral" body determining whether the government was doing its job.

[114]See "The Endangered Species Act: How Litigation is Costing Jobs and Impeding True Recovery Efforts." Statement of Brandon M. Middleton, Staff Attorney at Pacific Legal Foundation. *Oversight hearing before the U.S. House of Representatives Committee on Natural Resources.*112th Congress, First Session. December 6, 2011.

[115]See "The Endangered Species Act: How Litigation is Costing Jobs and Impeding True Recovery Efforts." Statement of Representative Doc Hastings (WA). *Oversight hearing before the U.S. House of Representatives Committee on Natural Resources.* 112th Congress, First Session. December 6, 2011. Hastings also noted that in July 2011, the Department of Interior agreed to a settlement that covered 779 species in 85 lawsuits and legal actions against the government, with over 180 pending lawsuits with respect to the ESA still remaining.

dangered Species Act (ESA), and the Bald and Golden Eagle Protection Act (BGEPA). The American Bird Conservatory argued thath the FWS's December 9, 2013 final regulation, which "extend[ed] the maximum term for programmatic permits" to kill or otherwise take bald and golden eagles from five to thirty years, was adopted in violation of the aforementioned statutes and thus should be invalidated. This 30-year eagle permit rule, they note, was adopted without the legal safeguards of any NEPA documents (which were deemed of legal importance given the rule's explicit intention of having an environmental impact) or any consultations under section 7 of the ESA, and in contravention of the core purpose of the BGEPA. The FWS's refusal to consider the environmental impact or to comply with the legal and procedural safeguards in place for the protection of plant and animal species thus led the Conservatory to find the agency noncompliant and warranting litigation (Notice of Intent to Sue, April 30, 2014).

Additional allegations of noncompliance by the Department of Interior can be found under Gale Norton's term as Secretary of Interior, with Forest Guardians, Biodiversity Conservation Alliance, Center for Biological Diversity, Center for Native Ecosystems, Predator Conservation Alliance, and other interested parties joining forces in providing on August 12, 2004 a notice of intent to sue the DOI due to the promulgation of an arbitrary and capricious rule opting not to list the black-tailed prairie dog as an endangered species, the Department's failure to ground the rule in best available science, and in turn its contravention of Section 4(b) of the Endangered Species Act. Moreover, in their challenge with respect to grazing permits, the Western Watersheds Project and the American Lands Alliance provided notice of intent to sue for violations of the Federal Land Management Act, the Taylor Grazing Act, the Endangered Species Act, and the Code of Federal Regulations. Within this challenge emerged a pattern that was discussed in Chapter 4 in the context of EPA scientists' and lawyers' views being squelched by those in leadership positions, in this case with the plaintiffs holding that in making its determination with respect to the grazing

permit, "this political decision has been made by policy-makers in Washington D.C., over the advice and scientific conclusions of BLM's field staff charged with managing the subject allotments, overriding their professional judgment and authority – to the point where local staff have been expressly excluded from involvement in management of the allotments, which is now being determined out of BLM's national offices."[116] Thus, while looking within the context of a different administrative agency and in some cases different statutes, the nature of the legal challenges and the accusations directed at the agency appear to be quite similar rather than being unique to the Environmental Protection Agency, which admittedly garners vastly more public attention. And with a number of former Secretaries argued to be close to the industries they were meant to regulate (e.g., James G. Watt, Gale Norton, Dirk Kempthorne), there have been a number of opportunities for such conflict to emerge.

The fact that both of the above notices of intent to sue were under the Endangered Species Act (ESA) is of little surprise, with the ESA known as the "pitbull of environmental statutes" in compelling federal agencies to avoid putting in harm's way protectect species, though the "ESA's bar is often worse than its bite, especially in the hands of its bureaucratic handlers" (Parenteau 2004: 321). It is these bureaucrats who work to ensure that the statute be as reasonable and user-friendly as possible, potentially at the cost of being left with a statute less aggressive in addressing threats to animal and plant species than the statute originally set out for. Contained within the ESA, of course, is the provision for citizen suit litigation, a provision deemed in this case to be a "potent weapon for conservationists," but one whose use has historically led to some degree of backlash (Id at 351). The enforcement of the ESA then becomes a balancing act, with litigation often the only way to ensure the Act's enforcement in protecting endangered species, but also with the desire to avoid political conflicts that may be difficult to overcome.

Creating the Department of Interior Data

[116]See "Notice of Intent to Sue for Violations of the Federal Land Policy and Management Act, Taylor Grazing Act, Endangered Species Act, and the Code of Federal Regulations." July 7, 2003.

To evaluate the extent of, and conditions under which we can expect to observe bureaucratic noncompliance in statutory implementation in the Department of Interior over the same time period of 1973 to 2010, I first identified from the DOI's website the 22 laws that it implements in whole or in part, half of which are jointly implemented with the Environmental Protection Agency. While a comprehensive list of implemented laws was not provided on the main DOI website, I went to the individual bureau sites to gather the laws that they implemented and provided as comprehensive a list of laws as I was able. These laws consist of: the Alaska National Interest Lands Conservation Act, the Clean Air Act Amendments of 1990, the Clean Water Act, the Community Environmental Response Facilitations Act, the Emergency Planning and Community Right-to-Know Act, the Endangered Species Act, the Energy Policy Act, the Energy Policy and Conservation Act Amendments, the Federal Coal Leasing Amendments Act, the Federal Land Management and Policy Act, the Migratory Bird Treaty Act, the Oil Pollution Act, the Outer Continental Shelf Lands Act, the Pollution Prevention Act, the Resource Conservation and Recovery Act, the Safe Drinking Water Act, the Soiil and Water Resources Conservation Act, Submerged Lands Act, the Superfund Amendments and Reauthorization Act, the Surface Mining Control and Reclamation Act, and the Wilderness Act.

While half of these laws have some degree of overlapping jurisdiction with the Environmental Protection Agency, it is typically the case that the agencies are tasked with implementing different aspects of the same laws, as opposed to engaging in joint implementation efforts (e.g., congressional provision for joint rulemaking). For example, while the Clean Air Act Amendments of 1990 housed the vast majority of implementation authority (e.g., rulemaking, adjudicatory hearings, cease and desist orders and civil penalties) in the Environmental Protection Agency, as well as with the Attorney General when invoking judicial action (e.g., petitioning courts for injunctive relief), the 1990 Amendments also preserved the Department of Interior's authority to regulate air emissions in particular regions. And

Table 1: Department of Interior Laws

Law Name	Year	Bureau(s)	Also EPA
Alaska National Interest Lands Conservation Act	1980	BLM	No
Clean Air Act Amendments of 1990	1990	BLM	Yes
Clean Water Act	1972	BLM	Yes
Community Environmental Response Facilitations Act	1992	BLM	No
Emergency Planning and Community Right-to-Know Act	1986	BLM	Yes
Endangered Species Act	1973	BLM, FWS	Yes
Energy Policy Act	1992	USGS, BLM, BOEM	Yes
Energy Policy and Conservation Act Amendments	2000	BLM	No
Federal Coal Leasing Amendments Act	1976	USGS	No
Federal Land Management and Policy Act	1976	BLM, USGS	No
Migratory Bird Treaty Act	1918	USGS	No
National Environmental Policy Act	1969	BLM	Yes
Oil Pollution Act	1990	BOEM	Yes
Outer Continental Shelf Lands Act	1953	BOEM, BSEE	No
Pollution Prevention Act	1990	BLM	Yes
Resource Conservation and Recovery Act	1976	BLM	Yes
Safe Drinking Water Act Amendments	1977	BLM	Yes
Soil and Water Resources Conservation Act	1977	BLM	No
Submerged Lands Act	1953	BOEM	No
Superfund Amendments and Reauthorization Act	1986	BLM	Yes
Surface Mining Control and Reclamation Act	1977	BLM, USGS, OSMRE	No
Wilderness Act	1964	USGS	No

while the Endangered Species Act (ESA) of 1973 – a significant law providing a program for the conservation of threatened and endangered plants and animals – is largely in the terrain of the Department of Interior (specifically, the US Fish and Wildlife Service and the National Oceanic and Atmospheric Administration), the Environmental Protection Agency's Office of Pesticide Programs (OPP) regulates the use of all pesticides in the United States, which in turn affects the preservation of certain species relevant to the ESA.

Consistent with the analysis performed in Chapter 4, I evaluate here the data with respect to this new set of laws and new implementing actors. In evaluating noncompliance in the Department of Interior, I replicated the agency curbing coding procedure discussed in the previous chapter, as applied to the DOI statutes. Thus, consistent with the EPA agency

curbing, I conducted THOMAS searches for the statutes from the 93rd (or first relevant Congress, if the law was passed later) to the 111th Congress and hand-coded the CRS summaries to identify whether or not there were agency curbing provisions. Because unlike with the Environmental Protection Agency, there are a number of different units within the Department of Interior, rather than looking for simply "the Department of Interior" or "the Secretary," I also counted mandates, prohibitions, and oversight of the DOI's subunits, such as the Bureau of Land Management or the Fish and Wilidlife Service.[117] I coded for whether a bill compelled new action from the Department of Interior (or its Secretary) or the subunit(s) within it (*requirements*), whether it prohibited action of those same parties or otherwise sought to strip regulatory latitude from them (*prohibitions*), and whether it imposed new oversight provisions such as reporting or consultation requirements or sunset provisions (*oversight*). When a bill's CRS summary contained a *requirement*, a *prohibition*, or *oversight* measures, or some combination of those three efforts, it was considered an agency curbing bill.

Replicating this method for the DOI statutes produced a total of 745 agency curbing bills from the president's co-partisans over the 1973 to 2010 time period, a noticeable decline from the volume of such bills observed in the case of the EPA.[118] This from was from a pool of 5,378 total bills introduced on the subject of these statutes, 2,475 of which were introduced by the president's co-partisans in Congress. This is compared with 11,272 bills introduced on the Environmental Protection Agency's Laws, 5,169 of which were curbing bills introduced by the president's co-partisans.[119] Consistent with the case of the EPA curbing, *requirements* are by far the most common form of constraint taken by Congress – a notion

[117]These bureaus were by far the most common targets of congressional attention relative to the other bureaus within the Department of Interior, though there were many agency-level constraints and authorizations.

[118]However, a difference-in-means test reveals a statistically significant and *nearly doubled* amount of Department of Interior agency curbing legislation within the domain of legislation over which the EPA also has regulatory authority.

[119]It is worth noting that there were also considerably fewer lawsuits filed in the United States Court of Appeals against the Department of Interior or the units within it.

consistent with anecdotal evidence of congressional and interest group dissatisfaction with the pace of environmental protection progress – with 822 of the 2,475 bills containing such commands, though both efforts to prohibit DOI activity (417 instances) and to impose new oversight (492 instances) were also quite common. In performing principal components factor analysis, the three variables all loaded heavily on a single factor with an eigenvalue of 2.23, with individual factor loadings of .90, .84, and .84, which suggests that the variables are all contributing significantly toward the composite measure and to a similar degree. Averaging the standardized scores produced a Chronbach's alpha of 0.88, which is considered excellent for scale reliability (DeVillis 2012), providing further support for these measures being used as a composite measure for the purpose of evaluating noncompliance in the Department of Interior. Figure 1 provides lowess plots of the agency curbing composite measure alongside the three individual components of the measure. Consistent with the expectations given the analysis discussed above, one finds that the trend of the variables over the time series are very similar to one another, with relatively low and flat levels of curbing activity with only minor ebbs and flows, and a noticeable increase in the later part of the data.

One concern about evaluating bill introductions is that there is the potential for such bills merely to be "cheap talk" attacks on an agency controlled by the opposing political party. In Figure 2, I present time series plots of each of the 22 statutes under the Department of Interior's jurisdiction. If the bill activity were in fact blanket attempts to attack the agency (for example, to eliminate a bureau or to make an enormous funding reduction), one might expect far more similarity in the patterns of agency curbing than what one in fact finds when looking at the patterns and persistence of curbing activity among the various statutes. What we find instead is a high level of variation in the extent of curbing behavior from statute to statute, suggesting a more careful consideration of the nuances of the laws and their proper implementation (or improper as the case may be). This claim is reinforced further by the specificity of the agency curbing bills, which address such nuanced subjects

Table 2: Department of Interior Curbing Bills

Law Name	Requirements	Prohibitions	Oversight
Alaska National Interest Lands Conservation Act	51	20	17
Clean Air Act Amendments of 1990	15	5	8
Clean Water Act	15	7	15
Community Environmental Response Facilitations Act	0	0	0
Emergency Planning and Community Right-to-Know Act	2	0	1
Endangered Species Act	122	72	62
Energy Policy Act	45	18	33
Energy Policy and Conservation Act Amendments	12	4	11
Federal Coal Leasing Amendments Act	6	2	4
Federal Land Management and Policy Act	2	0	2
Migratory Bird Treaty Act	21	2	11
National Environmental Policy Act	135	83	124
Oil Pollution Act	20	11	15
Outer Continental Shelf Lands Act	165	130	80
Pollution Prevention Act	1	0	1
Resource Conservation and Recovery Act	2	0	0
Safe Drinking Water Act Amendments	19	5	20
Soil and Water Resources Conservation Act	2	2	2
Submerged Lands Act	20	11	7
Superfund Amendments and Reauthorization Act	0	0	1
Surface Mining Control and Reclamation Act	35	20	15
Wilderness Act	132	25	63

as "Prohibits the Secretary from conveying or leasing any such land unless he or she has received assurance from the Nevada State Engineer that an alternative groundwater source is or could be available to Aerojet" (S. 854, 100th Congress), detail that requires costly effort on the part of the sponsor to gauge the level at which a policy currently is being enforced. Thus, I am confident that the concerns raised in these bills are about the important details of the agency's statutory implementation as opposed to efforts to merely signal partisan opposition.

Distinguishing Differences in EPA versus Interior Data

Apart from the reduced number of such bills, another striking distinction among the Department of Interior curbing bills is its greater prevalence of discretionary provisions alongside curbing provisions. While a random sample of 200 curbing bills addressing the EPA had revealed just under a 20% rate of discretion-granting provisions, in the Department of Interior context the rate of discretion-granting provisions was approximately doubled within a random sample of the same size.[120] This raises certain questions that did not appear as important in the EPA case, such as the information that the *requirements* variable is really giving us. Might Congress simply be more trusting of the Department of Interior, whether given that historically it has been less politicized, or given that it is more structurally fragmented nature such that departures from status quo policies are more difficult to effectuate? Might the evaluation of congressionally-provided requirements provide less informative a signal of congressional effort to micromanage the range of its regulatory latitude than in the case of stricter mandatory requirements in the absence of discretion as was largely the case with the EPA?

Because it is potentially valuable to know those conditions under which Congress is *solely* constraining the agency through the use of authority retraction in the form of prohibiting action or further overseeing it, one can also look separately at those agency curbing bills containing *prohibitions* and/or *oversight* but no *requirements* whatsoever. There were 272 such cases, compared with 269 in the EPA case. A limitation here is that not only is this a small amount of data over the time series, but when evaluating these data by law-Congress, one finds that in only 94 of the 345 observations of the dataset are there such bills involving *constraints without requirements*, and in 6 of the 22 laws there were no instances at all, rendering panels with only zeros and thus no variation. Thus, the inferential challenges here preclude me from presenting a separate analysis with this data, though future work evaluating the fuller universe of environmental laws could provide enough data with which

[120] 77 of the 200 randomly-selected curbing bills also granted some measure of discretion to a division of the Department of Interior.

to understand better what leads Congress to micromanage agency capacity in ways only precluding and not not also compelling some regulatory action. And so despite some of the skepticism with which we might want to evaluate the *requirements* variable, the fact that it loads heavily on a single factor and in the alternative specification helped produce a Chronbach's alpha of nearly .9 provides strong support for its inclusion in the composite agency curbing measure.

The statutory agenda similarities between the Environmental Protection Agency and the Department of Interior allow for direct comparisons of congressional responses to different agencies' implementation of (potentially different aspects of) the same statutes. One might expect that if congressional coalitions' primary concern is with the policy outputs from the law, we might find the patterns in agency curbing behavior to track one another reasonably closely, whereas one might expect greater deviations in the patterns of agency curbing if it is driven more by ideology given that the Environmental Protection Agency typically is considered more politicized and is far to the left ideologically from the Department of Interior. Figure 3 presents lowess plots the agency curbing activity of both the EPA and the Department of Interior with respect to the National Environmental Policy Act of 1969 (NEPA), a significant statute that required federal agencies to take into account environmental impacts of their proposed actions and reasonable (potentially more environmentally sound) alternatives. While enforcement is housed largely within the Department of Interior, it shares regulatory responsibilities with the Environmental Protection Agency. What we can see clearly from Figure 2 is that vastly more congressional constraint with respect to NEPA is being aimed at the Department of Interior than at the Environmental Protection Agency, though some of the rises and declines in agency curbing appear to coincide quite closely with one another. Thus, while the patterns in congressional concern as to NEPA's implementation (and the compliance thereof) appear not to vary by agency, there is a high level of discernment between *which* agency is responsible for actions that must be curbed.

A similar pattern presents itself with respect to the Oil Pollution Act, a law that is also jointly implemented by the Environmental Protection Agency and the Department of Interior and which worked to improve the nation's ability to prevent and respond to oil spills, as well as the government's ability to respond to oil spills should they occur. With respect to this statute, the Environmental Protection Agency has promulgated regulations for above ground storage facilities[121] toward the end of reducing hazardous conditions. The Act also provided that for consultations with the Fish and Wildlife Service in the development of contingency plans so as to provide damage assessments associated with oil spills. As with the case of NEPA, one agency has more regulatory authority with respect to the Act than does the other case (with respect to the Oil Pollution Act, the EPA is featured more prominently). Consistent with that, we find that the overall patterns between agency curbing of the EPA and the DOI, there is a noticeable difference in the volume with which Congress acts to constrain the agency's capacity, with EPA curbing being at a much higher level in particular toward the end of the time series. Thus, while Congress and mobilized interest groups may have directed their attention toward the Act in consistent times, the *extent* of the concern about each agency's implementation appears to vary noticeably between the EPA and DOI.

Empirical Estimation

I turn now to the analysis of agency curbing behavior, in this case directed at the Department of Interior. Within the domain of environmental policy is extensive heterogeneity, with the laws (listed above) covering such diverse topics as species and wildlife protection, energy, public lands, toxic chemicals, air, and water, all of which have different health implications and may garner different types of attention from Congress and organized interests. For example, while the regulation of clean air has become a global challenge addressing climate change, the regulation of water and public lands tends to be more local in nature, and the regulation of oil and energy tends to engage big business such as oil companies.[122] While in

[121]http://http://www2.epa.gov/laws-regulations/summary-oil-pollution-act

[122]Battles over resources such as lands and water also tend to reflect regional differences, with western

the case of the Environmental Protection Agency laws, I assigned policy fixed effects based on a judgment about the main substance of the statute at hand (for example, assigning the Food Quality Protection Act as being about public health and safety, and the Federal Water Pollution Control Act as being water regulation), in the case of the Department of Interior I instead assigned bureau fixed effects given the subunit(s) of the Department of Interior tasked with implementing the given law. Thus, I created dummy variables for each of the bureaus that were engaged in implementing one or more of the statutes under the Department of Interior's jurisdiction.[123]

Chapter 4 discussed the limitations inherent in the use of congressional bill introductions, in part because bills may be introduced for any number of reasons, with high variation in the plausibility of ultimate passage. The introduction of legislation can serve a number of different benefits, including showing to constituents an interest (sincere or not) in a given local issue or popular local position; it can support partisan agendas that might or might not succeed on the floor given the degree of polarization and gridlock pervading the legislative dynamics; it can facilitate bargaining processes among legislators; or it can be a sincere expression of legislative intent to pass policy. Because at face value it is not necessarily clear whether a bill is sincere versus cheap talk (outside the domain of purely "symbolic" legislation that would never pass[124]), interpretation of curbing bills can be rather unclear.

In addition to estimating the predictors of noncompliance in the DOI using the main agency curbing measure, I thus made a number of attempts to gauge the seriousness with

states feeling denied their right to influence decisions affecting their lands as well as arguing for federal divestment of land within some state borders (Rosenbaum 2014: 332), while other states are reliant upon less environment-friendly industries for the sustaining of their labor forces.

[123]While there are nine bureaus within the DOI, only five bureaus – the Bureau of Land Management, the United States Geological Survey, the US Fish and Wildlife Service, the Bureau of Ocean Energy Management, and the Bureau of Safety and Environmental Enforcement – identified statutes under thier jurisdictions, and thus these are the only ones accounted for in the bureau fixed effects.

[124]Clark (2011) notes in the context of court curbing that some such symbolic legisative action against the judicial branch included efforts to reduce the number of justices, an act which had not succeeded in several decades. In the context of agency curbing, one such example might be the legislative attempt to eliminate the Environmental Protection Agency, as opposed to simply impose additional constraints on it.

which congressional coalitions were introducing these bills, so as to better differentiate sincere opposition to buireaucratic behavior and mere cheap talk that may not be as firmly rooted in the Department's actions. First, I weighted the bills by cosponsorship support by normalizing between the values of 0 and 1 the average number of cosponsors for the curbing bills, with the expectation that those bills garnering the support of only their sponsor are less indicative of widespread congressional opposition to bureaucratic regulatory behavior than are those that receive high numbers of cosponsors such that large coalitions in Congress are united in those efforts to constrain agency capacity. While there was an average of 6.3 cosponsors, the values ranged widely from an average of 0 to 113 per statute per Congress.[125] I additionally weighted the curbing composite measure by the normalized value of the number of committees to which the curbing bills were referred over the course of their legislative lifetimes. The theory is that those bills drawing upon the expertise of multiple committees, and being exposed to the coalitions of multiple committees, will have greater sincerity than those introduced in a single committee and potentially receiving no further legislative action, given some members' judgment that the bill be considered by a broader legislative audience. There was an average of 1.1 committees, though with a range of 0 to 9 committees per law per Congress. This measure likewise is imperfect in that multiple referral became a more common practice beginning in the 1980s – that is, well after the study begins – and thus it may erroneously appear as though "sincerity" is increasing over time, in addition to which some laws are simply more complex (or omnibus) and thus draw on the knowledge of more committees rather than necessarily being more sincerely aimed at constraining the agency in reality as opposed to cheap talk signaling of opposition. This is particularly true of omnibus legislation, which likewise has become more common practice since the 1980s.[126]

[125]There are, of course, limitations to the usefulness of this measure, with some laws reaching final passage without any cosponsors, and others achieving as many as two hundred cosponsors while failing ultimately to pass.

[126]Hanson (2014) notes that the shift toward the use of omnibus packages to pass legislation is "the most important change to take place in the appropriations process since the passage of the Congressional Budget and Impoundment Control Act of 1974 (2014: 25), though they are not without their fair share

A further metric of sincerity of legislative efforts to curb bureaucratic capacity – in turn, I argue, raising the plausibility that the congressional action was targeted at the bureaucratic behavior as opposed to being partisan efforts unlikely to succeed – is whether or not the bill ultimately was signed into law. Over one third of the bills – 1,013 – did not receive any legislative action, and thus they were killed immediately upon introduction. There is ample variation in the length of the legislative cycles among those bills on which some action was taken, with some having their final action taken only a couple days later, others lasting more than a session before dying, and others reaching a floor vote and ultimately passing and being signed by the president. From the rate at which such legislative achievement occurs, we may be able to glean the overall seriousness of legislative efforts to constrain the agency, which may bolster confidence in it being a reflection of the agency's implementation behavior as opposed to mere partisan differences between one or a few members of Congress and the executive branch.

Upon examination of the Department of Interior curbing bills, one finds that as compared with the 6.8% passage rate of Environmental Protection Agency curbing bills introduced by the president's co-partisans, the passage rate among Department of Interior curbing bills is somewhat higher at 9.8% (280 of the 2,856 curbing bills introduced by the president's co-partisans), though the extent of cosponsorship support and the number of committee referrals for the two sets of bill introductions were nearly identical to one another.[127] Thus, while there is considerably less agency curbing activity aimed at the Department of Interior, when Congress does take such action it is slightly more likely to succeed in that endeavor.

The dependent variables that I utilize in the analyses below are: the main (unweighted)

of controversy given their great influence but limited opportunity for legislative participation. They are thought to be associated with more periods of greater difficulty achieving legislative passage, and thus their rise can be seen alongside the growth of legislative polarization, which I argue is central to the reshaping of agencies' implementation incentives.

[127]The Environmental Protection Agency curbing bills had an average of 9.5 cosponsors and 1.5 congressional committees, compared with 9.4 cosponsors and 1.7 committees among the Department of Interior curbing bills.

variable *DOI Agency Curbing* (continuous, ranging from 0-6.11), *DOI Curbing Weighted by Cosponsorship* (continuous, ranging from 0-1.12), *DOI Curbing Weighted by Comittees* (continuous, ranging from 0-1.17), and *DOI Curbing Weighted by Percent Passed* (continuous, ranging from 0-1.43).[128] These estimations are presented separately in Table 3 below. Performance of a Wooldridge test yielded statistically significant results in all of these variables except for *DOI Curbing Weighted by Cosponsorship*, indicating the presence of AR(1) autocorrelation in the other three specifications. Thus, because panel-corrected standard errors do not correct for AR(1) autocorrelation, I include in the model a panel-specific AR(1) autocorrelation structure, accounting for these processes varying across statutes.

The independent variables in the model specifications that I present below are largely the same as those discussed in Chapter 4, and discuss here only those of main theoretical interest. Because I expect that agencies will be less responsive to congressional preferences over implementation when there is greater legislative-executive distance *unless* the opposing party is well-positioned to punish the agency, I estimate the *legislative-executive distance*, which is the NOMINATE distance between the president and the floor median.[129] I include the *margin of control*, which is the absolute value of the margin by which the party opposing the president controls the seats in Congress, and to test the theory that bureaucratic inclination toward noncompliance will be conditioned by their likelihood of punishment, I interact *legislative-executive distance* and *margin of control*. I expect that when Congress is more constrained by polarization – which has become all the more common in recent decades (McCarty, Poole, and Rosenthal 2006) – it will be less capable of being an effective monitor of its administrative agents, resulting in policies farther from its preferences. Thus,

[128]Before assigning weights, I assigned the *cosponsors*, *committees*, and *percentage passed* to fall between the values of 0 and 1.

[129]Estimating executive branch preferences is particularly difficult in this case given that there are multiple bureaus within the Department of Interior, each of which may have different preferences from one another, such as Fish and Wildlife Service potentially being to the left of the USGS. However, existing alternative measures of executive branch preferences do not allow for variation over time for the period at which I am looking, and so the president's ideology serves as the best available proxy.

I estimate the *chamber distance*, which is the NOMINATE distance between the House and Senate median members.[130].

I expect that when there is greater competition between legislative principals – that is, when the authorizing Congress that passed the statute and the law currently empowered to punish the DOI are more at odds with one another ideologically – bureaucratic compliance will be less likely. That is, by being faithful to the statutory text, the agency is under these circumstances by definition going against the preferences of its current legislative principal, resulting in the agency curbing activity that I capture here. Thus, I evaluate the *distance between Congresses*, which is the NOMINATE distance between the floor median of the Congress in power when the statute was enacted and the floor median of the Congress currently in power.[131] I identified from the text of each of the 22 statutes whether or not it provided for *citizen suit* litigation, which I argue expands the pool of potential plaintiffs against the administrative agency and thus should serve as a check on its implementation behavior, inducing greater compliance. Seven of the 22 statutes provided for citizen suits, while the remaining 15 did not.[132]

I include a dummy variable for whether or not it is post-*Chevron* given its (purported) influence on the extent of judicial discretion toward agencies' statutory interpretations. While the case was aimed at the Environmental Protection Agency's interpretation of the Clean Air Act, not only is it likely the most cited case in American administrative law, but its reach has been felt across agencies when faced with challenges of statutory interpretation and ascertaining how those interpretations will be received should they go to court. Environmental policy is particularly litigious in this respect given the complexity and technicality of the policy, with "a steady flow of political hot potatoes [coming] to the bureaucracy, which

[130]I also evaluated the effect of the distance between the majority and minority party medians, and utilizing this measure produced similar, often slightly stronger results

[131]Thus, if the preferences are perfectly aligned, the value of this variable would be 0.

[132]This relatively low number of citizen suit laws under the Department of Interior's jurisdiction may help to account for the quite low rates of litigation against the DOI.

must untangle and clarify this legal language – often to the accompaniment of political conflict and legislative criticism" (Rosenbaum 2014: 96). If it is in fact the case that judges have changed their course of action with respect to affording agencies greater deference in interpreting the laws that they are tasked with implementing, this greater latitude should mean that there is weaker third-party review of agencies by the judiciary, and thus greater opportunity for more opportunity for the agency to skirt the edges of its authority should it choose to do so.

The holding of *Chevron v. NRDC* thus provides a valuable cutpoint in the data for evaluating any potential change in congressional behavior with respect to monitoring agency implementation. Such structural breaks are prominent in data analysis over long time periods, with significant events taking place and reshaping the relationships among variables.[133] A difference-in-means test reveals that there is a somewhat higher rate of agency curbing against the Department of Interior in the post-*Chevron* period – suggesting that with reduced deference came a need for greater congressional supervision – though it does not achieve conventional levels of statistical significance. Figure 4 plots the time series of each of the laws under the DOI's jurisdiction, with the vertical line on the x-axis marking the point at which the *Chevron* decision was rendered (the 98th Congress). Given the marked variation in response – or in many cases, lack thereof – it is difficult to assess what, if any, impact the holding had on the congressional monitoring of individual statutes.

To identify the extent to which each of these statutes exhibited *fragmentation*, I replicated the methods utilized by Farhang & Yaver (2015), identifying for each of these 22 laws the number of actors, agencies, and instances of overlapping jurisdiction with respect to core regulatory functions (defined as rulemaking, adjudications, administrative sanctions, or lawsuits), and then creating a *fragmentation* factor score for each law. Within this set

[133]There is, of course, the challenge in assigning merely a time dummy variable to distinguish observations before and after the event, in that it may take time to observe the effect of the event (Katznelson & Wawro 2014).

of laws, there was an average of just over three administrative actors, and as many as six implementing in a single law. With more administrative actors needed for the purposes of coordinating a policy change, as well as the greater level of diffused authority, agencies should be better kept in check and induced to be compliant in implementing laws at higher levels of the fragmentation spectrum.

The data are time-series cross-section in structure, with an N of the 22 laws implemented in whole or in part by the Department of Interior and a T of the 19 Congresses covered in this dissertation (93rd-111th), yielding a total of 345 observations in the dataset. As with the case of the Environmental Protection Agency, the passage of these laws over a long span of time poses some challenges to the empirical estimation due to the creation of imbalanced panels. However, this effect is moderated in the case of the Department of Interior, whose implemented laws were largely passed in the earlier time period, whether before 1973 or shortly thereafter.[134] Because all four of the dependent variables are continuous, I am utilizing OLS with panel-corrected standard errors (PCSEs). Because PCSEs address contemporaneous correlation but not serial correlation, I combine them with Prais Winsten except in the case of the cosponsors model, and I specify that it is a panel-specific AR(1) autocorrelation structure. Because performing statistical analysis on nonstationary time series can yield spurious results, I perform a Fisher-type test to confirm whether the data contain a unit root. Performance of this test revealed nonstationarity in the *total environmental groups* variable, and so I first-differenced it, which rendered it stationary. While I include cubic splines in the models presented here, performance of sensitivity analysis with respect to the number and location of the knots did not produce significantly different results, and nor did the inclusion of the simple linear time trend of *Congress*. Because the models being analyzed here are OLS, the results can be interpreted directly.

[134]Forcing balance among the panels carries the great disadvantage of losing half of the data, which are valuable sources of information in evaluating the Department of Interior's implementation strategy with respect to those laws, many significant.

Results

While I discuss here only the findings of main theoretical interest, the full model specifications are presented in Table 3. It is immediately clear that while the unweighted curbing measure produces results that are highly consistent with those produced in the case of the Environmental Protection Agency in Chapter 4, the results in the Department of Interior case are far less robust to alternative specifications.

Turning first to model 1, consistent with the expectation that legislative-executive conflict would motivate greater agency noncompliance resulting in agency curbing, conditional upon the strength of the opposing party in Congress (and thus its capacity to potentially punish the agency), I find a strong, positive, and significant effect of *legislative-executive distance* but the interaction term is powerful, significant, and negative. To put the effects into perspective, a standard deviation increase in *legislative-executive distance* is associated with a .37-standard deviation increase in agency curbing when the *margin of control* is zero, but when the opposing political party is in a strong position in Congress, I find that a standard deviation increase in this interaction term is associated with a 1.19-standard deviation decline in agency curbing. These powerful effects are consistent both with my hypotheses about the legislative-executive conflict dynamics I expect to produce noncompliance implementation choices, as well as my findings with respect to the EPA. However, I do not find in this case that the extent of legislative division is associated with noncompliance.

Consistent with expectations, I find that amid greater ideological conflict between legislative principals, the Department of Interior is more prone to act in ways that result in punishment, with a standard deviation increase in *distance between Congresses* associated with a .09 standard deviation increase in agency curbing, albeit significant only at the .10 level and rather small in magnitude. However, unlike in the case of the EPA, I find here that congressional provision for citizen suit litigation not only has a significant and negative effect, but is also great in magnitude, with a move from a non-citizen suit law to a citizen

suit law associated with approximately a 0.44-unit decline in agency curbing by Congress. The effects of *Chevron* and *fragmentation* appear both to be insignificant, which is consistent with the findings in the previous chapter.

Model 2, in which I weight the agency curbing measure by the extent of its cosponsor support, does not display support for any of the findings discussed above, with the exceptions of *citizen suits* and *fragmentation*, both of whose substantive effects are close to zero. Model 3 provides support (albeit weakened) for the legislative-executive conflict hypothesis, with a standard deviation increase in *legislative-executive distance* associated with a .07 increase in agency curbing when the *margin of control* is zero, and a standard deviation increase in the interaction term producing a .17 standard deviation decline in agency curbing, significant at the .10 level. While *distance between Congresses* becomes insignificant and post-*Chevron* and *fragmentation* remain insignificant, the effect of *citizen suits* remains significant and negative, with a move from a non-citizen suit law to a citizen suit law associated with a .15-unit decline in agency curbing by Congress. Finally, in model 4 I find that while there is not a statistically significant main effect of *legislative-executive distance*, the interaction is significant at the .10 level, with a standard deviation increase in the interaction associated with a .24-unit decline in agency curbing. We again find that the growth of the *distance between Congresses* contributes toward agencies implementing in ways that provoke curbing legislation, though the substantive effect is small and its effect has been insignificant across model specifications and thus must be interpreted with caution. While the effect of *citizen suits* remains negatively signed here, it is no longer statistically significant and its substantive effect is vastly diminished relative to models 1 and 3. The effect of *Chevron* remains insignificant, and while the effect of *fragmentation* reaches statistical significance, as in model 2, the substantive effect is very small and is inconsistent across the models presented.

Robustness Checks

As a robustness check, rather than using panel-corrected standard errors along with

Prais Winsten, I instead run the models using GLS with an AR(1) disturbance and unit (law) random effects. Doing so allows for me to account for unit heterogeneity that might not be adequately specified through the use of PCSEs, and which if left unmodeled could yield biased inferences (Kristensen & Wawro 2003). I present the results in Table A1 of the Appendix. Using this alternative model specification, the results are largely identical, with powerful and significant effects in model 1 with respect to *legislative-executive distance*, *LE distance x margin*, *distance between Congresses*, and *citizen suits*, but no effect of *chamber distance*, *Chevron*, or *statutory fragmentation*. Weighting by cosponsorship support continues to produce no statistically significant effects on any of the variables of interest. Models 3 and 4 both produce results supporting the legislative-executive hypotheses as well as the effects of citizen suit provisions, and in this case model 4 provides support for both the *chamber distance* and *distance between Congresses* claims made here and in Chapter 4. The similarity among the model two sets of model specifications leaves me confident that unit heterogeneity is not a driving factor in the results. The results are also highly comparable when performing GLS with unit random effects and using a lagged dependent variable to address the issue of autocorrelation (however, see Achen 2001 on problems associated with the use of lagged dependent variables and their impact on other explanatory variables).

In Table A2 of the Appendix, I provide also separate count model specifications of the individual agency curbing actions – *requirement*, *prohibitions*, and *oversight*. While I argue that they can meaningfully be collapsed into a single measure of *agency curbing* given that they all work in different ways to micromanage what the agency must or must not do, because of the possibility of effects being different when compelling versus precluding regulatory action (see, e.g., Ting 2001), I provide individual count model specifications to decompose the curbing measure. In all three constituent variables, the variance exceeded the mean in violation of the assumption of Poisson dispersion, and thus instead run panel negative binomal models with lagged dependent variables and unit random effects. Because these

are non-linear models, their effects cannot be interpreted directly (though their direction can be) – one must turn instead to their marginal effects to evaluate the magnitudes. I find that a unit increase in rulemaking is associated with just over an 8 percentage point increase in agency curbing, while a unit increase in the interaction term is associated with more than a 300 percentage point decline in agency curbing, a finding that is consistent with my hypothesis and with the main model discussed above and in Chapter 4. I find that a move from a non-citizen suit law to a citizen suit law is assocaited with approximately an 84 percentage point decline in agency curbing, which again lends support toward the broadened pool of potential litigants providing a useful constraint on agency actions. As with the models discussed above, I do not find support for the effect of *chamber distance* or *Chevron*. I find similar effects with respect to the legislative-executive distance, chamber distance, and citizen suit hypotheses in the *oversight* model 3. While the main effect of *legislative-executive distance* is positive and significant at the .10 level in the *prohibitions* model, the interaction term – though properly signed – falls short of conventional levels of statistical significance, though in this specification I *do* find some evidence in favor of greater chamber distance providing useful regulatory latitude for the agency and producing what I refer to as noncompliance. While the results are not the same across every variable, their relative consistency gives me confidence that the results do not hinge on their being treated as a single composite measure, and moreover that there do not appear to be particularly different processes at work with respect to mandates versus prohibitions of the agency.

While scholars have debated the true effect of *Chevron* with respect to its change in judicial norms (and in turn, for these purposes, bureaucratic behavior), *Lujan v. Defenders of Wildlife* (1992) unambiguously raised the bar for environmental litigation and the ability to obtain standing in court. While replacing the post-*Chevron* dummy with a post-*Lujan* dummy has very little effect on the legislative-executive and intra-branch conflict hypotheses, it does in the unweighted model produce a statistically significant, powerful, and positive

effect, which is consistent with expectations. That is, (even with statutory *authority* to sue) in the absence of a credible threat of having standing to press one's claims against the agency, it has greater regulatory freedom given the reduced threat of costly litigation.[135]

Conclusion

This chapter sought to explore to what extent, if at all, the hypotheses laid out and tested in Chapter 4 would in fact be born out in this different institutional environment of the Department of Interior. While the theory applies broadly to separation-of-powers interactions among Congress, courts, and administrative agencies, the extensive variation among agencies creates uncertainty as to what one may find from one agency to the next. And while the Environmental Protection Agency and Department of Interior share the features of being environmental agencies with some overlapping statutory jurisdiction, the Department of Interior provided variation with respect to ideology, bureaucratic structure, and the extent to which it is in the public eye and viewed politically as the EPA undoubtedly is.

I found that congressional use of the agency curbing strategy is used with much lower frequency with the Department of Interior than it is with the Environmental Protection Agency. However, the manner in which they use this tool appears to mirror the case with the the EPA, with the patterns in bills appearing similar across agencies amid shared policy space, and similar distributions of the frequency with which Congress compelled new actions, prohibited existing authority from being used, and/or imposed new oversight provisions. However, unlike with the EPA case, the results are only modestly consistent with the hypotheses outlined in Chapter 4 and tested again here.

Further research should explore the clearly quite different roles of cosponsorship behavior in the context of EPA and DOI curbing efforts. While weighting the agency curbing measure by cosponsorship support did little to affect the results in Chapter 4, in this case

[135]It may also be the case that knowing that it will be harder for litigants to go to trial, Congress became more assertive in pressing for regulatory constraints on the agency, filling the role that otherwise plaintiffs could not.

the incorporation of that information made all effects disappear, and the findings were quite reliant on whether the curbing measure was weighted, and with what information, whether cosponsorship, committee referrals, or passage rates. However, looking to the main model specification provided in model 1 of Table 3, I find that the results are largely consistent with the story that I articulated and found support for in Chapter 4: that amid ideological conflict between the legislative and executive branches, the agency will exercise considerably less fidelity to that legislative principal unless that Congress is strong enough to credibly impose sanctions; that greater ideological disagreement between delegating and contemporary legislative principals leads the agency to act in ways out of concert with the preferred implementation; but that the increasing of the threat of lawsuits and thus judicial involvement seems to temper the agency in its policy choices. I now proceed to evaluate how – if at all – Congress manages to successfully respond to this bureaucratic behavior when it observes these defections.

Table 3: Agency Curbing Against the Department of Interior

	(1) Unweighted Curbing	(2) Cosponsors	(3) Committees	(4) Percent Passed
Legislative-Executive Distance	4.968**	0.041	0.978*	0.859
	(1.849)	(0.306)	(0.480)	(0.603)
Margin of Control	19.609***	0.688	3.062*	4.122*
	(5.734)	(1.002)	(1.568)	(1.922)
LE Distance x Margin	-31.166**	-0.774	-4.670†	-6.262†
	(10.400)	(1.806)	(2.862)	(3.511)
Chamber Distance	0.981	0.083	0.070	0.295
	(0.805)	(0.110)	(0.227)	(0.252)
Distance Between Congresses	0.706†	0.022	0.115	0.205**
	(0.424)	(0.072)	(0.108)	(0.082)
Citizen Suits	-0.440**	-0.014*	-0.150**	-0.026
	(0.160)	(0.007)	(0.059)	(0.036)
Democratic President	-0.160	-0.022	-0.040	-0.081†
	(0.165)	(0.022)	(0.040)	(0.047)
Environmental Groups	0.002	-0.003	0.000	-0.000
	(0.011)	(0.002)	(0.003)	(0.004)
DC Circuit Ideology	-1.900†	-0.264	-0.232	-0.877*
	(1.120)	(0.184)	(0.291)	(0.365)
Post-*Chevron*	-0.258	-0.042	-0.058	-0.072
	(0.166)	(0.032)	(0.043)	(0.066)
Significant Law	0.373**	0.033*	0.034	0.098*
	(0.142)	(0.014)	(0.055)	(0.042)
Fragmentation	-0.023	-0.008*	0.014	-0.023***
	(0.045)	(0.004)	(0.020)	(0.006)
Total DOI Legislating	0.018***	0.001***	0.004***	0.002**
	(0.003)	(0.000)	(0.001)	(0.001)
Electoral Uncertainty	-1.892	-0.261	-0.426	-1.093*
	(1.651)	(0.297)	(0.423)	(0.532)
Intercept	-23.974**	-2.846	-4.061*	-6.112*
	(7.862)	(1.502)	(1.851)	(2.575)
Bureau Fixed Effects	✓	✓	✓	✓
Splines	✓	✓	✓	✓
R^2	0.55	0.39	0.48	0.32
Total Observations	336	336	336	336

$^{***}p < .001, ^{**}p < .01, ^{*}p < .05, ^{\dagger}p < .10$

Figure 1: Department of Interior Agency Curbing Over Time

Figure 2: Volume of Agency Curbing Over Time Across Statutes

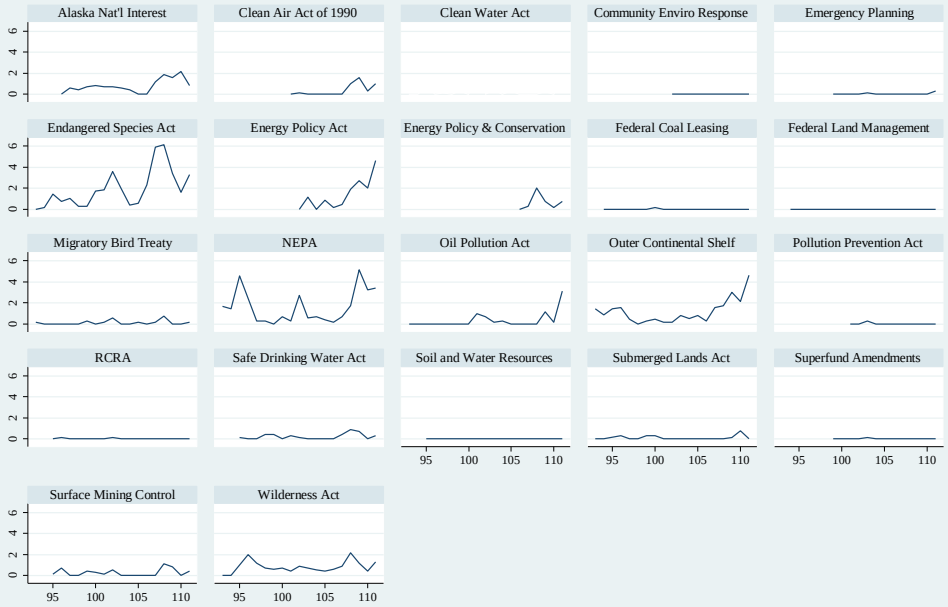


Figure 3: Comparing EPA and DOI Agency Curbing Over Time

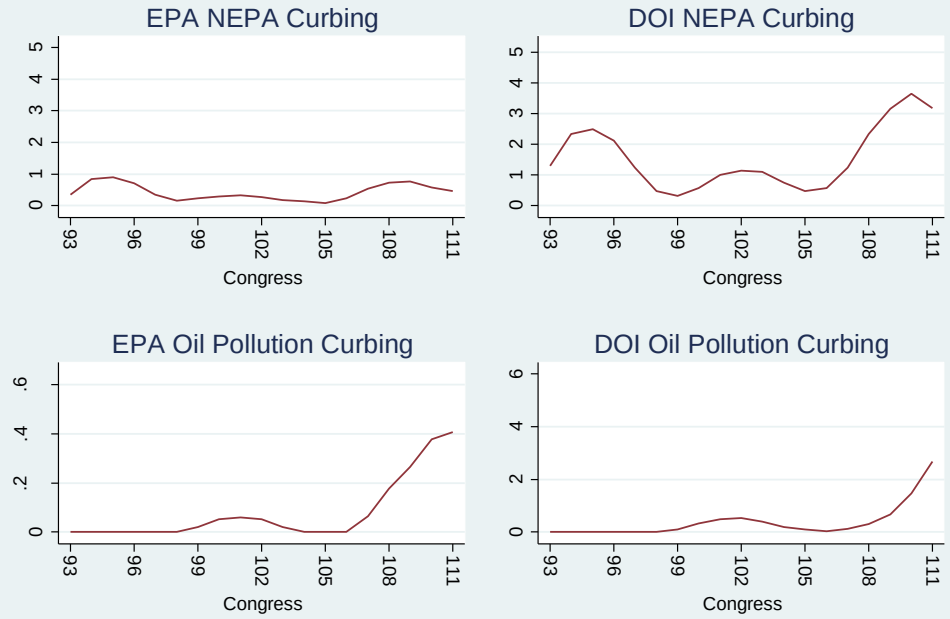


Figure 4: DOI Agency Curbing Pre- and Post-Chevron

Appendix

I went to the legislative database THOMAS:

http://thomas.loc.gov/home/LegislativeData.php

I conducted THOMAS searches for each of the 22 statutes implemented in whole or in part by the Department of Interior. E.g., searching "National Environmental Policy Act" in the 93rd Congress, 94th Congress, and so on through the 111th Congress. There were no restrictions on whether it eventually became a public law or the committee from which it originated. I assigned to the label "agency curbing" those bills compelling regulatory action (requirements), prohibiting regulatory action or otherwise stripping agency latitude/authority (prohibitions), or increasing oversight over agency actions (oversight).

See Chapter 4 Appendix for detailed codebook replicated here as applied to the Department of Interior.

Table A1: Modeling Agency Curbing with GLS and AR(1) Disturbance

	(1) Unweighted Curbing	(2) Cosponsors	(3) Committees	(4) Percent Passed
Legislative-Executive Distance	5.116*	0.041	1.123*	0.863
	(2.137)	(0.421)	(0.547)	(0.554)
Margin of Control	21.094**	0.688	3.467†	4.625**
	(7.420)	(1.417)	(1.880)	(1.893)
LE Distance x Margin	-34.059**	-0.774	-5.458	-7.129*
	(13.548)	(2.585)	(3.431)	(3.454)
Chamber Distance	0.668	0.083	-0.012	0.385
	(0.928)	(0.169)	(0.232)	(0.232)
Distance Between Congresses	0.963*	0.022	0.128	0.226**
	(0.412)	(0.059)	(0.095)	(0.090)
Citizen Suits	-0.462*	-0.014	-0.142**	-0.037
	(0.224)	(0.022)	(0.049)	(0.038)
Democratic President	-0.214	-0.022	-0.051	-0.080
	(0.201)	(0.032)	(0.048)	(0.046)
Environmental Groups	0.004	-0.003	0.001	-0.001
	(0.013)	(0.002)	(0.003)	(0.003)
DC Circuit Ideology	-2.150	-0.264	-0.274	-0.944**
	(1.494)	(0.250)	(0.360)	(0.352)
Post-*Chevron*	-0.247	-0.042	-0.071	-0.074
	(0.240)	(0.042)	(0.059)	(0.058)
Significant Law	0.312†	0.033†	0.023	0.070*
	(0.174)	(0.018)	(0.038)	(0.030)
Statutory Fragmentation	-0.014	-0.008	0.015	-0.015
	(0.068)	(0.007)	(0.015)	(0.012)
Total DOI Legislating	0.017***	0.001***	0.004***	0.001**
	(0.002)	(0.000)	(0.001)	(0.000)
Electoral Uncertainty	-2.543	-0.261	-0.623	-1.093*
	(2.188)	(0.378)	(0.535)	(0.527)
Intercept	-24.538*	-2.846	-4.118†	-6.984**
	(10.207)	(1.777)	(2.485)	(2.456)
Bureau Fixed Effects	✓	✓	✓	✓
Splines	✓	✓	✓	✓
Total Observations	336	336	336	336

$^{***}p < .001, ^{**}p < .01, ^{*}p < .05, ^{\dagger}p < .10$

Table A2: NBREG Models of Individual Curbing Actions Against DOI

	(1) Requirements	(2) Prohibitions	(3) Oversight
Lagged Curbing	0.079†	0.034	0.057†
	(0.044)	(0.025)	(0.033)
Legislative-Executive Distance	19.430**	13.128†	15.547*
	(6.185)	(6.991)*	(7.393)
Margin of Control	78.999***	54.997*	62.325**
	(20.690)	(22.636)	(24.029)
LE Distance x Margin	-127.588***	-75.260	-95.309*
	(37.424)	(41.987)	(44.042)
Chamber Distance	1.631	7.666**	2.270
	(2.296)	(2.380)	(2.902)
NOMINATE Distance	0.371	0.386	0.428
	(0.666)	(0.721)	(0.841)
Citizen Suits	-1.838**	-2.493**	-2.070**
	(0.720)	(1.015)	(0.766)
Democratic President	-1.521**	-0.267	-1.004
	(0.574)	(0.565)	(0.636)
Environmental Groups	-0.048†	-0.031	0.023
	(0.028)	(0.031)	(0.034)
DC Circuit Ideology	-11.248**	-8.286*	-8.634*
	(3.755)	(3.877)	(4.159)
Post-*Chevron*	-0.772	-0.924	-1.596*
	(0.527)	(0.872)	(0.674)
Significant Law	1.252*	1.912**	1.401**
	(0.552)	(0.732)	(0.552)
Statutory Fragmentation	0.449*	0.382	0.448*
	(0.205)	(0.273)	(0.207)
Total DOI Legislating	0.016***	0.020***	0.014***
	(0.003)	(0.004)	(0.003)
Electoral Uncertainty	-16.711**	-8.253	-10.466
	(6.070)	(7.448)	(6.937)
Intercept	-88.849***	-91.483***	-95.271***
	(23.488)	(25.857)	(27.166)
Bureau Fixed Effects	✓	✓	✓
Splines	✓	✓	✓
Total Observations	335	335	335

$^{***}p < .001, ^{**}p < .01, ^{*}p < .05, ^{\dagger}p < .10$

Chapter 6: Re-Setting the Agenda: Congressional Responses to Bureaucratic Noncompliance in Environmental Law

Chapters 4 and 5 worked to bring to light the factors yielding bureaucratic implementation behavior that is out of step with the original statutory delegations and/or with how the current Congress sees those statutes as being properly implemented. While the agency curbing measure in a sense indicates how Congress can (and does) respond to observing such noncompliant behavior by administrative agencies, it is in this chapter that I evaluate more closely the opportunities that Congress might have to better control agencies statutorily in the periods of the game that follow.

Central to American lawmaking is the issue of strategic delegation and choices of statutory implementation, particularly amid rising polarization both within and across the branches (McCarty, Poole, & Rosenthal 2006). In light of this institutional conflict, this chapter raises the following question within the domain of environmental law: How do expansions in bureaucratic latitude reshape the long-term trajectories of the policy that emerges under their jurisdiction? While a range of conditions can expand administrative agencies' policymaking latitude when their preferences diverge from the policy laid out by Congress, extant methods do not allow for the evaluation of the policy change that results from this bureaucratic behavior. By providing a new metric of policy change, this chapter allows for new evaluations of policy (in)stability emerging from growing separation-of-powers conflict, and tests the predictors of powerful policy change within the domain of environmental law.[136]

Eskridge & Ferejohn (2010) hold that statutes have been the dominant mode of the development of American democracy and that amid America's "republic of statutes," public deliberation over fundamental rights and commitments "has migrated, relatively speaking, away from Constitutionalism and toward legislative and administrative constitutionalism"

[136]However, it should be stressed that the methods employed here are fully generalizeable to any domain of public policy.

(2010: 16). What we then are left with is state statutory expansions of policy and the entrenchment of federal "superstatutes" such as the Civil Rights Act of 1964. The study of statutes to date has neglected their dynamic nature, which I argue is a critical dimension of how law, policy, and the American state develop over time. Such a dynamic conception of lawmaking better captures the realities of the increasingly complex, amendment-based nature of modern statutes, as well as the ongoing nature of inter-branch interactions in shaping policy outcomes. Indeed, in reference to Moe's (1989) widely-cited claims that Congress can constrain agencies through durable but inefficient structural design, Patashnik holds that the "institutional development story must be followed all the way through" (2008: 157) in order to capture downstream structural developments in the policies being implemented because "the game doesn't end when the laws are adopted" (Id at 10).

A large and growing body of literature has sought to characterize legislative agenda-setting and to predict the incidence and timing of policy change in that political configuration (see, e.g., Krehbiel 1998; Binder 2003; Cox & McCubbins 2005; Brady & Volden 2006). Krehbiel (1998) raises the question of why gridlock – the inability to move policy away from the status quo – frequently occurs in American government, and finds that gridlock occurs regularly due to moderate status quo policies, heterogeneous preferences in Congress, and supermajoritarian procedures that help to explain why winning coalitions tend to be greater than minimum-majority sized. Brady & Volden (2006) see this gridlock as instrumental to the American political system, with policy shifts made possible with electoral shifts that change the locations of the pivots and thus the windows for potential change from the status quo policy location. A limitation to the modal analyses of gridlock (as well as other characterizations of the congressional inability to pass major policy; see also Binder 2003) is their restriction to the policy inputs – that is, the bargaining processes at work and the logrolling that we observe going into a statute in order to achieve its final passage – making the stories rendered static lawmaking analyses that end with the passage of the final statute.

However, with the persistence and growth of divided government, such that Democratic congresses are relying in part on Republican administrations (or vice versa) to carry laws into effect, administrators may in fact be more than mere rote implementers of these laws that emerge through the veto gates.

This chapter argues that evaluating the longer-term effects of bureaucratic behavior – and in some cases, *bureaucratic noncompliance* and *statutory noncompliance* as defined in the previous chapters – in the system known for high levels of inter-branch conflict requires the development of a measure of incremental policy change within the laws under these agencies' jurisdiction. The chapter provides and evaluates such a measure, based on a novel and original dataset spanning from 1973 to 2010. Creating an original measure that accounts for the significance, specificity, and direction of each amendment to each of the 26 laws under the jurisdiction of the Environmental Protection Agency, I find that there is in fact significantly more policy volatility than the dominant policymaking theories predict.

To take a prominent recent example, the Patient Protection and Affordable Care Act (ACA) – famously called "Obamacare" – was signed into law on March 23, 2010 after years of discourse over the proper reach and nature of the impending health care overhaul. Among the health laws importantly implicated by the ACA was the Federal Food, Drug, and Cosmetic Act (FDCA), originally passed in 1938 but subsequently amended several times, and which among other thing allows the Environmental Protection Agency to establish maximum residue limits for pesticide residues on foods. The ACA marked the most significant overhaul of America's health care system since the 1965 Medicare and Medicaid Acts, seeking to vastly increase the quality and affordability of both private and public health insurance coverage. The Congressional Budget Office estimated that the ACA would ensure the health coverage of 94 percent of Americans, addressing such reform components as the provision of quality affordable health care to all Americans, improving health care efficiency, improving access to innovative medical therapies, and increasing transparency in the health care system

(CBO Summary of the ACA). The 2010 congressional midterm elections marked the greatest loss of a party in a House election since 1938, and the Republican Party's largest gain in House seats since that same year.[137] Thus, a statute of landmark magnitude was left to be monitored by a congressional majority strongly ideologically opposed to the coalition that enacted the law originally, as well as opposed to the presidential administration tasked with its implementation.

Moreover, the ideological diversity of the states provided additional complexity to the enforcement landscape as governors and Attorneys General battled over the extent to which they could in fact be mandated to provide this vast expansion of health care benefits. Twenty-eight states filed lawsuits seeking to strike down the Affordable Care Act's individual mandate provision (Fletcher 2010), with some states (e.g., Virginia) joining in suits together and others filing separately. In one lawsuit, signed on by 12 Republican Attorneys General and 1 Democrat Attorney General, there was the challenge that Congress has the authority "to regulate commerce," but the Commerce Clause does not allow the federal government to compel one to purchase something (Williams 2010). It was not until 2012 in *National Federation of Independent Business v. Sibelius* that the United States Supreme Court would uphold by a vote of 5-4 the health care mandate as being within Congress's power to tax, though not within the scope of its authority under the Commerce Clause. This provides but one example of the challenges presented by implementing policy amid separated – and often ideologically conflicted – powers.

Further, rather than creating a new administrative apparatus such as with the Communications Act of 1934 or the Fair Labor Standards Act of 1938, Congress increasingly has turned to amendment-based lawmaking strategies which may result in mere incrementalism, but may also potentially result in marked deviations from the status quo policy. A single law

[137]The Republican Party gained 63 seats in the House of Representatives as well as gaining 6 seats in the Senate, thus expanding its minority status. The election also left the Republican Party in control of 26 state legislatures and 29 of the 50 governorships.

may receive dozens if not hundreds of statutory amendments over time. However, to date no work has sought to systematically account for the magnitude and direction of policy change within a law over time when there is heterogeneity within the statute. Such conditions of heterogeneous laws is increasingly common as Congress turns to omnibus legislating (Krutz 2001).[138] Within "must-pass" omnibus bills often fast-tracked through the committee process as single pieces of legislation (Krutz 2001: 2), one may find policies too controversial to pass on their own, and brought to the floor when debates are focused on "the larger issue of the omnibus nucleus" (Id at 2) such that members pressured into voting in favor often are unaware of the law's other contents. Moreover, even apart from the large omnibus appropriations packages, the high acceptability of this pork barrel legislating has led to the passage of laws touching on more diverse arrays of topics than what we observed in earlier decades (Krutz 2001). These processes make more complex the estimation of policy change over time.

I begin by discussing legislative design features most conducive to agencies taking more active role in policymaking relative to the statutory text and leading to outcomes to which I refer in this project as *bureaucratic* or *statutory noncompliance*. I then review existing theories of policy change and their limitations in permitting systematic evaluation of the consequences of this noncompliance, given the chapter's claim that bureaucratic behavior inconsistent with congressional preferences should trigger greater subsequent policymaking activity in order to bring legislation closer to their preferred location. I move on to introduce my original measure of substantive policy change through statute and the volatility that results from these legislative changes, and use those original data to test the core separation-of-powers hypotheses. I find that bureaucratic and statutory noncompliance, as well as the

[138]While many (e.g., Krutz 2001, Hanson 2014) discuss omnibus legislation in the context of appropriations bills, such as omnibus budget reconciliation acts – and indeed, that is a very frequent venue in which one finds them – I am treating laws as omnibus if they simply touch on multiple distinct policy domains, such as having both provisions pertaining to the provision of communication services as well provisions governing prosecution for drug crimes. Thus, I adopt a broad definition of omnibus legislating, and do not rely on the name of the statute but rather the text itself to determine whether or not it meets this criteria.

partisan configuration of Congress and the extent of judicial delegation toward administrative agencies, fundamentally reshape the extent to which Congress engages in ongoing monitoring of the policies and locations of the 26 statutes under the jurisdiction of the Environmental Protection Agency.

Bureaucratic Noncompliance in the United States

A common characterization of the relationship between legislators (principals) and bureaucrats (agents) is the delegation framework of lawmaking. According to this well-developed line of scholarly inquiry, when Congress writes a law in which there is some complexity or uncertainty that makes it disadvantageous to risk taking blame for, or when there is ideological agreement between the branches, Congress opts to delegate rulemaking and/or enforcement authority to the agency while maintaining certain administrative procedures and statutory specificity so as to guard against the potential for bureaucratic drift (*e.g.*, McCubbins & Schwartz 1984; McNollGast 1987, 1989; Banks & Weingast 1992; Bawn 1995; Epstein & O'Halloran 1999; Bendor, Glazer & Hammond 2001; Huber, Shipan & Pfahler 2001; Huber & Shipan 2002; Volden 2002). Should the agency fail to act consistent with the statute, it would face punishment deemed undesirable in equilibrium. Thus, what we observe is bureaucratic compliance. The earlier chapters of this project challenged that assumption, holding that scholars have underappreciated the true reach of bureaucratic discretion under conditions of inter-branch ideological conflict and settings that are not conducive to efficient bureaucratic oversight – conditions that are all the more prevalent in the recent decades of rising polarization and legislative gridlock (see also Gailmard 2002; Huber & McCarty 2004).

While theories often articulate the mechanisms of congressional control of bureaucracy (*e.g.*, McNollGast 1987, 1989; Callander & Krehbiel 2014), absent a metric of bureaucratic compliance, scholars have been unable to ascertain empirically the extent to which these constraints on agencies are indeed effective, and the conditions under which this bureaucratic control breaks down. This breakdown of effective congressional control of agencies

can result in *noncompliance*, defined above. Legislative-executive disagreement and ideological disagreement between the chambers of Congress were found in previous chapers to powerfully contribute to the Environmental Protection Agency's pulling policy toward its preferences rather than engaging in "rote implementation," though congressional provision for citizen suit litigation against the agency appears to effectively constrain the agency's range of policymaking choices relative to the statute under its jurisdiction. The support for the Department of Interior was more modest, though the overarching patterns of legislative-executive disagreement, conditional upon opposition strength, and the effective of citizen suit provisions were largely consistent with the findings of Chapter 4 in the context of the EPA. The findings strongly suggest that the separation-of-powers conflict prevalent since the late 1960s has expanded agency latitude beyond what the dominant delegation theories predict. However, if our ultimate goal is to better understand what explains policy outcomes, then we must be able to estimate not simply the *extent* of noncompliance, but also its *effects*. That is the question that this chapter takes up.

Theories of Policy Change

Estimating changes in policy and preferences is of interest to scholars in a vast number of subfields of political science – from measuring doctrinal change on the Supreme Court (e.g., Baum 1995) to measuring moves between liberalism and conservatism in policy adoption to capturing movement from the status quo when gridlock has been broken – though in every case, scholars are faced with a number of empirical challenges. While many public policies are considered subject to drift and others "bombarded by it" (Callander & Krehbiel 2014: 819) with drift caused by sources ranging from changes in demographics to innovations in technology, delegation has been considered a mechanism through which governments can accommodate this potentially inevitable drift (Id). A number of scholars have sought to explain the patterns and extent of policy change that we should expect to observe amid varied political and institutional arrangements, with policy stability typically increasing with

the number of veto players and their distances from one another, and reflecting the dfficulty of making significant departures from the status quo (Tsebelis 2002: 37). Thus, the number of significant laws passed by a legislature should be decreasing in the function of ideological distance between the parties or key players, and increasing as a function of the distance between the previous government and the one currently in power given the desire to undo an ideologically distant regime's policies (Id at 165). Such claims are consistent with the argument that in evaluating the stability of a given policy over time, we must consider both the current and the prior institutional configurations, as well as the bureaucratic behavior in response to congressional allocations of discretion.

There is a further question of whether policy change tends to be incremental, immune to radical change, or subject to ebbs and flows. Hall (1993) ultimately notes that in the United States lawmaking system, most changes to policy are only marginal, though there periods of fundamental changes, or "punctuated equilibria," at which point Baumgartner & Jones observe that crises do occur as the American public and policymakers reshape their understandings of the problems at hand. That is, a program may exist unchanged for decades, but then experience a radical reform, a prominent example of which is the aforementioned ACA. Of course, one important consideration in evaluating significant legislation versus the politics of incrementalism is whether to think of policy change in the *aggregate* – that is, over time producing important changes in the scope of administrative implementation capacity – versus characterizing incremental legislation as non-significant as Tsebelis (2002: 180) does.

One of the lone treatments of incremental policymaking is that by Ainsworth & Hall, who outline three strategic reasons for legislators' pursuit of incremental policy change: "First, legislators consider the trade-offs between vote maximization and policy gains linked to proposals. Second, incremental policy change affects members' incentives for engaging in legislative effort and legislative sabotage when they are evaluated on their relative performance. Finally, members' informational constraints affect their pursuits of incremental

policy change" (2011: 39-40). Thus, among the considerations of legislators is – consistent with median voter models of legislative decisionmaking and traditional bargaining theories – the interest in ensuring passage, often by way of moving to the center so as to gain the necessary majority. Moreover, legislative gatekeepers' risk aversion leads them to trade policy gains for votes as the prospects of legislative passage increase. Amid heightened partisan conflict and difficulty in moving legislation through the legislative process, incremental changes may be easier to explain and defend than radical reforms that may be highly discordant with key coalitions in Congress (Id at 43). Thus, the barriers to final passage are simply lower when putting forward more modest policy proposals than a new administrative apparatus that will provide a shock to the existing system. And while incremental changes minimize the policy gains that ultimately are reaped at each individual stage of congressional attention to an issue, on their face each incremental move may push policy forward in important ways over time.

A number of well-cited theories of lawmaking have sought to explain the conditions under which policy change is feasible, though such efforts have not resulted in a systematic quantifying of that policy change and its direction. Krehbiel (1998) argues that legislative productivity varies according to the location of the status quo with respect to the gridlock interval, with changes to the status quo possible only when the status quo policy lies outside the gridlock interval. Brady and Volden (2006) instead employ a median voter model, holding that to explain and define gridlock, one can think of members of Congress as being arrayed on a left-right continuum, and to determine whether effective policy change is possible, one must know the policy preferences of those members of Congress who are near the median and determine where their preferences lie in relation to the status quo policy. Thus, the median voter's preferences are a critical determinant of the policies ultimately adopted. In both models, we will observe major policy change only when the status quo is further from crucial members' (whether the median or the pivot) preferences than the proposed alternative policy.

In the discussion below, and consistent with the median voter theorem, I focus on the preferences of coalition members near the center rather than on the location of the filibuster and veto pivots, though this is not to say that these veto gates are irrelevant to the policymaking process. I argue that we must look at the statute (e.g., Clean Air Act) rather than policy level (e.g., the more macro level of environmental policy) given the heterogeneous nature of environmental policy (as well as other policies such as transportation, which intersects with such diverse domains as the environment and energy, labor, and civil rights). The importance of evaluating the particulars of policy substance has not gone entirely unnoticed, with Lapinski (2013) holding that there is a great risk of mischaracterizing lawmaing and policymaking processes when pooling in our analyses all laws across issue areas, with even accepted theories of the patterns and persistence of polarization over time not holding across policy issue areas. While his disaggregation of issue areas is at the level of four policy categories – sovereignty, organization and scope, international affairs, and domestic affairs – and thus does not disaggregate to the level of particular domestic affairs agendas (Id at 62), it suggests a need to consider more closely the effect of policy substance in shaping institutional interactions and the polarization degrees that impact bureaucratic capacity in policymaking.[139]

Rosenbaum (2014: 101) notes that the EPA administers both regulatory (e.g., clean air) and distributive programs (e.g., federal waste treatment grants), along with research activities, and as discussed previously, the statutes under its jurisdiction span environmental, energy, food and agriculture, and labor policies. This affects not just the array of problems that the agency faces over time, but also the composition of the groups lobbying for policy change and the agency's relationships to branches of the federal, as well as state and local, governments. That is, while Chevron and Exxon Mobil may seek to assert themselves and

[139]Lapinski's (2013) findings on variation in lawmaking productivity within these four issue domains further supports the importance of looking at policy in more nuanced levels than does much of the extant lawmaking literature.

signal a willingness to fight decisions with respect to the Oil Pollution Act and the Clean Water Act, it may be Pacific Gas and Electric Company that flexes its muscles with respect to the implementation of the Energy Policy Act, and still different companies mobilizing around the Clean Air Act and the Safe Drinking Water Act. Thus, there are implications for lobbying and interest group pressures, as well as the local/regional versus national versus global aspects of some of the laws that are at stake, affecting the agency's decisionmaking processes and those who seek to influence them.

Estimating the effects of statutory amendment behavior is most relevant when we can understand the ultimate impact on the policies that we observe over time. That is, while Congress may revisit legislation with high frequency, it is not necessarily of great relevance if precious little change is actually being enacted and it is merely the politics of incrementalism in action.[140] Given what clearly are dynamic processes at work in US lawmaking in the separation-of-powers setting, the ability to estimate the significance, magnitude, and direction of policy change in a statute (or even policy area, e.g., consumer protection) would open the door toward allowing us to understand better at the law level the conditions necessary or sufficient for meaningful policy change, and the key factors at work in shaping the outcomes we observe in this politics of potentially only incrementalism. This has important implications for the studies not just of lawmaking, but also bureaucratic behavior, policy stability, and the impact on the legal landscape.

Why Not Roll Calls?

To determine the extent of policy change over time, one must first identify all of the instances in which Congress takes up and ultimately amended the given statute. One way that this has been achieved in existing literature is through the identification of roll calls

[140]For example, Huber (2007) notes that the main way that Congress works to monitor the Occupational Safety and Health Act (a share of which the Environmental Protection Agency also enforces) is through the process of constraining the agency's appropriations as opposed to utilizing other legislative tools such as providing for administrative sanctions, whereas the Clean Air Act has received much more widespread and well-noted congressional attention and revision.

on the subject of interest, with roll call data and NOMINATE scores of the relevant legislators all easily accessible. The use of roll call votes to identify statutory amendments will systematically identify the bills for which the provisions of interest are central, as in Clinton's (2012) analysis of wage and hour amendments to the Fair Labor Standards Act, which importantly calls attention to certain disconnects between lawmaking theoretical predictions and empirics, at least under certain conditions of partisan conflict. However, I argue that such a strategy will not capture the wealth of amendment activity that occurs within other laws, whether in related statutes of different names (e.g., other, more heterogeneous labor legislation or a comprehensive environmental package) or in omnibus legislation (e.g., Omnibus Budget Reconcilliation Acts).

For example, while Congress may choose to pass a new environmental law, it may also insert a handful of environmental provisions into an omnibus budget reconciliation act, which makes the estimation of policy change (particularly that which is only incremental) considerably more challenging. After all, apart from the Clean Air Act Amendments of 1970, the Clean Air Act Amendments of 1977, and the Clean Air Act Amendments of 1990, Congress also amended the Clean Air Act in laws with titles including "Steel Industry Compliance Extension Act 1981," "Tax Reform Act of 1986," and the "Airport and Airway Safety, Capacity, Noise Improvement, and Intermodal Transportation Act of 1992," none of which would likely be reflected in analyses of roll call votes on Clean Air Act amendments over time. Thus, while Clinton's (2012) study provides an excellent contribution toward understanding empirically the actual reach of statutory policy change under varied conditions, its confinement to congressional revision of a single, well-defined statute rather than providing comparative analyses of policy change or addressing laws that intersect more with other legislation leaves us without a roadmap for addressing the measurement of policy change in more heterogeneous laws.

This issue is of particular importance given that the policy captured by these different

statutes may be substantively different in ways that are central to this study. Krutz (2000: 533) notes that not only has the use of omnibus legislation proliferated since World War II, but such laws are often assembled in order to ensure passage of policy that otherwise faces uncertainty. Thus, within these often must-pass omnibus bills in which one will find some widely-supported policies, one may also find policies that might well have been too controversial to garner the support necessary for final passage on their own merits.[141] Such information might well be important to an analysis of the extent to which policy changes are ultimately enacted.

By instead identifying each public law in which Congress revisited a law to any extent – and providing a novel indicator of each amendment's scope (and, in a sense, complexity) – we can not only gain a better grasp on the mechanisms through which Congress typically seeks to achieve statutory policy changes as it sees previously established policies being carried into effect, but we can also systematically evaluate the relationship between policymaking theories and empirics in recent decades.

A New Measure of Statutory Policy Change

This chapter proposes a more inclusive (though still imperfect) mode of estimating deviations from the status quo policy. To develop the measure and test its performance in the context of noncompliant environmental policy implementation, I utilized the 26 laws implemented in whole or in part by the Environmental Protection Agency, and on which I based my analysis in Chapter 4. I conducted through Lexis Congressional's database of public laws searches for the name of each of the 26 statutes under the EPA's jurisdiction. The laws returned through these searches thus revisited in some way one (or more) of the laws implemented by the EPA. These searches returned a total of 2,000 observations between

[141]Krutz (2000) acknowledges the potential benefits of using omnibus legislating in this manner, citing proponents who claim that it enables legislative productivity in a process otherwise rife with gridlock and veto players.

1973 and 2010 and form the basis of this chapter's analysis.[142] Over the course of the time series, there were an average of 5 amending laws per Congress per EPA statute. This number is roughly comparable when evaluating separately those laws that the EPA shares with the Department of Interior and those laws that the EPA does not, and the performance of a difference-in-means test produces an insignificant test statistic. However, when looking to the entire pool of Department of Interior laws, one finds a strikingly lower average of 1.5 amending laws per Congress per DOI statute, though of course the number is higher when restricting analysis to those laws over which there is joint jurisdiction between the EPA and DOI.

To estimate policy change, I first identified the DW-NOMINATE score of the median legislator in the coalitions supporting the passage of each of the laws in the sample, as well as indicators of the significance and the specificity of the amendment that Congress made to one (or more) of these 26 statutes under the EPA's jurisdiction.[143] In obtaining the coalition ideologies, I rely on the final vote cast by the chamber on the entirety of the bill, whether the conference committee vote to accept all changes or the final floor vote in favor of passage. Utilizing the NOMINATE median of these coalitions is consistent with legislative median-voter theories, which – as with Black's (1958) median voter theorem – propose that policy outcomes will be consistent with the preferences of the median legislator.[144]

A limitation of this measure is that to determine the direction of policy change, I am considering the votes on the bills taken as a whole, and not on the individual amendments

[142]While there are 2,000 observations, they are only 917 separate laws. Omnibus appropriations packages often amended multiple environmental laws in a single statute, as many as 10.

[143]An important limitation is that a number of these statutory amendments received voice votes. In these cases, I assign the DW-NOMINATE score of the median legislator in Congress. Thus, for coding purposes that are not distinguishable from unanimous votes.

[144]Wiseman & Wright (2008) find that the median legislator is "unambiguously closer" to the majority party median than to the minority party median and is predisposed to support the agenda advocated by the majority party, giving one reason to expect that looking to the preferences of the median legislator will be highly informative. There is, of course, also much value in looking also at the preferences of other key members of the legislature, such as the committee chair and the veto and filibuster pivots. See, e.g. Krehbiel (1998).

pertaining to the EPA or the Clean Water Act if the amending law is in fact omnibus.[145] However, I argue that this measure can provide us with valuable leverage in understanding better the nature and scope of policy changes given ongoing inter-branch battles over implementation. For example, I expect that if one law amending the Clean Air Act was passed by a coalition with a NOMINATE median of -.3 and the next amendment has a coalition median of .2, one can reasonably reach the conclusion that there was a swing in the conservative direction with respect to the Clean Air Act. Alternatively, if the next amendment is passed with a coalition median of .18, one can hold that the difference is small, if significant at all.

Examining the coalition medians of these laws reveals a marked amount of volatility. For example, the Clean Air Act from the 93rd to the 111th Congress has an average coalition NOMINATE median of -0.017 with a standard deviation of .179, and the amendments range from -0.236 to 0.322 (though given its controversial nature, it should come as little surprise that few amendments to the Act have ultimately passed relative to the other statutes implemented by the EPA). Moreover, consistent with what we might expect to find, the average coalition median for those laws amending the Clean Air Act in the 103rd Congress was -0.110, while in the 104th Congress it shifts to 0.203 – a .313 swing in the conservative direction amid the marked partisan turnover with the 1994 midterm elections amid the Contract with America. Contrary to expectations, the Toxic Substances Control Act – regulating by way of disclosure as opposed to more direct specification of regulatory policies, and remaining largely intact since its initial passage – has a quite broad range of movement, from -.226 to .473. While this is inconsistent with accounts of TSCA's stability, this measure addresses only the location and not the significance or specificity of the statutory amendments, which if small would reconcile the competing TSCA accounts. Moreover, this measure captures

[145]Moreover, there is the challenge of estimating the location of new policies in isolation, as opposed to comparing policies to their proposed alternatives. There is thus a question of to what extent it is valuable to know whether a given policy is the more conservative one available, the most centrist option, etc. in assigning based on the voting coalition whether it was in fact liberal or conservative.

only the location of the law as a whole, rather than the relevant portions of the law, and with a growing need for supermajority support in order to pass legislation (see, e.g., Wawro & Schickler 2006), one can 1.) infer less from the coalition ideology alone given the extent of compromise needed to achieve final passage, and 2.) observe that the resulting policy change is potentially watered down, or at least touching less directly upon the more salient policies given the bargaining processes at work.

To assign greater weight to those amending laws in which there was more extensive revision of the statute, I created the variable *specificity*, which is a scale comprised of information on whether each of the following were present in each of the 2,000 statutory amendments: whether the law was simply mentioned, whether there were changes to appropriations or appropriations cycles, changes to statutory enforcement (e.g., administrative adjudications or the creation of a private right of action), oversight provisions (e.g., reporting or consultation requirements), definitions, prohibitions, requirements of regulated entities, rules/regulations, exemptions from the Act, provisions specifying to whom the law *does* apply, and rules of construction. These variables were identified by hand-coding each of the 2,000 amendments from the Statutes at Large.[146] Those laws coded as having prohibitions or requirements contained – it is important to note – regulatory commands of *private entities* and not of the administrative agency as was the case in Chapters 4 and 5. That is, these are identifying language such as "it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source." Those laws coded as containing regulations provided that an administrative actor such as a Secretary or Administrator (whether or not it was in the EPA or DOI, so long as it was in the relevant statutory amendment) should promulgate rules or standards (for example, "[The Secretary] shall promulgate such revised drinking water regulations with such modifications as he deems appropriate") Both mandatory and discretionary rulemaking provisions were

[146]In long statutes, word searches were used to identify the relevant section(s) of the law.

included here, as the variable seeks only to evaluate whether Congress was working to provide for more detail with respect to the rulemaking role of the relevant administrator. Rules of application and exemption are those passages in laws where Congress provided for greater detail as to the conditions under which certain statutory provisions do (or don't) apply, and who is (or isn't) responsible for complying with the provisions. Rules of construction likewise create bounds on the statute and contain such language as, "Nothing in this subsection shall be construed to limit or prohibit any other authority the Administrator may have under this Act." Through this coding process I also identified the number of pages in each of these 2,000 amendments that were dedicated to amending the original EPA statute (that is, the number of pages of the Asbestos Hazard Emergency Response Act of 1986 that specifically address the Toxic Substances Control Act (22 pages) as well as the number of pages of that same Act that specifically address the Occupational Safety and Health Act (1 page)).

The Chronbach's alpha, or indication of scale reliability, is .76, which is sufficient evidence in support of the measures being incorporated into a single scale (DeVellis 2003), and thus I take the sum of the dummy variables to create this index. Table 1 reports the distribution of occurrences of each type of statutory amendment in the dataset. While appropriations are clearly a heavily-utilized tool in congressional amendments of these laws, evaluating appropriations changes hardly tells the complete story, with extensive numbers of oversight provisions being integrated into the legislation, as well as changes to the enforcement apparatus. The addition of different types of language can be construed to reduce bureaucratic discretion to read between the lines should Congress be dissatisfied with its statutory implementation decisions (Huber & Shipan 2002), but it can also indicate new regulatory efforts on the part of Congress and which are independent of the agency's behavior. Thus, less can be gleaned by looking at the addition of language alone. However, this reflects that there are in fact a number of ways in which Congress works to revise legislation, which it takes up with far more frequency than one would guess if basing analysis on the amending law titles

Table 1: Types of Statutory Amendments (93rd-111th)

	Yes	No
Mentioned/Incorporated Only	777	1,223
Just Technical Amendment	121	1,879
Appropriations	690	1,310
Oversight Provisions	267	1,733
Changes to Enforcement	148	1,852
Definitions	195	1,805
Prohibitions	76	1,924
Requirements	96	1,1904
Regulations	131	1,869
Exemptions	155	1,845
Application	194	1,806
Rules of Construction	137	1,863

as opposed to the body of the statutes. The presence of a greater number of these types of statutory amendments suggests a greater degree of congressional attention to the particular law, which could well be an indicator of dissatisfaction with its prior implementation. Table 2 reports the distribution of the values of the specificity scale, which ranges from 1 to 11, with lower values indicating only modest attention to the authorizing statute and high values indicating that Congress was aggressively taking the act to task. While the majority of these 2,000 statutory amendments are of a smaller nature, there are still quite a number that engage in extensive reshaping of substantive policy and the manner in which it will be carried into effect.

Lastly, in estimating policy change I incorporated information on the overall significance of each of the statutory amendments. Common measures of law-level significance are those drawn from David Mayhew (1991/2005) and from Lapinski & Clinton (2006). However, the more ideal granular-level codes that the Lapinski & Clinton data assign all public laws are not only restricted to the law-level significance, but also do not extend beyond the 103rd

Table 2: Specificity Scale (Law Level)

Value	Count	Percent
1	778	38.90
2	855	42.75
3	166	8.30
4	61	3.05
5	42	2.10
6	27	1.35
7	24	1.20
8	15	0.75
9	13	0.65
10	8	0.40
11	11	0.55
TOTAL	2,000	100

Congress, whereas I am evaluating the 93rd to the 111th Congress. I instead created an *amendment significance* measure which is, for each of the 2,000 observations, the ratio of the number of pages revising the authorizing statute relative to the number of pages in the original law.[147] The intention is to downweight those laws that appear to be amending in ways more trivial and to give more stature to those that are taking on more extensive regulatory change. The expectation is that having a greater number of amending pages relative to the length of the original statute is indicative of a more extensive regulatory effort on the part of Congress. The advantage of such an approach is that it works to evaluate the significance of the amendment and not the law as a whole (that is, it does not erroneously attribute a high level of significance to a trivial amendment embedded in a vitally important omnibus budget reconciliation act). However, there nevertheless are limitations in that it imposes the assumption that the length of the amending content is associated with the significance of that

[147]Thus, if 3 pages were dedicated to amending the 10 page-long original Clean Air Act, the *significance* score would be 3/10, or 0.3. If 45 pages were dedicated to amending that same law, the *significance* score would be 4.5. All calculations were based on the number of pages in the Statutes at Large, the structure of which is consistent over time. In alternative specifications, I calculated the ratio of pages amending the statute to the number of pages in the amending law – that is, the share of the law dedicated to the given EPA statute. The results produced were similar.

amendment, when it might instead reflect the more technical nature of the subject matter (for example, addressing clean air regulations with the introduction of new technologies) as opposed to the importance of that particular content.[148]

I averaged the standardized *specificity* and *amendment significance* variables to create a composite indication of the *magnitude of amendment*. I then treated this *magnitude of amendment* variable as a weight on the DW-NOMINATE median of the legislators voting in favor of the statutory revision. Thus, it allows for differentiation between a marked ideological swing between statutory amendments that are extensive, which would appear as considerable policy volatility, and a marked ideological swing between statutory amendments that are relatively trivial, which would appear as very modest deviations from the status quo. The resulting value is the novel estimate of each statutory amendment's *policy location* that allows for comparison across iterations of each of the statutes.

Tracking Policy Change

Figure 1 plots the time trends of the *specificity* with which Congress amended each of the statutes under the jurisdiction of the EPA. The y-axis is the specificity scale, averaged by law by Congress. It is immediately clear that there is marked variation in the extent to which Congress takes laws to task when choosing to amend it to some degree. While the Ocean Dumping Act and Pollution Prevention Act have been virtually untouched, I find in a number of these statutes that there are vast differences not only the level of the specificity scale, but also the patterns of when Congress took on more versus less amending activity. While we see a sharp peak in the extent of amendments to the Endangered Species Act (largely implemented by the Department of Interior) in the beginning of the time series and then a decline and relative plateau, the Oil Pollution Act peaks in the beginning of the data

[148]However, such concerns about the confusion between significance and technicality are likely to be consistent across most environmental legislation, which typically is highly detailed and complex, and this is the exclusive domain under my microscope here. Thus, the ability to assess relative statutory significance should be more feasible when looking within this one policy domain.

and then declines sharply and then remains at the bottom third level of specificity, while still others such as the Clean Air Act, the Federal Water Pollution Control Act, and the Safe Drinking Water Act all display considerable volatility throughout the time series. That is, the forces aligned to reshape these laws do not appear to be taking to task the whole of the issues under the umbrella of the Environmental Protection Agency or more broadly, environmental policy. Rather, it appears highly specific to the issues at hand, suggesting congressional attention to statutory implementation as opposed to macro-level environmental policy preferences, and further supporting the chapter's claim of the importance of examining within-statute policy changes over time.

The wide variation in the extent of statutory amendment activity both over time and across laws provies for greater reinforcement of the value of studying amendments of particular statutes rather than evaluating the extent to which Congress has moved more liberally (conservatively) overall or in environmental policy generally. This is further supported by the marked variation in the significance of these statutory amendments using the measure discussed above (see Figure 2). While none of the National Environmental Policy Act amendments achieve much significance at all using this metric, the Endangered Species Act exhibits more significant amendment activity that is also more volatile and peaks at the end of the time series, there are perids during which the Federal Water Pollution Control Act enjoys more modestly significant amendment activity, and the Safe Drinking Water Act has marked spikes in its amendments' significance levels in the late 1980s and the mid to late 1990s. Thus, we can observe important variation across the statutes under the Agency's jurisdiction, lending greater credence to this chapter's claim that important information is missed when we pool laws together as constituting a single policy domain, and when we fail to consider Congress's numerous methods for amending policy in ways not reflected merely in legislators' votes but that have important implications for the policies that we ultimately observe. Most importantly for the purpose of this project, the creation of this measure en-

ables me to match my law-Congress bureaucratic noncompliance measures with law-Congress amendment measures, thus evaluating not just blanket opposition to the agency but rather opposition to the agency with respect to its implementation of a particular statute.

Testing Theories of Policy Change

Having described the construction of this novel measure of statutory policy movement and displayed the patterns apparent in this measure of policy change from the status quo, I now turn to evaluate its performance by testing the core theories of policy change in a complex inter-branch setting, beginning with the most central motivating question of congressional attention to bureaucratic noncompliance with the laws in which it delegates to the agency.

The dominant delegation models implicitly assume that agencies' ranges of possible actions lie only within the discretionary windows allotted by the delegating Congress, thus taking only actions that Congress at some level prefers (though for alternative arguments, see Gailmard (2002), Huber & McCarty (2004)). However, I argue in earlier chapters that a number of political conditions (e.g., heightened partisan conflict within Congress, statutory design, and fragmented oversight of the agency) fundamentally reshape and expand administrative agencies' latitude to be active policymakers and pull the policy location toward their preferences rather than adhering strictly to the statutory text. While Congress routinely introduces bills that signal dissatisfaction with agency actions, particularly in turbulent times, few such bills ultimately reach final passage. Thus, I expect that major policy change will occur when the agency has been found to be not just ideologically distant (that is, out of alignment with the opposing party), but *noncompliant* in its implementation:

H_1: Policy changes by Congress should be the greatest when the EPA was charged with bureaucratic or statutory noncompliance in the previous Congress.

The above hypothesis addresses congressional responses to agencies' overstepping of their discretionary windows, with an assumption of congressional concern about the preferences

of the executive branch and its implementation of the laws that Congress drafts. Farhang & Yaver (2015) argue that Congress works to fragment the administrative state so as to insulate policy against bureaucratic drift, as well as against coalition drift should the present congressional majority lose power in the upcoming election. The idea of fragmentation is that with greater numbers of actors and agencies involved in the implementation process, the president must consult with more actors in order to change policy, and the added coordination costs among the agencies involved should induce a status quo bias, insulating policy consistent with the preferences of the enacting coalition. It is with an eye to guarding against bureaucratic drift, thus creating a "sticky" status quo given the potentially different composition of preferences in the future (see also Moe 1989), as well as the greater number of agencies with which the president must consult should he seek a departure from the current policy. If these efforts are successful, laws that are drafted in a highly fragmented manner should require less ongoing statutory amendment activity to revise the policy location than is required of laws in which there is centralized authority that would afford the implementing agency greater latitude in setting policy.

H_2: More fragmented laws should result in less subsequent policy change.

Consistent with the political economy models of lawmaking discussed above (e.g., Krehbiel 1998; Brady & Volden 2006), I expect that under conditions of heightened legislative conflict, any policy change that occurs will be more incremental rather than marked in its magnitude. With high levels of consensus within Congress, the passage of more significant amendments to legislation may be possible, depending upon the preferences of those in office. Indeed, powerful majorities may be quite motivated to secure large policy victories and to secure programs before political conditions change, thus paving the way for more significant policy movement if there is an alternative policy location that is preferred. In contrast, chambers that are ideologically distant from one another find it challenging to reach the consensus necessary to pass new laws (and presumably, amending legislation as well), and

Wawro & Schickler (2006) observe an increase in de facto supermajority requirements for the Senate's passage of legislation of significance. Thus:

H_3: Policy change should be the smallest when there is heightened intra-branch conflict in Congress, as measured by the NOMINATE distance between the chambers.

Relatedly, in examining the durability of statutes as indicated by their time to amendment, Maltzman & Shipan (2008) argue that fragmented authorizing coalitions yield laws that ultimately prove to be more fragile. However, in addition to the limitations presented by their measuring statutory complexity in terms of page length, their use of a hazard model to estimate the time to amendment does not allow us to test theories of the types of laws most liable to experience major overhauls as opposed to minor (if any) adjustments, and the extent to which those amendments are ongoing or infrequent. Here, I test this theory:

H_4: Policy change should be the greatest when the enacting legislation was passed by ideologically distant chambers.

Other Predictors of Major Policy Change

A number of other conditions could have important effects on congressional propensity to significantly alter the legislation under the EPA's jurisdiction. A long literature has worked to explore the effects of third-party oversight on administrative behavior (*e.g.*. McCubbins & Schwartz (1984). Consistent with these arguments, legal scholars have argued that the mobilization of private litigants provides a potent mechanism of policy enforcement independent of (and potentially despite) agency preferences (Farhang 2008, 2010).[149] More specific to environmental law, the use of citizen suits, which were first introduced in the Clean Air Act of 1970 – along with their broadly-construed attorney's fees and injunctive relief for prevailing parties – worked to "mobilize private litigation against the targets of regulation

[149]The effectiveness of citizen suits appears particularly potent in recent years, in the aftermath of *Friends of the Earth, Inc, et al v. Laidlaw Environmental Services, Inc.* (2000), in which the Supreme Court lowered the bar for standing to sue.

as well as... to control the bureaucracy" (Farhang 2011: 673), given agencies' interest in avoiding the burdens of legal suits. These provisions are a particularly meaningful departure from the broader legal landscape in which one must have suffered a personal, tangible injury in order to have standing to sue. Rather, within this domain of law, individuals can be (though certainly are not always) empowered to bring suits against agencies due to their action or inaction, *regardless of personal harm suffered*, providing a particularly meaningful constraint on agency behavior that might not otherwise have been vigilant with respect to enforcement. Making the reasonable assumption that agencies are well aware of the extent of potential legal threats, I argue that it reshapes bureaucratic behavior in implementation, and in turn the necessity of ongoing congressional monitoring through statutory amendment.

Just as the availability of citizen suits should have the effect of providing an additional monitor on bureaucratic decisionmaking, so too should the extent of deference afforded agency decisions by the judiciary. The Supreme Court's landmark holding of *Chevron v. Natural Resources Defense Council* (1984) provided a clear articulation of administrative deference to agency actions provided that they are not arbitrary or capricious. In the absence of more vigorous judicial oversight, agencies were left to satisfy the low threshold of inquiry – a permissible reading of the statute – and thus could be said to have had expanded latitude moving forward in setting policy, and leaving Congress with more responsibility to perform that oversight function.

Lastly, the electoral uncertainty of the political conditions will affect Congress's ability and inclination to make major changes. Fenno (1978) notes that legislators implicitly believe that their effectiveness in moving bills through the legislative cycle is valued by the constituents on whom they depend for reelection. There may be greater incentive to reshape policy to be consistent with legislators' preferences while still in a position of power, and in doing so to secure policy gains in ways that will insulate against subsequent drift (e.g., Moe

1989).[150]

Empirical Model

I use the novel statutory *specificity* and policy change measures as the continuous dependent variables for models working to test central claims regarding institutional conflict and policy movement in the context of these 26 statutes.

Political Environment Variables.

A range of political conditions including intra-branch conflict and the fragmentation of bureaucratic oversight vastly expands agencies' capacity to be active policymakers by pulling policy toward their preferences rather than exercising strict statutory compliance. Here I turn again to the two measures of *statutory* and *bureaucratic noncompliance* that were introduced in Chapter 4: the percentage of cases in which the EPA was sued in the DC Circuit and lost on substantive grounds, and an agency curbing factor score based on bill introductions from the president's co-partisans which sought to constrain the agency's regulatory actions. While both the statutory amendment and agency curbing datasets evaluate congressional efforts to revise the way in which the given statute is being carried into effect, they are crucially quite different in that the amendment data contain *only* passed legislation, and such legislation may *or may not* target the powers of the agency or its leadership, and by way of statutory amendment discretion may be limited in ways more diverse than those captured in the agency curbing data (for example, the addition of specificity and in turn, reduction of bureaucratic discretion even if not imposing additional oversight provisions).

Because the effect of bureaucratic noncompliance on subsequent policy change is a core hypothesis examined here and because these measures tap into importantly distinct dimensions of noncompliance, I examine them in separate statistical models, with the former

[150]However, there is the possibility that electoral uncertainty will give legislators less focus on passing statutory amendments as opposed to working to better ensure electoral safety (that is, spending more time campaigning), and also have less leverage in pressing for major policy changes.

estimating judicial determinations that the agency has transgressed its authority, and the latter indicating congressional dissatisfaction with agency implementation. To allow time for a congressional response to the bureaucratic behavior and to avoid inducing post-treatment bias, I lag both variables by one Congress. I expect the coefficients on both indicators of *bureaucratic noncompliance* to be significant and positive.

Divided Government is a dummy variable coded as 0 when the President's party controls both chambers of Congress, and coded 1 otherwise.[151] Successful policy adoption requires some overlap of preferences between the chambers of Congress, with greater ideological disagreement affecting markedly the transaction costs associated with passing legislation, and in turn the potential for the policy location to move. To estimate this effect, I use the variable *Chamber Distance*, which is the absolute value of the Common Space NOMINATE distance between the House and Senate medians. If the chambers are ideologically opposed, a conference committee would require the moderation – and thus, reduced movement – of the policy, while a Congress with a more unified opposition to the status quo would be better capable of organizing to deliver more significant overhaul. I expect the coefficient to be significant and negative.

To test Maltzman & Shipan's (2008) claim that ideological disagreement at the time of a law's enactment contributes adversely toward its ultimate durability, I include the variable *Authorizing Chamber Distance*, which is the absolute value of the distance between the Common Space NOMINATE medians of the authorizing chambers of Congress (thus, for example, it is the chamber distance in the 93rd Congress in the case of the Endangered Species Act of 1973). This enables me to estimate to what extent ideological disagreement and legislative polarization – potentially contributing to additional complexity and bargaining as legislators seek to buy support of coalitions – contributes to the long-run growth and persistence in these policy changes rather than legal stability over time.

[151]The only divided Congresses in the data are the 97th-99th Congresses, and thus limited leverage can be gained from analyzing such partisan configurations separately.

There is a possibility that statutory amendments will be more likely to occur amid conditions of *electoral uncertainty*, so as to solidify policy better before any partisan regime change in the next election cycle. To estimate this, I utilize the uncertainty measure developed by Yaver (2015b), which is the percentage of races won in the previous election by margins of five percentage points or fewer, with the expectation that having many tightly contested seats will induce in Congress a sense of uncertainty about future political conditions.[152]

I argue that a greater presence of environmental interest groups will be more likely to pressure Congress and agencies to act on these issues, yielding more marked policy movement. Boehmke, Gailmard, & Patty (2012) note that interest groups often lobby both the legislature and bureaucracies, suggesting that they receive at least some of the same signals and pressures. I expect that these pressures will result in increased congressional attention to the reshaping of substantive policy objectives and implementation by the EPA. Thus, I draw from the Policy Agendas Project the number of environmental interest groups per Congress in order to control for the extent of potential pressures and lobbying to change environmental policy over time.[153]

I include the absolute value of the *NOMINATE Distance* between the authorizing and contemporary Congress medians. That is, with greater disagreement between the authorizing Congress and that currently empowered, there should be greater volatility in the policies set forth. I include a dummy variable for whether the statutory amendments are *post-* Chevron, with the variable taking the value of 1 if the amendment was passed after the landmark case and 0 otherwise. Finally, to account for the non-linear patterns of statutory amendment activity over time, I include smooth cubic splines to model time. However, using the linear time trend of *Congress* produced similar results.

[152]A common metric of electoral uncertainty is that created by Binder (1997), though due to its inducement of post-treatment bias, I do not utilize it here. Moreover, there is the additionally problematic assumption that legislators are cognizant of future (potential) losses. However, its inclusion in the model in lieu of the narrow elections indicator does not substantially affect the main results.

[153]I divide the number of environmental groups by 1000 so as to allow for easier interpretation of the results.

Law-Level Variables.

To test the effect of a statute's original design on its subsequent policy durability, I estimate the extent of the *statutory fragmentation*, a variable created using Farhang & Yaver's (2015) methodology and utilized in Chapters 4 and 5. This variable captures the extent to which Congress has constructed a law that diffuses authority across different institutional actors in effort to achieve policy insulation, as opposed to centralizing enforcement powers in a single administrative entity (in this case, the EPA). I include a dummy variable for whether the authorizing statute was *significant* according to David Mayhew's (1991/2005) list of significant post-war laws, taking the value of 1 if it is a significant law and 0 otherwise. I include a dummy variable for whether the authorizing statute provided for *citizen suits*. To address the fact that laws may have been long and policy-dense to begin with and thus by nature have more content that can be amended, I control for the *page length* of the original statute. Finally, to control for variation specific to certain domains of environmental policy, I include policy fixed effects.

Estimation

I averaged the statutory amendment data by law by Congress to yield a total of 398 observations over the time period of the 93rd to the 111th Congress. The first dependent variable that I present is *specificity*, which is a continuous variable ranging from 0 to 8.

The data discussed in this project cover 26 laws[154] over 19 Congresses, with an aim of examining variation over both units and time. It thus takes the form of time series cross-sectional data (TSCS), in which we have repeated observations over N units and T time periods. An advantage of the TSCS structure is that one obtains greater variation across a greater number of observations, and allows one to evaluate predictions in space and time that cannot be estimated through exploiting pure cross-section or pure time-series (Beck & Katz 2010). I employ panel-corrected standard errors (PCSEs), which are utilized for linear

[154]Two of the laws under the EPA's jurisdiction were passed after 2006.

time-series cross-section models and which correct for contemporaneous correlation.

A common concern – and thus a necessary diagnostic – in time series data is that of serial correlation, for which PCSEs do not correct. I began by plotting the residuals against the lagged residuals, and I did not observe a clear pattern, which is not suggestive of a serial correlation problem in the data. Subsequent performance of a Wooldridge test for autocorrelation in panel data allowed me to strongly rule out that there is first-order autocorrelation in these data ($p > .4$), such that it does not require correction in the models presented. To test whether the variables in the TSCS dataset are stationary, I performed a Fisher-type test.[155] The null hypothesis being tested by a Fisher-type test is that all panels contain a unit root – that is, we are testing the hypothesis that $\rho = 1$, where ρ is the coefficient on the lagged dependent variable. For a finite number of panels, the alternative is that at least one panel is stationary. Nonstationarity was revealed in the variables *NOMINATE Distance* and *Environmental Groups*, and I first-differenced these variables, which rendered them stationary.

Below, I use the measures and methods to estimate the effects of bureaucratic behavior, legislative design, partisan conflict, and the legal environment on statutory policy change and in turn, the scope of administrative capacity that we ultimately observe.

Findings on the Specificity of Amendment Activity

The OLS results with panel-corrected standard errors are reported in Table 3. I begin by discussing model 1, in which I estimate the effects driving policy change when using the *agency curbing* metric of bureaucratic noncompliance. I find that a unit increase in agency curbing in the previous Congress is associated with a 0.23-unit increase in the magnitude of policy. To put this magnitude into better perspective, a standard deviation increase in *agency curbing* in the previous period is associated with a .17 increase in the specificity with

[155]I use this test for a unit root because it does not require strongly balanced panels, and a number of laws under the EPA's jurisdiction were passed since 1973.

which an amending law makes its revisions. Thus, with greater congressional dissatisfaction with bureaucratic implementation, there is a greater likelihood that Congress returns to the legislation with greater care and specificity, resulting in heightened policy change.

Turning to the lawsuit loss measure, I continue to find a powerful and significant effect, with a standard deviation increase in the agency's losses in court in the previous period associated with a .39 standard deviation increase in the specificity of amending laws. This is consistent with both the agency curbing measure, as well as the theory discussed above. Thus, both of the indicators of punishment for bureaucratic misbehavior appear to be significantly and positively associated with the specificity with which Congress revisits laws to make policies more consistent with its present preferences. It further lends credence to the chapter's claim that these measures of bureaucratic noncompliance, while clearly distinct, both tap into a single core concept with respect to the agency's implementation behavior, and in turn Congress's response to it.

While congressional coalitions' observations about bureaucratic behavior appear to powerfully shape the magnitude with which they revise the delegating legislation, the degree of fragmentation in the original statutory design – in theory structured to insulate against drift and thus subsequent continued monitoring – does not appear to have any continued effect on congressional amendment activity with respect to those laws. *Divided government* has a significant and positive effect on the specificity of amendments to these laws in model 2, suggesting that while there may be evidence of diminished production of significant laws amid divided government, there is in fact greater attention paid to administrative implementation of its laws and Congress's willingness to meaningfully provide greater detail (and in turn, less discretion to the executive branch). However, this finding's inconsistency between model specification requires that it be interpreted with caution.

The effect of *chamber distance* is in the expected (negative) direction but it is only statistically significant in model 2. Despite Maltzman & Shipan's (2008) claim that statutes

crafted amid ideological disagreement as indicated by ideological distance between the chambers, I find that the authorizing Congress's inter-chamber disagreement does not affect the extent to which we observe major policy overhauls. And in fact, an authorizing statute's *page length*, a rough proxy for the complexity that might emerge from a divided authorizing legislature, is actually *negatively* associated with its subsequent overhaul by Congress.

The NOMINATE distance between the enacting and contemporary Congresses does not appear to be associated with the extent to which Congress takes a law to task in its amendments. More marked statutory amendments appear to occur within the domain of significant laws, which is consistent with the expectation that battles will be more likely to be waged over issues of greater significance rather than over ordinary legislation. While the influence of courts through citizen suits does not appear to be meaningful in shaping congressional incentives with respect to drastic statutory changes, the effect of *Chevron*'s articulation of deference toward agency decisions appears to have markedly increased the need for ongoing congressional attention to these statutes, with the post-*Chevron* period associated with a .90 and .72-unit increase in statutory amendment specificity in models 1 and 2 respectively, or approximately 57% increases over the mean of *specificity*.

While a congressional coalition may have particular motivation to shift policy while still in power to do so, it is unclear to what extent that coalition is well-positioned to enact more striking policy changes to the statutes implemented by the EPA, with *electoral uncertainty* significant and positive in model 2 but insignificant (albeit correctly signed) in model 1. The effect of environmental interest groups is positively signed but is only significant in model 1, thus giving reason for caution in interpreting the result, and future work should explore the effect of not simply the volume of interest groups, but also their activities with respect to these particular policies.

Incorporating Policy Direction

To examine when we will observe greater swings in policy and not just the detail with

which a law is being amended (potentially in the same direction as that established in the authorizing statute), I turn now to the *policy change* dependent variable, which is the *policy location* weighted by the average of the standardized *significance* and *specificity* variables. This *policy change* dependent variable is continuous and ranges from 0 to 2.75. I again use ordinary least squares with panel-corrected standard errors (PCSEts). Performance of a Wooldridge test again did not produce a significant test statistic, suggesting that AR(1) autocorrelation is not of concern in these data.

Here, *bureaucratic noncompliance* produces an inconsistent result, falling well short of significance and incorrectly signed in the case of the agency curbing specification, though remaining positive and significant in the lawsuit specification. However, the substantive effect of noncompliance ascertained by the DC Circuit is much diminished, with a standard deviation increase in lawsuit losses associated with a .03 standard deviation increase in policy change. Divided government continues to powerfully and significantly predict the increase in policy volatility over time in the lawsuit specification, with a move from unified to divided government associated with a .03-unit increase in policy change. The fragmented versus centralized nature of a statute continues not to be associated with subsequent statutory amendment activity, either in looking at the specificity of those amendments as in Table 3, or the policy volatility resulting from those amendments as here in Table 4. The effect of *authorizing chamber distance* remains insignificant as in the models discussed above, though here in both models 3 and 4 the effect of *chamber distance* is significant and *positive*. While I argued that heightened divisions within Congress should be associated with smaller degrees of policy change, the results have the potential to be skewed in that I am looking only at passed legislation, which requires some threshold degree of preference overlap.

While the post-*Chevron* period appeared to be associated with more *detailed* statutory amendments, those changes do not appear to be associated with significant policy shifts in those laws, with the variable insignificant in model 3 and *negatively* signed though with

a small substantive effect in model 4. Consistent with model 2's predictions of statutory specificity of amending laws, here *electoral uncertainty* has a significant and positive effect on policy change. The effects of *distance between Congresses* and the authorizing statute's status as *significant* do not appear to be associated with greater policy change. The inconsistency in the findings of bureaucratic noncompliance in the form of the agency curbing measure is deserving of further inquiry. Of course, it is important to bear in mind that the congressional decision to overhaul a statute both in substance and direction may be quite different from the congressional decision to merely provide policy clarity in complex terrain, given that the latter case may not be with the mindset of moving the statute's location. Such a distinction could produce a highly specific amendment – that is, one that provides lots of additional language and provisions – by a coalition that is ideologically aligned with that which passed the authorizing statute, and thus one that is not inclined to shift the policy location, scoring high on *specificity* while scoring low on *policy change*.

Overall, however, the core claim of the role of bureaucratic behavior in shaping legislative behavior and in turn the policy outcomes we observe is supported when looking at the detail with which Congress is revising laws upon observing that bureaucratic behavior, and when looking at the volatility of policy as Congress works to monitor the statute's implementation and guard against further bureaucratic drift. And these inter-branch dynamics in re-setting the policy agenda appear to result in greater ongoing policy change than the dominant lawmaking theories predict.

Conclusions

While it is the case that the prospects of congressional passage of the Clean Air Act of 2014 indeed look grim given the present level of partisan polarization in the legislature, it is far from the case that Congress has been entirely hampered in its ability to address – to varying degrees – the environmental legislation enforced by the Environmental Protection Agency. Rather, through the dynamic, amendment-based processes of lawmaking through

incrementalism, Congress is able to impose additional constraints on the agency and provide for some degree of continued monitoring that importantly shapes policy. Indeed, it is in a sense a different lawmaking game than that previously specified in the Congress literature, which focuses largely on the bargaining processes at work with respect to passing new legislation. This chapter instead works to demonstrate the conditions under which Congress can successfully pass legislation that revises the location of the delegating statute, with bureaucratic behavior contrary to congressional preferences over implementation having marked effects on the law's ultimate policy trajectory. This project thus bridges the gap between the literatures emphasizing the bargaining processes at work in congressional writing and passage of legislation, and those who seek to understand the predictors and nature of the policies that we ultimately observe. It additionally calls into question the generalizeability of theories predicting the potential for policy change by Congress given the marked volatility observed in a number of the statutes examined here, and the variation observed even among this subset of environmental laws.

While prior work provided evidence of the conditions under which agencies' latitude in implementation might be expanded relative to the policy locations of the statutes under their jurisdiction, this chapter provides the first evidence of the *consequences* of this bureaucratic noncompliance. The results of this chapter call attention to the need to consider more carefully the more precise ways in which Congress is changing the policy location of laws given not just the broader political environment and changing preferences, but also the agency's implementation of those laws and their original implementation designs. While extant research based on roll call votes has shed important new light on the extent to which policymaking theories are confirmed in practice, the increasing use of omnibus legislation, as well as the wealth of ways in which Congress can revisit laws – whether through oversight, the tool of appropriations, the changing of enforcement, or the addition of specificity – makes it all the more important to look at the broader legislative landscape in which these policy

battles are being waged.

The chapter further provides a roadmap for evaluating policy change in a number of other policy contexts, allowing us to gain greater insights into the trajectories of law and the scope of capacity with which institutional actors are endowed over time. Extending the methods to a greater range of policies and agencies will give us greater traction on the factors that predict policy change, but these robust results suggest that the conditions enhancing bureaucratic latitude have important consequences with respect to the stability of the policies we observe, and potentially the longer-term scope of administrative capacity with which they operate.

Table 3: Specificity of Policy Change in the SOP System

	Model 1 Agency Curbing	Model 2 Lawsuit Losses
Bureaucratic Noncompliance	0.234***	1.211***
	(0.060)	(0.103)
Divided Government	0.140	0.229***
	(0.175)	(0.035)
Chamber Distance	-4.142	-5.886***
	(3.426)	(0.765)
Authorizing Chamber Distance	4.718	-0.043
	(4.472)	(1.693)
Environmental Groups	0.050**	0.005
	(0.016)	(0.006)
Distance Between Congresses	1.669*	3.088***
	(0.761)	(0.600)
Significant Law	0.815***	0.599***
	(0.162)	(0.120)
Statutory Fragmentation	-0.171	-0.003
	(0.117)	(0.078)
Citizen Suits	0.250	-0.039
	(0.130)	(0.083)
Post-*Chevron*	0.902**	0.715***
	(0.280)	(0.031)
Electoral Uncertainty	1.587	1.094***
	(0.911)	(0.167)
Page Length	-0.002***	-0.002***
	(0.000)	(0.000)
Intercept	29.830***	19.158***
	(5.610)	(1.044)
Policy Fixed Effects	✓	✓
Splines	✓	✓
R^2	0.29	0.28
Total Observations	359	359

$^{***}p < .001, ^{**}p < .01, ^{*}p < .05$

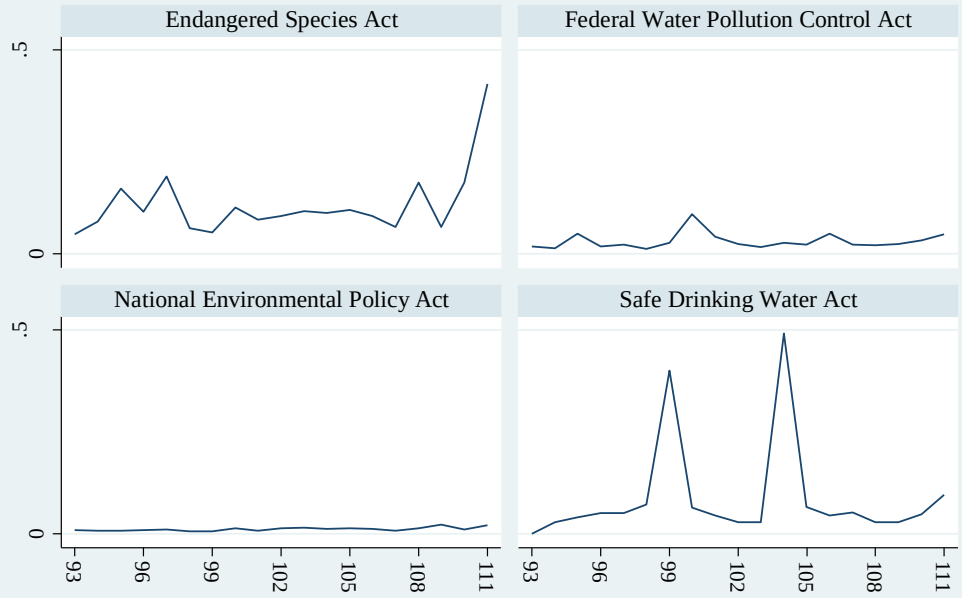
Table 4: Policy Volatility in the SOP System

	Model 3 Agency Curbing	Model 4 Lawsuit Losses
Bureaucratic Noncompliance	-0.005	0.116***
	(0.012)	(0.035)
Divided Government	0.024	0.030**
	(0.016)	(0.010)
Chamber Distance	0.240**	0.164***
	(0.081)	(0.033)
Authorizing Chamber Distance	0.325	0.248
	(0.660)	(0.223)
Environmental Groups	-0.000	-0.004***
	(0.001)	(0.001)
Distance Between Congresses	-0.043	-0.069
	(0.115)	(0.085)
Significant Law	0.002	0.007
	(0.032)	(0.006)
Statutory Fragmentation	-0.021	-0.019*
	(0.024)	(0.008)
Citizen Suits	-0.012	-0.011
	(0.025)	(0.010)
Post-*Chevron*	-0.039	-0.045**
	(0.024)	(0.014)
Electoral Uncertainty	0.305***	0.255***
	(0.063)	(0.038)
Page Length	0.000	0.000
	(0.000)	(0.000)
Intercept	1.673*	1.267**
	(0.741)	(0.428)
Policy Fixed Effects	✓	✓
Splines	✓	✓
R^2	0.10	0.09
Total Observations	359	359

$^{***}p < .001, ^{**}p < .01, ^{*}p < .05$

Figure 1: Specificity Scale Across All EPA Laws

Figure 2: Significance Levels of Amendments Over Time



Appendix

Measuring Policy Change Codebook

I conducted Lexis searches for each of the 26 statutes implemented in whole or in part by the EPA. E.g., searching "Clean Air Act" in the 93rd Congress, 94th Congress, and so on through the 111th Congress. There were no restrictions on whether that name was in the title or description of the Act, provided that it be an *enacted* piece of legislation. This generated a total of 2,000 amendments from 1973 to 2010 (though coming from 917 unique statutes, some of which amended multiple laws). Each of these laws was downloaded from the Statutes at Large through Hein and was coded by hand.

Conducting the same searches for amending public laws on THOMAS garnered a smaller set of laws with which to work. All those accounted for in THOMAS were included in Lexis, but THOMAS was missing some, presumably due to the particulars of their searches. Analysis here was based on the universe of statutes identified through Lexis.

Collected for each amending statute the following variables:

Law Name: Name of the original law (e.g., Clean Air Act, Clean Water Act)

Original Congress: Congress that enacted the statute

Original Pages: Number of pages of original statute in the Statutes at Large

Amending Congress: Congress that is amending the statute

Bill Number: Bill number of the amending statute (e.g., HR 1, S49)

House Origin: 1 if originating in the House, 0 if originating in the Senate

Final House Vote Number: Number of last recorded House vote on entirety of the law (conference committee vote if applicable, otherwise the full chamber vote) – got

from GovTrack

Final Senate Vote Number: Number of last recorded Senate vote on entirety of the law (conference committee vote if applicable, otherwise the full chamber vote) – got from GovTrack

Final House Coalition Median: First-dimension DW NOMINATE score of median House member voting in favor of the law in the final vote

Final Senate Coalition Median: First-dimension DW NOMINATE score of median Senate member voting in favor of the law in the final vote

Sponsor: Name of the sponsor of the amending law, along with their state and district if applicable (e.g., Barbara Boxer (CA), Jerry McNerney (CA-11))

Democratic Sponsor: 1 if the law sponsor is a Democrat, 0 if the bill sponsor is a Republican

Same Sponsor: 1 if the President and the law sponsor are of the same political party, 0 if they are of different parties

Majority Sponsor: 1 if law's sponsor is in her chamber's majority party, 0 if she is not

Committees: List of the committees to which the amending law was referred (e.g., "Senate Environment and Public Works, Senate Energy and Natural Resources, Senate Appropriations")

Number of Committees: Count of the number of committees to which the law was referred

Introduced: Date of the law's introduction

Year: Year of the law's introduction

Democratic President: 1 if the law was passed by a Democratic administration, 0 if under a Republican administration

Amending PL: Public law number of amending statute (e.g., 110-5)

Amendment Name: Name of the law amending one (or more) of the environmental statutes (e.g., Clean Air Act Amendments of 1977, Environmental Research, Development, and Demonstration Authorization Act of 1976)

Pages of Amending Law: Total number of pages of amending law in Statutes at Large

Amending Pages: Number of pages of amending law dedicated to addressing the particular law (e.g., the share of the law addressing the Clean Air Act – perhaps in a 40 page law that is making some amendment to the Clean Air Act, 12 of those pages address the CAA and the remaining 28 pages address other issues entirely, so this would get a code of 12 amending pages)

Number mentions: Number of times the original law was mentioned in amending law

Number sections: Number of sections in the amending law in which the original law was addressed (perhaps it was only in 1 section of the law, perhaps the law amended the Clean Air Act in 4 separate sections of the law)

Administrative Actors Mentioned: List of administrative actors mentioned in the amending pages (e.g., Secretary, Secretary of the Interior, Administrator, President)

Mentioned Only: 1 if the law made no changes to the original statute and only mentioned it in passing

Technical Amendment: 1 if the law was a technical amendment rather than containing subtantive amendment provisions (for example, replacing "and" with "or," or reordering sections of a statute, punctuation changes, etc.), 0 otherwise

Appropriations: 1 if the amending law provided for appropriations for the original

law (e.g., "There shall me appropriated for the fiscal year 2012 $12,000,000 toward the preservation of..." or "There shall be appropriated such sums as may be necessary to carry out the Act"), 0 otherwise

Oversight: 1 if the Act contained any oversight provisions (e.g., reporting requirements, consultation requirements, public hearings, sunset provisions, appointment limits, direct audits), 0 otherwise

Definitions: 1 if the law added or revised any definitions in the original law, 0 otherwise

Prohibitions: 1 if the law added or revised any prohibitions in the original law, 0 otherwise. Prohibitions here *do not* refer to the agency, but rather are aimed at the regulated entities (for example, "No person shall discharge pollutants" or "No person shall operate a vehicle without a permit and verification of emissions compliance" or "Tampering with smoke detectors is prohibited.")

Requirements: 1 if the law added or revised any requirements in the original law, 0 otherwise. As with prohibitions, this is aimed at private entities rather than the state itself, and here is simply looking at whether the law required new things of the regulated parties (e.g., All persons must comply with emissions requirements pertaining to certain cars).

Regulations: 1 if the law added or revised any rules or regulations in the original law, 0 otherwise. This has to do with the rules being promulgated by the administrative actor (Administrator, Secretary, etc.) and counts whenever the amending law adds to the original law that the Secretary (etc.) shall promulgate rules on XYZ. Also counting discretionary rules here, not just mandatory.

Exemptions: 1 if the law contains language specifying when the original law does *not* apply, or if there are other provisions in the amending text clarifying who is exempt from various requirements/provisions, 0 otherwise

Application: 1 if the law contains language specifying when the original law does apply, or if there other provisions in the amending text clarifying how a law/policy applies, 0 otherwise.

Construct: 1 if the law contained rules of construction, 0 otherwise. Rules of construction come in the form of "Nothing in this section shall be construed to prohibit X" or "Nothing in this Act shall be construed to require Y under the Endangered Species Act."

Amend to Enforcement: 1 if were were amendments made to the way in which the original Act is enforced (for example, the amending law might lay out an administrative hearing or provide information about an administrative sanction or criminal penalties, or a private right of action), 0 otherwise

Number of Laws Amended: Number of environmental laws amended by this law (ex: 1 if only the Clean Air Act was amended, 2 if both the Clean Air Act and the Energy Policy Act were amended)

Chapter 7: Conclusion

With nearly constant discussion of polarization in the United States Congress, it is striking to what political scientists have emphasized its *causes*, while paying relatively little attention to its *consequences* with respect to the manner in which agencies come to operate and the policy outcomes that emerge. This dissertation set out to evaluate to what extent the weakening of Congress as a monitor on bureaucratic latitude could in fact reshape agency incentives with respect to whether or not to comply with the laws that they are tasked with implementing. With so many anecdotes about foot-dragging in the EPA under President Reagan and in the EEOC under President Bush Sr., it seemed altogether likely that within the domain of politically salient issues, if given the opportunity not to implement a given policy with which it is at odds ideologically, it might well take advantage of that latitude. True enough, this was in large part what I found.

We see this dynamic play out in the data that I presented in Chapters 3 and 4, with politically advantageous (from the agency's point of view) institutional configurations promoting bureaucratic behavior that is found by the DC Circuit to be out of accordance with the statutory text, and/or found by the contemporary Congress to be out of accordance with how it views the law should properly be implemented. And behind the data are rich stories of legal debate over the proper reach of agency authority, and to what extent the agency is in fact fulfilling its mandatory statutory obligations as in the previous chapters' examples of agency failures to promulgate rules or their regulating to lesser degrees than the delegating legislation provided for (see, *e.g., Natural Resources Defense Council v. Train* (1976)).

When evaluating these questions of bureaucratic implementation – the story not simply of how a bill becomes a law but of *how the law becomes policy* – we inherently are evaluating the scope and functioning of the American administrative state. When such cases as *NRDC v. Train* occur – with an administrative agency unwilling to perform mandatory regulatory duties – individuals and industries are affected, potentially quite heavily. This raises an

important question as to who exactly is winning or losing when these battles are waged? While a cynical response would be to say that the answer depends on who is sitting on the Court of Appeals at a given time (and such a claim is not wholly without merit), this question strikes deeper and calls attention to the need for a greater understanding of the ways in which corporate industries are inducing noncompliant behavior – or potentially inducing compliant behavior – and the political pressures to which agencies are most sensitive in shaping their regulatory agenda relative to the delegating statutes. I found that that inclination not to comply was also powerfully predicted by the extent to which the executive branch preferences are aligned with those who formed the authorizing legislation.

In the preceding chapters, I tested a number of institutional conflict hypotheses as to the conditions under which agencies would exploit their regulatory latitude and when the agency would exercise greater caution and compliance so as to avoid, for example, costly litigation. I found that legislative-executive conflict powerfully predicts when the Environmental Protection Agency will be motivated to act contrary to the preferences of its current legislative principal, but that that inclination to skirt the edges of its authority is dramatically tempered when the opposing political party is in a strong position of power and thus able to provide a more credible threat of punishment in the form of retracting some level of discretion or much-valued resources.

A challenge with which administrative agencies ultimately are forced to cope is one of multiple principals: one legislative principal delegates to the agency, and another legislative principal subsequently monitors this agent, and while these legislative principals may be aligned, it is by no means a guarantee, nor is it a guarantee that the contemporary Congress will be committed to an agency's faithful upholding of a past bargain. And when there is a greater clash between the delegating and contemporary Congresses, agencies may find themselves caught between a rock and a hard place: fideility to the statutory text leaves the agency in the judiciary's good graces but means deviating from the current Congress's

preferences over implementation and thus risking losing discretion or resources, while being responsive to that current legislative principal will likely mean straying from the statutory text and in turn facing costly litigation and potential losses in court.

It can be easy amid polarization and accounts of bureaucratic noncompliance to see Congress as unable to perform its monitoring functions effectively. And to an extent, the findings of Chapters 3 and 4 show that that can be true in the cases of the Environmental Protection Agency and the Department of Interior. Yet as I show in Chapter 5, despite the numerous veto players constraining legislative action from moving forward amid this heightened partisan conflict, Congress nevertheless manages on many occasions to pass legislation that, while not significant on the whole in most cases, has important ramifications with respect to agency discretion in implementation. Moreover, bureaucratic noncompliance powerfully predicts the legislative choice to provide such detailed amendments to the statutes under the agency's jurisdiction, often in ways that rein in bureaucratic discretion. A question then emerges: If agencies know that congressional coalitions can insert into legislation amendments that curb their regulatory capacity, why do we continue to see noncompliance over the course of the 1973 to 2010 time series? To be sure, the agency is aware of statutory adjustments to its authority and obligations, and the imposition of new oversight provisions was quite a common occurrence in the data and burdensome to the agency. One might expect instead to observe a decline in bureaucratic noncompliance in the aftermath of being being punished by Congress. However, this is not the pattern that one actually finds in the data. So why is this?

One answer is that just as there are changing legislative principals that create monitoring problems for Congress and for the agency, so also are there changing administrative actors, with new presidential administrations and even within presidential administrations sometimes a change in leadership. With new administrative implementers means gaining new familiarity with the key political players and the environment in which they operate. And

this political environment itself is changing frequently, with new developments in technology opening new discussions (and battles) over environmental impact, natural disasters forcing new discussions on such issues as water quality and the protection of certain lands. Thus, with these frequent upsets to the system, learning becomes far more difficult, rendering the agency less able to update its beliefs about other institutions' capacity to punish and adjust implementation strength accordingly.

The other answer is that the agency may simply be taking a gamble. While I evaluate as one of my noncompliance measures the agency's loss rate in the DC Circuit, it should be noted that even in those challenging cases that reach the DC Circuit, the agency is winning three quarters of the time, with those three quarters of the cases potentially being the avoidance of rules that would have required extensive costly effort and resources to promulgate. Thus, what may appear to be nonstrategic behavior on the part of the agency – continuing not to comply after havnig received a prior punishment – may instead simply be the agency guessing (sometimes accurately, sometimes inaccurately) that its probability of being punished is still *low enough* to justify skirting the edges of authority such as by being particularly aggressive or particularly lax with rulemaking.

Overall, I found broad support for the core separation of powers hypotheses as to the conditions under which this noncompliance occurs. To the extent that public opinion is reflected in the makeup of Congress, the findings have important implications for the extent to which we in fact have adequate substantive representation in bureaucratic administration in these times of clashing over compliance – and what that representation means in the context of implementing statutes passed by long-past Congresses but the text of which is still intact. And given the congressional propensity to not simply propose but actually continue to *pass* extensive substantive revisions of statutes upon observing noncompliant implementation by the agency, the subsequent reining in of bureaucratic discretion makes for a potentially increasingly rigid statutory structure with incremental gestures made frequently

to the effect of leaving little room to read between the lines or to operate without multiple forms of oversight. Moreover, one might ponder the normative implications of these continued efforts at imposing new oversight and further reducing discretion when one of the purposes of delegation to administrative agencies is to capitalize on their greater expertise and resources. Ultimately, of course, it is a balancing act of giving the agency *just enough* regulatory latitude to be responsive but also compliant.

Normative Implications

What this dissertation has not taken up is the normative question or whether we *should* have compliance with the laws passed by Congress. The answer to this has important bearings on the state of American democracy and the proper forces shaping observable policy outcomes. On the one hand, there is a potentially more normatively desirable notion that the directly elected branch of government have the reins with respect to lawmaking and shaping the direction in which policy takes shape over time. Yet if we consider the basis of congressional delegation to agencies being their advantage in technical expertise in matters of substantive policy, there is merit in considering the value of agencies capitalizing on that knowledge rather than (potentially blindly) implementing the statutes passed by Congress.

The extent of normative desirability (or lack thereof) with respect to compliance may be shaped in part by the winners and losers emerging from these policy battles, though there often is a lack of consensus around the ideal policy given dueling corporate and interest group stakes. The further question that emerges is who ought to be driving policy decisions that stray from the original delegating legislation, whether the expert agency to which authority was delegated, or the democratically-elected legislature which could (in theory, though perhaps not in practice amid gridlock) pass new remedial legislation. If we permit the agency to formulate judgments about the appropriateness of the delegating legislation given who is benefiting or else harmed by the law at hand, then compliance *for the sake of compliance* may in fact be undesirable and yield bad outcomes. Yet these agencies, while

with leadership appointed by an elected president and confirmed by the elected Senate, are not as directly accountable to the public as is Congress, and moreover are subject to the same interest group pressures with respect to policy choices, suggesting that there are risks inherent in leaving these implementation judgments to appointed administrators, without a clear ideal regulatory pathway when the faithful implementation of the delegating statute produces outcomes either objectively harmful or contrary to the legislative purpose. And while the judiciary provides a valuable oversight mechanism with respect to the interpretation and application of these delegating statutes to new policy conditions and the proper reach of administrative authority in carrying these laws into effect, there are limits to the extent to which judges can truly be considered neutral arbiters in these debates.

While there is not a clear-cut answer to the question of whether compliance is necessarily the desirable outcome on the part of the agency, future work can evaluate more squarely the conditions under which compliance yields more positive versus negative outcomes for the interests at whom the legislation was originally aimed at protecting and those who are most in need of federal protections.

Limitations

While I have presented evidence in support of my hypotheses in both the Environmental Protection Agency and the Department of Interior, a dissertation focused on environmental agencies alone is limited in its ability to explain broader swaths of regulatory dynamics among the branches. This is particularly the case given the environmental movement's common association with the Democratic Party, making it somewhat of an "owned" issue. Anecdotal empirics from other scholars (e.g., Johnson 2011; Carpenter 2010) support the claim that bureaucratic noncompliance as defined in this project is a phenomenon more generally applicable than examined within these pages, extending to such realms as agriculture, health policy, and civil rights.

Among the goals of the dissertation was to provide a novel dataset with which to evalu-

ate the limitations of effective bureaucratic control as evidenced by institutional constraints on agency capacity to regulate, in a manner that would be generalizeable to a number of other domains to which this theory also applies. However, extensions of the analysis are constrained by the necessity that one have a large number of statutes under the jurisdiction of the administrative agency so as to evaluate in a time-series cross-section manner the institutional (time-varying) and statutory (law-varying) conditions that shape these regulatory outcomes. Both the Environmental Protection Agency and the Department of Interior carry the advantage that they have large regulatory agendas, taking on in whole or in part the implementation of 26 and 22 statutes respectively. While the EEOC's failure to investigate claims of employment discrimination under the leadership of Clarence Thomas is a case that is highly compatible with this project's theory and core findings, the EEOC's quite smaller regulatory agenda[156] makes for more limited opportunities to conduct rigorous statistical analyses of the Commission's implementation decisions vis-a-vis the other branches. Likewise, an agency that carries with it a large regulatory agenda concentrated in a very small number of large and highly influential laws (e.g., the Internal Revenue Code, implemented by the Internal Revenue Service) creates challenges in the way of a small N dimension of the data. Thus, replication of this procedure is best suited to those agencies with extensive statutory agendas, such as the Federal Trade Commission, the Department of Labor, or the Department of Transportation,[157] as opposed to more targeted agencies such as the Federal Elections Commission or the Federal Communications Commission. Thus, while I argue that the theory that I put forward and test here applies broadly to a wide array of policy

[156]The EEOC is responsible, in whole or in part, for the implementation of seven statutes: Title VII of the Civil Rights Act of 1964, the Pregnancy Discrimination Act, the Equal Pay Act of 1963, the Age Discrimination in Employment Act of 1967, the Americans with Disabilities Act of 1990, the Civil Rights Act of 1991, and the Genetic Information Nondiscrimination Act of 2008.

[157]The Department of Transportation has the advantage of not only implementing in some measure well over 40 statutes, but those laws cut across different domains including the environmental implications of transportation technology, the labor conditions in which transportation works operate, the disability access to which people are entitled in different transportation modes, and energy efficiency, thus providing extensive variation across time, statute, and policy area.

domains, replicability may be constrained to a smaller number of administrative agencies as opposed to being able to evaluate the full universe of agencies.

Next Steps

While this dissertation has gone to great efforts to evaluate the factors leading to bureaucratic behavior straying from statutory commands and/or current congressional commands of the Environmental Protection Agency and the Department of Interior, the study's isolation to a single policy domain is a limitation to be remedied by the inclusion of a third case, the Internal Revenue Service. Doing so will allow the study to take on a new policy domain – one that is not so closely aligned with with the political left – in addition to evaluating to what extent these inter-branch dynamics in fact play out in highly important but particularly contentious policy settings.

Furthermore, an advantage exploited throughout the dissertation – the overlapping jurisdiction between the Environmental Protection Agency and the Department of Interior – points to an important extention to this avenue of research. While the EPA and DOI are naturally going to receive the clearest signals from one another in the context of the statutes over which they both have jurisdiction (e.g., the Oil Pollution Act), the fact that they share jurisdiction over not one, not two, but *eleven* statutes gives one reason to expect that they are highly familiar with one another's broader regulatory agendas. Thus, might there be information spillovers with respect to the implementation of additional laws and other institutions' likely responses? One might plausibly assume that the Environmental Protection Agency's observation of a flurry of lawsuits directed at the Department of Interior might give it reason to exercise caution so as not to find itself caught up in litigation as well. And indeed, preliminary evaluations of the agency curbing data reflect that high levels of DOI agency curbing in the previous period are often associated with decreases in EPA agency curbing in the current period.

Much work will need to be done in the future to better understand how agencies learn

from one another the extent of the political constraints in which they operate (for example, their likelihood of punishment), and the ways in which that shapes decisions regarding bureaucratic compliance. The findings of this project and those that it motivates address important issues of bureaucratic performance – that is, the factors shaping the effectiveness of agency implementation and the ways in which changing political configurations reshape incentives to respond to legal binds and the Democratically-elected legislature – in turn, helping us to derive and test more hypotheses as to the policy outcomes we will be more likely to observe as agencies carry laws into effect. However, the pages here present at least a starting point for understanding better the ways in which agencies find ways to maximize their regulatory latitude, and the consequences of those agency choices in subsequent periods.

References

Achen, Christopher H. 2001. "Why Lagged Dependent Variables Can Suppress the Explanatory Power of Other Independent Variables." *Working paper*

Adcock, Robert & David Collier. 2001. "Measurement Validity: A Shared Standard for Qualitative and Quantitative Research." *American Political Science Review* 95: 529-46.

Ainsworth, Scott H. & Thad E. Hall. 2011. *Abortion Politics in Congress: Strategic Incrementalism and Policy Change.* New York, NY: Cambridge University Press.

American Bird Conservatory. "Notice of Intent to Sue for Violations of the National Environmental Policy Act, the Endangered Species Act, and the Bald and Golden Eagle Protection Act In Connection with the Fish and Wildlife Service's Final Rule Authorizing the Issuance of Eagle 'Take' Permits for Thirty Years." April 30, 2014.

Banks, Christopher P. 1999. *Judicial Politics in the D.C. Circuit.* Baltimore, MD: Johns Hopkins University Press.

Banks, Jeffrey & Barry Weingast. 1992. "The Political Control of Bureaucracies under Asymmetric Information." *American Journal of Political Science* 31(4): 796-828.

Barnes, Jeb. 2004. *Overruled?: Legislative Overrides, Pluralism, and Contemporary Court-Congress Relations.* Palo Alto, CA: Stanford University Press.

Baum, Lawrence. 1995. "Measuring Policy Change in the Rehnquist Court." *American Politics Quarterly* 23: 373-382.

Baumgartner, Frank R. 2012. "Ideas and Policy Change." *Governance.*

Bawn, Kathleen. 1995. "Political Control Versus Expertise: Congressional Choices About Administrative Procedures." *American Political Science Review* 89(1): 62-73.

Beck, Nathaniel. "Time-Series-Cross-Section Methods." In, *The Oxford Handbook of Political Methodology.* Box-Steffensmeier, Janet M., Henry Brady, and David Collier eds. (2010). New York: Oxford University Press.

Beim, Deborah, Alexander Hirsch, and Jonathan P. Kastellec. 2014. "Signaling and Counter-Signaling in the Judicial Hierarchy: An Empirical Analysis of En Banc Review." Forthcoming in *American Journal of Political Science.*

Bendor, Jonathan, A. Glazer & Thomas H. Hammond. 2001. "Theories of Delegation." *Annual Review of Political Science* 4: 235-269.

Berry, Christopher R. & Jacob E. Gersen. 2010. "Agency Design and Distributive Politics." *Working paper.*

Binder, Sarah. 2003. *Stalemate: Causes and Consequences of Legislative Gridlock.* Washington, DC: Brookings Institution Press.

Binder, Sarah. 1997. *Minority Rights, Majority Rule: Partisanship and the Development of Congress.* New York, NY: Cambridge University Press.

Binder, Sarah & Forest Maltzman. 2008. *Advice and Dissent: The Struggle to Shape the Federal Judiciary.* Washington, DC: Brookings Institution Press.

Brady, Katherine. 2011. "Who Decides? Overview of *Chevron, Brand X,* and *Mead* Principles." Immigrant Legal Resource Center.

Brady, David & Craig Volden. 2006. *Revolving Gridlock: Politics and Policy from Jimmy Carter to George W. Bush.* Boulder, CO: Westview Press.

Brambor, Thomas, William Roberts Clark & Matt Golder. 2006. "Understanding Interaction Models: Improving Empirical Analyses." *Political Analysis* 14(1): 63-82.

Brehm, John & Scott Gates. 1999. *Working, Shirking, and Sabotage.* Ann Arbor, MI: University of Michigan Press.

Brougher, Cynthia. 2013. "Nondiscrimination in Environmental Regulation: A Legal Analysis." Congressional Research Service.

Callander, Steven & Keith Krehbiel. 2014. "Gridlock and Delegation in a Changing World." *American Journal of Political Science* 58(4): 819-34.

Calvert, Randall L., Mathew D. McCubbins & Barry Weingast. 1989. "A Theory of Political Control and Agency Discretion." *American Journal of Political Science* 33(3): 588-611.

Cameron, Charles. 2000. *Veto Bargaining: Presidents and the Politics of Negative Power.* New York: Cambridge University Press.

Cameron, Charles & Jee-Kwang Park. How Will They Vote? Predicting the Future Behavior of Supreme Court Nominees, 1937-2006. *Journal of Empirical Legal Studies* (2009).

Canon, Bradley C. & Charles A. Johnson. 1999. *Judicial Policies: Implementation and Impact, 2nd ed.* Washington, DC: CQ Press.

Carpenter, Daniel P. 1996. "Adaptive Signal Processing, Hierarchy, and Budgetary Control in Federal Regulation." American Political Science Review 90(2): 283-302.

Carpenter, Daniel P. 2000."State Building through Reputation Building: Coalitions of Esteem and Program Innovation in the National Postal System, 1883-1913." *Studies in American Political Development* 14: 121-55.

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

Carpenter, Daniel P. 2003. "Why Do Bureaucrats Delay? Lessons from a Stochastic Optimal Stopping Model of Product Approval." In *Politics, Policy, and Organizations: Frontiers in the Scientific Study of Bureaucracy*, George Krause & Kenneth Meier, eds. Ann Arbor, MI: University of Michigan Press.

Carpenter, Daniel P. 2005. "The Evolution of National Bureaucracy in the United States." In *The Executive Branch*, Joel D. Aberbach & Mark A. Peterson, eds. New York, NY: Oxford University Press.

Carpenter, Daniel P. 2010. *Reputation and Power: Organizational Image and Phamaceutical Regulation at the FDA.* Princeton: Princeton University Press.

Chalekian, Paul. 2014. "Patterns of Public Policy and Administration: Identifying Interfaces and Relationships." *Working paper.*

Chiang, Chun-Fang & Brian Knight. 2011. "Media Bias and Influence: Evidence From Newspaper Endorsements." *The Review of Economic Studies* 78(3):795-820.

Clark, Tom. 2011. *The Limits of Judicial Independence.* Princeton: Princeton University Press.

Clinton, Joshua D. 2012. "Congress, Lawmaking, and the Fair Labor Standards Act, 1971-2000." *American Journal of Political Science* 56(2): 355-372.

Clinton, Joshua & David E. Lewis. "Expert Opinion, Agency Characteristics and Agency Preferences," 16 (1) *Political Analysis* (2008): 3-20.

Clinton, Joshua, David Lewis, & Jennifer Selin. 2013. "Influencing the Bureaucracy: works The Irony of Congressional Oversight." Forthcoming, *American Journal of Political Science.*

Congressional Budget Office. "Detailed Summary of the Patient Protection and Affordable Care Act."

Derthick, Martha and Paul J. Quirk. 1985. *The Politics of Deregulation.* Washington, DC: The Brookings Institution Press.

DeVellis, Robert F. 2012. *Scale Development: Theory and Applications, 3rd ed.* Thousand Oaks: SAGE Publications

Dixit, A.K. 1995. *The Making of Economic Policy: A Transaction Cost Politics Perspective.* Cambridge, MA: MIT Press.

Earthrise Law Center. 2015, February 11. "60-Day Notice of Intent to Sue for Failure to Perform Mandatory Duties Under Section 303(c)(4) of the Clean Water Act (CWA), 33 U.S.C. 1313(c)(4), to Revise Oregon's Water Quality Criteria for Toxic Pollutants."

Environmental Law Institute. 1984. *Environmental Law Institute, Citizen Suits: An Analysis of Citizen Enforcement Actions Under EPA-Administered Statutes.*

Epstein, David & Sharyn O'Halloran. 1994. "Administrative Procedures, Information, and Agency Discretion." *American Journal of Political Science* 38: 697-722.

Epstein, David & Sharyn O'Halloran. 1996. "Divided Government and the Design of Administrative Procedures: A Formal Model and Empirical Test." *The Journal of Politics* 58: 373-97.

Epstein, David & Sharyn O'Halloran. 1999. *Delegating Powers: A Transaction Costs Politics Approach to Politics under the Separation of Powers.* Cambridge: Cambridge University Press.

Epstein, Lee, Andrew D. Martin, Jeffrey A. Segal, & Chad Westerlund. 2007. "The Judicial Common Space." *Journal of Law, Economics, and Organization* 10: 1-23.

Eskridge Jr., William N. and John Ferejohn. 2010. *A Republic of Statutes: The New American Constitution.* New Haven: Yale University Press.

Farber, Daniel A.1996. "Is the Supreme Court Irrelevant? Reflections on the Judicial Role in Environmental Law." 18 *Minnesota L. Rev.* 547-70.

Farhang, Sean. 2010. *The Litigation State: Public Regulation and Private Lawsuits in the U.S.* Princeton: Princeton University Press.

Farhang, Sean. 2011. "Legislative-Executive Conflict and Private Statutory Litigation in the U.S.: Evidence from Labor, Civil Rights, and Environmental Law." *Law & Social Inquiry* 37: 657-685.

Farhang, Sean. 2013. "Legislating for Litigation: Lawsuits, Administrators, and Statutory Specificity." *Working paper.*

Farhang, Sean & Miranda Yaver. 2015. "Divided Government and the Fragmentation of American Law." Forthcoming, *American Journal of Political Science.*

Ferejohn, John and Charles Shipan. 1990. "Congressional Influence on Bureaucracy." *Journal of Law, Economics, and Organization* 6: 1-20.

Fletcher, Paschal. 2010, April 7. "Update 3 – Florida says challenge to healthcare reform widens." *Reuters.* http://www.reuters.com/article/2010/04/07/usa-healthcare-states-idUSN079896320100407

Gailmard, Sean. 2002. "Expertise, Subversion, and Bureaucratic Discretion." *Journal of Law, Economics, and Organization.* 18(2): 536-555.

Gailmard, Sean. 2009. "Discretion Rather than Rules: Choice of Instruments to Control Bureaucratic Policy Making." *Political Analysis.* 17(1): 25-44.

Gailmard, Sean & John Patty. 2007. "Slackers and Zealots: Civil Service, Policy Discretion, and Bureaucratic Expertise." *American Journal of Political Science* 51(4): 873-89.

Gailmard, Sean & John Patty. 2013. *Learning While Governing: Expertise and Accountability in the Executive Branch.* Chicago, IL: Chicago University Press.

Galanter, Mark. 1974. "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change." *Law and Society Review* 9(1): 95-160.

Gawthrop, Louis C. *Bureaucratic Behavior in the Executive Branch.* New York, NY: The Free Press.

Gerring, John. 2007. *Case Study Research: Principles and Practices.* New York, NY: Cambridge University Press.

Goertz, Gary. 2006. *Social Science Concepts: A User's Guide.* Princeton, NJ: Princeton University Press.

Gordon, Sanford & Catherine Hafer. 2005. "Flexing Muscle: Corporate Political Expenditures as Signals to the Bureaucracy." *American Political Science Review.* 99(2): 245-262.

Hacker, Jacob & Paul Pierson. 2010. *Winner-Take-All Politics: How Washington Made the Rich Richer – and Turned Its Back on the Middle Class.* New York: Simon & Schuster.

Hall, Peter. 1993. "Policy Paradigms, Social Learning, and the State: the Case of Policymaking in Britain." *Comparative Politics* 25: 275-96.

Hammond, Thomas H. & Jack H. Knott. 1996. "Who Controls the Bureaucracy?: Presidential Power, Congressional Dominance, Legal Constraints, and Bureaucratic Autonomy in a Model of Multi-Institutional Policy-Making." *Journal of Law, Economics, & Organization* 12(1): 119-66.

Hanson, Peter. 2014. *Too Weak to Govern: Majority Party Power and Appropriations in the U.S. Senate.* New York: Cambridge University Press.

Harris, Richard A. & Sidney M. Milkis. 1996. *The Politics of Regulatory Change: A Tale of Two Agencies, 2nd ed.* Oxford: Oxford University Press.

Herz, Michael. 1992. "Judicial Textualism Meets Congressional Micromanagement: A Potential Collision in Clean Air Act Interpretation." *Harvard Environmental Law Review* 16: 175-205.

Hill, Kathleen Thompson and Gerald N. Hill. 2004. *The Encyclopedia of Federal Agencies and Commissions.* New York: Facts on File, Inc.

Houston Chronicle. 1986, August 29. "EPA negligent on pesticides, report charges."

Huber, Gregory A. 2007. *The Craft of Bureaucratic Neutrality: Interests and Influence in Governmental Regulation of Occupational Safety.* Cambridge: Cambridge University Press.

Huber, John D. & Arthur Lupia. 2001. "Cabinet Instability and Delegation in Parliamentary Democracies." *American Journal of Political Science* 45(1): 18-32.

Huber, John D. & Nolan McCarty. 2004. "Bureaucratic Capacity, Delegation, and Political Reform." *American Political Science Review.* 98(3): 481-94.

Huber, John D. & Charles Shipan. 2002. *Deliberate Discretion? The Institutional Foundations of Bureaucratic Autonomy.* New York: Cambridge University Press.

Huber, John D, Charles Shipan, and Madeline Pfahler. 2001. "Legislatures and Statutory Control of Bureaucracy." *American Journal of Political Science* 45(2): 330-45.

Huntington, Samuel P. 1952. "The Marasmus of the ICC: The Commission, the Railroads, and the Public Interest." *Yale Law Journal* 61: 467-509.

Johnson, Kimberly. 2011. "Racial Orders, Congress, and the Agricultural Welfare State, 1865-1940." *Studies in American Political Development* 25: 143-61.

Kagan, Robert A. 2009. "Fragmented Political Structures and Fragmented Law." *Working paper.*

Kerwin, Cornelius M. 1994. *Rulemaking: How Government Agencies Write Law and Make Policy.* Washington, DC: CQ Press.

King, Gary, Robert Keohane & Sidney Verba. 1994. *Designing Social Inquiry: Scientific Inference in Qualitative Research.* Princeton, NJ: Princeton University Press.

Krehbiel, Keith. 1998. *Pivotal Politics: A Theory of U.S. Lawmaking.* Chicago: The University of Chicago Press.

Krehbiel, Keith & Douglas Rivers. 1988. "The Analysis of Committee Power: An Application to Senate Voting on the Minimum Wage." *American Journal of Political Science* 32 (4): 115174.

Kristensen, Ida P. and Gregory Wawro. 2003. "Lagging the Dog? The Robustness of Panel Corrected Standard Errors in the Presence of Serial Correlation and Observation Specific Effects." *Working paper.*

Krutz, Glen S. 2001. *Hitching a Ride: Omnibus Legislating in the United States Congress.* Columbus: Ohio University Press.

Krutz, Glen S. 2000. "Getting Around Gridlock: The Effect of Omnibuz Utilization on Legislative Productivity." *Legislative Studies Quarterly* 25(4): 533-49.

Landes, William & Richard Posner. "The Independent Judiciary in an Interest-Group Perspective." *Journal of Law and Economics* 18 (1975): 875-901.

Landy, Marc K., Marc J. Roberts & Stephen R. Thomas. 1990. *The Environmental Protection Agency: Asking the Wrong Questions.* New York: Oxford University Press.

Lapinski, John S. 2013. *The Substance of Representation: Congress, American Political Development, and Lawmaking.* Princeton, NJ: Princeton University Press.

Lapinski, John & Joshua Clinton. 2006. "Measuring Legislative Accomplishment, 1877-1946." *American Journal of Political Science* 50: 232-249.

Lee, Frances. 2005. *Beyond Ideology: Politics, Principles, and Partisanship in the U.S. Senate.* Chicago: University of Chicago Press.

Leuchtenburg, William E. 1963. *Franklin D. Roosevelt and the New Deal.* New York, NY: Harper & Row Publishers, Inc.

Lowi, Theodore J. 1972. "Four Systems of Policy, Politics, and Choice." *Public Administration Review.* 32(4): 298-310.

Lowi, Theodore J. 2009. *The End of Liberalism: The Second Republic of the United States, 2nd ed.* New York: W.W. Norton.

Lubbers, Jeffrey S. 2006. *A Guide to Federal Agency Rulemaking, 4th ed.* Chicago, IL: American Bar Association.

Maltzman, Forest & Charles R. Shipan. 2008. "Change, Continuity, and the Evolution of the Law." *American Journal of Political Science* 52(2): 252-67.

Maskin, Eric & Jean Tirole. 2004. "The Politician and the Judge: Accountability in Government." *American Economic Review* 94(4): 1034-54.

May, James R. 2003. "Now More Than Ever: Trends in Environmental Citizen Suits at 30." *Widener Law Review* 10(1): 1-47.

Mayhew, David. 2005. *Divided We Govern: Party Control, Lawmaking, and Investigations, 1946-2002, 2nd ed.*. New Haven, CT: Yale University Press.

McCarty, Nolan. 2011. "Complexity, Capacity, and Capture." *Working paper.*

McCarty, Nolan, Keith Poole, & Howard Rosenthal. 2006. *Polarized America: The Dance of Ideology and Unequal Riches.* Cambridge: The MIT Press.

McCubbins, Mathew D. 1985. "The Legislative Design of Regulatory Structure." *American Journal of Political Science* 29(4): 721-48.

McCubbins, Mathew D. & Thomas Schwartz. 1984. "Congressional Oversight Overlooked: Police Patrols versus Fire Alarms." *American Journal of Political Science* 28(1): 165-179.

McNollgast. 1987. "Administrative Procedures as Instruments of Control." *Journal of Law, Economics, and Organization* 3: 243-77.

McNollgast. 1989. "Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies." *Virginia Law Review* 75: 431-82.

Melnick, R. Shep. 1994. *Between the Lines: Interpreting Welfare Rights.*Washington DC: Brookings Institution Press.

Merrill, Thomas W. 1992." Judicial Deference to Executive Precedent." 101 *Yale L.J.*: 982-985.

Miller, Gary J. 1977. "Bureaucratic Compliance as a Game on the Unit Square." *Public Choice* 29(1): 37-51.

Moe, Terry. 1984. "The New Economics of Organization." *American Journal of Political Science* 28: 739-77.

Moe, Terry M. 1985. "The Politicized Presidency." In *The New Direction in American Politics.* John E. Chubb & Paul E. Peterson, eds. Washington, DC: The Brookings Institution Press.

Moe, Terry. 1987. "An Assessment of the Positive Theory of Congressional Dominance." *Legislative Studies Quarterly* 12: 475-520.

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

Moe, Terry M. & William G. Howell. 1999. "The Presidential Power of Unilateral Action." *The Journal of Law, Economics, & Organization* 15: 132-79.

"Notice of Intent to Sue Concerning Not Warranted Black-tailed Prairie Dog Petition Finding." 60-Day Notice of Intent to Sue Under the Endangered Species Act. August 12, 2004.

"Notice of Intent to Sue for Violations of the Federal Land Management Act, Taylor Grazing Act, Endangered Species Act, and the Code of Federal Regulations." July 7, 2003.

Nou, Jennifer & Jed Stiglitz. 2015. "Strategic Rulemaking Disclosure." *Working Paper.*

Novak, William J. 2008. "The Myth of the 'Weak' American State." *American Historical Review* 752-72.

Novak, William J. 2012. "The Modern American Legislative State." In *Living Legislation: Durability, Change, and the Politics of American Lawmaking.*, Jeffery A. Jenkins & Eric M. Patashnik, eds. Chicago: University of Chicago Press.

O'Connell, Anne Joseph. 2011. "Agency Rulemaking and Political Transitions." *Northwestern University Law Review* 105(2): 471-534.

Olson, Mancur. 1965. *The Logic Of Collective Action: Public Goods and the Theory of Interest Groups.* Cambridge, MA: Harvard University Press.

Olson, Walter K. 1991. *The Litigation Explosion: What Happened When America Unleashed the Lawsuit.* New York: Penguin Group.

Parenteau, Patrick. 2004. "Citizen Suits Under the Endangered Species Act: Survival of the Fittest." *Widener Law Review* 10: 321-52.

Patashnik, Eric. 2008. *Reforms at Risk: What Happens After Major Policy Changes are Enacted.* Princeton: Princeton University Press.

Poole, Keith T. & Howard Rosenthal. 1997. *Congress: A Political-Economic History of Roll Call Voting.* New York: Oxford University Press.

Public Hearing Before the United States Environmental Protection Agency. May 4, 1979.

Rosenbaum, Walter A. 2014. *Environmental Politics and Policy, 9th Edition.* Thousand Oaks: CQ Press.

Schuck, Peter H. 1992. "Legal Complexity: Some Causes, Consequences, and Cures." *Duke Law Journal.* 42(1): 1-52.

Seawright, Jason & John Gerring. 2008. "Case Selection Techniques in Case Study Research: A Menu of Qualitative and Quantitative Options." *Political Research Quarterly* 61(2): 294-308.

Sinclair, Barbara. 2002. "The '60-vote Senate.'" In *U.S. Senate Exceptionalism*, ed. BI Oppenheimer, pp. 241-61. Columbus: Ohio State University Press.

Skowronek, Stephen. 1982. *Building a New American State: The Expansion of National Administrative Capacities, 1877-1920.* Cambridge: Cambridge University Press.

Strauss, Peter L. 1974. "Rules, Adjudications, and Other Sources of Law in an Executive Department: Reflections on the Interior Department's Administration of the Mining Law." *Columbia Law Review* 74 (7): 1231-75.

Teles, Stephen. 2010. *The Rise of the Conservative Legal Movement: The Battle for Control of the Law.* Princeton: Princeton University Press.

Ting, Michael M. 2001. "'The Power of the Purse' and its Implications for Bureaucratic Policy-Making." *Public Choice* 106(3-4): 243-274.

Tsebelis, George. 2002. *Veto Players: How Political Institutions Work.* Princeton, NJ: Russell Sage Foundation.

Volden, Craig. 2002. "A Formal Model of the Politics of Delegation in a Separation of Powers System." *American Journal of Political Science* 46(1): 111-33.

Wawro, Gregory J. & Ira Katznelson. 2014. "Designing Historical Social Scientific Inquiry: How Parameter Heterogeneity Can Bridge the Methodological Divided Between Quantitative and Qualitative Approaches." *American Journal of Political Science* 58(2): 526-46.

Wawro, Gregory J. & Eric Schickler. 2006. *Filibuster: Obstruction and Lawmaking in the U.S. Senate.* Princeton: Princeton University Press.

Weingast, Barry & Mark J. Moran. 1983. "Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission." *Journal of Political Economy* 91: 765-800.

Westerlund, Chad, Jeffrey A. Segal, Lee Epstein, Charles M. Cameron, & Scott Comparato. 2010. "Strategic Defiance and Compliance in the U.S. Courts of Appeals." *American Journal of Political Science* 54(4): 891-905.

Whittington, Keith. 2009. "Judicial Checks on the Presidency." In *The Oxford Handbook of the American Presidency.* George C. Edwards III & William G. Howell, eds. Oxford, UK: Oxford University Press.

Williams, Pete. 2010, March 23. "State attorneys general sue over health bill." *NBC* $http://www.nbcnews.com/id/36001783/ns/politics-health_care_reform/.VWNuq0aPy8A$

Wilson, James Q. 1989. *Bureaucracy: What Government Agencies Do and Why They Do It.* New York: Basic Books.

Wiseman, Alan E. & John R. Wright. 2008. "The Legislative Median and Partisan Policy." *Journal of Theoretical Politics* 20(1): 5-29.

Wood, B. Dan. 1992. "Modeling Federal Implementation as a System: The Clean Air Case." *American Journal of Political Science* 36(1): 40-67.

Wood, B. Dan & Richard W. Waterman. 1993. "The Dynamics of Political-Bureaucratic Adaptation." *American Journal of Political Science* 37(2): 497-528.

Wood, B. Dan & Richard W. Waterman. 1994. *Bureaucratic Dynamics: The Role of Bureaucracy in a Democracy.* Boulder, CO: Westview Press.

Yackee, Jason Webb & Susan Webb Yackee. 2010. "Administrative Procedures and Bureaucratic Performance: Is Federal Rule-making 'Ossified'?" *Journal of Public Administration Research and Theory* 20: 261-82.

Yaver, Miranda. 2015. "Asserting the Power of the Purse: Institutional Conflict and Regulatory Authority." Forthcoming in *Journal of Law, Economics, and Organization.*