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## Sticky Regulations and Net Neutrality Restoring Internet Freedom

Aaron L. Nielson

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# Sticky Regulations and Net Neutrality Restoring Internet Freedom

AARON L. NIELSON<sup>†</sup>

*Stable law is valuable, yet also remarkably lacking in our nation's internet policy. Over the last two decades, the Federal Communications Commission (FCC) has charted a zigzagging course between heavier and lighter regulation. Last year, the U.S. Court of Appeals for the District of Columbia Circuit largely upheld the agency's latest shift—this time toward deregulation. But in 2016, that same court upheld the agency's shift in the opposite direction. And to top it all off, some predict that after political control of the White House shifts, the FCC may again reverse course and reinstate a policy similar to what the FCC has recently overridden. The upshot of this series of policy reversals is that it is difficult for anyone to make long-term investment decisions premised on any particular internet policy because that policy may not have a long shelf life. This makes it harder for the private sector to plan and for the FCC to encourage investment.*

*This Essay, however, is not about internet policy. Rather, it uses this example to examine stickiness more broadly, as well as whether and how that stickiness can or should be increased. To the extent, for instance, that we believe that greater stability is sufficiently valuable, which is debatable, it may make sense to revisit aspects of administrative law that make it relatively easy for agencies to reverse course, including adding more procedural steps or requiring better explanations to change policy. Ultimately, however, administrative law likely will not be able to create stability for controversial, highly-salient issues. When it comes to achieving the social benefits of stability, rulemaking is a poor substitute for legislation.*

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*“The Commission’s authority under the Act includes classifying various services into the appropriate statutory categories. In the years since the Act’s passage, the Commission has exercised its classification authority with some frequency.”*<sup>1</sup>

*“[I]n a world in which regulated parties reasonably lack confidence in the stability of the regulatory scheme, agencies are less able to pursue policies with longer time horizons.”*<sup>2</sup>

## INTRODUCTION

On October 1, 2019, the D.C. Circuit upheld the Federal Communications Commission’s (FCC) decision to replace the agency’s so-called “Net Neutrality” or “Open Internet” order,<sup>3</sup> issued in 2015,<sup>4</sup> with the FCC’s “Restoring Internet Freedom” order, issued in 2018.<sup>5</sup> The 2018 order adopts “a market-based, ‘light-touch’ policy for governing the Internet and depart[s] from [the agency’s] 2015 order that had imposed utility-style regulation.”<sup>6</sup> This policy reversal is a big deal for internet policy in the United States. But this was not the FCC’s first reversal. The FCC’s 2015 policy marked a reversal from an earlier FCC policy that itself—arguably—also was a reversal from yet another earlier FCC policy. In other words, the FCC has been zigzagging on fundamental policy issues governing the internet for a long time. And not surprisingly, the “zigs” and the “zags” correspond with changes in presidential administrations. The upshot of this series of significant reversals is that the D.C. Circuit’s 2019 decision strongly suggests that any reliance by private industry on the FCC’s 2015 policy was foolhardy given the prospect of change.<sup>7</sup>

The D.C. Circuit’s skepticism of reliance on the FCC’s 2015 policy was surely correct—at least descriptively. Judged against black-letter administrative law, which largely allows agencies to change policy just as the FCC has repeatedly done,<sup>8</sup> no reasonable participant in the telecommunications industry could have been *that* confident following the creation of the FCC’s 2015 policy that a new administration wouldn’t come into power and chart a different course. The same point is true for those making investment decisions today—it would be risky to place too much confidence in the FCC’s 2018 policy, which also may not be long for this world. Should the White House flip political hands in 2020

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1. *Mozilla Corp. v. FCC*, 940 F.3d 1, 17 (D.C. Cir. 2019) (citation omitted).

2. Aaron L. Nielson, *Sticky Regulations*, 85 U. CHI. L. REV. 85, 91 (2018).

3. Well, *mostly* upheld. The Court sided against the agency on some points, but did not vacate the entire order. *See Mozilla*, 940 F.3d at 18.

4. *See* Protecting and Promoting the Open Internet, 30 FCC Rcd. 5601 (2015) (“2015 Order”). The 2015 Order is often called the “Net Neutrality” or “Open Internet” order. *See, e.g., A Brief History of Net Neutrality*, WIRED, <https://www.wired.com/amp-stories/net-neutrality-timeline/> (last visited June 28, 2020).

5. *See* Restoring Internet Freedom, 33 FCC Rcd. 311 (2018) (“2018 Order”).

6. *Mozilla*, 940 F.3d at 17.

7. *Id.* at 64 (“[I]n light of the Commission’s approach to classifying cable modem service and Internet access since the late 1990s, the Title II Order could reasonably have been viewed as a regulatory step that might soon be reversed. . . . Any reliance on the rules of the Title II Order would not have been reasonable unless tempered by substantial concerns for legal or political jeopardy.”).

8. *See, e.g., Nielson, supra* note 2, at 90–92.

or 2024, the FCC, under new management, presumably will revert to something like the 2015 policy.

Whether the D.C. Circuit's conclusion *should* be correct, however, is a different question. Is this really the sort of regulatory system we want—one in which major policies zigzag from administration to administration? Elsewhere I have discussed the concept of “sticky regulations”—regulations backed by a credible agency commitment that the policy will not be changed too soon.<sup>9</sup> Stickiness allows regulated parties to invest with greater confidence that they will be able to recoup their investment over the long run, which enhanced investment in turn better allows agencies to pursue long-term policies.

Few aspects of administrative law, however, provide stickiness. Agencies receive deference for many legal questions, which—per the *Brand X* doctrine—sometimes allows them to override judicial decisions that would otherwise lock policy in place.<sup>10</sup> And per *Fox Television*, agencies also do not bear an especially heavy burden when reversing prior policy, as the APA “makes no distinction . . . between initial agency action and subsequent agency action undoing or revising that action.”<sup>11</sup> And although an agency sometimes must “provide a more detailed justification than what would suffice for a new policy created on a blank slate,” for instance “when its prior policy has engendered serious reliance interests,”<sup>12</sup> that principle seems to have little force when it comes to zigzagging policies, as the very act of zigzagging by the agency makes it harder for *reasonable* “reliance interests” to develop in the first place.<sup>13</sup> Accordingly, in many cases, to the extent stickiness exists at all, it is the product of administrative law's procedures and in particular the very “ossification” that those procedures are said to produce.<sup>14</sup>

The FCC's pattern of crafting major policies for internet regulation and then reversing those policies when presidential administrations change casts doubt on whether “ossification” provides meaningful stickiness, at least for high-profile, politically-salient policies, for which agencies may be able to “speed things along if they are motivated to do so.”<sup>15</sup> To the extent that stickiness is valuable,<sup>16</sup> the question thus becomes what can be done to make law more stable.

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9. *See id.* at 89–90.

10. *See, e.g., Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005); Jonathan Masur, *Judicial Deference and the Credibility of Agency Commitments*, 60 VAND. L. REV. 1021 (2007) (explaining implications of *Brand X*).

11. *FCC v. Fox Television Stations*, 556 U.S. 502, 515 (2009).

12. *Id.*

13. *Mozilla Corp. v. FCC*, 940 F.3d 1, 64 (D.C. Cir. 2019).

14. *See* Nielson, *supra* note 2, at 89–90. Whether the rulemaking process is, in fact, ossified is the subject of a spirited academic debate. *See, e.g.,* Aaron L. Nielson, *Optimal Ossification*, 86 GEO. WASH. L. REV. 1209, 1219 (2018) (discussing the debate).

15. Nielson, *supra* note 14, at 1218.

16. As I have explained elsewhere, stickiness is not always valuable. Sometimes an agency “just wants some activity to stop.” *Id.* at 1237. Likewise, the desire to create stickiness may also create perverse incentives, especially for controversial policies.

Using the FCC's stabs at internet regulation as an example, this Essay explores how to increase policy stickiness. For instance, the Supreme Court or Congress could revisit *Brand X* or *Fox*, two cases that make it harder for agencies to credibly commit to particular policies. Similarly, Congress is free to require additional procedures for the regulatory process, especially for the highest profile rules. Finally, it may be time to expand the so-called "major questions" doctrine, which would leave the most important policies to Congress. Because statutes are almost always stickier than regulations, perhaps certain categories of policies are simply poor fits for the administrative process. To be clear, my point here is not that any or all of these options are worthwhile. Stickiness, after all, may not be worth the price. But if that is the conclusion, no one should complain about instability and diminished investment.

### I. REGULATING THE INTERNET

The FCC's zigzagging approach to internet regulation is not a secret.<sup>17</sup> Here, I'll briefly summarize the story.

#### A. THE 1996 TELECOMMUNICATIONS ACT

In the Telecommunications Act of 1996, Congress enacted "two potential classifications for broadband Internet: 'telecommunications services' under Title II of the Act and 'information services' under Title I."<sup>18</sup> The distinction matters a great deal, as a Title II designation carries with it "common carrier status" that in turn "triggers an array of statutory restrictions and requirements," including a prohibition on "unjust or unreasonable" conduct.<sup>19</sup> As mushy words like "unjust or unreasonable" suggest, the FCC has a great deal of discretion over common carriers. "Information services," by contrast, are not subject to "common carriage status."<sup>20</sup>

Which classification to use thus is a significant question—the answer to which prompts strong opinions, often with a political and ideological tint. In particular, those who believe that internet providers should be subject to heavier regulation believe that the FCC should classify those providers as

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17. See, e.g., John Blevins, *The Use and Abuse of "Light-Touch" Internet Regulation*, 99 B.U. L. REV. 177, 185 (2019) (examining at length "the historical origins and limitations of the light-touch narrative"); Justin (Gus) Hurwitz, *Net Neutrality: Something Old; Something New*, 2015 MICH. ST. L. REV. 665, 671–75 (2015); Jay S. Kaplan, *Finding the Middle Ground: A Proposed Solution to the Net Neutrality Debate*, 26 GEO. MASON L. REV. 230, 232 (2018) (explaining "four time periods" of "internet regulation"); see also Randolph J. May, *The Ongoing Saga of Chevron and Net Neutrality*, REG. REV. (Oct. 21, 2019), <https://www.theregreview.org/2019/10/21/may-ongoing-saga-chevron-net-neutrality/> (examining "the long saga of back-and-forth regulatory treatment of internet access regulation").

18. *Mozilla*, 940 F.3d at 17.

19. *Id.*; see also *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 975 (2005) ("Telecommunications carrier . . . must charge just and reasonable, nondiscriminatory rates to their customers, design their systems so that other carriers can interconnect with their communications networks, and contribute to the federal 'universal service' fund.") (citations omitted).

20. *Mozilla*, 940 F.3d at 17.

“telecommunications services,” while those who favor a light-touch regime push for an “information services” classification.

#### B. THE AMBIGUOUS EARLY PERIOD

The FCC first addressed this issue in 1998, briefly, when it determined that internet (then over telephone lines) should be classified as a “telecommunications service.”<sup>21</sup> The agency’s analysis, however, was far from pellucid. The FCC “conclude[d] that advanced services,” which the agency had defined to mean broadband, “are telecommunications services.”<sup>22</sup> The agency quickly went on, however, to say that no one had disagreed “that a carrier offering such a service is offering a ‘telecommunications service,’” and noted that “[a]n end-user may utilize a telecommunications service together with an information service, as in the case of Internet access.”<sup>23</sup> Around the same time, however, the FCC prepared the so-called “Stevens Report” for Congress that “concluded that Internet access providers do not offer ‘telecommunications service’ when they furnish Internet access to their customers.”<sup>24</sup>

In 2000, the FCC solicited public comments about whether to classify cable broadband as a “telecommunications service.”<sup>25</sup>

#### C. THE 2002 CLASSIFICATION

In 2002, after receiving comments, the FCC concluded that cable broadband should be classified as an “information service.”<sup>26</sup> Notably, the agency did this, in part, “to remove regulatory uncertainty that in itself may discourage investment and innovation.”<sup>27</sup> The FCC reasoned that certainty—especially, perhaps, deregulatory certainty—would encourage cable broadband providers and related companies to invest in infrastructure.<sup>28</sup> Over the next five years, the agency extended that decision to broadband more generally.<sup>29</sup>

The FCC’s classification of cable broadband was challenged in the Ninth Circuit. In 2000, the Ninth Circuit had held—in a case to which the FCC was

21. See *Deployment of Wireline Servs. Offering Advanced Telecomms. Capability*, 13 FCC Red. 24011 (1998).

22. *Id.* at 24029; see also *Verizon v. FCC*, 740 F.3d 623, 632 (D.C. Cir. 2014) (discussing this history).

23. *Deployment of Wireline Servs. Offering Advanced Telecomms. Capability*, 13 FCC Red. at 24030.

24. Federal-State Joint Board on Universal Service, 13 FCC Red. 11501, 11541 (1998).

25. *Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, 15 FCC Red. 19287, 19296–98 (2000).

26. *Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, 17 FCC Red. 4798, 4802 (2002).

27. *Id.*

28. See *id.* at 4801–02. The order further emphasized the agency’s statutory charge to “‘encourag[e] the deployment . . . of advanced telecommunications capability to all Americans’ by . . . regulating methods that remove barriers to infrastructure investment.” *Id.* (quoting 47 U.S.C. § 1302(a) (2018)).

29. See *Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireless Networks*, 22 FCC 5901 (2007); *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Red. 14853 (2005).

not a party—that a cable model service is a “telecommunications service.”<sup>30</sup> This decision was made prior to the FCC’s classification decision, so the court was in a position where it had to interpret the statute as a matter of first impression, without deference. In 2003, in a case subsequent both to its 2000 opinion finding that cable internet service was a telecommunications service and the FCC’s 2002 contrary classification of cable broadband as an information service, the Ninth Circuit concluded that the court’s earlier decision controlled and was binding on the FCC.<sup>31</sup>

The Supreme Court reversed the Ninth Circuit in *Brand X*.<sup>32</sup> The Court, in an opinion by Justice Thomas, concluded that the FCC’s classification decision was entitled to *Chevron* deference,<sup>33</sup> and, in so doing, rejected an argument about the risk of agency inconsistency. In particular, Justice Thomas explained that “inconsistency is not a basis for declining to analyze the agency’s interpretation under the *Chevron* framework. Unexplained inconsistency is, at most, a reason for holding an interpretation to be an arbitrary and capricious change.”<sup>34</sup> But an *explained* change is generally permissible “since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency,” especially because “[a]n initial agency interpretation is not instantly carved in stone.”<sup>35</sup> Hence, *Brand X* holds that “[a] court’s prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.”<sup>36</sup> Importantly, the Court stressed that allowing a prior judicial decision to trump an agency’s subsequent interpretation of an ambiguous statute “would ‘lead to the ossification of large portions of our statutory law,’ by precluding agencies from revising unwise judicial constructions of ambiguous statutes.”<sup>37</sup>

After establishing that agencies are not per se bound by earlier judicial decisions, the Justices concluded that the FCC’s interpretation of “telecommunications service” was entitled to *Chevron* deference because the 1996 Act was sufficiently ambiguous and the FCC’s decision was reasonable.<sup>38</sup>

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30. *Brand X Internet Servs. v. FCC*, 345 F.3d 1120, 1130–32 (9th Cir. 2003) (discussing *AT&T Corp. v. Portland*, 216 F.3d 871 (9th Cir. 2000)).

31. *Id.* at 1132.

32. *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 972 (2005).

33. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

34. *Brand X Internet Servs.*, 545 U.S. at 981.

35. *Id.* (quoting *Chevron*, 467 U.S. at 863–64).

36. *Id.* at 982.

37. *Id.* at 983 (citation omitted) (quoting *United States v. Mead Corp.*, 533 U.S. 218, 247 (2001) (Scalia, J., dissenting)).

38. *See id.* at 989–1000.



#### D. THE 2015 RECLASSIFICATION

In 2015, the FCC—following a decade of court-rejected efforts to impose more internet regulations<sup>39</sup>—reversed course and concluded that broadband internet access is a telecommunications service after all.<sup>40</sup> After public comment, the agency concluded that reclassification was necessary “to bring a decade of debate to a certain conclusion.”<sup>41</sup> The FCC also explained its reversal, reasoning that “the facts in the market today are very different from the facts that supported the Commission’s 2002 decision to treat cable broadband as an information service and its subsequent application to fixed and mobile broadband services.”<sup>42</sup> The agency stressed, however, that it would not regulate too aggressively, “consistent with further investment and broadband deployment.”<sup>43</sup> The agency also read *Fox* broadly, reasoning that the agency had no “special burden” to account for reliance interests and that “the regulatory history regarding the classification of broadband Internet access service would not provide a reasonable basis for assuming that the service would receive sustained treatment as an information service.”<sup>44</sup>

That policy reversal was unsuccessfully challenged in the D.C. Circuit in 2016.<sup>45</sup> The court concluded that, under *Brand X*, the FCC’s new legal conclusion was entitled to deference because the statute is ambiguous and the FCC’s conclusion was reasonable.<sup>46</sup> The panel majority also rejected an argument that the FCC’s reclassification was arbitrary and capricious because it upset reliance interests.<sup>47</sup> Among other points, the majority accepted the FCC’s characterization of the zigzagging history of regulation and concluded that the agency’s view that there was not enough reliance to prevent reclassification was sufficiently explained, especially given the agency’s views about changed factual circumstances.<sup>48</sup> Judge Williams, in dissent, disagreed.<sup>49</sup>

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39. See generally *Verizon v. FCC*, 740 F.3d 623, 652 (D.C. Cir. 2014) (holding that the agency’s 2010 order unlawfully regulated internet access as common carriage); *Comcast Corp. v. FCC*, 600 F.3d 642, 642–43 (D.C. Cir. 2010) (rejecting an effort to regulate “network management practices”).

40. See *Protecting and Promoting the Open Internet*, 30 FCC Red. 5601 (2015); *A Brief History of Net Neutrality*, *supra* note 4.

41. *Protecting and Promoting the Open Internet*, 30 FCC Red. at 5614.

42. *Id.*

43. *Id.*

44. *Id.* at 5760.

45. See *U.S. Telecom Ass’n v. FCC*, 825 F.3d 674, 675 (D.C. Cir. 2016).

46. *Id.* at 701–06.

47. *Id.* at 708–10.

48. See *id.* at 709 (“[T]he Commission noted that its past regulatory treatment of broadband likely had a particularly small effect on investment because the regulatory status of broadband service was settled for only a short period of time.”); *id.* at 710 (“Given this shifting regulatory treatment, it was not unreasonable for the Commission to conclude that broadband’s particular classification was less important to investors than increased demand.”).

49. See *id.* at 746–47 (casting doubt on the FCC’s claims about insufficient reliance and the extent of the zigzags leading to the 2015 Order, and explaining that “[i]f a regulatory switch will significantly undercut the productivity and value of past investments, made in reasonable reliance on the old regime, rudimentary fairness suggests that the agency should take that into account in evaluating a possible switch,” especially because “a

The panel decision was controversial. A number of judges, including now-Justice Kavanaugh, dissented. Relevant here, Kavanaugh argued that “[t]he FCC’s net neutrality rule is a major rule for purposes of the Supreme Court’s major rules doctrine,”<sup>50</sup> meaning that it could only stand with “clear authorization” from Congress, which Kavanaugh concluded was lacking.<sup>51</sup> According to Kavanaugh, only Congress, not the FCC, could subject the internet to common-carrier obligations.

#### E. THE 2018 RECLASSIFICATION

In 2018, the FCC again reversed course and “revert[ed] to its pre-2015 position.”<sup>52</sup> That reversal was also challenged in the D.C. Circuit and largely upheld. As to reliance, the panel did not address the Commission’s first argument—that no one in the industry had, in fact, relied in a “serious” way.<sup>53</sup> Instead, the panel focused on the FCC’s arguments that “the 2015 rules had been in effect ‘barely two years before the Commission proposed to repeal them,’ a limited period to engender reliance,” and further that “in light of the Commission’s approach to classifying cable modem service and Internet access since the late 1990s, the Title II Order could reasonably have been viewed as a regulatory step that might soon be reversed.”<sup>54</sup> In other words, the panel relied upon analysis very similar to what the panel had used in the 2016 decision.

Judge Millett, however, wrote separately to express her frustration with *Brand X*—and in particular, *Brand X*’s conclusion that “classification of broadband as an information service was permissible.”<sup>55</sup> According to Millett, echoed by Judge Wilkins,<sup>56</sup> the Supreme Court should conclude “that the ‘factual particulars of how Internet technology works,’ have changed so materially as to undermine the reasonableness of the agency’s judgments.”<sup>57</sup> Put differently, if she could write on a clean slate, it is quite likely that Millett would

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pattern of capricious change would undermine any agency purpose of encouraging future investment on the basis of new rules”) (Williams, J., dissenting in part).

50. *U.S. Telecom Ass’n v. FCC*, 855 F.3d 381, 422 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from reh’g en banc denied); *see id.* at 402 (Brown, J., dissenting from reh’g en banc denied) (concluding that “turning Internet access into a public utility is obviously a ‘major question’ of deep economic and political significance”). *See generally* Cass R. Sunstein, *The American Nondelegation Doctrine*, 86 GEO. WASH. L. REV. 1181, 1185 (2018) (“[T]he ‘major questions doctrine’ . . . forbids agencies from interpreting ambiguous statutory language in a way that ‘would bring about an enormous and transformative expansion in [their] regulatory authority without clear congressional authorization.’” (second alteration in original) (quoting *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014))).

51. *U.S. Telecom Ass’n*, 855 F.3d at 425 (Kavanaugh, J., dissenting from reh’g en banc denied) (“The problem for the FCC is that Congress has not clearly authorized the FCC to classify Internet service as a telecommunications service and impose common-carrier obligations on Internet service providers. Indeed, not even the FCC claims that Internet service is *clearly* a telecommunications service under the statute.”).

52. *Mozilla Corp. v. FCC*, 940 F.3d 1, 18 (D.C. Cir. 2019).

53. *Id.* at 63–64.

54. *Id.* at 64.

55. *Id.* at 87 (Millett, J., concurring) (internal quotation marks omitted).

56. *See id.* at 94–95 (Wilkins, J., concurring).

57. *Id.* at 89 (citation omitted).

hold—in light of how the internet works today—that the FCC has no authority to classify broadband as an information service.

#### F. 2020 AND BEYOND?

Will the FCC’s current approach be long for this world? Perhaps not. After all, there is reason to think that “the FCC in a Democratic administration could simply bring back the Obama-era regulations, or rules very much like them, without an act of Congress.”<sup>58</sup> Assuming President Trump wins re-election (and it is always risky to bet against an incumbent), moreover, the White House likely will flip political hands again at some point while this issue remains salient. So the zigzagging may not be done yet.

### II. A THEORY OF STICKY REGULATIONS

I have offered my theory of sticky regulations before and will not repeat it in full here. The basic idea is straightforward: To the extent that a legal scheme can quickly change, rational actors in the private sector are less willing to make long-term investments in reliance on that scheme, at least at the margins.<sup>59</sup> Uncertainty is a problem for regulated parties. But uncertainty can also be a problem for *agencies*. If agencies cannot credibly commit that the law won’t change, they will struggle to achieve policy objectives that depend on long-term investment from the private sector.<sup>60</sup> Flexibility, thus, is not always a blessing for agencies. Too much of it and policy suffers, especially long-term policy.

So where do we find legal stability? Statutory law—and, *a fortiori*, constitutional law—is (relatively) stable precisely because the enactment process is difficult.<sup>61</sup> A statute must pass both houses of Congress and ordinarily survive a potential presidential veto.<sup>62</sup> Given filibuster rules in the Senate and other competing matters that call for congressional time, achieving that much policy consensus is difficult even when the same party controls all of Congress and the White House—which rarely happens. When Congress is divided or the White House is controlled by one party and Congress by the other, it can even be more difficult to navigate bicameralism and presentment. Indeed, operationally, requiring bicameralism and presentment can have the same effect

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58. John Hendel, *House Democrats’ Net Neutrality Win Likely DOA In Senate but Poised to Become 2020 Issue*, POLITICO (Apr. 10, 2019, 11:58 AM), <https://www.politico.com/story/2019/04/10/net-neutrality-2020-election-issue-1331217>.

59. See Nielson, *supra* note 2, at 90–91.

60. See *id.*

61. See Nielson, *supra* note 14, at 1212 (citing John F. Manning, *Lawmaking Made Easy*, 10 GREEN BAG 2D 191, 204 (2007)).

62. See U.S. CONST. art. I, § 7. Of course, it is possible for Congress to override a presidential veto by a two-thirds majority in each chamber; that process is obviously difficult and rare. Indeed, “[h]istorically, Congress has overridden fewer than ten percent of all presidential vetoes.” *Override of a Veto*, U.S. SENATE, [https://www.senate.gov/reference/glossary\\_term/override\\_of\\_a\\_veto.htm](https://www.senate.gov/reference/glossary_term/override_of_a_veto.htm) (last visited June 28, 2020).

as a supermajority voting requirement.<sup>63</sup> Amending the Constitution is even more difficult.<sup>64</sup>

But what about administrative law? The plain terms of the Administrative Procedure Act (APA) do not suggest much stability. Section 553 of the APA, at least on its face, requires few procedures for informal rulemaking. All an agency must do is publish a notice of proposed rulemaking with “(1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.”<sup>65</sup> Then, after soliciting comments, the agency is allowed to issue a final rule, so long as it contains “a concise general statement of [its] basis and purpose.”<sup>66</sup> Nothing in the APA *expressly* bars an agency from reversing direction. The closest the APA comes is the requirement that agency action not be “arbitrary, capricious, [or] an abuse of discretion,”<sup>67</sup> which—as *Fox* holds and the FCC’s internet decisions confirm—is not much of a check. At the same time, agencies receive deference for their reasonable interpretations of ambiguous law that they implement,<sup>68</sup> and, under *Brand X*, that deference sometimes allows agencies to override some judicial decisions. As Jonathan Masur has demonstrated, *Brand X* also reduces stability because the public knows that even a prior judicial decision often will not constrain an agency’s ability to reverse course.<sup>69</sup>

So is there *any* stickiness in administrative law? Yes. Despite the APA’s minimalistic text, courts—perhaps driven by constitutional avoidance<sup>70</sup>—have for generations construed the APA to impose procedural requirements on agencies. For instance, not only must agencies offer “the terms or substance of the proposed rule or a description of the subjects and issues involved,”<sup>71</sup> but they also must turn over any relevant data in order to encourage meaningful comments.<sup>72</sup> Agencies also not only must solicit comments, but they also must respond to all “material” ones.<sup>73</sup> Agencies too must ensure that the final rule is a “logical outgrowth” of the proposed rule; if the final rule varies too much from

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63. See, e.g., John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 TEX. L. REV. 703, 712–13 (2002) (citing JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* 233–48 (1962); John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 74–75 (2001)).

64. See generally U.S. CONST. art. V.

65. 5 U.S.C. § 553(b) (2018).

66. *Id.* § 553(e).

67. *Id.* § 706(2)(A).

68. *Chevron, U.S.A., Inc. v. Nat’l Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

69. See Masur, *supra* note 10 (arguing this point at length).

70. See, e.g., Gillian E. Metzger, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1295 (2012) (“Instead of invalidating modern administration on constitutional grounds, the Court has often addressed the constitutional concerns that modern administrative governance raises through administrative common law doctrines.”).

71. 5 U.S.C. § 553(b)(3).

72. See Nielson, *supra* note 2, at 96–97 (citing *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 237 (D.C. Cir. 2008)).

73. See *id.* at 97 (citing *City of Portland v. EPA*, 507 F.3d 706, 714–15 (D.C. Cir. 2007)).

what was submitted for public comment, a reviewing court will invalidate the rule and make the agency start over.<sup>74</sup> Final rules must also withstand “hard look” review, which can require agencies to spend a great deal of time thinking through the policy, further creating delay and procedural costs.<sup>75</sup> And to top it all off, in recent decades, the White House—acting through a series of executive orders—has imposed additional requirements on the rulemaking process, at least for significant rules.<sup>76</sup> All of this naturally makes it more difficult for agencies to rapidly change direction. Indeed, for that reason, these requirements are often lamented as “ossifying” rulemaking. Yet that very ossification also creates some stickiness that agencies can use to encourage greater private-sector reliance on their rules. Some ossification, thus, expands an agency’s menu of options by creating a credible commitment mechanism that the regulatory scheme is stable.

### III. HOW MUCH STICKINESS?

Moving beyond theory, however, how much stickiness does ossification create? It surely creates some, but how much? The FCC’s zigzagging treatment of the internet suggests that the answer may be: not much, particularly for high-profile decisions to which agencies will devote a great many resources. When the FCC decided to regulate broadband providers as common carriers, it was able to put together a lengthy rule (114 pages) relatively quickly (approximately twelve months between issuing a proposed rule and issuing a final rule). And when the FCC decided to stop regulating broadband providers as common carriers, it could also do that through a lengthy rule (71 pages) prepared quickly (approximately seven months). Perhaps other types of regulations are subject to greater ossification, but at least for regulatory schemes like the FCC’s, it is hard to say that the regulatory gauntlet creates much stickiness.

Assuming that lack of stickiness is a problem,<sup>77</sup> what can be done to create regulations endowed with greater glue? Here, I sketch out some options. To be clear, I am not saying that these options are the only ones, or even that they are worth doing. Nor am I saying that they would not carry with them costs of their own, including unintended consequences. I am saying, however, that these options would increase stickiness. Simply put, it is hard to see how we can avoid zigzagging policy without some changes to the structure of administrative law.

#### A. CURTAIL *BRAND X*

One approach is to curtail *Brand X*. With *Brand X*, agencies can more readily change regulatory schemes. Hence, by parity of reason, without *Brand X*, a regulated party could more readily rely on an agency regulation, at least if

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74. See *id.* at 97–98 (citing Phillip M. Kannan, *The Logical Outgrowth Doctrine in Rulemaking*, 48 ADMIN. L. REV. 213 (1996)).

75. See *id.* at 98 (citing *Motor Vehicle Mfrs. Ass’n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983)).

76. See *id.* at 99–100 (collecting citations).

77. It is not certain that this assumption is true. Stickiness is not always valuable. Indeed, stickiness can be downright problematic, especially for policies that lack majority support.

a court had previously interpreted the statute.<sup>78</sup> *Brand X*, moreover, already has critics.<sup>79</sup> It is peculiar that an agency can override a judicial decision about the meaning of the law.

The problem with this approach to increasing stickiness is that it is hard to reconcile with *Chevron*—which may be a problem with *Chevron*.<sup>80</sup> But if *Chevron* is right, it is hard to see how *Brand X* is wrong,<sup>81</sup> at least when applied to rulemaking where concerns about retroactivity are diminished.<sup>82</sup> To be sure, to the extent that *Chevron* is a fiction,<sup>83</sup> perhaps the Supreme Court could revise the fiction to say that Congress never intended an agency interpretation to supersede a judicial decision. Or perhaps the Supreme Court could say that if the Justices themselves have interpreted a statute, an agency could not retreat from that meaning.<sup>84</sup> *Brand X* itself is odd because it was the Ninth Circuit, not the Supreme Court, that had previously interpreted the 1996 Telecommunications Act.<sup>85</sup> Neither of these potential revisions to *Brand X* seems especially consistent with the internal logic of *Chevron*. Both, however, would make regulations stickier.

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78. See Masur, *supra* note 10, at 1024; cf. Daniel J. Hemel & Aaron L. Nielson, *Chevron Step One-and-a-Half*, 84 U. CHI. L. REV. 757, 800 (2017) (noting that agencies may intentionally downplay the existence of ambiguity to prompt courts to rule in their favor at *Chevron*'s first step, and thus, lock in the interpretation).

79. See, e.g., *Baldwin v. United States*, 140 S. Ct. 690 (2020) (Thomas, J., dissenting from cert. denied) (urging Supreme Court to overrule *Brand X*); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1151 (10th Cir. 2016) (Gorsuch, J., concurring) (“*Brand X* . . . risks trampling the constitutional design by affording executive agencies license to overrule a judicial declaration of the law’s meaning prospectively, just as legislation might—and all without the inconvenience of having to engage the legislative processes the Constitution prescribes.”).

80. See, e.g., *Gutierrez-Brizuela*, 834 F.3d at 1151 (Gorsuch, J., concurring) (“If you accept *Chevron*’s claim that legislative ambiguity represents a license to executive agencies to render authoritative judgments about what a statute means, *Brand X*’s rule requiring courts to overturn their own contrary judgments does seem to follow pretty naturally. But acknowledging this much only brings the colossus now fully into view.”).

81. See, e.g., *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 983 (2005) (“A contrary rule would produce anomalous results. It would mean that whether an agency’s interpretation of an ambiguous statute is entitled to *Chevron* deference would turn on the order in which the interpretations issue. . . . Yet whether Congress has delegated to an agency the authority to interpret a statute does not depend on the order in which the judicial and administrative constructions occur.”).

82. Allowing an agency to use *Brand X* when it attempts to make policy through adjudication—which is retroactive—is more problematic for reasons well explained by then-Judge Gorsuch. See, e.g., *Gutierrez-Brizuela*, 834 F.3d at 1154 (Gorsuch, J., concurring). For what it is worth, Kristin Hickman and I elsewhere address whether *Chevron* should apply to interpretations announced in adjudication and whether preventing that might address Gorsuch’s concern. See Kristin Hickman & Aaron L. Nielson, *Narrowing Chevron’s Domain*, 70 DUKE L.J. (forthcoming 2021).

83. See, e.g., Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 994, 998 (1992) (describing *Chevron* as a “fiction”). But see Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 994 (2013) (suggesting that Congress now legislates against *Chevron*’s backdrop).

84. Cf. Michael Coenen & Seth Davis, *Minor Courts, Major Questions*, 70 VAND. L. REV. 777, 824, 827 (2017).

85. See *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 985 (2005) (“As the dissent points out, it is not logically necessary for us to reach the question whether the Court of Appeals misapplied *Chevron* for us to decide whether the Commission acted lawfully.”).

## B. REVISIT *FOX*

Another way to inject stickiness into regulations is to require agencies to place greater emphasis on reliance interests when replacing rules. Although it certainly contains a nod towards reliance interests,<sup>86</sup> the Supreme Court's interpretation of the APA's arbitrary-and-capricious standard in *Fox* does not place an especially high premium on stability. The Court explained that, when an agency changes policy, "it need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one," and that it only needs to provide greater explanation when "serious reliance interests" are implicated.<sup>87</sup> *Fox* therefore demonstrates that agencies have considerable freedom to reverse course, so long as they explain themselves and acknowledge the change.<sup>88</sup>

A problem with this approach to reliance interests is that it is circular. Regulated parties, as sophisticated actors, will rely on agency regulations to the extent that the law allows them to rely, but no further. Thus, it is hard to see how "serious reliance interests" can exist when everyone involved knows the agency can change its mind. Accordingly, at least absent precedent that already holds that reliance would be reasonable (as is the case with old policies<sup>89</sup> and perhaps other situations in which reliance is particularly acute<sup>90</sup>), the idea of reasonable reliance is puzzling, at least if reviewing courts give the word "reasonable" a descriptive rather than normative meaning. The D.C. Circuit's rejection of reliance in its FCC cases appears to be based on a descriptive understanding of "reasonable"—namely, despite the FCC's rulemakings, no one could *reasonably* expect a stable scheme.<sup>91</sup>

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86. See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (requiring agencies to "provide a more detailed justification than what would suffice for a new policy created on a blank slate" when revising a "policy" that "has engendered serious reliance interests that must be taken into account").

87. See *id.* at 514 ("We find no basis in the Administrative Procedure Act or in our opinions for a requirement that all agency change be subjected to more searching review."); *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2128 (2016) ("[R]eliance does not overwhelm good reasons for a policy change." (Ginsburg, J., concurring)).

88. See, e.g., Nielson, *supra* note 2, at 113.

89. See, e.g., *Navarro*, 136 S. Ct. at 2126 (requiring "a more reasoned explanation for [an agency's] decision to depart from its existing [and longstanding] enforcement policy.").

90. See, e.g., *Mingo Logan Coal Co. v. EPA*, 829 F.3d 710, 736 (D.C. Cir. 2016) (Kavanaugh, J., dissenting) ("Reliance interests pose an especially formidable obstacle to an agency's desired change in course in the context of government-issued permitting.").

91. *Mozilla Corp. v. FCC*, 940 F.3d 1, 64 (D.C. Cir. 2019) ("[A]ssuming the change in agency position implicated serious reliance interests, we agree with the Commission that such reliance would have been unreasonable on the facts before us."). The fact that agencies also speak with less than perfect clarity, especially when they try to demonstrate continuity over time, further complicates the search for "reasonable" reliance. See *id.* at 65 ("Petitioners' effort to define the status quo as a whole era of Commission policy . . . renders the claim more or less non-falsifiable. While outside observers may associate 'light touch' with a distinct era in regulation and 'open Internet' with another era, the successive Commission majorities have consistently vowed fealty to both. . . . Petitioners may distrust the Commission's stated dedication to an open Internet, but the ubiquity of Commissioners' attachment to an open Internet (as well as to 'light touch') makes it impossible to rest a reliance claim on some notion that either phrase represented a discrete policy that has appeared and disappeared with each zig or zag of Commission analysis.").

It is possible to imagine a different version of *Fox*, one that requires a significant showing of need before an agency could non-arbitrarily change its mind. Similarly, one could imagine allowing agencies to issue nonrevocable rules—though that seems problematic given that sometimes change can be quite valuable. To be sure, establishing a different version of *Fox* (one that is less accommodating to agency efforts to change regulatory policy) may well require congressional action given the text of the APA and *stare decisis*.<sup>92</sup> But conceptually, the idea would be that regulated parties should have a real reason to rely on a regulation merely because it has been promulgated.<sup>93</sup> Granted, this sort of regime may have unintended consequences, especially if administrations race to regulate so that their favored policies can be locked in. But, for purpose here, this approach would increase stickiness.<sup>94</sup>

### C. INCREASE OSSIFICATION

Another way to create stickier regulations may be to increase the procedural requirements for agencies. As I have explained elsewhere, “a regulatory system that optimizes ossification will, all else being equal, require more procedures for regulations that benefit from a credible commitment mechanism or for which the subject is contentious than for other regulations.”<sup>95</sup> I’ve also explained elsewhere what some of those extra procedures may entail. Some types of rules may benefit more from stickiness. And some agencies may also benefit more from stickiness. For cases in which stickiness is valuable, Congress could require heightened procedures, such as cross-examination or judicially enforceable cost-benefit analysis.<sup>96</sup>

Again, I do not claim that more procedures would be costless. Nor, frankly, am I confident that more procedures will always produce higher-quality rules (though they should at least sometimes). But to the extent that procedural costs make it harder for agencies to change policy, they also create stickiness, at least at the margins, as agencies have finite resources.

### D. REAL STICKINESS

Finally, another answer for zigzagging regulatory schemes may be to prevent them altogether. The fact that an issue is likely to prompt zigzagging rulemakings may be a signal that Congress alone should be able to resolve it.

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92. See *Fox Television*, 556 U.S. at 514 (“The [APA] mentions no such heightened standard.”).

93. Cf. *Mingo Logan*, 829 F.3d at 736 (Kavanaugh, J., dissenting) (explaining that changing position after an initial decision imposes greater costs on regulated parties, as, for example, “declining to hire someone is usually less disruptive to the individual than firing someone.”).

94. Related to this option is the possibility of absolute administrative *stare decisis*, meaning that once an agency interprets a statute, it is forever binding until Congress intervenes. Gus Hurwitz has explored this idea with particular focus on separation of powers. See generally Justin (Gus) Hurwitz, *Chevron’s Political Domain: W(h)ither Step Three?*, 68 DEPAUL L. REV. 615 (2019).

95. Nielson, *supra* note 14, at 1239. The word “ossification” is not ideal, because it suggests too much. I use the term, however, because it is so common in the literature. See *id.* at 1210 n.5. And to be clear, delay is not always good. See *id.* at 1213.

96. See *id.* at 1224.



Then-Judge Kavanaugh and Judge Janice Rogers Brown touched on this issue when they confronted the Net Neutrality rule and invoked the “major questions” or “major rules” doctrine. There, they argued that the FCC may have authority to address small policies, but it lacked authority to promulgate the Net Neutrality rule.<sup>97</sup> In response to this argument, Judge Sri Srinivasan defended the D.C. Circuit’s decision—but his defense, largely resting on the Supreme Court’s *Brand X* decision, did not go to first principles.<sup>98</sup>

Requiring congressional action for significant policies would enhance legal stability. Congress can provide greater stability than agencies, precisely because of Congress’ own onerous procedural obligations. It is not easy to navigate bicameralism and presentment.

The premise of the “major questions” doctrine is that in “extraordinary cases,” such as cases with great “economic and political significance,” a reviewing court should not conclude that Congress authorized the agency to act absent a clear statement.<sup>99</sup> The Court has applied this rule in a number of cases.<sup>100</sup> One significant problem with the “major questions” doctrine, however, is that the test is difficult to administer.<sup>101</sup> It can be challenging to know whether the agency is “regulating on a ‘major question’ of deep economic and political significance,” or whether it is “regulating on an interstitial matter.”<sup>102</sup> After all, is the policy “truly an elephant—and not just a rather plump mouse,” and is the statutory hook “sufficiently unimportant to be a mousehole—and not just a rather cramped circus tent?”<sup>103</sup> Bolstering the major questions doctrine would require grappling with this difficult question.<sup>104</sup>

Even so, if the goal is to avoid zigzagging regulations, perhaps courts should more vigorously enforce the major questions doctrine. One possible solution, moreover, to the difficult line-drawing problems inherent in the major questions doctrine is to find a more objective way to distinguish between major and minor rules. For instance, perhaps agencies should not be allowed to

97. See, e.g., *U.S. Telecom Ass’n v. FCC*, 855 F.3d 381, 404 (D.C. Cir. 2017) (Brown, J., dissenting from reh’g en banc denied) (“The mere fact that a ‘statutory ambiguity’ exists for some purposes does not mean it authorizes the agency to reach major questions—statutory context and the overall scheme must be considered.”); *id.* at 419 (Kavanaugh, J., concurring) (“For an agency to issue a major rule, Congress must *clearly* authorize the agency to do so. If a statute only *ambiguously* supplies authority for the major rule, the rule is unlawful.”).

98. See *id.* at 385 (Srinivasan, J., concurring in reh’g en banc denied) (“The major question at issue here, according to our colleague, is whether the FCC can subject broadband ISPs to common carrier obligations. If we assume that the FCC’s decision to treat broadband ISPs as common carriers amounts to a major rule, the question then is whether the agency clearly has authority under the Act to make that choice. In *Brand X*, the Supreme Court definitively—and authoritatively, for our purposes as an inferior court—answered that question yes.” (citation omitted)).

99. See, e.g., *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) (rejecting the argument that Congress “intended to delegate a decision of such . . . significance to an agency in so cryptic a fashion”).

100. See, e.g., *U.S. Telecom Ass’n*, 855 F.3d at 403 (collecting citations).

101. See, e.g., Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes*, 62 ADMIN L. REV. 19, 45–46, 52 (2010).

102. *U.S. Telecom Ass’n*, 855 F.3d at 403.

103. Loshin & Nielson, *supra* note 101, at 45.

104. See *id.* at 45–46.

promulgate regulations with an economic significance greater than \$X, with \$X decided by Congress.<sup>105</sup> Similarly, perhaps when zigzagging regulations emerge, a reviewing court should be able to more readily conclude that the question is major. Candidly, that sort of line may also create perverse incentives, but it perhaps could create greater long-term stability too.<sup>106</sup>

#### CONCLUSION

Our nation's oscillating approach to internet regulation is important in its own right. The lesson it offers for administrative law, however, is not limited to the internet. The reality is that in a polarized society, it is difficult for the White House to convince Congress to enact legislation. Presidents of both parties thus have increasingly turned to the administrative state, rather than Congress, for their policy goals. But policy made through the administrative process can be unmade through the administrative process, and to the extent that policies made through the administrative process lack bipartisan support, we should expect incoming administrations to undo what their predecessors have done.

Zigzagging policy, however, is not costless, especially for policies that require long-term investment. So the question is: what to do about it? One answer may be nothing—the costs of foregone flexibility may not justify the benefits of enhanced stability. If we decide to do something, however, the ideas here should help. Other ideas too may also merit consideration. But absent structural reform, there may not be a lot of stickiness in administrative law, at least for certain types of policies.

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105. This dividing line may not be perfect either. Agencies also may try to evade dollar limits when they structure their rules. *See, e.g.*, Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 HARV. L. REV. 1755, 1792 (2013).

106. Others have argued that independent agencies should receive less deference for policies than what other agencies receive. *See, e.g.*, Randolph J. May, *Defining Deference Down, Again: Independent Agencies, Chevron Deference, and Fox*, 62 ADMIN. L. REV. 433, 433–34 (2010) (“[S]uggest[ing] . . . ‘a reading of *Chevron* that accords less deference to independent agencies’ decisions than to those of executive branch agencies would be more consistent with our constitutional system and its values.”) (quoting Randolph J. May, *Defining Deference Down: Independent Agencies and Chevron Deference*, 58 ADMIN. L. REV. 429, 453 (2006)). The FCC, of course, is an independent agency. That said, zigzagging policy need not be limited to independent agencies. *See, e.g.*, *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 140 S. Ct. 789, 790 (2020) (Gorsuch, J., dissenting from denial of certiorari) (“[T]hese days it sometimes seems agencies change their statutory interpretations almost as often as elections change administrations.”).

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