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### Administrative Law's Political Dynamics

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# Administrative Law's Political Dynamics

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*Over thirty years ago, the Supreme Court in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* commanded courts to uphold federal agency interpretations of ambiguous statutes as long as those interpretations are reasonable. This Chevron deference doctrine was based in part on the Court's desire to temper administrative law's political dynamics by vesting federal agencies, not courts, with primary authority to make policy judgments about ambiguous laws Congress-charged the agencies to administer. Despite this express objective, scholars such as Frank Cross, Emerson Tiller, and Cass Sunstein have empirically documented how politics influence circuit court review of agency statutory interpretations in a post-Chevron world. Among other things, they have reported whistleblower and panel effects, in that ideologically diverse panels are less likely to be influenced by their partisan priors than ideologically uniform panels.*

*Leveraging the most comprehensive dataset to date on Chevron deference in the circuit courts (more than 1,600 cases over eleven years), this Article explores administrative law's political dynamics. Contrary to prior, more limited studies, we find that legal doctrine (i.e., Chevron deference) has a powerful constraining effect on partisanship in judicial decisionmaking. To be sure, we still find some statistically significant results as to partisan influence. But the overall picture provides compelling evidence that the Chevron Court's objective to reduce partisan judicial decisionmaking has been quite effective. Also contrary to prior studies, we find no statistically significant whistleblower or panel effects. These findings have important implications for the current*

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*debate over the future of Chevron deference. Our findings identify a significant, overlooked cost of eliminating or narrowing Chevron deference: such reform could result in partisanship playing a larger role in judicial review of agency statutory interpretations.*

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## INTRODUCTION

For decades, legal scholars and political scientists have largely talked past each other when it comes to the effect of legal doctrine on judicial decisionmaking. Legal scholars, judges, and practitioners, for their part, often routinely argue, or at least assume, that lower court judges dutifully apply the legal doctrine shaped by higher courts as well as other binding judicial precedent.<sup>1</sup> Political scientists, by contrast, are generally doctrinal skeptics—arguing in theory and demonstrating empirically how political dynamics shape judicial decisionmaking in appellate courts. In other words, legal scholars primarily assume a “legal model” of judicial decisionmaking, while political scientists primarily posit an “attitudinal model.”

This debate between the legal and attitudinal models matters as to any legal doctrine. But it has pronounced importance in the context of administrative law and, in particular, judicial review of agency statutory interpretations, because the Supreme Court has expressly highlighted its concern over removing politics from judicial decisionmaking in this context. Over three decades ago in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the Court announced that a reviewing court must defer to a federal agency’s reasonable interpretation of an ambiguous statute that the agency administers.<sup>2</sup> Once the reviewing court concludes that the statute is ambiguous, “[t]he court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.”<sup>3</sup> The agency’s interpretation must merely be “reasonable” to survive judicial scrutiny. *Chevron*, accordingly, recognizes agencies’ interpretive primacy over courts when construing ambiguous statutes.

Critically for our purposes, the *Chevron* Court grounded this deference doctrine in part on the need to reserve political (or policy) judgments for the politically accountable executive branch agencies:

Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges’ personal policy preferences. In contrast, an agency to which

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1. See generally BRYAN A. GARNER ET AL., *THE LAW OF JUDICIAL PRECEDENT* (2016) (treatise coauthored by Garner and twelve prominent appellate judges). Legal realists and critical theorists are the most prominent exceptions. See, e.g., Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 267 (1997) (“Legal realists and critical legal scholars have long maintained that opinions are post-facto rationalizations of results dictated by judicial ideology.”).

2. 467 U.S. 837, 842–43 (1984).

3. *Id.* at 843 n.11.

Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.<sup>4</sup>

Put differently, a chief and express objective of *Chevron* deference is to remove politics from judicial decisionmaking—to create a “space,” as Peter Strauss and Justice Scalia have framed it, for federal agencies to implement their policy prerogatives or the President's political preferences.<sup>5</sup> This political-accountability objective has become more significant as the Supreme Court has recently praised *Chevron*'s promotion of interpretive uniformity.<sup>6</sup> By giving agencies policymaking space and reducing judicial interpretive space, *Chevron* deference should lead federal courts across the country to accept agency statutory interpretations more often and thus reach uniform results (regardless of panel composition).<sup>7</sup>

Two decades ago in the pages of the *Yale Law Journal*, Frank Cross and Emerson Tiller attempted to “fuse the various judicial decisionmaking models of political scientists and legal scholars to explain and demonstrate empirically under what conditions appellate court judges do obey the legal doctrines the Supreme Court has set out.”<sup>8</sup> Analyzing some 170 judicial decisions by the U.S. Court of Appeals for the D.C. Circuit that involved *Chevron* deference, Cross and Tiller's landmark finding was that, while politics affect judicial decisionmaking, “panel effects”—i.e., the effects of participating in ideologically diverse three-judge panels—temper the influence of judicial partisanship.<sup>9</sup> Cass Sunstein, among others, has further explored “panel effects” in this administrative law context and reached similar conclusions.<sup>10</sup> Cross and Tiller (and Sunstein and others) have

4. *Id.* at 865–66.

5. Peter L. Strauss, “*Deference*” Is Too Confusing—Let's Call Them “*Chevron Space*” and “*Skidmore Weight*,” 112 COLUM. L. REV. 1143, 1144–45 (2012); accord *United States v. Mead Corp.*, 533 U.S. 218, 247 (2001) (Scalia, J., dissenting) (observing that ambiguities in statutes subject to *Chevron* deference “create a space, so to speak, for the exercise of continuing agency discretion”).

6. *City of Arlington v. FCC*, 569 U.S. 290, 307 (2013).

7. See, e.g., ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 208 (2006) (“If *Chevron* were not the law and were not followed faithfully, regulatory law—involving, for example, the environment, communications, and labor-management relations—would inevitably be highly variable across the country.”).

8. Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2158 (1998).

9. See *id.* at 2175–76.

10. See, e.g., Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823 (2006); Cass R. Sunstein, *Deliberative*

thus wisely focused on *Chevron* deference to explore the political dynamics of judicial decisionmaking. Of all legal doctrine, one would expect *Chevron* to be among the most powerful in constraining judicial partisanship, as that is one of the doctrine's express purposes.

Although prior studies explored these political dynamics to some degree with relatively small or otherwise limited datasets, to date there has been no comprehensive empirical investigation. This Article seeks to remedy that. To do so, we leverage a dataset that two of us constructed—the most comprehensive of its kind—that includes every published circuit court decision that involved *Chevron* or *Skidmore* deference<sup>11</sup> from 2003 through 2013.<sup>12</sup> Over this eleven-year period, the federal courts of appeals reviewed 1,613 agency statutory interpretations in 1,382 published opinions where they considered applying either *Chevron* or *Skidmore* deference (meaning that one decision may concern review of more than one agency statutory interpretation). In prior work, two of us presented a descriptive account of our findings without concern for judges' political ideologies.<sup>13</sup> We reported that, contrary to growing consensus, agencies prevailed substantially more often under *Chevron* review than less deferential standards. We also discussed how the circuits differed in applying *Chevron* and other standards of review, how the kind of agency action affected agency-win rates, how different agencies fared in the circuits, and which doctrinal and theoretical factors had express salience in judicial review.<sup>14</sup> All three of us (including one who is a lawyer, political scientist, and expert in empirical analysis of judicial behavior) then explored in a statistically more sophisticated manner the narrower question of whether politics affects circuit courts' decisions to apply the *Chevron* framework (as opposed to the less-deferential *Skidmore* doctrine or *de novo* review).<sup>15</sup>

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*Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71 (2000); Cass R. Sunstein, David Schkade & Lisa Michelle Ellman, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301 (2004). See generally Matthew C. Stephenson, *Statutory Interpretation by Agencies*, in RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW (Daniel A. Farber & Anne Joseph O'Connell eds., 2010) (providing literature review).

11. *Skidmore* deference refers to the Court's judicial review in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Under *Skidmore* review, the courts retain interpretive primacy, but they defer to an agency's interpretation based on several factors, including the thoroughness of the agency's interpretation and its consistency with the agency's prior pronouncements. See *id.* at 140.

12. See Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1 (2017).

13. See *id.*

14. See *id.*

15. Kent Barnett, Christina L. Boyd & Christopher J. Walker, *The Politics of Selecting Chevron Deference*, 15 J. EMPIRICAL LEGAL STUD. 597 (2018). In two shorter essays, two of us explored more qualitatively the findings from our dataset on how circuit courts approach the major questions doctrine, see Kent Barnett & Christopher J. Walker, *Short-Circuiting the New Major*

Relying on the same dataset, this capstone Article empirically explores administrative law's political dynamics and our findings' meaning for *Chevron*'s theoretical grounding. Like earlier, more limited studies, we find that politics play some role in how circuit courts review agency statutory interpretations. For instance, conservative panels are more likely to agree with conservative agency interpretations and less likely to agree with liberal interpretations; vice versa for liberal panels.<sup>16</sup>

But our findings become very surprising once we separate how conservative and liberal panels act in cases in which they apply and do not apply *Chevron* deference. We find that *Chevron* deference significantly curbs (but does not fully constrain) judicial discretion. For instance, the most liberal panels agree with conservative agency statutory interpretations only 18% of the time when they do not use *Chevron* deference but 51% when they do. Similarly, the most conservative panels agree with liberal agency interpretations only 18% of the time without *Chevron* deference but 66% with it.<sup>17</sup> Nonetheless, political behavior still likely exists, even with *Chevron* deference's mollifying effects. We found that conservative panels are up to 23% more likely than liberal panels to agree with conservative agency interpretations under *Chevron* deference and up to 36% more likely than liberal panels to agree with conservative agency interpretations under a lesser form of deference. Likewise, we found a 25% difference across the ideological spectrum for review of liberal agency interpretations under *Chevron* (with liberal panels being more likely than conservative ones to agree) and a whopping 63% difference without *Chevron* deference.<sup>18</sup> Based on our findings, *Chevron* deference predominantly supports the legal model by powerfully, even if not fully, constraining ideology in judicial decisionmaking.

When applying *Chevron*, panels of all ideological stripes use the framework similarly and reveal modest ideological behavior. For instance, both liberal and conservative panels are more likely to find the statute unambiguous when the agency's interpretation is contrary to the panel's ideological preferences. Likewise, both liberal and conservative panels are more likely to find the statute ambiguous when

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*Questions Doctrine*, 70 VAND. L. REV. EN BANC 147 (2017) [hereinafter Barnett & Walker, *Short-Circuiting Major Questions*], and on how circuit courts review agency interpretations under *Chevron*'s second step (the "reasonableness" inquiry), see Kent Barnett & Christopher J. Walker, *Chevron Step Two's Domain*, 93 NOTRE DAME L. REV. 1441 (2018) [hereinafter Barnett & Walker, *Chevron Step Two's Domain*]. These essays, like *Chevron in the Circuit Courts*, *supra* note 12, neither consider ideology nor rely upon sophisticated statistical analyses.

16. See *infra* Section IV.A.

17. See *infra* Section IV.A.

18. See *infra* Section IV.A.

the agency's interpretation aligns with the panels' ideological preferences. This means that panels permit agencies more policymaking space when the administrative interpretations are consistent with the panels' views. More specifically, we found that conservative panels were as much as 21% more likely than liberal panels to find no ambiguity when reviewing a liberal agency interpretation, while liberal panels were as much as 14% more likely than conservative panels to find no ambiguity when reviewing conservative agency interpretations. Nonetheless, contrary to Justice Scalia's view that textualist judges (who generally identify as conservative<sup>19</sup>) may be more likely to find statutes unambiguous regardless of the valence of the agency interpretation,<sup>20</sup> we found no relationship between panel ideology and a panel holding a statute unambiguous.<sup>21</sup>

We also briefly considered individual judges' behaviors in reviewing agency statutory interpretations. We find that of the 30 liberal judges examined, the majority behaved in expected ideological (liberal) ways. Only rarely did individual liberal judges indicate, on average, conservative behavior. In contrast, the 30 conservative judges examined demonstrated less political behavior overall than liberal judges. A nontrivial number of conservative judges, including some prominent ones, more favorably reviewed liberal interpretations than conservative interpretations.<sup>22</sup>

Finally, contrary to studies by Cross and Tiller and Sunstein and others, we find no "whistleblower effects" in how circuit courts apply *Chevron* deference. In other words, whether a panel is ideologically uniform or diverse does not affect whether circuit courts apply the *Chevron* framework, nor does it affect agency-win rates on judicial review. Indeed, we saw only minor differences at either ideological extreme (where we would have most anticipated whistleblowing effects to occur), and those differences were in the *opposite* direction than

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19. See Paul Killebrew, Note, *Where Are All the Left-Wing Textualists?*, 82 N.Y.U. L. REV. 1895, 1898 (2007) (citing James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 5, 6 (2005)) (noting that "empirical evidence also suggests that, aside from the fact that textualist judges are generally conservative, the use of textualist methods is disproportionately associated with conservative outcomes in certain cases").

20. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 521.

21. See *infra* Part VI; cf. Raymond M. Kethledge, *Ambiguities and Agency Cases: Reflections After (Almost) Ten Years on the Bench*, 70 VAND. L. REV. EN BANC 315, 323 (2017) (observing that in nearly ten years on the Sixth Circuit, he has yet to find a statute ambiguous at *Chevron* step one, even though "there have been plenty of cases where the agency wanted us to").

22. See *infra* Part V.



expected.<sup>23</sup> On its face, this finding is startling as it cuts against the grain of longstanding empirical conclusions based on smaller datasets. Upon further reflection, however, it should not be too surprising in light of our main finding. Because *Chevron* deference is such a powerful, if imperfect, constraint on the influence of partisanship in judicial decisionmaking, the ideological composition of the panel may have little, if any, additional constraining role to play.

These constraining effects have important implications for the current doctrinal, policy, and theoretical debates concerning the future of *Chevron* deference. In recent years, more members of the federal bench, the legal academy, and the Hill have called for the elimination—or at least narrowing—of *Chevron* deference.<sup>24</sup> The findings from this Article suggest that one significant and overlooked cost of eliminating or narrowing *Chevron* deference is that it could result in partisanship playing a larger role in judicial review of agency statutory interpretations. Moreover, with more partisanship, one would expect less interpretive uniformity across jurisdictions and ideologically diverse panels. It may turn out that, even with this cost taken into account, one would conclude that such reform efforts produce a net benefit. That inquiry far exceeds the ambitions of this Article. To date, however, this cost of increased partisan judicial decisionmaking and risk of interpretive disparity has been largely absent from these debates.

This Article proceeds as follows: In Part I, we briefly set forth the doctrine of *Chevron* deference as it has developed over the last three decades and explore its theoretical underpinnings. Part II surveys prior empirical studies concerning the role of politics in judicial decisionmaking. Part III provides an overview of our empirical study; a description of our study design, methodology, and dataset; and a ten thousand-foot view of *Chevron* in the circuit courts.

The remaining Parts present the findings from our study and discuss their implications for administrative law. Part IV examines the politics of invoking *Chevron* deference, including the effects of panel ideology on agency-win rates and on whether the panel applies the *Chevron* deference framework as well as other factors which seem to affect judicial decisionmaking. Part V shifts focus from panels to individual judges to explore the degree of variation in *Chevron* deference exhibited by liberal and conservative circuit judges. Part VI examines the subset of cases where the circuit courts apply the *Chevron*

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23. See *infra* Part VII.

24. See generally Christopher J. Walker, *Attacking Auer and Chevron Deference: A Literature Review*, 15 GEO. J. L. & PUB. POL'Y 103 (2018).

deference framework to explore any ideological effects at *Chevron* steps one and two. And Part VII returns to the central findings of prior studies—whistleblower and panel effects—and explores how such effects are not present in our data.

The Article concludes by discussing the implications of our findings for (1) the scholarly debate between those who support the legal model and the attitudinal model, (2) *Chevron* deference's theoretical bases, and (3) current calls to revisit the *Chevron* deference doctrine's mechanics, domain, or very existence.

## I. CHEVRON'S FOUNDATION

### A. *The Doctrine of Chevron Deference*

In *Chevron*, the Court upheld the Environmental Protection Agency ("EPA") regulations under the Clean Air Act. The Act required states that had not met national air-quality standards to establish permitting programs to regulate "new or modified major stationary sources" of air pollution.<sup>25</sup> The EPA's regulations allowed states to adopt a plant-wide definition of "stationary source."<sup>26</sup> Accordingly, an existing plant that contained several pollution-emitting devices could install or modify one device without needing a permit as long as the alteration would not increase the plant's total emissions.<sup>27</sup> The challengers argued that the plant-wide "bubble" concept was contrary to the statute because "stationary source" included either a plant or any of its components that emitted more than a certain threshold of pollutant.<sup>28</sup>

The Court followed a two-step approach in upholding the EPA's construction of a statute that it administered.<sup>29</sup> Using "traditional tools of statutory construction,"<sup>30</sup> the first step inquired whether Congress had directly spoken to the precise question at issue. If so, both the Court and agency were bound. But if Congress had not done so, the Court could not simply impose what it viewed as the best construction. Instead, it had to defer to the agency's interpretation at step two as long as it was "permissible."<sup>31</sup>

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25. See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 840 (1984).

26. *Id.*

27. See *id.*

28. See *id.* at 859.

29. See *id.* at 842–43.

30. *Id.* at 843 n.9.

31. *Id.* at 843.

Following these steps, the Court held at step one that Congress had not clearly stated its intent as to the meaning of “stationary source” in the text, drafting history, or legislative history.<sup>32</sup> Moving to step two, the Court deemed the EPA’s “bubble” concept “a reasonable accommodation of manifestly competing interests.”<sup>33</sup> The EPA was entitled to deference based on the “technical and complex” regulatory scheme and the agency’s “detailed and reasoned” consideration.<sup>34</sup> The Court emphasized that federal judges must respect the policymaking space within statutory ambiguities or silence which Congress has delegated—whether expressly or silently—to experts.<sup>35</sup>

The *Chevron* two-step framework seems relatively straightforward and capable of limiting judicial policy preferences when reviewing agency statutory interpretation. Yet scholars and courts have criticized the ever-more complicated framework. Those criticisms center around (1) both steps one and two,<sup>36</sup> (2) when *Chevron* applies (whether to certain questions<sup>37</sup> and certain methods of agency interpretation<sup>38</sup>), and (3) whether the framework affects judicial decisionmaking.<sup>39</sup> Indeed, based on its perceived failures, one prominent scholar has called for an end to *Chevron* deference.<sup>40</sup> Likewise, two sitting Justices have expressed hostility toward *Chevron*, largely based on its perceived unfairness to regulated parties and Article III separation of powers mandates.<sup>41</sup> Conservative circuit judges

32. See *id.* at 845–64.

33. *Id.* at 865.

34. See *id.* at 865.

35. See *id.* at 865–66.

36. See, e.g., Barnett & Walker, *Chevron Step Two’s Domain*, *supra* note 15, at 1446–57 (discussing the Court’s treatment of step two and scholarly discussions); Linda Jellum, *Chevron’s Demise: A Survey of Chevron from Infancy to Senescence*, 59 ADMIN. L. REV. 725 (2007) (arguing that the Supreme Court has moved, with some inconsistency from various Justices, from an intentionalist to a textualist inquiry at step one); Mark Seidenfeld, *A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 85 n.9 (1994) (listing scholarship that considers the appropriate tools of statutory interpretation at step one).

37. See Barnett & Walker, *Short-Circuiting Major Questions*, *supra* note 15, at 151–54 (describing extension of “major questions doctrine” and scholarly reaction).

38. See Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1449–50 (2005) (discussing views).

39. See Richard J. Pierce, Jr., *What Do the Studies of Judicial Review of Agency Actions Mean?*, 63 ADMIN. L. REV. 77, 83–84 (2011) (reviewing studies of *Chevron* and finding that choice of doctrine has little effect on judicial decisionmaking).

40. Jack M. Beermann, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 850 (2010).

41. See, e.g., *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring). Cynthia Farina argued shortly after the *Chevron* decision that *Chevron* deference violated the separation of powers. Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 456 (1989).

have recently expressed similar skepticism.<sup>42</sup> Because others (including two of us) have covered these matters in significant detail elsewhere, we only summarize the ongoing disputes most relevant for discussing our findings and their implications.

### 1. Steps One and Two

The Court has been far from clear as to how the two *Chevron* steps should operate. *Chevron* itself called for “traditional tools of statutory construction” at step one<sup>43</sup> and relied upon statutory text, historical development of the Clean Air Act, and legislative history of relevant amendments as tools.<sup>44</sup> Yet over the decades, the Court has likely turned the first step into a purely textual inquiry, meaning that step one has become a textualist, as opposed to an intentionalist, inquiry.<sup>45</sup> As for step two, the *Chevron* Court provided little guidance as to its application, but did evaluate the agency’s reasoning, its accommodation of competing interests, and its overall substantive reasonableness as part of that inquiry. In later cases, the Court has waffled between a textual or structural approach on the one hand, and the Administrative Procedure Act’s arbitrary and capricious review standard on the other.<sup>46</sup> Indeed, our data of circuit court decisions rejecting an agency statutory interpretation at step two indicate that the circuit courts do not approach step two consistently. We found that no single approach to step two—whether best described as arbitrary and capricious review, purposivism, or textualist—predominated,

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42. See *Waterkeeper All. v. EPA*, 853 F.3d 527, 539 (D.C. Cir. 2017) (Brown, J., concurring) (“An Article III renaissance is emerging against the judicial abdication performed in *Chevron*’s name.”); *Egan v. Del. River Port Auth.*, 851 F.3d 263, 278 (3d Cir. 2017) (Jordan, J., concurring in the judgment) (criticizing *Chevron*):

The doctrine of deference deserves another look. *Chevron* . . . and [its] like are, with all respect, contrary to the roles assigned to the separate branches of government; they embed perverse incentives in the operations of government; they spread the spores of the ever-expanding administrative state; they require us at times to lay aside fairness and our own best judgment and instead bow to the nation’s most powerful litigant, the government, for no reason other than that it is the government.;

Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2150–54 (2016) (reviewing ROBERT A. KATZMANN, *JUDGING STATUTES* (2014)) (drawing on his experience as a D.C. Circuit judge to express concerns with *Chevron* deference).

43. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984).

44. Barnett & Walker, *Chevron Step Two’s Domain*, *supra* note 15, at 1447.

45. See, e.g., Jellum, *supra* note 36, at 729 (arguing that the Supreme Court has moved, with some inconsistency from various Justices, from an intentionalist to a textualist inquiry at step one).

46. Barnett & Walker, *Chevron Step Two’s Domain*, *supra* note 15, at 1448–57 (discussing the Court’s varying descriptions and approaches to step two).

suggesting that the courts of appeals do not agree on how step two should operate.<sup>47</sup>

## 2. When Chevron Applies

Uncertainty exists not only as to *how*, but also *when Chevron* applies. The *Chevron* Court indicated that the two-step framework applied to all interpretations concerning a statute that an agency administers. But the Court has indicated that not all interpretive issues are suitable for deference. Most notably, the Court has recently confirmed that *Chevron*'s framework does not apply to questions concerning "deep 'economic and political significance' that [are] central to [the] statutory scheme" at issue.<sup>48</sup> Such questions, although rare, concern, for example, the IRS's interpretation of "an Exchange established by the State"<sup>49</sup> and the Attorney General's statutory interpretation implicating "medical judgments" outside of his expertise.<sup>50</sup> Otherwise, the Court has given little guidance.<sup>51</sup>

Relatedly, the uncertainty as to when *Chevron* applies extends to the method by which the agency must provide its interpretation. The *Chevron* Court indicated that the two-step framework applied to all agency statutory interpretations. But after *Chevron*, the Court clarified in two leading decisions—*United States v. Mead Corp.*<sup>52</sup> and *Christensen v. Harris County*<sup>53</sup>—that *Chevron* applies only to agency statutory interpretations with the "force of law."<sup>54</sup> Those interpretations are usually the product of notice-and-comment rulemaking or on-the-record "formal" adjudication. But less formal interpretations may also occasionally qualify,<sup>55</sup> such as interpretive

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47. See *id.* at 1466 fig.5.

48. *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)).

49. *Id.* at 2488–89.

50. *Gonzales v. Oregon*, 546 U.S. 243, 266 (2006).

51. Barnett & Walker, *Short-Circuiting Major Questions*, *supra* note 15, at 153 (citing David Gamage, *Foreword—King v. Burwell Symposium: Comments on the Commentaries (and on Some Elephants in the Room)*, 43 PEPP. L. REV. 1, 5 (2015); and Kristin E. Hickman, *The (Perhaps) Unintended Consequences of King v. Burwell*, 43 PEPP. L. REV. 56, 57 (2015)).

52. 533 U.S. 218 (2001).

53. 529 U.S. 576 (2000).

54. *Mead*, 533 U.S. at 227; see *id.* at 229 ("We have recognized a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed.").

55. See *id.* at 230 ("[T]he want of that procedure here does not decide the case, for we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded.").

rules<sup>56</sup> or policy statements.<sup>57</sup> This indeterminacy over which agency actions have the force of law has led to the “*Mead* Puzzle,” as lower courts attempt to determine which agency actions suffice.<sup>58</sup>

### 3. Impact on Judicial Decisionmaking

Regardless of *Chevron* deference’s perceived elasticity, some have questioned its effectiveness. For instance, Richard Pierce evaluated affirmance rates in the Supreme Court and circuit courts from earlier empirical studies. He found that the affirmance ranges for de novo, *Skidmore*, and *Chevron* review overlap: 66% for de novo review, 55.1% to 70.9% for *Skidmore*, and 64% to 81.3% for *Chevron*.<sup>59</sup> Pierce argued that “a court’s choice of which doctrine to apply in reviewing an agency action is not an important determinant of outcomes in the Supreme Court or the circuit courts.”<sup>60</sup>

The uncertainty surrounding *Chevron*’s steps and its reach create room for judges to leverage *Chevron* (or not) to further their policy preferences.<sup>61</sup> Although some indeterminacy is inherent in any review standard, the breadth of that indeterminacy is more salient when the purpose of the doctrine, like *Chevron*, is to separate judges from political decisions. Our results provide some guidance on how well *Chevron* limits the influence of judges’ policy preferences.

#### B. The Theory of Chevron Deference

Although administrative law scholars disagree about *Chevron*’s theoretical foundations,<sup>62</sup> the Supreme Court has regularly grounded

56. See, e.g., *Cooper Techs. Co. v. Dudas*, 536 F.3d 1330, 1336–37 (Fed. Cir. 2008) (applying *Chevron* deference to interpretive rules).

57. See, e.g., *Kruse v. Wells Fargo Home Mortg., Inc.*, 383 F.3d 49, 59 (2d Cir. 2004) (concluding that “*Chevron* deference is due to HUD’s [statutory] interpretation” in a policy statement).

58. See Kent Barnett, *Codifying Chevmore*, 90 N.Y.U. L. REV. 1, 56–58 (2015).

59. See Pierce, *supra* note 39, at 83–84.

60. See *id.* at 85; see also Beermann, *supra* note 40, at 830 (concluding after reviewing empirical studies concerning Supreme Court and circuit court decisionmaking that “[t]here is thus no reason to believe that *Chevron* has been more successful in the lower courts than at the Supreme Court”); Stuart Minor Benjamin & Arti K. Rai, *Administrative Power in the Era of Patent Stare Decisis*, 65 DUKE L.J. 1563, 1598 (2016) (noting that agency-win rates in the Supreme Court “undercut the value of *Chevron*”).

61. Cf. Nancy C. Staudt, *Modeling Standing*, 79 N.Y.U. L. REV. 612, 669 (2004) (“Standing decisions may be motivated by politics, but only when neither clear doctrine exists nor judicial monitoring takes place.”).

62. See generally Evan J. Criddle, *Chevron’s Consensus*, 88 B.U. L. REV. 1271, 1283–91 (2008) (surveying literature). One serious criticism of the congressional delegation theory is that the Administrative Procedure Act (“APA”) itself does not expressly embrace a doctrine of deference to agency statutory interpretations but instead commands reviewing courts to “decide all relevant

*Chevron* deference in a theory of congressional delegation.<sup>63</sup> Under this delegation theory, courts must defer to an agency's interpretation because there is "a 'presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.'"<sup>64</sup> Such congressional delegation need not be express as to the specific ambiguity. Delegation is usually implied (or at least presumed) whenever (1) a statute gives the agency the authority to act with the force of law by enacting notice-and-comment rules or by conducting formal on-the-record adjudication and (2) the agency has used those procedures.<sup>65</sup>

As two of us have noted elsewhere, "[t]he key criticism of the delegation theory is that it is fictional or fraudulent"—fictional because ambiguity does not necessarily evince congressional intent, and fraudulent because the Supreme Court seems disinterested in actually assessing congressional intent.<sup>66</sup> Moreover, the Court has failed to provide a robust normative basis for the congressional delegation theory, though it has suggested that the delegation theory resides in notions of agency expertise, deliberative process, political accountability, and national uniformity or stability.<sup>67</sup> Each normative basis merits additional discussion.

### 1. Agency Expertise

Agency expertise is considered one of the bedrock rationales for *Chevron* deference.<sup>68</sup> Indeed, the *Chevron* Court itself emphasized

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questions of law." 5 U.S.C. § 706 (2012); see Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 985–95 (2016) (arguing that *Chevron* deference is not consistent with the APA).

63. Barnett, *supra* note 58, at 14–15.

64. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005) (quoting *Smiley v. Citibank (S.D.)*, N.A., 517 U.S. 735, 740–41 (1996)).

65. See, e.g., *United States v. Mead Corp.*, 533 U.S. 218, 230 (2001). But see Christopher J. Walker, *Toward a Context-Specific Chevron Deference*, 81 MO. L. REV. 1095, 1105 (2016) (exploring how Chief Justice Roberts may be embracing a narrower, more context-specific *Chevron* deference that "would focus not just on the formality of the agency procedure creating the interpretation, but also whether Congress intended to delegate that particular substantive question to the agency").

66. Barnett & Walker, *Short-Circuiting Major Questions*, *supra* note 15, at 155.

67. Barnett, *supra* note 58, at 14–15. Scholars, moreover, have advanced additional normative bases for deference, including agency flexibility. See, e.g., Criddle, *supra* note 62, at 1291 (noting various additional bases).

68. See, e.g., Criddle, *supra* note 62, at 1286–88; accord Ronald J. Krotoszynski, Jr., *Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of Skidmore*, 54 ADMIN. L. REV. 735, 737 (2002); Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 836 (2001); Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2086 (1990).

agency expertise as grounds for deference, noting that Congress perhaps “consciously desired the [agency] to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so.”<sup>69</sup> Congress delegates interpretive authority to agencies, instead of generalist courts, at least in part because those agencies are more expert than courts in the subject matter.

This expertise rationale extends beyond the agency’s comparative policy or technical expertise in the subject matter; it also encompasses the agency’s comparative expertise in the structure and purpose of the statute itself. As Justice Scalia noted decades ago, “The cases, old and new, that accept administrative interpretations, often refer to the ‘expertise’ of the agencies in question, their intense familiarity with the history and purposes of the legislation at issue, their practical knowledge of what will best effectuate those purposes.”<sup>70</sup>

Justice Breyer has expanded on this “better understanding of congressional will” rationale for judicial deference:

The agency that enforces the statute may have had a hand in drafting its provisions. It may possess an internal history in the form of documents or “handed-down oral tradition” that casts light on the meaning of a difficult phrase or provision. Regardless, its staff, in close contact with relevant legislators and staffs, likely understands *current* congressional views, which, in turn, may, through institutional history, reflect prior understandings. At a minimum, the agency staff understands the sorts of interpretations needed to “make the statute work.”<sup>71</sup>

As one of us has empirically documented elsewhere, agencies play a substantial role in the legislative process, such that they possess far greater expertise than courts as to the legislative processes that resulted in the statutory schema that the agencies administer.<sup>72</sup>

Because of expertise’s doctrinal prominence as a basis for *Chevron* doctrine, scholars have explored it in some depth empirically in the literature. Most prominently, Lisa Bressman and Abbe Gluck have surveyed congressional drafters regarding their approaches to statutory drafting.<sup>73</sup> Of all the interpretive tools included in their

69. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984).

70. Scalia, *supra* note 20, at 514.

71. Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 368 (1986).

72. See Christopher J. Walker, *Legislating in the Shadows*, 165 U. PA. L. REV. 1377, 1406–07 (2017); accord Ganesh Sitaraman, *The Origins of Legislation*, 91 NOTRE DAME L. REV. 79, 129 (2015) (arguing that, “at least in some situations, courts should grant greater deference to agencies” based on their involvement in the legislative process). See generally CHRISTOPHER J. WALKER, *FEDERAL AGENCIES IN THE LEGISLATIVE PROCESS: TECHNICAL ASSISTANCE IN STATUTORY DRAFTING* (Admin. Conference of the U.S. ed., 2015).

73. 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.



survey, *Chevron* deference was the most known (82%) by congressional drafters.<sup>74</sup> When asked about which types of statutory gaps or ambiguities Congress intends for federal agencies to fill, moreover, the congressional respondents emphasized the importance of agency expertise: 93% of respondents said the agency's area of expertise mattered. The related expertise-driven rationales of ambiguities concerning implementation details (99%) and omissions in statutes (72%) also garnered large responses.<sup>75</sup>

Agency rule drafters seem to have similar impressions about the centrality of agency expertise to *Chevron* deference. One of us surveyed agency officials regarding how they approach statutory interpretation and rulemaking, replicating many of the questions from the Bressman and Gluck study.<sup>76</sup> Like the congressional respondents, the agency rule drafters surveyed did not view all statutory ambiguities equally. Instead, statutory gaps or ambiguities relating to agency expertise were those Congress most likely intended to delegate to federal agencies to fill: implementation details (99%) and agency's area of expertise (92%).<sup>77</sup>

## 2. Deliberative Process

Although the *Chevron* decision itself did not focus on the value of the deliberative process involved in the agency crafting its statutory interpretation, subsequent Supreme Court decisions have focused on the importance of an agency's deliberative process for evidence of congressional delegation.<sup>78</sup> The most important case on this subject, as discussed in Section I.A, is *United States v. Mead Corp.*<sup>79</sup> The *Mead*

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REV. 901 (2013) [hereinafter Gluck & Bressman, *Part I*]; Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725 (2014) [hereinafter Bressman & Gluck, *Part II*].

74. Gluck & Bressman, *Part I*, *supra* note 73, at 994–95.

75. *Id.* at 1005 fig.11. As Bressman and Gluck concluded, the congressional respondents viewed federal agencies—not courts—as their primary partners in implementing and interpreting statutes; they “saw agencies as the everyday statutory interpreters, viewed interpretive rules as tools for agencies, too, and made no distinction, as some scholars have, between agency statutory ‘implementation’ and agency statutory ‘interpretation.’” Bressman & Gluck, *Part II*, *supra* note 73, at 765.

76. See Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999 (2015).

77. *Id.* at 1053 fig.10.

78. See, e.g., Criddle, *supra* note 62, at 1308–10 (discussing the Court's reliance on the agency's deliberative process (or lack thereof) in deciding whether *Chevron* deference was appropriate in *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007); and *Gonzales v. Oregon*, 546 U.S. 243 (2006)).

79. 533 U.S. 218 (2001).

Court held that not all agency interpretations of statutory ambiguities merited *Chevron* deference, but “a very good indicator of delegation meriting *Chevron* treatment [is] express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed.”<sup>80</sup> Or, as *Mead*’s loudest critic—Justice Scalia<sup>81</sup>—put it over a decade later: “[T]he preconditions to deference under *Chevron* are satisfied because Congress has unambiguously vested the FCC with general authority to administer the Communications Act through rulemaking and adjudication, and the agency interpretation at issue was promulgated in the exercise of that authority.”<sup>82</sup>

Like agency expertise, agency deliberative process as a normative basis for delegation finds support in the realities of statutory drafting. Bressman and Gluck indicated that when congressional drafters were asked about the *Mead* doctrines by concept,

*Mead* was a “big winner” in our study—the canon whose underlying assumption was most validated by our [congressional] respondents after *Chevron*: 88% told us that the authorization of notice-and-comment rulemaking (the signal identified by the Court in *Mead*) is always or often relevant to whether drafters intend for an agency to have gap-filling authority.<sup>83</sup>

The results were similar among the agency rule drafters surveyed. The rule drafters were asked whether eight different factors “affect whether *Chevron* deference (as opposed to *Skidmore* deference or no deference) applies to an agency’s interpretation of an ambiguous statute it administers.”<sup>84</sup> The leading factors the agency rule drafters reported to affect whether *Chevron* deference applies are the two *Mead* principles: whether Congress authorized the agency to engage in rulemaking and/or formal adjudication under the statute (84%), and whether the agency promulgated the interpretation via rulemaking and/or formal adjudication (80%).<sup>85</sup>

### 3. Political Accountability

Another key rationale the Court has proffered for its delegation theory of *Chevron* deference concerns political accountability. As the *Chevron* Court itself noted, “Judges are not experts in the field, and are

80. *Id.* at 229.

81. *Cf. id.* at 239 (Scalia, J., dissenting) (“Today’s opinion makes an avulsive change in judicial review of federal administrative action.”).

82. *City of Arlington v. FCC*, 569 U.S. 290, 307 (2013).

83. Gluck & Bressman, *Part I*, *supra* note 73, at 999.

84. Walker, *supra* note 76, at 1063.

85. *Id.* at 1063–64, 1065 tbl.1.

not part of either political branch of the Government.”<sup>86</sup> Agencies, by contrast, are part of a political branch (the executive) and report back to another political branch (the legislature). “While agencies are not directly accountable to the people,” the *Chevron* Court explained:

[T]he Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.<sup>87</sup>

The political-accountability basis for *Chevron* deference has not been as well received in the administrative law literature<sup>88</sup>—with then-Professor Kagan’s *Presidential Administration* being a very notable exception.<sup>89</sup> The main criticism is that this rationale depends on a unitary executive model of presidential control that—whatever its theoretical benefits or normative force—does not and likely cannot exist in reality.<sup>90</sup> Moreover, the effect of any agency action is likely negligible on voter behavior.<sup>91</sup> Nor does the political-accountability rationale seem to find much support from congressional and agency drafters. In the agency rule drafter study, only 9% of the respondents indicated that an agency’s political accountability was a factor that affects whether *Chevron* deference applies to the agency’s interpretation of an ambiguous statute that the agency administers.<sup>92</sup> The Bressman and Gluck congressional survey did not explore political accountability as a basis for *Chevron* deference.<sup>93</sup>

Scholars and agencies, on the one hand, and the Court, on the other, may be talking past one another. Rather than asking about the extent of agencies’ political accountability in the abstract, as scholars have largely done, the *Chevron* Court considered the concept from a comparative-institutional perspective. The Court considered political accountability comparatively between the courts and executive agencies. The *Chevron* Court’s focus on political accountability arguably was to minimize the influence of partisanship in judicial

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86. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984).

87. *Id.* at 865–66.

88. See, e.g., Criddle, *supra* note 62, at 1288–90 (reviewing literature).

89. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2376 (2001) (“*Chevron*’s primary rationale suggests [an] approach, which would link deference in some way to presidential involvement.”). But see Peter M. Shane, *Chevron Deference, the Rule of Law, and Presidential Influence in the Administrative State*, 83 FORDHAM L. REV. 679, 680 (2014) (arguing against the proposition that “presidential involvement in an agency’s decision making should intensify its entitlement to *Chevron* deference”).

90. See Criddle, *supra* note 62, at 1289.

91. See *id.* at 1290.

92. Walker, *supra* note 76, at 1065 tbl.1.

93. Gluck & Bressman, *Part I*, *supra* note 73, at 992.

decisionmaking, especially where a federal agency has already exercised its policy judgment. As the *Chevron* Court noted, "Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences."<sup>94</sup> A federal agency, on the other hand, "may, within the limits of that [congressional] delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments."<sup>95</sup>

#### 4. National Uniformity

The final, more recent rationale proffered for *Chevron* deference is that it promotes interpretive uniformity. It does so by limiting courts' responsibility for determining the best reading of a statute. Instead, as Peter Strauss has argued, courts need only assess the reasonableness of an agency's interpretation, rendering it more likely that lower federal courts across the country will agree in accepting or rejecting the agency's interpretation.<sup>96</sup> Moreover, by providing agencies space for interpreting statutory ambiguities, *Chevron* provides a disincentive for judicial challenges and thereby allows the agency to provide a national standard even absent judicial review.

The Court recently echoed Strauss's argument. In holding that *Chevron* applied to questions surrounding an agency's "jurisdiction" under a statutory scheme, the Court in *City of Arlington v. FCC* recognized the "stabilizing purpose of *Chevron*."<sup>97</sup> The Court observed that, unlike "[t]hirteen Courts of Appeals applying a totality-of-the-circumstances test," *Chevron* deference provides predictability to agency statutory interpretations.<sup>98</sup>

Unlike the other theoretical grounds for *Chevron*, uniformity has received relatively light scholarly treatment, perhaps because the Court invoked it only a few years ago. But in the descriptive account of the data that serves as the basis for the results discussed in this Article, two of us noted that our data provides conflicting evidence regarding the effectiveness of *Chevron*'s success in achieving uniformity.<sup>99</sup> We reported that agencies prevailed 39% more often under *Chevron* than de novo review, indicating that *Chevron* does lead to agencies receiving

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94. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984).

95. *Id.*

96. Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1121–22 (1987); accord VERMEULE, *supra* note 7, at 208.

97. *City of Arlington v. FCC*, 569 U.S. 290, 307 (2013).

98. *Id.*

99. Barnett & Walker, *supra* note 12, at 71.

more interpretive space,<sup>100</sup> which encourages uniformity. But when one considers the results circuit by circuit, *Chevron's* success at promoting uniformity is questionable. For instance, the range of agency-win rates across the circuits with and without *Chevron* deference is striking. At one extreme, the Sixth Circuit agreed with agency interpretations 88.2% of the time when it applied *Chevron's* framework but only 39.4% without *Chevron*. At the other extreme, the Eighth Circuit agreed with the agency 76.2% of the time under *Chevron's* framework and nearly as much without *Chevron* (71.4%).<sup>101</sup>

Our descriptive account purposefully avoided discussing how judicial political preferences affect judicial behavior or our results. This variable is highly relevant to assess *Chevron's* success in promoting interpretive uniformity more fully. Agencies can obtain meaningful interpretive space under *Chevron* only if judges of different ideological stripes across the country are consistent in deferring to agency statutory interpretations. If ideological preferences affect judicial review notwithstanding *Chevron*, one would expect different results based on panel composition in challenges across the country, which would impede an agency's ability to provide a uniform, national answer to the statute in question. Relatedly, it would encourage forum shopping and numerous judicial challenges.

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The focus of this Article is not to further explore the well-trod agency expertise and deliberative-process rationales for *Chevron's* delegation theory, though our findings do shed some additional light on those rationales. Instead, using the most comprehensive database of its kind, the Article aims to assess the bases of political accountability and uniformity by assessing *Chevron's* effectiveness in constraining partisanship in judicial decisionmaking. These areas are ripe for further empirical, normative, and theoretical development.

## II. PRIOR *CHEVRON* EMPIRICAL STUDIES

By expressly grounding *Chevron* deference in notions of agencies' political accountability and expertise, *Chevron* seeks to divorce judges' individual policy preferences from decisional outcomes. But should one expect *Chevron* to succeed in its objective? The answer depends upon which one of two key theories of judicial behavior

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100. *Id.*

101. *Id.* at 48 fig.9.

prevails. Under the legal model, *Chevron* should succeed because judges will apply neutral deference and statutory-interpretation principles—all of which are external to the judges' policy preferences—to reach uniform results.<sup>102</sup> Contrary to the legal model and in support of the attitudinal model,<sup>103</sup> numerous empirical studies have found that circuit judges' policy preferences significantly predict judicial behavior in various contexts,<sup>104</sup> even if external factors limit judges from achieving preferred policy outcomes in some cases.<sup>105</sup> Prior empirical findings on *Chevron* deference in the courts of appeals specifically support the attitudinal model and suggest that *Chevron* has largely failed in separating judicial policy preferences from case outcomes.

Perhaps the best known of these studies is Frank Cross and Emerson Tiller's twenty-year-old study of approximately 170 D.C. Circuit cases decided between 1991 and 1995 that cited *Chevron*.<sup>106</sup> The authors found strong evidence of policy convergence between judicial policy preferences and case outcomes. More specifically, they concluded that a "panel is 31% more likely to defer (that is, follow [*Chevron*]) when its policy preferences are consistent with the agency's policies than when they are not."<sup>107</sup>

Later empirical work that also considered *Chevron* outcomes supports the attitudinal model. Thomas Miles and Cass Sunstein considered more than 200 published *Chevron* decisions decided between 1990 and 2004 from the courts of appeals that reviewed statutory interpretations from two agencies: the EPA and the National Labor Relations Board ("NLRB").<sup>108</sup> They chose the EPA and NLRB because

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102. See Frank B. Cross, *Decisionmaking in the U.S. Circuit Courts of Appeals*, 91 CALIF. L. REV. 1457, 1462 (2003) ("This model reflects the theory of judicial decisionmaking commonly taught in law school: judicial decisions are the product of impartial, reasoned analysis grounded in accepted sources of authority."); Jason J. Czarnezki & William K. Ford, *The Phantom Philosophy? An Empirical Investigation of Legal Interpretation*, 65 MD. L. REV. 841, 847–48 (2006).

103. See, e.g., JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 86 (2002); Czarnezki & Ford, *supra* note 102, at 847–48.

104. See, e.g., LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1998); VIRGINIA A. HETTINGER, STEFANIE A. LINDQUIST & WENDY L. MARTINEK, *JUDGING ON A COLLEGIAL COURT: INFLUENCES ON FEDERAL APPELLATE DECISION MAKING* (2006); Ryan C. Black & Christina L. Boyd, *US Supreme Court Agenda Setting and the Role of Litigant Status*, 28 J.L. ECON. & ORG. 286 (2012); Gregory C. Sisk, Michael Heise & Andrew P. Morriss, *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377, 1388–89 (1998) (listing prior studies that have supported or not supported the attitudinal model); Sunstein et al., *supra* note 10, at 318–25 (finding support for the attitudinal model in nine legal subject matters, including discrimination, campaign finance, and environmental regulation).

105. See Staudt, *supra* note 61, at 669.

106. Cross & Tiller, *supra* note 8, at 2168.

107. *Id.* at 2171.

108. See Miles & Sunstein, *supra* note 10, at 825. Miles and Sunstein also considered all *Chevron* decisions of the Supreme Court from 1989 to 2005. See *id.* They found that conservative Justices were 30% more likely to uphold conservative agency interpretations than liberal

they were “two important agencies known for producing politically contentious decisions.”<sup>109</sup> They found that the “validation rates [for agency interpretations] of the judges of each party ris[e] when the content of the agency decision is closer to their political preference.”<sup>110</sup>

Orin Kerr likewise found evidence of the attitudinal model in his study of all published courts of appeals decisions that applied the *Chevron* framework from 1995 through 1996.<sup>111</sup> He found “a tendency for Republican and Democratic judges to reach results consistent with their political ideologies in certain areas.”<sup>112</sup> More specifically, he found that Republican and Democratic appointees treated some claims differently: entitlement claims (with Republican appointees upholding agency denials 100% of the time and the latter upholding denials only 40% of the time); immigration claims (with Republican appointees siding with the government 71% of the time compared to 42% for Democratic appointees); and economic-regulation claims (with Democratic appointees upholding agency regulation 92% of the time compared to 68% for Republican appointees).<sup>113</sup>

It may be that circuit judges’ behavior depends not only on their own preferences but also on the composition of the panel and collegial effects. As Jonathan Kastellec notes, “[C]ollegial politics can play a large role in shaping judicial decision making—in many cases, a judge’s vote depends not just on where she stands, but with whom she sits.”<sup>114</sup> Recent empirical studies have found strong evidence to support this.<sup>115</sup>

When it comes to *Chevron* deference, it seems likely that the partisan composition of the judicial panel should affect the operation of

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interpretations and that liberal Justices were 27% more likely to uphold liberal agency interpretations than conservative ones. *See id.* at 826. In other words, they concluded that “the *Chevron* framework is not having the disciplining effect that it is supposed to have.” *Id.* Because our focus is on the courts of appeals and not the Supreme Court, we do not discuss their Supreme Court findings in detail here.

109. *Id.* at 848.

110. *Id.* at 851. Jason Czarnezki reported similar results after he considered courts of appeals decisions that cited *Chevron* and concerned environmental law between 2003 and 2005. *See* Jason J. Czarnezki, *An Empirical Investigation of Judicial Decisionmaking, Statutory Interpretation, and the Chevron Doctrine in Environmental Law*, 79 U. COLO. L. REV. 767, 784–85 (2008). He confirmed “that judges vote in their perceived ideological direction.” *Id.* at 770.

111. Orin S. Kerr, *Shedding Light on Chevron: An Empirical Study of the Chevron Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REG. 1, 4–5, 18–19 (1998).

112. *Id.* at 39.

113. *Id.* at 39–40.

114. Jonathan P. Kastellec, *Hierarchical and Collegial Politics on the U.S. Courts of Appeals*, 73 J. POL. 345, 349 (2011).

115. *See, e.g.*, SUSAN B. HAIRE & LAURA P. MOYER, DIVERSITY MATTERS: JUDICIAL POLICY MAKING IN THE U.S. COURTS OF APPEALS (2015); Kastellec, *supra* note 114; Sunstein et al., *supra* note 10; *see also* Christina L. Boyd, Lee Epstein & Andrew D. Martin, *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389 (2010).

preference-based voting, with all-Democratic and all-Republican panels demonstrating more political behavior than mixed partisan panels. Sunstein, Schkade, Ellman, and Sawicki argue that this phenomenon is the product of group polarization or, in other words, the idea that “[d]eliberating groups of like-minded people tend to go to extremes.”<sup>116</sup> By contrast, a panelist with opposing political preferences can serve as a “whistleblower,” threatening to “expose the majority’s manipulation or disregard of the applicable legal doctrine.”<sup>117</sup> This threat may prevent the extreme attitudinal behavior that would otherwise be present with a homogeneous panel.

Cross and Tiller found that the presence of a “whistleblower” on the panel—that is, a judge who does not share the majority’s presumed policy preference—did indeed affect judicial behavior. In their study, unified panels deferred to an “agency only 33% . . . of the time when the policy outcomes that would have resulted from adhering to doctrine appeared inconsistent with the panel’s political preferences.”<sup>118</sup> Split panels, in contrast, deferred to an agency in similar circumstances 62% of the time. Accordingly, it was “almost twice as likely that [mixed panels would follow doctrine] when doctrine works against the partisan policy preferences of the court majority” than when the panels were unified.<sup>119</sup> Their whistleblower results, however, were only marginally significant (at the  $p=0.10$  level).<sup>120</sup>

The Miles and Sunstein *Chevron* study found similar evidence of the moderating effects of mixed partisan panels. According to the Miles and Sunstein results, circuit judges who sit on unified partisan panels (i.e., panels with either three Republican or three Democratic appointees) voted to uphold agency interpretations that matched the judge’s presumed policy preferences 32% to 40% more often than agency interpretations that did not match.<sup>121</sup> But when the panels were not unified along partisan lines, the circuit judges’ political behavior moderated significantly.<sup>122</sup>

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116. CASS R. SUNSTEIN, DAVID SCHKADE, LISA M. ELLMAN & ANDRES SAWICKI, ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY 71 (2006).

117. Cross & Tiller, *supra* note 8, at 2156.

118. *Id.* at 2172.

119. *Id.*

120. *See id.*

121. Miles & Sunstein, *supra* note 10, at 861–62.

122. *Id.* at 863–65.



## III. OVERVIEW OF OUR EMPIRICAL STUDY

Based on these prior studies concerning *Chevron* in the federal courts of appeals, we would expect two key findings in our more comprehensive inquiry. First, we would expect, consistent with the attitudinal model, that judges' decisions will align in a statistically significant way with their presumed policy preferences. Second, we would expect "whistleblower" effects that dampen the effect of ideological majorities on mixed panels from voting consistently with their policy preferences.

## A. Study Design, Methodology, and Dataset

To analyze our research questions of interest, we utilize Barnett and Walker's recently collected data.<sup>123</sup> This dataset contains federal circuit court decisions from 2003 to 2013 that review agency statutory interpretations. The data include all published opinions from three-judge panels that cite and discuss *Chevron*<sup>124</sup> and/or *Skidmore*<sup>125</sup> and proceed with judicial review of an agency's statutory interpretation.<sup>126</sup> The cleaned dataset includes 1,613 observations of judicially reviewed statutory interpretations within 1,381 unique opinions (meaning that a single judicial decision may contain more than one agency interpretation subject to judicial review).<sup>127</sup> Each interpretation was coded for nearly forty variables.<sup>128</sup> Many of those variables closely

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123. Barnett & Walker, *supra* note 12.

124. To find decisions related to *Chevron* deference, Barnett and Walker searched Westlaw Next's federal appellate cases database for "Chevron" along with relevant terms such as "agency," "order," "ALJ," "rule," and "formal adjudication." Barnett & Walker, *supra* note 12, at 22 & n.141. The authors then excluded extraneous decisions like those that were unpublished, not issued in the federal circuit courts, or did not ultimately involve a court's review of an agency's interpretation of a statute. *Id.* at 22–24, 24 n.148. For a complete description of their study design and methods, see Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts: The Codebook Appendix*, 116 MICH. L. REV. ONLINE 1 (2017) [hereinafter Barnett & Walker, *Codebook Appendix*]. For a discussion of methodological limitations and actions taken to mitigate those limitations, see Barnett & Walker, *supra* note 12, at 25–27.

125. Barnett and Walker followed similar searching and culling procedures to find additional relevant circuit court decisions that cited *Skidmore* but did not cite *Chevron*. Barnett & Walker, *supra* note 12, at 26.

126. The Barnett and Walker data-collection design leaves open the unavoidable possibility that additional relevant published circuit court opinions exist that cite neither *Chevron* nor *Skidmore*. See *id.*

127. In the empirical analyses below, we exclude 38 cases that were decided en banc. These decisions provide a very distinct, noncomparable judicial decisionmaking environment relative to traditional three-judge panel circuit court cases. See, e.g., Micheal W. Giles, Virginia A. Hettinger, Christopher Zorn & Todd C. Peppers, *The Etiology of the Occurrence of En Banc Review in the U.S. Court of Appeals*, 51 AM. J. POL. SCI. 449 (2007) (finding that the granting of rehearing en banc is important but also rare and varied across circuits).

128. See Barnett & Walker, *Codebook Appendix*, *supra* note 124, at 7.

tracked the variables in the leading study by William Eskridge and Lauren Baer of how the Supreme Court applies the *Chevron* doctrine and otherwise reviews agency statutory interpretation.<sup>129</sup>

As most germane here, our analysis frequently requires that we subset the data to allow for separate focus on cases in which the agency interpreted the relevant statute in a liberal direction (*Liberal Agency Interpretation*) and cases in which the agency interpreted the statute in a conservative direction (*Conservative Agency Interpretation*).<sup>130</sup> Specifically, largely tracking Eskridge and Baer's methodology for coding the ideological valence of interpretations, we coded agency interpretations as conservative when they favor interests of parties like employers, alleged discriminators in civil rights cases, tax collectors, criminal prosecutors, and companies accused of environmental pollution. Alternatively, if the agency favored the interests of parties like civil rights plaintiffs, debtors, employees, immigrants, and taxpayers, we coded the agency interpretation as liberal. In the statistical analyses focused on divided *Liberal Agency Interpretation* and *Conservative Agency Interpretation*, we exclude the 126 cases where the agency interpretations are neutral or ideologically mixed. The resulting data with clear liberal or conservative agency interpretations includes 1,449 observations within 1,252 unique opinions.

### 1. Dependent Variables

With these data in hand, we can turn to an assessment of what explains variation in our outcomes of interest—i.e., our dependent variables.<sup>131</sup> We focus primarily on three dependent variables in our statistical and descriptive analyses: *Circuit-Agency Agreement*, *Unambiguous Statute*, and *Legal Factor Reliance*.

*Circuit-Agency Agreement* captures whether the reviewing circuit court rules in favor of the agency's statutory interpretation. It is coded as 1 if the circuit court favors the interpretation and 0 if it rules against the agency's interpretation.

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129. William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083 (2008).

130. *Id.* at 1205–06. Their Appendix provides full details on the coding of this variable. Unlike Eskridge and Baer, we added trade decisions that favored domestic industry to liberal interpretations. Likewise, we added to conservative interpretations trade decisions that favored foreign industry and instances in which companies accused of polluting the environment or violating business-regulating laws prevailed. Barnett & Walker, *supra* note 12, at 24 n.150.

131. See, e.g., LEE EPSTEIN & ANDREW D. MARTIN, AN INTRODUCTION TO EMPIRICAL LEGAL RESEARCH 35–37 (2014) (defining variables); Christina L. Boyd, *In Defense of Empirical Legal Studies*, 63 BUFF. L. REV. 363, 365–71 (2015) (reviewing best practices in empirical legal studies scholarship).

*Unambiguous Statute* focuses on the *Chevron* framework's step one and assesses whether the reviewing circuit court holds that Congress's intent on the statute's interpretation is unambiguous. If it holds that the statute is unambiguous, then the court enforces Congress's clear meaning without regard to the agency's preferences. If, however, the court finds ambiguity in the statute, it then moves to the more deferential step two of the *Chevron* inquiry to ascertain whether the agency's interpretation is a reasonable resolution of the statutory ambiguity. *Unambiguous Statute* is coded as 1 if the court finds the statute's intent unambiguous and 0 if the court finds statutory ambiguity. *Unambiguous Statute* excludes all observations where the reviewing circuit court does not engage the *Chevron* framework in its decision.

*Legal Factor Reliance* captures the legal and factual factors courts use to rationalize their decision in support of or opposition to the agency's statutory interpretation. We examine a variety of these discussed factors such as longevity of the agency's interpretation, jurisdiction and regulatory authority, and foreign affairs. The full list of individual factors is detailed in Tables 2 and 3, *infra*. For each individual factor, we code it as 1 if the court relies on or discusses the factor in its decision and 0 otherwise.

## 2. Independent Variables

We test our above-discussed theories via three key independent variables and the effects that they may have on the dependent variables. These independent variables are *Panel Ideology*, *Partisan Unified Panel*, and, in select analyses, *Chevron Deference*.

*Panel Ideology* permits the assessment of whether circuit court panels behave in ideologically motivated ways. We measure *Panel Ideology* with the widely used Judicial Common Space ("JCS") ideology scores.<sup>132</sup> JCS scores have a theoretical range from -1 (most liberal) to +1 (most conservative) and are assigned to judges based on the strong norms of senatorial courtesy in the appointment process.<sup>133</sup> *Panel*

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132. See Lee Epstein, Andrew D. Martin, Jeffrey A. Segal & Chad Westerland, *The Judicial Common Space*, 23 J.L. ECON. & ORG. 303 (2007) (comprehensively developing a JCS score for all federal judges since 1953); see also Micheal W. Giles, Virginia A. Hettinger & Todd Peppers, *Picking Federal Judges: A Note on Policy and Partisan Selection Agendas*, 54 POL. RES. Q. 623, 629–32 (2001) (describing the mechanics of the JCS score).

133. JCS scores are derived from the Poole and Rosenthal NOMINATE Common Space ideal points for judges' home-state senators and the appointing president. See generally KEITH T. POOLE & HOWARD ROSENTHAL, CONGRESS: A POLITICAL-ECONOMIC HISTORY OF ROLL CALL VOTING (1997); Keith T. Poole, *Recovering a Basic Space from a Set of Issue Scales*, 42 AM. J. POL. SCI. 954 (1998).

*Ideology* is computed as the average JCS score of all circuit court judges sitting in the majority in a case. Within our data, *Panel Ideology* ranges from -0.502 to +0.538.

*Partisan Unified Panel* captures the potential effects of a whistleblower (when assessed in combination with *Panel Ideology* and whether the agency's statutory interpretation was liberal or conservative). This variable measures whether the panel's partisanship is unified (either all Republican-appointed judges or all Democrat-appointed judges) or divided (panels with two partisan allies and one outsider).<sup>134</sup> *Partisan Unified Panel* is coded dichotomously as 1 when the panel's partisanship is unified and 0 if it is divided. Within the data, approximately 26% of the panels are composed of unified partisan judges.

*Chevron Deference* captures whether the reviewing circuit court panel utilized the *Chevron* deference framework in its review or, instead, avoided applying *Chevron's* framework and applied a lower level of deference to the agency's interpretation such as the *Skidmore*-deference framework or no deference at all. *Chevron Deference* is coded dichotomously, with the variable equaling 1 when *Chevron* deference is used and 0 otherwise.<sup>135</sup> In addition to our primary theory-linked independent variables, we include additional control variables related to the cases and agencies that may affect the occurrence of the outcomes of interest. Depending on the analysis conducted, these control variables may include:

*Independent Agency* assesses whether the interpreting agency was an executive branch agency or independent. *Independent Agency* is coded as 1 if the agency is independent and 0 if it is an executive agency.<sup>136</sup>

*Agency's Interpretive Format* captures the agency's format or process for engaging in statutory interpretation by using three separate

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134. An alternative way to measure potential whistleblowing effects is with *Panel Variance*. Calculated as the absolute distance between the most liberal and conservative judges on a panel, *Panel Variance* is measured using the panelists' JCS scores. The variable ranges from 0 to 1.052 in the data. Observations with a 0 score indicate that all judges on the panel have identical JCS scores. In the statistical modeling presented below, alternating *Panel Variance* for *Partisan Unified Panel* has no statistical or substantive effect on the results presented.

135. Throughout, when we say that the panel or judge used or applied *Chevron* deference, we mean that the panel or judge used the *Chevron* two-step framework. Likewise, if we say that a panel or judge used or applied *Skidmore* deference, we mean the multifactor framework. In neither case do we mean, without more, that the panel or judge agreed with the agency.

136. The coding for this variable mirrors that used in Barnett and Walker, *supra* note 12, at 56 n.248. Specifically, relying on the Administrative Conference of the United States' *Sourcebook of the United States Executive Officers*, they categorized agencies as independent if the head of the agency could be removed only for cause or if the agency was traditionally categorized as an independent regulatory commission. See *id.*

dichotomous variables: *Rulemaking*, *Adjudication*, and *Informal Interpretation*. An agency's format is coded as *Rulemaking* if the agency uses formal "on the record" rulemaking, informal "notice-and-comment" rulemaking, or Federal Energy Regulatory Commission ("FERC") rulemaking proceedings to conduct its statutory interpretation. An agency's format is coded as using *Adjudication* if its statutory interpretations arise from adversarial hearings or adjudications. Finally, an agency's format is coded as using *Informal Interpretation* if it uses settings such as settlements, licensing or permit decisions, or agency manual or policy statements to interpret statutes that do not fit within our *Rulemaking* or *Adjudication* variables.

*Agency Subject Matter* controls, with individual dichotomous variables, for the dominating subject areas within the data. These subject areas include Immigration (29%), Environment (14%), Entitlement Programs (9%), and Employment (6%). Subject areas not within these categories are captured in a baseline "Other" subject matter variable. We generally expect more judicial deference to agencies when the subject matter under consideration has low political salience or involves scientific or technical expertise.

*Longstanding Interpretation* captures instances where the reviewing circuit court notes the presence of a longstanding and stable agency position on statutory interpretation. This variable is coded dichotomously, with its value at 1 when the court explicitly mentions this longstanding agency position and 0 otherwise, including when the court is silent. Of note, this control variable is present in our statistical modeling only when the court is using *Chevron* deference and we are assessing whether the reviewing circuit panel finds a statute to be unambiguous or ambiguous. We expect that for statutes with a longstanding agency interpretation, the statute is likely ambiguous and leaves room (now and historically) for the agency to provide its own interpretation.

*Year*, following Cross and Tiller, is coded as a continuous count variable, starting at 0 for the first year within our data and proceeding to 10 by 2013, the final year in our data.<sup>137</sup> As in Cross and Tiller's study, this variable "is intended to capture the possibility that the *Chevron* doctrine has grown weaker" or stronger over time.<sup>138</sup>

*Circuit* controls for the circuit court deciding the case by including a series of dichotomous variables—one for each circuit court—within the statistical modeling. A circuit court's variable is coded as 1

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137. See Cross & Tiller, *supra* note 8, at 2170.

138. *Id.*

if the case was heard within that circuit and 0 if the case was not heard in that circuit.

### *B. 10,000-Foot View of Chevron in the Circuit Courts*

Descriptive analysis of the Barnett and Walker data provides important insights into administrative law, statutory interpretation, and judicial review in the federal circuit courts.<sup>139</sup> To this end, Figure 1 plots key information about the direction of agency statutory interpretations and how those interpretations are then treated by reviewing circuit courts. As the figure's first vertical gray box reveals, about 29.5% (n=464) of the statutory interpretations in the data were made in a liberal direction. Another 62.5% (n=985) of the statutory interpretations were in the conservative direction. The final 8% of the statutory interpretations in the data were in a neutral ideological direction or contained mixed interpretations (partially liberal, partially conservative).

Via the vertical black lines, Figure 1 also shows how these liberal, conservative, and neutral/mixed interpretations were treated by the reviewing circuit court. Unlike the wide variation in the direction of the agency's interpretation of the statutes, there is a high degree of consistency in the overall response of circuit courts to the agency interpretations. For liberal statutory interpretations, the reviewing courts favor 73.9% of them. For the conservative interpretations, reviewing circuit courts favor about 69% of them. And for the neutral/mixed interpretations, the circuit courts favor approximately 74.5% of them.

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139. The descriptive analysis of the data that we provide here follows that provided in Barnett and Walker, *supra* note 12. However, the statistics reported here include the full dataset, including the cases that cite *Skidmore* but not *Chevron*. By comparison, the vast majority of the statistics reported in Barnett and Walker exclude the *Skidmore*-only cases.

FIGURE 1: IDEOLOGICAL NATURE OF AGENCY INTERPRETATION, COMPARED TO AGENCY-WIN RATES IN CIRCUIT COURTS

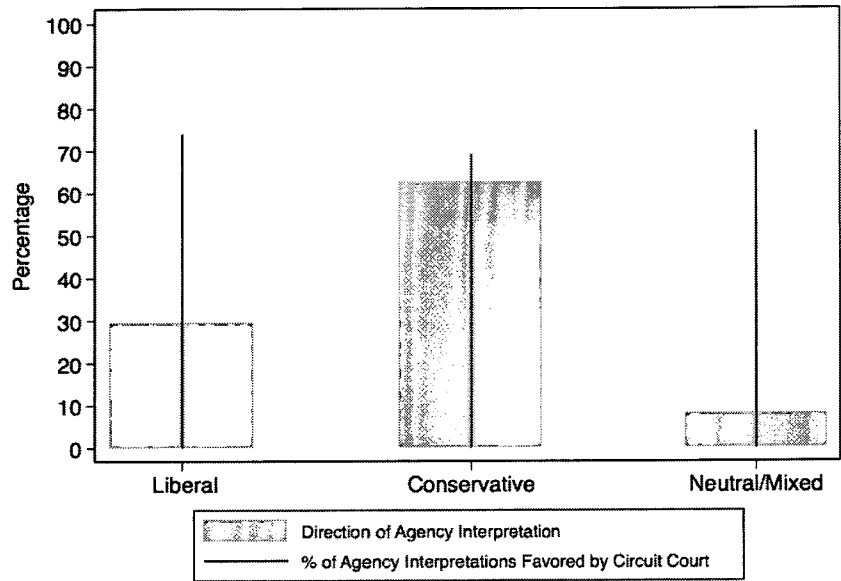


Figure 2 reports descriptive information on the frequency that circuit courts invoke *Chevron* deference in their review of agency statutory interpretations. *Chevron* deference is utilized in about 72.5% of the statutory interpretation judicial reviews in the dataset. That means that the circuit courts rely on less deferential standards (or no deference at all) in about 27.5% of the observations in the data. As the vertical black line in Figure 2 indicates, in cases with *Chevron* deference, the circuit courts favor approximately 77% of interpretations. By contrast, that number falls below 55% for circuit court cases reviewing statutory interpretations with a non-*Chevron* deference standard.

FIGURE 2: AGENCY-WIN RATES IN CIRCUIT COURTS BASED ON DEFERENCE DOCTRINE APPLIED AND *CHEVRON* STEPS

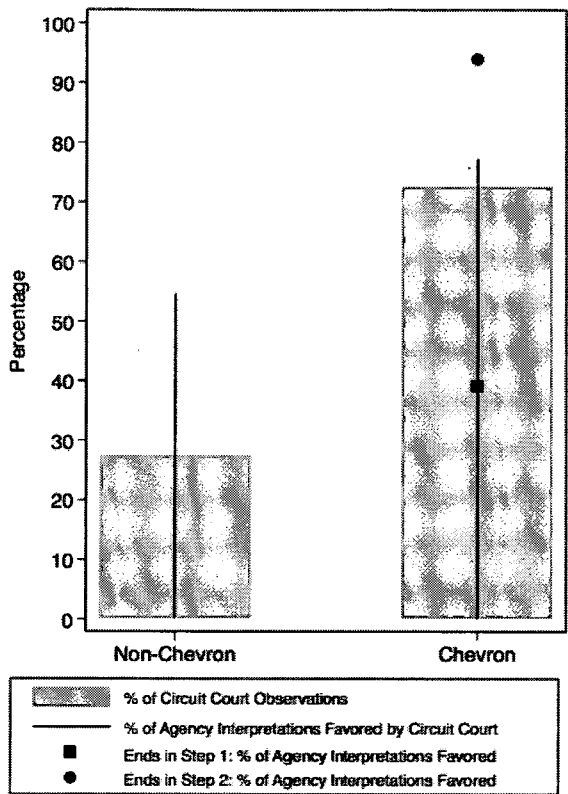


Figure 2 reports one additional descriptive detail on cases with *Chevron* deference. Specifically, it highlights the percent of circuit decisions that favor the agency's interpretation based on whether the analysis stops at *Chevron* step one or, instead, step two. For observations stopping at step one (i.e., those where the court has determined the statute is unambiguous), the courts defer to the agency just under 39% of the time (visible with the black square in Figure 2). By contrast, for interpretations in which the court proceeds to step two, the reviewing courts defer to the agency's interpretation nearly 94% of the time (as represented by the black circle in Figure 2).

IV. THE POLITICS OF *CHEVRON* AND JUDICIAL BEHAVIOR

To explore the political dynamics of *Chevron* deference and judicial behavior, we break our findings into three separate inquiries. First, we explore the effects of panel ideology on agency-win rates. Second, we



detail the factors the panels expressly relied on to rationalize their decisions, including *Chevron's* theoretical foundations of congressional delegation, agency expertise, and agency deliberative process discussed in Section I.B. Third, we briefly summarize the effects of panel ideology on the panel's decision whether to apply the *Chevron* deference framework at all.<sup>140</sup>

#### A. *The Effects of Panel Ideology on Agency-Win Rates*

In assessing our first research question—which factors predict whether the circuit court panel agrees with the agency's statutory interpretation—we focus primarily on two potential explanations: *Panel Ideology* and *Chevron Deference*. To estimate the effects that these variables have on the dependent variable, *Circuit-Agency Agreement*, we utilize a logistic regression model with robust standard errors clustered on the case citation.<sup>141</sup> Because of the ideological nature of the inquiries in this area, we separately assess *Circuit-Agency Agreement* for cases where there was a *Liberal Agency Interpretation* or a *Conservative Agency Interpretation*.

The attitudinal theory would anticipate that as *Panel Ideology* gets more liberal, the circuit panel would be more likely to agree with an agency's liberal interpretation and disagree with an agency's conservative interpretation. Likewise, when the *Panel Ideology* gets more conservative, the circuit panel would be more likely to agree with an agency's conservative interpretation and disagree with the agency's liberal interpretation.

But, as detailed above, *Chevron* was designed to increase deference to agency statutory interpretations and rein in the ideological tendencies in the judicial review of agency statutory interpretations. As such, if the legal model holds true we should expect that the use of *Chevron Deference* (as opposed to a less deferential standard of review such as *Skidmore* or *de novo*) would lead to a much higher rate of agreement with an agency's statutory interpretation across all cases. Similarly, many would anticipate that *Chevron Deference* will lead to less ideological behavior among judges than less deferential standards.

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140. These findings are explored in much greater detail in Barnett, Boyd & Walker, *supra* note 15.

141. Clustering by case citation accounts for the lack of independence present from two or more reviewed instances of statutory interpretation within a single circuit panel's opinion-citation. Failure to account for this will result in standard errors that will be inaccurate. By clustering, our models yield robust standard errors (Huber-White standard errors) that account for the violation of independence. See J. SCOTT LONG & JEREMY FREESE, *REGRESSION MODELS FOR CATEGORICAL DEPENDENT VARIABLES USING STATA 86* (2d ed. 2006).

In other words, the expectation is that the effect of *Panel Ideology* is conditional on the use of *Chevron Deference*. Statistically testing this potential conditional effect of *Chevron Deference* in curbing the political behavior of judges in their decision on *Circuit-Agency Agreement* requires an interaction between *Chevron Deference* and *Panel Ideology*.

Table 1 reports the results of our logistic regression of the effects of *Panel Ideology*, *Chevron Deference*, the interaction of *Panel Ideology* and *Chevron Deference*, and additional control variables on *Circuit-Agency Agreement*. Positive values in the reported coefficients indicate that a variable increases the likelihood of *Circuit-Agency Agreement*, and negative values in those coefficients indicate that a variable increases the likelihood of disagreement with the agency's statutory interpretation (i.e., decreases the likelihood of *Circuit-Agency Agreement*).

The modeling provides strong evidence for our expectation concerning *Panel Ideology*, *Chevron Deference*, and the interaction of the two. First, *Panel Ideology* is positive and significant in the *Conservative Agency Interpretation* data and negative and significant in the *Liberal Agency Interpretation* data. This indicates that overall in the data, conservative panels are more likely to agree with conservative statutory interpretations and less likely to agree with liberal ones, and liberal panels are less likely to agree with conservative statutory interpretations and more likely to agree with liberal ones. *Chevron Deference* also has a notable unconditional effect on the likelihood of agreeing with the agency's interpretation. In both models in Table 1, *Chevron Deference* has a statistically significant and positive effect on *Circuit-Agency Agreement*.

TABLE 1: LOGISTIC REGRESSION OF IDEOLOGY AND DEFERENCE EFFECTS ON CIRCUIT-AGENCY AGREEMENT

	Liberal Agency Interpretation	Conservative Agency Interpretation
Panel Ideology	-2.816* (1.01)	1.490* (0.63)
<i>Chevron</i> Deference	1.478* (0.33)	0.953* (0.19)
Panel Ideology X <i>Chevron</i> Deference	1.291 (1.14)	-0.506 (0.73)
Partisan Unified Panel	0.272 (0.33)	-0.058 (0.18)
Independent Agency	-0.393 (0.34)	0.692** (0.38)
Rulemaking	-1.076* (0.39)	-0.541* (0.23)
Informal Interpretation	-0.428 (0.36)	-0.412 (0.28)
Subject Matter: Environment	0.230 (0.35)	-0.073 (0.26)
Subject Matter: Employment	-0.669** (0.39)	0.977** (0.52)
Subject Matter: Immigration	-0.535 (0.73)	-0.324 (0.26)
Subject Matter: Entitlements	1.278 (0.89)	0.312 (0.30)
Year	0.007 (0.03)	0.001 (0.02)
Circuit Controls	Included	Included
Constant	1.066* (0.51)	0.124 (0.38)
Observations	464	985

Logistic regression estimates for whether the reviewing panel decides in favor of the agency's statutory interpretation. Baseline values include Adjudication (for agency format) and Other (for subject matter). Standard errors (reported in parentheses) are robust and clustered on the individual case. \*\* p<0.10, \* p<0.05.

The interactive effect between *Panel Ideology* and *Chevron Deference* is also strong and behaves as expected, indicating that while there is a lingering ideological effect in judicial behavior even when *Chevron Deference* is used, the size and power of that ideological effect is very dependent on the deference regime used by the judges.

Interactive effects like these are difficult and misleading to interpret using a regression table.<sup>142</sup> Accordingly, Figures 3, 4, 5, 6, 7, and 8 provide graphical visualizations of the effects present from this interaction for the *Liberal Agency Interpretation* data and *Conservative Agency Interpretation* data, respectively. Each figure presents the probability that a reviewing circuit court will agree with the agency's interpretation (the y-axis within each figure) across the full range of *Panel Ideology* values (the x-axis within each figure, moving from most liberal to most conservative), with 95% confidence around the plotted mean probability and other variables held at their mean and modal values. For both the liberal and conservative agency interpretation data, the figures are presented based on the two values of *Chevron Deference*: one for the instances where the court uses *Chevron* deference and another where the court uses a less deferential standard of review. And for both liberal and conservative agency interpretations, we also provide separate plots (Figures 5 and 8) estimating the difference between the probability of *Circuit-Agency Agreement* between when *Chevron Deference* is and is not used, with the 95% confidence interval plotted around that difference.<sup>143</sup>

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142. Statistical and substantive effects stemming from interacted variables in a logistic regression model can only be fully and properly assessed through postestimation simulations. See J. SCOTT LONG, REGRESSION MODELS FOR CATEGORICAL AND LIMITED DEPENDENT VARIABLES 34–84 (1997). Additionally, an interaction effect “cannot be evaluated simply by looking at the sign, magnitude, or statistical significance of the coefficient on the interaction term when the model is nonlinear.” Chunrong Ai & Edward C. Norton, *Interaction Terms in Logit and Probit Models*, 80 ECON. LETTERS 123, 129 (2003).

143. Because overlapping confidence intervals for mean point predictions (e.g., by comparing the confidence intervals in Figure 3 and Figure 4) do not indicate that there is no statistically significant difference between two quantities, we estimate and plot the difference in the probability, with its own mean and confidence interval in Figures 3 and 5. See, e.g., Peter C. Austin & Janet E. Hux, *A Brief Note on Overlapping Confidence Intervals*, 36 J. VASCULAR SURGERY 194 (2002).

FIGURE 3: PREDICTED PROBABILITIES OF CIRCUIT-PANEL AGREEMENT WITH AGENCY'S LIBERAL STATUTORY INTERPRETATION WHEN *CHEVRON*-DEFERENCE FRAMEWORK APPLIES

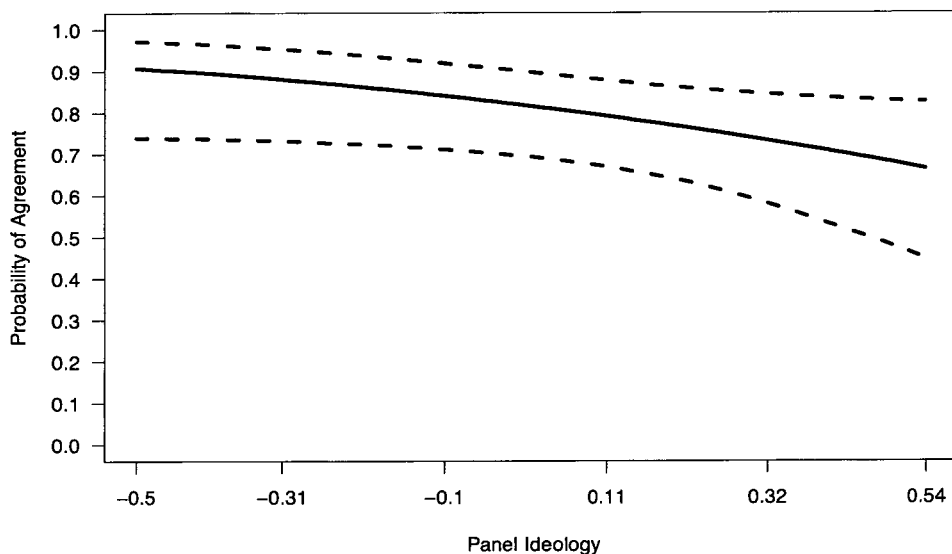


FIGURE 4: PREDICTED PROBABILITIES OF CIRCUIT-PANEL AGREEMENT WITH AGENCY'S LIBERAL STATUTORY INTERPRETATION WHEN *CHEVRON*-DEFERENCE FRAMEWORK DOES NOT APPLY

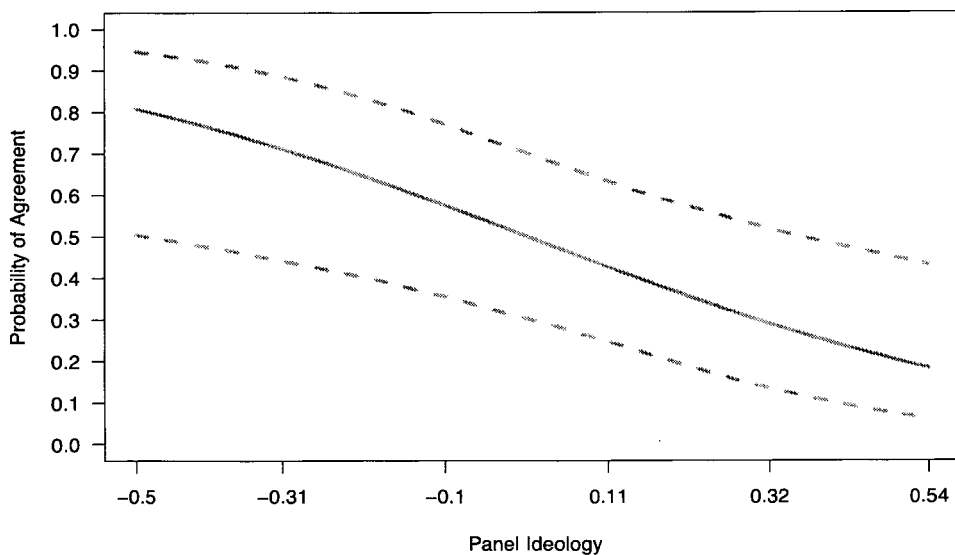
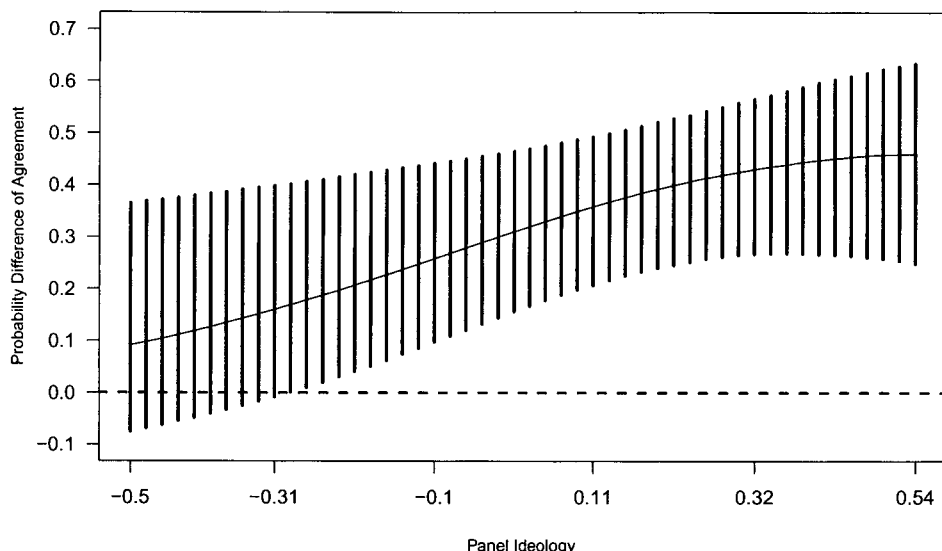


FIGURE 5: DIFFERENCE IN THE PREDICTED PROBABILITIES OF CIRCUIT-PANEL AGREEMENT WITH AGENCY'S LIBERAL STATUTORY INTERPRETATION BETWEEN WHEN *CHEVRON*-DEFERENCE FRAMEWORK APPLIES AND WHEN IT DOES NOT APPLY



We focus first on Figures 3 and 4, where the plots depict the predicted probabilities that circuit courts will agree with the agency's interpretation when that agency has a liberal interpretation of the statute.<sup>144</sup> When non-*Chevron* deference is being used, Figure 4 indicates that the most liberal panels agree with the agency's statutory interpretation about 81% of the time, and the most conservative panels agree with the agency's statutory interpretation as little as 18% of the time. When panels use *Chevron* deference (Figure 3), the most liberal panels agree with the agency's statutory interpretation about 91% of the time, and the most conservative panels agree with the agency's statutory interpretation about 66% of the time. As Figure 5 further indicates, the difference in the probability of agreement with an agency's liberal statutory interpretation based on whether *Chevron* deference is used is statistically significant (i.e., its confidence intervals do not intersect with 0) across nearly the full range of *Panel Ideology*.<sup>145</sup> At the extreme, with a very conservative reviewing panel, there is as

144. In these and all other estimated predicted probabilities within the Article, we set other variable values at their means and modes, as appropriate.

145. The plotted difference is statistically significant when its 95% confidence intervals do not intersect with 0. In Figure 5, that includes all cases decided by panels with ideology scores to the right of -0.28 (i.e., nonextreme liberal).

much as a 46% difference between agreement rates for when the panel uses *Chevron* deference or a less deferential standard.

Figures 6 and 7 provide similar predicted effects for conservative agency interpretations. Here, we see that when non-*Chevron* deference is being used (Figure 7), the most conservative panels agree with the agency's interpretation as little as 60% of the time, and the most liberal panels agree with the agency's statutory interpretation about 24% of the time. However, when panels use *Chevron* deference (Figure 6), the most conservative panels agree with the agency's interpretation about 74% of the time, and the most liberal panels agree with the agency's statutory interpretation about 51% of the time. As revealed in Figure 8, the differences in agreement probabilities between *Chevron* and non-*Chevron* deference are statistically significant (i.e., different from 0) across nearly the entire political spectrum of judges, with only the most conservative panels (with ideologies more conservative than +0.45) behaving indistinguishably under *Chevron* and non-*Chevron* deference.

FIGURE 6: PREDICTED PROBABILITIES OF CIRCUIT-PANEL AGREEMENT WITH AGENCY'S CONSERVATIVE STATUTORY INTERPRETATION WHEN *CHEVRON*-DEFERENCE FRAMEWORK APPLIES

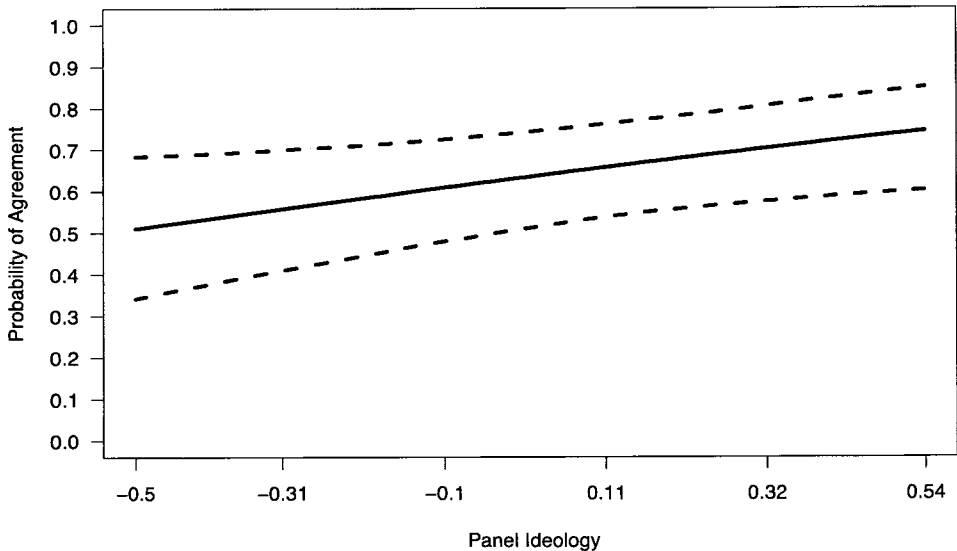


FIGURE 7: PREDICTED PROBABILITIES OF CIRCUIT-PANEL AGREEMENT WITH AGENCY'S CONSERVATIVE STATUTORY INTERPRETATION WHEN *CHEVRON*-DEFERENCE FRAMEWORK DOES NOT APPLY

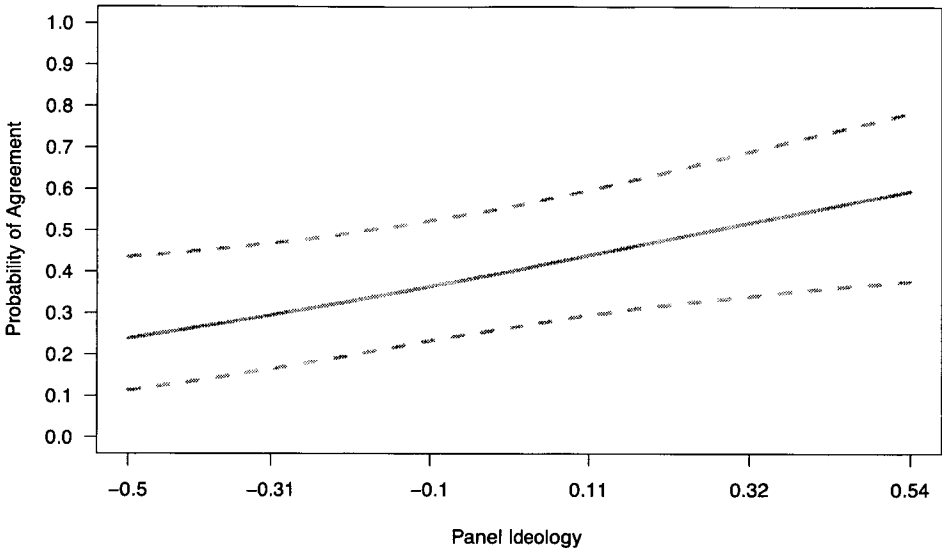
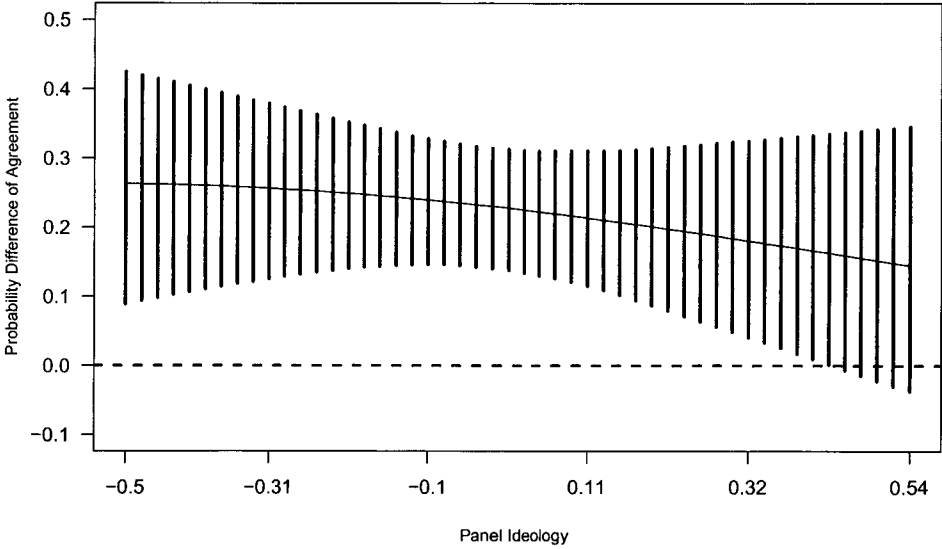


FIGURE 8: DIFFERENCE IN THE PREDICTED PROBABILITIES OF CIRCUIT-PANEL AGREEMENT WITH AGENCY'S CONSERVATIVE STATUTORY INTERPRETATION BETWEEN WHEN *CHEVRON*-DEFERENCE FRAMEWORK APPLIES AND WHEN IT DOES NOT APPLY





Overall, then, these statistical results provide two important insights. First, *Chevron* deference markedly curbs ideological behavior among reviewing circuit judges. We observe much more agreement among *Chevron*-applying judges with agencies' statutory interpretations than we do with less deferential regimes like *Skidmore* or de novo review. This ideology curbing is particularly apparent in the face of judicial preferences that are not consistent with the agency's interpretation.

Second, less political behavior under *Chevron* deference does not mean a complete absence. Judges applying *Chevron* deference are still much less likely to agree with an agency statutory interpretation that does not align with their political preferences than an agency interpretation that is politically aligned with the judges' preferences. This is true for both liberal and conservative agency interpretations and liberal and conservative judges. Liberal judges are much less likely to adopt a conservative agency interpretation than conservative judges are, and conservative judges are much less likely to adopt a liberal agency interpretation than liberal judges are. Overall for liberal agency interpretations, you still see as much as a 25% difference in the likelihood of the court agreeing with the agency across the ideological spectrum when that court applies *Chevron* deference. That difference is as high as 63% when the court applies a less deferential standard than *Chevron*. And for conservative agency interpretations, there is as much as a 23% difference in the likelihood of agreeing with the agency across the ideological spectrum when applying *Chevron* deference. That difference is as high as 36% when the reviewing court applies a less deferential standard of review.

Regarding the control variables in the models, *Rulemaking* consistently has a negative and significant effect, indicating that circuit panels are less likely to agree with agency interpretations emerging from the rulemaking process than adjudications (the model's baseline). Also significant across both models in Table 1 is *Subject Matter: Employment*. It is negative for the liberal interpretations (panels are, on average, less likely to adopt these interpretations than those in other subject areas) and positive for the conservative interpretations (panels are, on average, more likely to adopt these interpretations than those in other subject areas). The variable *Partisan Unified Panel* assesses the potential for whistleblowing effects. This variable is not significant in either model, a result that we return to in much greater detail below.

B. Factors Relied on to Rationalize Decisions

In addition to the results indicating strong ideological and deference-standard effects in the likelihood of a circuit court agreeing with an agency's interpretation, we might also see differences emerge in how conservative and liberal panels or *Chevron* and non-*Chevron* deference panels rationalize their decisions. To examine descriptively whether this is the case, we detail the frequency and percentage of time that panels discuss different expressed factors in their opinions in Table 2 and Table 3. The tables' descriptive statistics are divided by *Chevron Deference*, whether the reviewing circuit court agrees or disagrees with the agency's statutory interpretation (with white cells indicating cases where the panel agrees with the agency's interpretation and gray cells indicating the opposite), and *Panel Ideology*. For ease of description, we divide *Panel Ideology* into three categories: Liberal, Moderate, and Conservative. Liberal panels are those with *Panel Ideology* scores ranging from -0.502 to -0.1009. Moderate panels have *Panel Ideology* scores from -0.1 to +0.1. And conservative panels' *Panel Ideology* scores range from +0.1009 to +0.538. The tables' reported percentages are calculated for each category (agency interpretation direction + panel ideology + deference standard).

TABLE 2: CHEVRON-DEFERENCE DECISIONS

Factors Relied on or Discussed in Decision	Liberal Panel	Moderate Panel	Conservative Panel
Longstanding and fairly stable agency position on the statutory interpretation <sup>146</sup>	40.56% (n=73)	39.72% (n=114)	38.46% (n=160)
	21.43% (n=12)	20.45% (n=18)	17.39% (n=20)
Evolving agency position on the statutory interpretation	15.56% (n=28)	13.59% (n=39)	13.46% (n=56)
	26.79% (n=15)	37.50% (n=33)	13.04% (n=15)

146. We coded the continuity of the agency interpretation as follows: (1) longstanding and fairly stable, (2) evolving (meaning that the agency had a prior inconsistent interpretation), or (3) recent (meaning that the agency had a new interpretation without having had a prior one). Continuity that is not evident from the opinion, along with missingness, are excluded from Tables 2 and 3 but can be assessed by adding within individual columns per category (e.g., for the category where there is a liberal panel and the panel agrees with the agency's interpretations, the remaining percentage is 32%). In coding continuity, Barnett and Walker did not look outside of the decision. Instead, they evaluated, among other things, whether the court referred to the continuity, the date of the regulation, and any agency precedent on point. See Barnett & Walker, *Codebook Appendix*, *supra* note 124, at 7.

Recent agency position on the statutory interpretation	11.67% (n=21)	18.47% (n=53)	16.59% (n=69)
	19.64% (n=11)	18.18% (n=16)	18.26% (n=21)
Congressional delegation questioned <sup>147</sup>	6.67% (n=12)	7.67% (n=22)	5.29% (n=22)
	5.36% (n=3)	7.95% (n=7)	6.96% (n=8)
Agency expertise (or lack thereof) <sup>148</sup>	18.89% (n=34)	15.68% (n=45)	20.91% (n=87)
	3.57% (n=2)	4.55% (n=4)	2.61% (n=3)
Rulemaking authority (or lack thereof) <sup>149</sup>	31.67% (n=57)	23.34% (n=67)	22.36% (n=93)
	8.93% (n=5)	6.82% (n=6)	4.35% (n=5)
Agency procedures (or lack thereof) <sup>150</sup>	27.22% (n=49)	22.65% (n=65)	21.39% (n=89)
	10.71% (n=6)	6.82% (n=6)	5.22% (n=6)

White shaded cells provide descriptive statistics for cases where the panel agrees with the agency's interpretation. Gray shaded cells provide descriptive statistics for cases where the panel disagrees with the agency's interpretation. Individual cell values represent the number (n=) and percentage of observations that meet the listed criteria (panel ideology, factor present, *Chevron*-deference employed, panel agrees or disagrees with agency's interpretation). Values are computed within the factor category.<sup>151</sup>

Tables 2 and 3 reveal some interesting variance in factors relied on among panels based on outcome (agreeing or disagreeing with the agency's interpretation). For example, within court decisions that favor

147. We marked as "1" those interpretations in which the parties or the court questioned if Congress had delegated authority to the agency to interpret the statute at issue. *See id.* at 8. This variable addresses whether so-called *Chevron* "step zero" is at issue, i.e., whether the predicate for *Chevron* deference—the delegation of interpretive authority to the agency—exists. *See* Merrill & Hickman, *Chevron's Domain*, *supra* note 68, at 836 (discussing *Chevron* "step zero").

148. We marked "1" for interpretations in which the court justified upholding or rejecting the agency's interpretation because of the agency's expertise or lack thereof. *See* Barnett & Walker, *Codebook Appendix*, *supra* note 124, at 12.

149. We inserted "1" for interpretations in which the court justified upholding or rejecting the agency's interpretation because of the agency's rulemaking authority or lack thereof. *See id.*

150. We inserted "1" for interpretations in which the court justified upholding or rejecting the agency's interpretation based on the kind of agency procedures that the agency used (or did not use) in promulgating its interpretation (such as formal rulemaking, notice-and-comment rulemaking, formal adjudication, etc.). *See id.* at 13.

151 To aid clarity, here is an example of how the percentages are computed: For "Rulemaking Authority (or lack thereof)," 31.67% of liberal panels that agree with the agency and apply *Chevron* deference discuss rulemaking authority. That means that 68.33% of liberal panels in that same situation do not discuss rulemaking authority.

the agency's interpretation, around 40% of the opinions indicate (expressly or by inference<sup>152</sup>) that the agency's position on the statutory interpretation is longstanding and stable.<sup>153</sup> By contrast, that number falls to around 20% of opinions for court decisions that oppose the agency's interpretation. Not surprisingly, panels that disagree with the agency's interpretation are much more likely to concern recent or evolving agency interpretations. Additionally, court decisions favoring the agency's interpretation are more likely to discuss agency expertise and rulemaking authority than those decisions disagreeing with the agency's interpretation. Notably, many of these numbers are quite stable within the type of outcome—i.e., among liberal, moderate, and conservative panels and whether they use *Chevron* deference.

Tables 2 and 3 show very little variation in relied-on factors based on the panel's ideology and the adopted deference. Based on whether the panel is using *Chevron* deference, we do see some significant jumps in how frequently the panel discusses congressional delegation (Table 3 only), agency expertise (Table 2 and Table 3), rulemaking authority (Table 2 only), and agency procedures (Table 2 and Table 3). Across panel average ideologies, conservative panels that are not using *Chevron* deference are more likely to question congressional delegation in their opinions (Table 3) than panels of other ideologies. And within opinions that ultimately disagree with the agency's interpretation, conservative panels using *Chevron* less frequently rejected evolving agency interpretations than liberal or moderate panels using *Chevron* (13% vs. 27% and 38% of opinions, respectively).

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152. Barnett and Walker coded the agency's interpretive continuity based on the court's express statements, the date of the interpretation, or other evidence within the opinion itself. The explicit or implicit reference to continuity could arise anywhere in the opinion, not necessarily in the court's discussion of the agency's interpretation. *See id.* at 7. The other factors mentioned here—such as agency expertise, congressional delegation, agency procedures, etc.—were coded only if the courts referred to them explicitly as part of their rationale for permitting or rejecting the agency's interpretation. *See id.* at 12–13.

153. It is important to note that the differences in factor reliance that we observe among panels may not be caused by the distinct behavior of different ideology panels but may, instead, be driven by differences in the underlying cases (which are not fully randomly assigned and are not randomly distributed across the circuits). *See, e.g.,* Adam S. Chilton & Marin K. Levy, *Challenging the Randomness of Panel Assignment in the Federal Courts of Appeals*, 101 CORNELL L. REV. 1, 48–50 (2015) (identifying implications of nonrandom assignment for empirical studies).

TABLE 3: NON-CHEVRON-DEFERENCE DECISIONS

Factors Relied On or Discussed in Decision	Liberal Panel	Moderate Panel	Conservative Panel
Longstanding and fairly stable agency position on the statutory interpretation	37.29% (n=22)	43.21% (n=35)	37.11% (n=36)
	20.34% (n=12)	22.81% (n=13)	22.50% (n=18)
Evolving agency position on the statutory interpretation	1.69% (n=1)	3.70% (n=3)	5.15% (n=5)
	8.47% (n=5)	15.79% (n=9)	17.50% (n=14)
Recent agency position on the statutory interpretation	11.86% (n=7)	11.11% (n=9)	10.31% (n=10)
	30.51% (n=18)	15.79% (n=9)	13.75% (n=11)
Congressional delegation questioned	6.78% (n=4)	7.41% (n=6)	13.40% (n=13)
	18.64% (n=11)	12.28% (n=7)	16.25% (n=13)
Agency expertise (or lack thereof)	22.03% (n=13)	28.40% (n=23)	30.93% (n=30)
	25.42% (n=15)	14.04% (n=8)	28.75% (n=23)
Rulemaking authority (or lack thereof)	3.39% (n=2)	11.11% (n=9)	11.34% (n=11)
	10.17% (n=6)	14.04% (n=8)	10.00% (n=8)
Agency procedures (or lack thereof)	28.81% (n=17)	34.57% (n=28)	39.18% (n=38)
	38.98% (n=23)	40.35% (n=23)	48.75% (n=39)

White shaded cells provide descriptive statistics for cases where the panel agrees with the agency's interpretation. Gray shaded cells provide descriptive statistics for cases where the panel disagrees with the agency's interpretation. Individual cell values represent the number (n=) and percentage of observations that meet the listed criteria (panel ideology, factor present, *Chevron*-deference employed, panel agrees or disagrees with agency's interpretation). Values are computed within the factor category.

### C. The Politics of Selecting the Chevron Framework

With the above empirical evidence in hand, we see that *Chevron* deference appears to significantly constrain judges' political behavior in their judicial review of statutory interpretations. This result leads to the inevitable threshold question of whether circuit panels, being aware

of *Chevron*'s intent to constrain judges, choose to invoke *Chevron* at politically convenient times.

The effects of panel ideology on a panel's decision to apply the *Chevron* deference framework is the research question that we have tackled in recent empirical work.<sup>154</sup> Using the same Barnett and Walker data from 2003 to 2013, we expected to find political behavior in circuit panels' decisions regarding which deference standard to use. In particular, we expected judges who were politically aligned with the agency's decision to be more likely to use *Chevron* to afford agencies more interpretive discretion. We anticipated that judges who were not politically aligned with the agency's interpretation would want broader judicial interpretive discretion. As such, we predicted that those panels that were not ideologically aligned with the agency's decision would be less likely to invoke *Chevron* deference in their judicial review and more likely to invoke a less deferential standard.

In regression analysis of whether the reviewing panel invokes *Chevron* deference, our empirical results were telling. When an agency's interpretation of the statute was liberal, panel ideology had no statistically meaningful effect on whether the panel invoked *Chevron* deference. However, the results did indicate an ideological effect in cases in which the agency had a conservative statutory interpretation. There, as expected, liberal circuit court panels were much less likely than conservative panels to invoke *Chevron*—with as much as a 16% difference in the probability of invoking *Chevron* across the full range of panel ideologies. That is, liberal panels are purposefully opting to avoid *Chevron* when it is politically advantageous to do so. This indicates that the substantive effects stemming from Figure 7 are even more potent than already discussed. These threshold political results, viewed together with our above-discussed results regarding the likelihood of circuit courts agreeing with an agency's interpretation based on whether they use *Chevron* deference, paint an interesting, comprehensive picture about the effects of political preferences on the judicial review of agency statutory interpretations.

## V. POLITICAL DYNAMICS AND INDIVIDUAL JUDGE BEHAVIOR

While we focus primarily on the political dynamics present within circuit panel decisionmaking, we also evaluate more closely the behavior of individual circuit court judges. Specifically, in this Part we focus on individual judges' deference to conservative and liberal agency

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154. See Barnett, Boyd & Walker, *supra* note 15.

interpretations. To do this, we recenter the Barnett and Walker circuit court data to focus on the way individual judges vote rather than on cases. With the judge-level data, we can better examine the degree of deference variation that exists within notable liberal and conservative circuit judges. Based on our panel-level results involving *Panel Ideology*, it may be that liberal judges, relatively consistently, are more likely than conservative judges to agree with liberal agency statutory interpretations (and vice versa). However, it could also be that some liberal and conservative circuit judges behave in extremely political ways, while others are consistent in the deference that they afford agency interpretations.

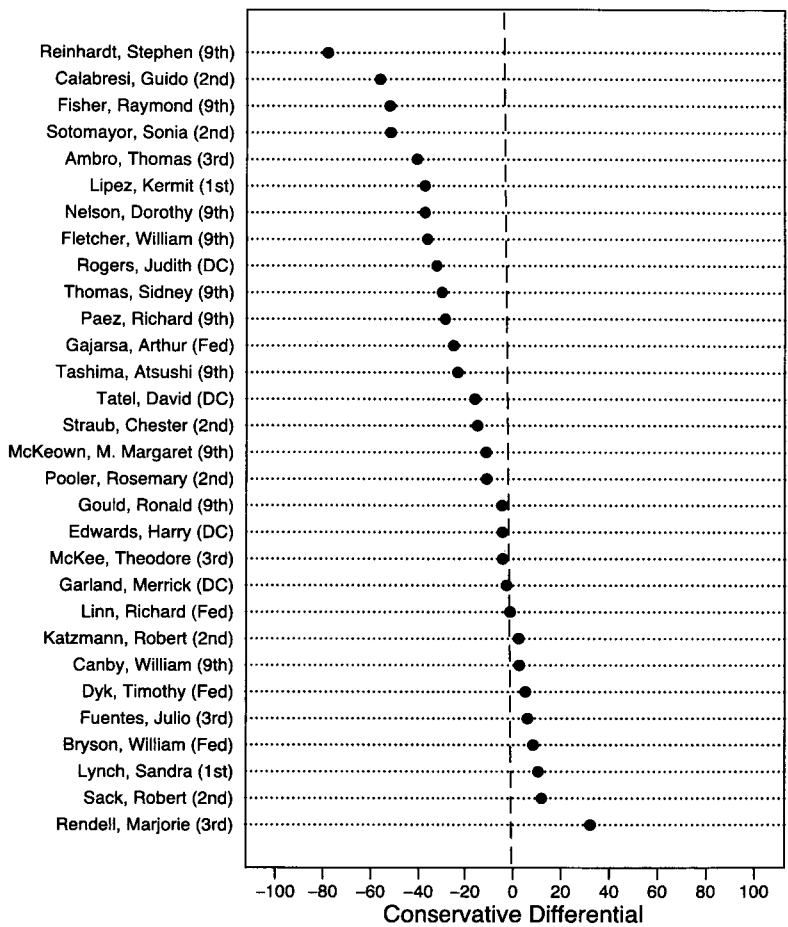
Our discussion and descriptive analysis in this arena focuses on a judge's *Conservative Differential*. Computed for each commonly occurring judge in the data, the *Conservative Differential* measures the difference between the percentage of cases in which a judge adopts a conservative agency interpretation and the percentage of cases in which the judge adopts a liberal agency interpretation. As such, *Conservative Differentials* range from -100 to +100 and are positive when the judge votes in favor of more conservative interpretations than liberal ones and negative when the judge votes in favor of more liberal interpretations than conservative ones.

Figures 9 and 10 highlight the *Conservative Differential* for key judges within the data. The data contains at least 20 observations for the highlighted judges, meaning that the emerging patterns are less likely to be based on outlier cases.<sup>155</sup> The overall pattern visible in the figures is what we would expect from a political story. There are many more liberal judges with negative *Conservative Differentials* than conservative judges and many more conservative judges with positive *Conservative Differentials* than liberal judges. However, there is also a substantial amount of variation in what that differential is. And some judges stand out for their very moderate behavior or for their behavior that is contrary to their presumed ideological preferences.

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155. However, given the highly collegial nature of circuit court decisions and the relatively small number of individual judge votes per judge in the data, it is important not to read too much into these judge-by-judge descriptive statistics.

FIGURE 9: CONSERVATIVE DIFFERENTIALS FOR LIBERAL JUDGES  
(WITH AT LEAST 20 OBSERVATIONS IN DATASET)



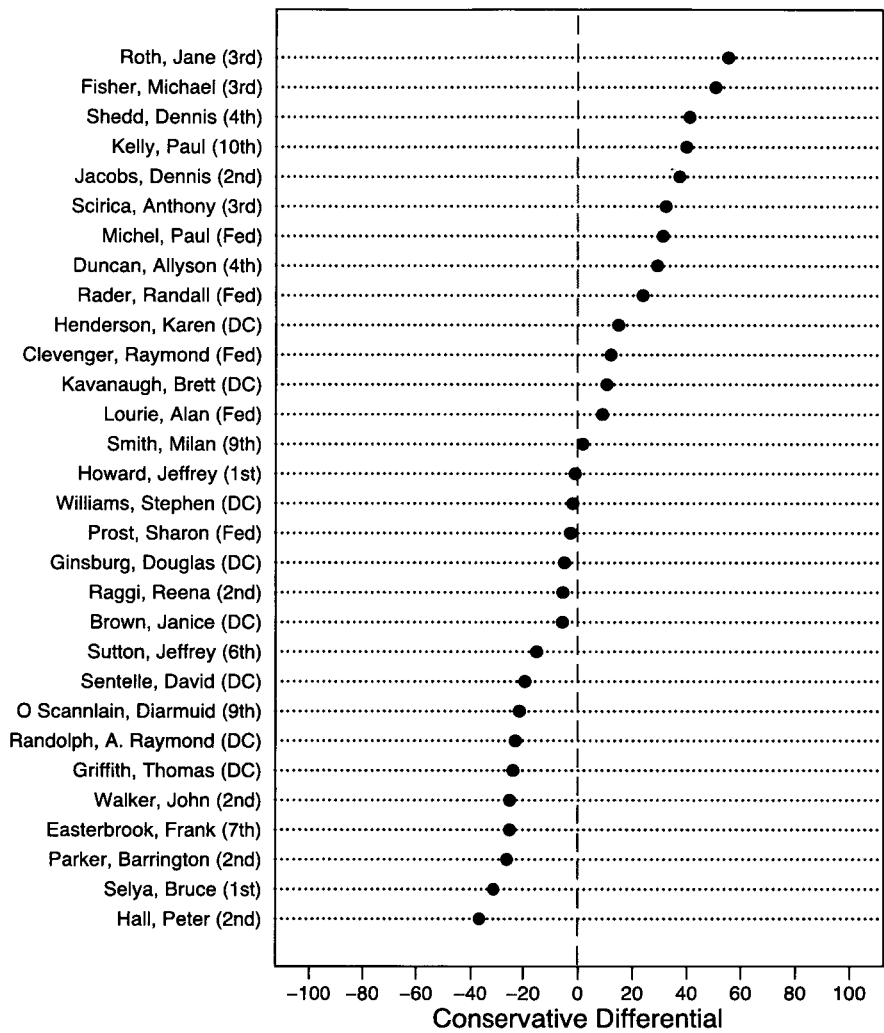
Focusing first on Figure 9 and the commonly occurring liberal judges in the data, the figure reveals a large number of judges who behave in strongly political ways. Most notable is Judge Stephen Reinhardt of the Ninth Circuit. With a conservative differential of -78.26, he voted to adopt 100% of the liberal interpretations that he reviewed but only 21.74% of the conservative ones. Some liberal judges in the data stand out for their very negative conservative differential scores. This group of judges includes, for example, Justice (then-Judge) Sonia Sotomayor, with a score of -51.85. Like Judge Reinhardt, Justice Sotomayor, while on the Second Circuit, deferred to 100% of the liberal interpretations that she reviewed. About a third of the 30 commonly occurring liberal judges had conservative differential scores very close



to 0. Also of note with the liberal judges in the data is that it is quite rare to see a positive conservative differential score. This means that these judges tend to behave liberally or neutrally in their judicial reviews of statutory interpretations, but they do not, on average, behave conservatively.

Turning to Figure 10 and the frequently appearing conservative judges in the data, one immediately noticeable item is that the conservative judges appear to behave less politically than the liberal judges. In other words, fewer of the conservative judges have extreme positive conservative differential scores than liberal judges had negative ones. The most extreme conservative-behaving judge in the data is Judge Jane Roth from the Third Circuit, with a conservative differential score of +55.56. Judge Roth adopted 88.89% of the conservative statutory interpretations that she reviewed but only 33.33% of the liberal ones. As with the liberal judges, some conservative judges have conservative differentials at or very close to 0. We also see a nontrivial number of negative conservative differential scores, including 10 conservative judges with quite liberal scores ranging between -15 and -37. This group of judges includes, for example, Judge Peter Hall from the Second Circuit, who voted to adopt 100% of liberal interpretations but just 63% of the conservative ones.

FIGURE 10: CONSERVATIVE DIFFERENTIALS FOR CONSERVATIVE JUDGES  
(WITH AT LEAST 20 OBSERVATIONS IN DATASET)



VI. JUDICIAL BEHAVIOR AT *CHEVRON* STEPS ONE AND TWO

In this Part, we move to a more in-depth inquiry into judicial behavior exclusively in cases where the panel applies *Chevron* deference. Using the original case-centered Barnett and Walker data once again, we focus on two related questions: First, how does panel ideology explain whether a panel's *Chevron* analysis stops at step one (with a finding that the statute is unambiguous) or continues to step

two? Second, how does panel ideology affect whether the panel agrees with the agency interpretation for cases ending in *Chevron* step one and *Chevron* step two?

*A. Panel Ideology and Statute Ambiguity*

First, we examine the ideological effects on whether the *Chevron*-applying panel finds the statute to be ambiguous or unambiguous in its *Chevron* step-one inquiry. The more or less frequently the courts find ambiguity, the more or less frequently they give agencies interpretive space. Based on past studies finding some political effects on judicial behavior even within *Chevron*'s framework, we would expect that courts are more likely to reject agency statutory interpretations that are inconsistent with a panel's ideological preferences at step one. By doing so, they limit the agency's interpretive discretion. Likewise, we would expect panels to move to step two more frequently when reviewing agency interpretations that are consistent with the panel's preferences because step two gives the agency more interpretive space.

As noted above, our dependent variable for this analysis is *Unambiguous Statute*, with values of 1 present when the court finds the statute to be unambiguous and values of 0 for cases where the statute is found to be ambiguous. In cases where the panel finds the statute unambiguous, the *Chevron* analysis concludes at step one.

To assess ideological effects on this finding of whether a statute is unambiguous, we once again divide the data into conservative and liberal agency interpretations. The results of our logistic regression analysis (again, with robust standard errors clustered on case citation) of the effects of *Panel Ideology* on the panel's finding of the statute to be unambiguous or ambiguous are listed in Table 4's columns two and three ("Liberal Agency Interpretation Cases" and "Conservative Agency Interpretation Cases").

TABLE 4: LOGISTIC REGRESSION OF IDEOLOGY EFFECTS ON WHETHER STATUTE IS FOUND UNAMBIGUOUS

	Liberal Agency Interpretation Cases	Conservative Agency Interpretation Cases	All Cases
Panel Ideology	1.105** (0.63)	-0.648** (0.38)	-0.103 (0.31)
Partisan Unified Panel	-0.056 (0.32)	0.162 (0.19)	0.172 (0.15)
Longstanding Interpretation	-0.775* (0.33)	-0.396* (0.18)	-0.525* (0.15)
Independent Agency	0.042 (0.34)	-0.784* (0.39)	-0.406** (0.21)
Rulemaking	0.468 (0.37)	-0.133 (0.25)	0.103 (0.19)
Informal Interpretation	0.175 (0.43)	0.043 (0.35)	0.167 (0.24)
Subject Matter: Environment	0.434 (0.35)	0.271 (0.27)	0.311 (0.20)
Subject Matter: Employment	1.304* (0.48)	-0.840 (0.56)	0.187 (0.31)
Subject Matter: Immigration	-0.523 (1.16)	0.097 (0.28)	0.392** (0.21)
Subject Matter: Entitlements	-0.819 (0.80)	-0.257 (0.31)	-0.321 (0.26)
Year	0.071** (0.04)	-0.011 (0.03)	0.017 (0.02)
Constant	-1.815* (0.43)	-0.468 (0.32)	-0.955* (0.23)
Observations	336	708	1142

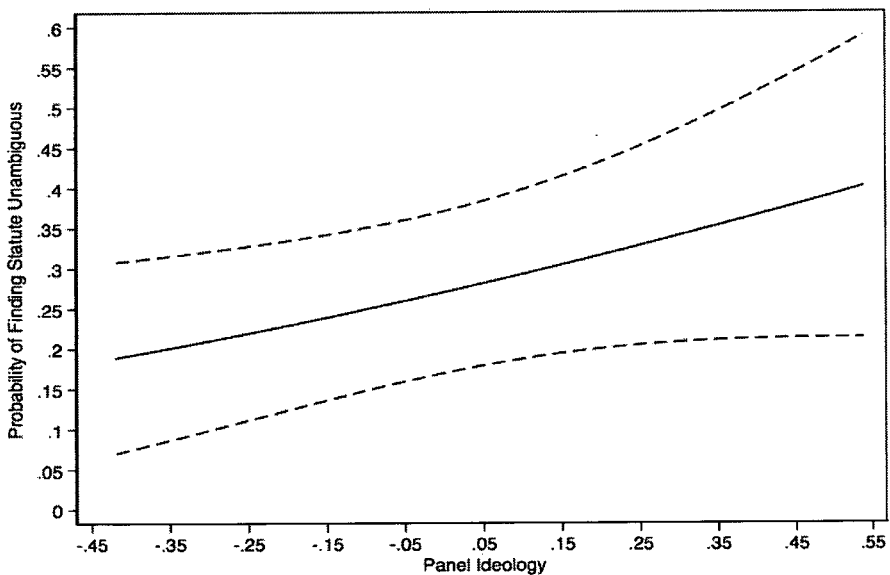
Logistic regression estimates of *Chevron* deference observations for whether the reviewing panel decides that the statute is unambiguous (and thus stops its analysis at *Chevron* step one). Baseline values include Adjudication (for agency format) and Other (for subject matter). Standard errors (reported in parentheses) are robust and clustered on the individual case. \*\*  $p < 0.10$ , \*  $p < 0.05$ .

As Table 4's results indicate, *Panel Ideology* appears to have the expected ideological effects on whether a *Chevron* deference case concludes at step one or step two. In particular, when the agency has made a liberal statutory interpretation, conservative panels are more likely to find the statute to be unambiguous. And when the agency has

made a conservative statutory interpretation, liberal panels are more likely to find the statute to be unambiguous.

To provide more substantive insight into these effects, Figures 11 and 12 plot the predicted probability that a panel will find the statute to be unambiguous given the direction of the agency's statutory interpretation (liberal or conservative) and the changing value of the panel's ideology (from most liberal to most conservative).

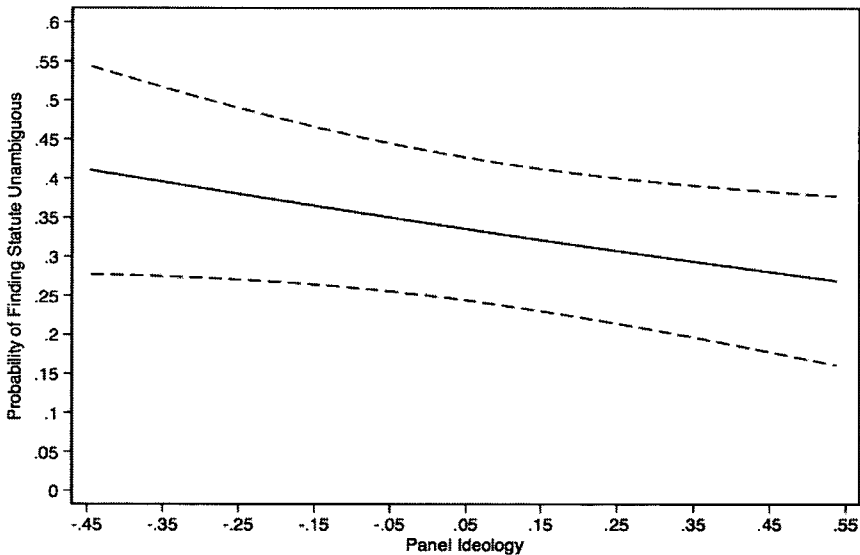
FIGURE 11: PREDICTED PROBABILITIES OF PANEL FINDING STATUTE UNAMBIGUOUS BASED ON PANEL IDEOLOGY WHEN LIBERAL AGENCY INTERPRETATION



As the figures indicate, for liberal agency interpretations, conservative ideology panels have as much as a 40% chance of finding the statute unambiguous. For the most liberal ideology panels in the data (Figure 11), that number is just 19%. Accordingly, liberal panels more often than conservative panels provide agencies interpretive space to issue liberal interpretations. And for conservative agency interpretations (Figure 12), liberal ideology panels have as much as a 41% chance of finding the statute unambiguous. For the most conservative ideology panels in the data, that number falls to 27%. Thus, conservative panels more often than liberal panels give agencies space to propound conservative interpretations. While these ideological results are relatively modest in size, especially relative to the very

notable non-*Chevron* results from Table 1 and Figures 3 through 8, they do still point to a change of up to 21% in the probability of finding a statute to be unambiguous based on the panel's ideological composition.

FIGURE 12: PREDICTED PROBABILITIES OF PANEL FINDING STATUTE UNAMBIGUOUS BASED ON PANEL IDEOLOGY WHEN CONSERVATIVE AGENCY INTERPRETATION



Regarding control variables in the models, the most consistent effect comes from the *Longstanding Interpretation* variable. Recall that our expectation for this variable is that for times where a longstanding agency interpretation is present, the reviewing panel should be more likely to find the statute to be ambiguous and thus allow the inquiry to move to assessing the reasonableness of the agency's interpretation in step two. The *Longstanding Interpretation* variable is consistently negative and significant, providing evidence to support our expectation.

An alternative theory involving *Chevron's* step one and judicial ideology is that in all cases regardless of the valence of the agency's interpretations or the panel's agreement with the agency, conservative judges will be more likely to stop their *Chevron* analysis at step one than liberal judges because they will more often find statutory meaning clear. Indeed, this was how Justice Antonin Scalia, a longtime defender of *Chevron's* framework, understood the *Chevron* framework to work. He argued that as a textualist—who, accordingly, would more often find

statutory meaning clear from statutory text and context—he was less likely to find ambiguity and thus less likely to give agencies interpretive discretion.<sup>156</sup> In contrast, judges who moved beyond a textual inquiry would be more likely to find ambiguity and thus give agencies interpretive discretion.<sup>157</sup> Recently, Judge Raymond Kethledge of the Sixth Circuit (a Republican appointee) echoed Justice Scalia's conception of a powerful, textual *Chevron* step one that will often—or, so far for Judge Kethledge, always<sup>158</sup>—uncover Congress's clear meaning.<sup>159</sup> Textualism or strict construction is often ascribed to conservative judges, while legislative history and purposivism are more often deemed tools of liberal judges.<sup>160</sup>

To assess Justice Scalia's alternative theory, we again use the *Unambiguous Statute* as our dependent variable. This time, however, we estimate the effects of *Panel Ideology* (and other variables) on this dependent variable for all of the cases in our data at once—i.e., conservative, liberal, and neutral/mixed agency interpretations. If Scalia's theory holds, the result should be a positive sign and statistically significant effect on the *Panel Ideology* variable.

As the "All Cases" column of Table 4 indicates, there is no statistical evidence to support Scalia's theory. *Panel Ideology* performs in the wrong direction (indicating a tendency among conservative panels to be less likely to find statutes to be unambiguous than liberal judges) and does not have a statistically significant effect on whether the panel finds the statute to be unambiguous. As such, there is much more evidence to support the more standard ideological story here—that panels are more likely to find statutes to be unambiguous when the agency's

156. See Scalia, *supra* note 20, at 521. Justice Scalia referred to himself as "(for want of a better word) a 'strict constructionist'" in his 1989 essay. *Id.* In his later monograph, he eschewed the label "strict constructionist," which he referred to as "a degraded form of [his preferred] textualism." ANTONIN SCALIA, A MATTER OF INTERPRETATION 23 (1997).

157. See SCALIA, *supra* note 156.

158. Kethledge, *supra* note 21, at 320:

In my own opinions as a judge, I have never yet had occasion to find a statute ambiguous. In my view, statutory ambiguities are less like dandelions on an unmowed lawn than they are like manufacturing defects in a modern automobile: they happen, but they are pretty rare, given the number of parts involved.

159. See *id.* ("For, in my experience at least, if one works hard enough, all the other interpretations are eventually revealed as imposters.").

160. See Killebrew, *supra* note 19, at 1898 (citing James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 5, 6 (2005)) (noting that "empirical evidence also suggests that, aside from the fact that textualist judges are generally conservative, the use of textualist methods is disproportionately associated with conservative outcomes in certain cases"); Alexander Volokh, *Choosing Interpretive Methods: A Positive Theory of Judges and Everyone Else*, 83 N.Y.U. L. REV. 769, 815 (2008) (noting and questioning the conventional thinking of which judges use textual and intentionalist tools).

interpretation of that statute is in ideological opposition to the panel.<sup>161</sup> Doing so likely serves to rein in agency discretion and how deferential the panel must be to the agency's position.

### *B. Panel Ideology, Chevron's Steps, and Agency Wins*

While the analyses in Table 1 and Figures 3 through 8 reveal that there is a modest ideological effect in judicial behavior in *Chevron* deference cases (and a substantial ideological effect in non-*Chevron* cases), it does not fully speak to whether the *Chevron* case effects are present across both steps within *Chevron* analyses. To provide more in-depth insight into this area, Table 5 presents the descriptive statistics for the percentage of cases that panels agree with liberal and conservative agency interpretations based on panel ideology and whether the case ends at step one or step two in the *Chevron* analysis. The relatively small number of observations within each *Chevron* step makes descriptive, rather than regression analysis, preferable.<sup>162</sup> We focus this descriptive analysis on the top 10% most conservative and liberal panels in the data. If ideological patterns do not emerge for these extreme cases, there is no reason to expect them with more moderate panels.

Two notable conclusions emerge from Table 5. First, in general and across panel ideologies, there is much less agreement with the agency's interpretation for cases resolved in step one than in step two. To put it another way, liberal and conservative panels are both much less likely to agree with the agency's interpretation when they have determined that the statute is unambiguous than when determining it is ambiguous.

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161. One potential explanation, which we cannot test with our dataset, is that there are two competing right-of-center views on judicial review of government actions. See Christopher J. Walker, *The Federalist Society's Chevron Deference Dilemma*, L. & LIBERTY (Apr. 3, 2018), <http://www.libertylawsite.org/2018/04/03/the-federalist-societys-chevron-deference-dilemma/> [<https://perma.cc/M8XT-R3K4>] ("For years, if not decades, the proper role of federal courts has thus been subject to an ongoing and vigorous debate within the Federalist Society and related [conservative] circles.").

162. See, e.g., LONG, *supra* note 142, at 53–54 (discussing appropriate sample sizes for maximum likelihood regressions).



TABLE 5: PANEL AGREEMENT WITH AGENCY'S INTERPRETATION

	Percent of time that panel agrees with Liberal Agency Interpretation	Percent of time that panel agrees with Conservative Agency Interpretation
<i>Case Ends at Step One:</i>		
Extreme Liberal Panels	50.00% (N=2)	37.93% (N=29)
Extreme Conservative Panels	28.57% (N=14)	37.50% (N=24)
<i>Case Ends at Step Two:</i>		
Extreme Liberal Panels	90.48% (N=21)	78.05% (N=41)
Extreme Conservative Panels	96.55% (N=29)	95.74% (N=47)

Second, the Table's statistics show some modest ideologically tinged behavior for outcomes in steps one and two. For case outcomes for cases ending at *Chevron's* step one, liberal panels are about 12% less likely to agree with the agency's interpretation when it is conservative than when it is liberal. Conservative panels are about 9% less likely to agree with the agency's interpretation when it is liberal than when it is conservative. While the small observation size in step one has a limiting effect in our interpretation ability, the data that we have are telling. For case outcomes for cases ending at *Chevron's* step two, liberal panels are, as they were under step one, about 12% less likely to agree with the agency's interpretation when it is conservative than when it is liberal. There is not, however, any notable difference among conservative panels in this context.

Overall, then, the size of these ideological differences in steps one and two is generally not large, especially considering that this analysis focuses exclusively on the most extreme liberal and conservative panels in the data. This is consistent with our larger story about *Chevron* decisions from our primary empirical model: there are some ideological effects, but they are not the only or even primary story when it comes to judicial review in these cases.

## VII. WHISTLEBLOWER AND PANEL EFFECTS

To test the whistleblower theory—that is, that panels that are not homogeneous in their partisan composition will behave less politically due to a partisan whistleblower's pressure on the panel—we first return to Table 1's logistic regression results. There, the whistleblower theory would expect that *Partisan Unified Panels* would be less likely to agree with an agency's interpretation than those with a whistleblower on them. However, as Table 1 reveals, the *Partisan Unified Panel* variable is not statistically significant for either the liberal or the conservative agency interpretation models.

Cross and Tiller's more nuanced whistleblower theory expects that whistleblower effects should only be apparent when there is a lack of ideological congruence between the panel and the agency's interpretation.<sup>163</sup> In these cases of conflict in preferences between the panel and the agency, the presence of a whistleblower on the panel is likely to produce a higher adherence to doctrine by the panel.

Because of the expectation that the effect of *Partisan Unified Panel* on the likelihood of panel agreement with the agency is conditioned on the panel's ideology, an empirical test of this ideological whistleblower theory requires the interaction of *Panel Ideology* and *Partisan Unified Panel* for both liberal and conservative agency interpretations.<sup>164</sup> Table 6 reports the logistic regression results that include this interaction term. The dependent variable continues to be *Circuit-Agency Agreement*.

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163. Cross & Tiller, *supra* note 8, at 2171–73.

164. In their assessment of policy-minded whistleblowing, Cross and Tiller examine the interplay of unified/divided panel (measured like our *Partisan Unified Panel* variable) with policy convergence (indicating whether the assumed preferences of the panel majority, based on party affiliation, aligns with the policy output of the agency). See Cross & Tiller, *supra* note 8, at 2173. Our methodology is very similar to that used by Cross and Tiller but, because of the use of *Panel Ideology* instead of party affiliation, it permits a more nuanced assessment of whether a panel should be expected to favor the agency outcome.

TABLE 6: LOGISTIC REGRESSION OF WHISTLEBLOWER EFFECTS ON  
CIRCUIT-AGENCY AGREEMENT

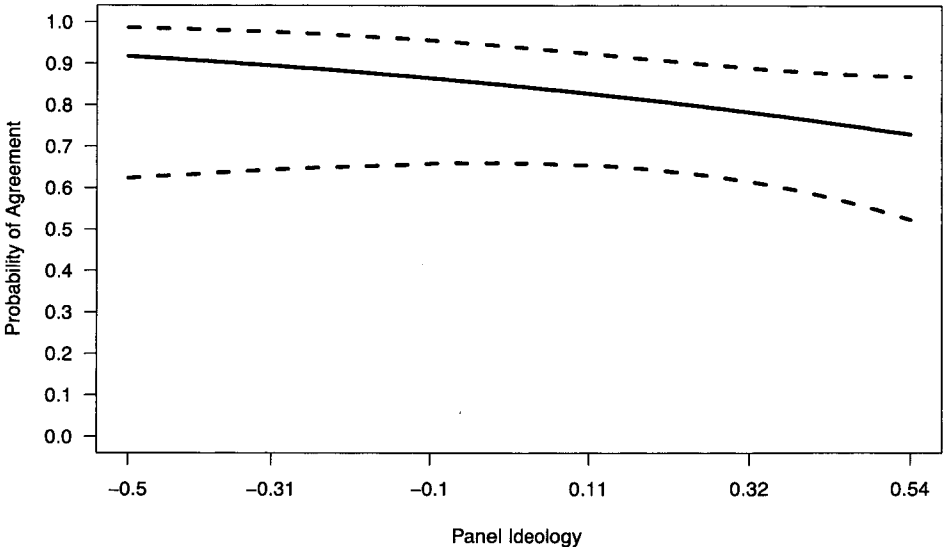
	Liberal Agency Interpretation	Conservative Agency Interpretation
Panel Ideology	-2.968* (1.11)	2.117* (0.75)
Panel Ideology X <i>Chevron</i> Deference	1.302 (1.13)	-0.417 (0.72)
Partisan Unified Panel	0.224 (0.41)	-0.017 (0.18)
<i>Chevron</i> Deference	1.473* (0.33)	0.947* (0.19)
Panel Ideology X Partisan Unified Panel	0.286 (1.31)	-1.066 (0.72)
Independent Agency	-0.384 (0.34)	0.711** (0.38)
Rulemaking	-1.074* (0.39)	-0.537* (0.22)
Informal Interpretation	-0.430 (0.36)	-0.412 (0.27)
Subject Matter: Environment	0.235 (0.35)	-0.088 (0.26)
Subject Matter: Employment	-0.670** (0.39)	0.978** (0.52)
Subject Matter: Immigration	-0.530 (0.74)	-0.327 (0.26)
Subject Matter: Entitlements	1.287 (0.88)	0.313 (0.30)
Year	0.007 (0.03)	-0.002 (0.02)
Circuit Controls	Included	Included
Constant	1.067* (0.51)	0.110 (0.39)
Observations	464	985

Logistic regression estimates for whether the reviewing panel decides in favor of the agency's statutory interpretation. Baseline values include Adjudication (for agency format) and Other (for subject matter). Standard errors (reported in parentheses) are robust and clustered on the individual case. \*\*  $p < 0.10$ , \*  $p < 0.05$ .

Because of the difficulty in interpreting interactive effects in a regression table, we immediately turn to the substantive effects from this regression as reported in Figures 13, 14, 15, and 16. There, we

observe very little difference between divided and unified partisan panels for either liberal or conservative agency interpretations. This is true even at the ideological extremes for panels where we would most expect a whistleblowing effect to occur (i.e., liberal panels with conservative agency interpretations and conservative panels with liberal agency interpretations). Indeed, the slight differences between divided and unified panels that are present for ideologically extreme panels are in the *opposite* direction than expected. As the Figures reveal, for both conservative and liberal agency interpretations, we see that unified panels are actually slightly less likely to be political (and more likely to defer to the agency's interpretation) than divided panels that have a whistleblower on them.<sup>165</sup>

FIGURE 13: PREDICTED PROBABILITIES OF PANEL AGREEMENT WITH AGENCY'S LIBERAL INTERPRETATION BASED ON PANEL IDEOLOGY WHEN UNIFIED PANEL



165. Similarly, in earlier work, we found no evidence of whistleblower effects at “step zero”—i.e., whether courts invoke *Chevron* or a less deferential standard. Barnett, Boyd & Walker, *supra* note 15, at 15–17.

FIGURE 14: PREDICTED PROBABILITIES OF PANEL AGREEMENT WITH AGENCY'S LIBERAL INTERPRETATION BASED ON PANEL IDEOLOGY WHEN DIVIDED PANEL

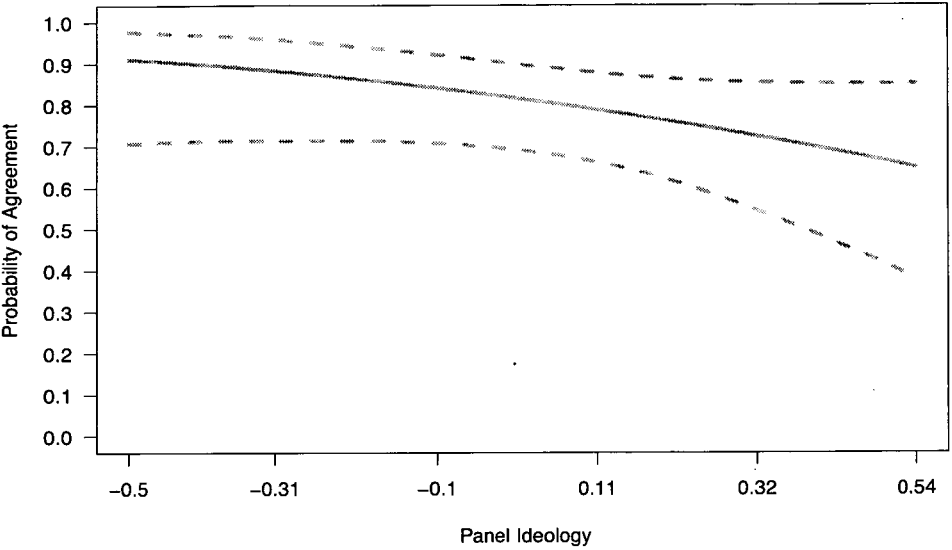


FIGURE 15: PREDICTED PROBABILITIES OF PANEL AGREEMENT WITH AGENCY'S CONSERVATIVE INTERPRETATION BASED ON PANEL IDEOLOGY WHEN UNIFIED PANEL

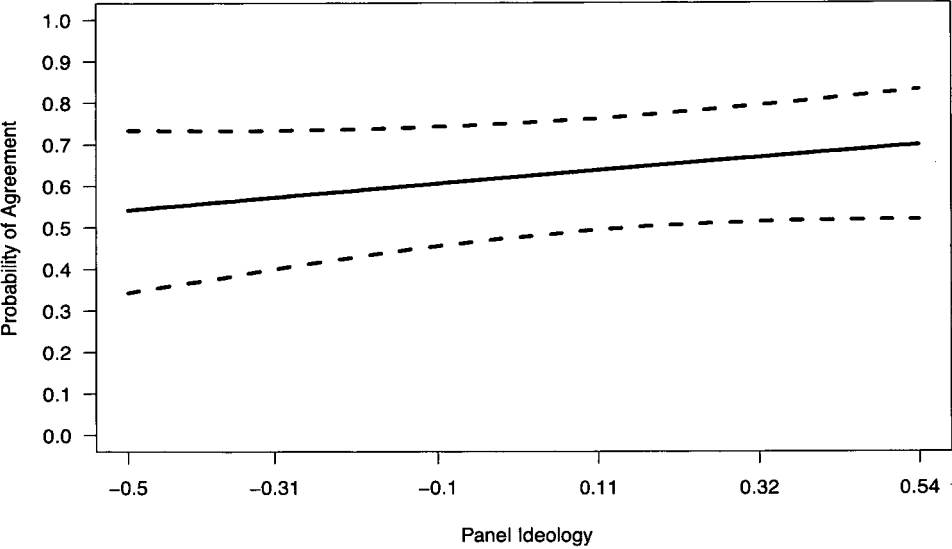
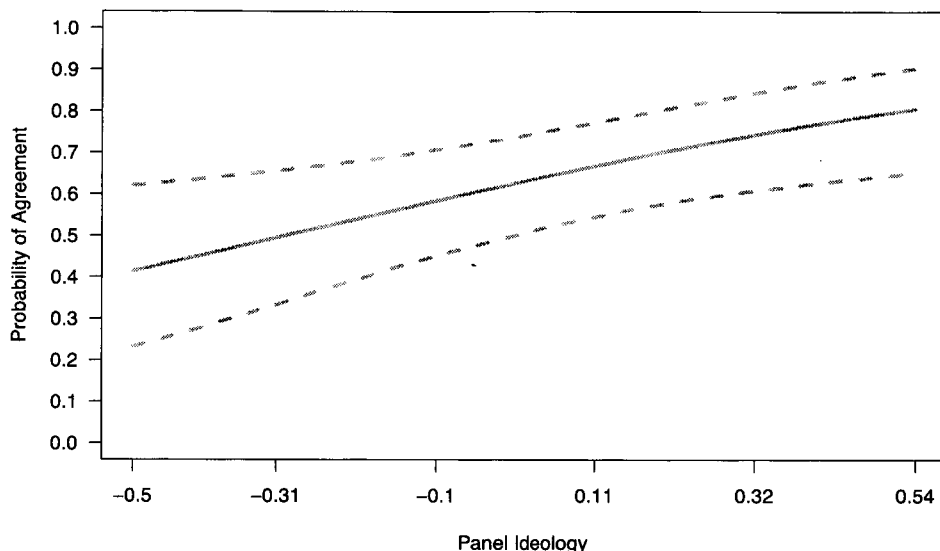


FIGURE 16: PREDICTED PROBABILITIES OF PANEL AGREEMENT WITH AGENCY'S CONSERVATIVE INTERPRETATION BASED ON PANEL IDEOLOGY WHEN DIVIDED PANEL



### CONCLUSION

Two decades ago in their foundational study on *Chevron* deference, Frank Cross and Emerson Tiller concluded that “[p]artisanship clearly affects how appellate courts review agency discretion,” in that “panels controlled by Republicans were more likely to defer to conservative agency decisions (that is, to follow the *Chevron* doctrine) than were the panels controlled by Democrats,” and vice versa.<sup>166</sup> Cross and Tiller, however, also concluded that legal doctrine nevertheless matters because minority judges on a panel can use *Chevron* deference “to corral the partisan ambitions of a court majority whose policy preferences would best be accomplished by neglecting the dictates of doctrine.”<sup>167</sup> Other scholars have built on this study, further supporting the finding that more ideologically diverse panels are less likely to be influenced by their partisan priors than more ideologically uniform panels.<sup>168</sup>

This Article casts serious doubt on those findings and related intuitions about administrative law’s political dynamics. Utilizing the most comprehensive circuit court dataset to date, we find that, while

166. Cross & Tiller, *supra* note 8, at 2175.

167. *Id.*

168. See Barnett, Boyd & Walker, *supra* note 15, at 8–9 (discussing studies).

there are some statistically significant results as to partisan influence, *Chevron* deference has a powerful constraining effect on partisanship in judicial decisionmaking. And, contrary to the Cross and Tiller study, we find no statistically significant whistleblower or panel effects.

Why our study reaches a contrary conclusion is an open question. It could be that since the Cross and Tiller study the circuit courts have more fully embraced *Chevron* deference as a constraint on partisan decisionmaking. The Cross and Tiller dataset spanned 1991 through 1995,<sup>169</sup> whereas ours covers circuit court decisions from 2003 through 2013. It could also largely be the result of the differences in scope. The Cross and Tiller study, after all, only looked at five years of decisions by the D.C. Circuit, for a total of 115 opinions.<sup>170</sup> Our study, by contrast, includes eleven years of decisions by all thirteen circuit courts, for a total of more than 1,600 decisions.

Whatever the reasons for these differences, our findings do more than contribute to the longstanding academic debate among political scientists and legal scholars over the legal and attitudinal models. They also have important implications for the real-world debate over the future of *Chevron* deference. As Congress, the federal judiciary, and legal scholars consider eliminating or narrowing *Chevron* deference, they should more closely consider one significant and overlooked cost: such reform could result in partisanship playing a larger role in judicial review of agency statutory interpretations. It may turn out that other factors may convince the Supreme Court (or Congress) to abandon *Chevron*,<sup>171</sup> but *Chevron*'s ameliorating effects on judicial partisanship should be part of the calculus.

After all, the overall picture that emerges from our study provides compelling evidence that the *Chevron* Court's express objective to reduce partisanship in judicial decisionmaking has been quite effective. Relatedly, *Chevron*'s success in reducing such partisanship also buttresses the uniformity theory for *Chevron*. Panels of various ideologies are more likely to defer to agencies with *Chevron*'s framework than without, thereby rendering it more likely that agency

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169. Cross & Tiller, *supra* note 8, at 2168.

170. *Id.* at 2169.

171. Philip Hamburger, for instance, has a very different reading of our findings: "Rather than reveal diminished politicization, Walker's numbers provide strong evidence of diminished judicial independence and even of institutionalized judicial bias. That is, his research actually proves just how much judicial bias *Chevron* creates in favor of the government—not how much judicial bias it reduces." Philip Hamburger, *Chevron Bias, Illustrated by Statistics*, L. & LIBERTY (Apr. 12, 2018), <http://www.libertylawsite.org/2018/04/12/chevron-deference-administrative-state-philip-hamburger/> [https://perma.cc/737T-4JCM]; see also Philip Hamburger, *Chevron Bias*, 84 GEO. WASH. L. REV. 1187 (2016) (arguing that *Chevron* deference violates constitutional due process by introducing systematic progovernment bias in judicial decisionmaking).

interpretations will prevail (or not) across the country. Of course, our findings do not attempt to compare how different ideological panels treat a particular agency interpretation, and more empirical work in this area would be helpful. But our findings do suggest that *Chevron* creates a more favorable climate for nationwide uniformity that *de novo* or *Skidmore* review cannot match.

Finally, in considering these political dynamics and theoretical implications, one should not ignore that modest partisan effects exist even when courts apply *Chevron*'s framework. These partisan effects mean that courts, and especially the Supreme Court, should create a better-defined doctrine if they seek to have *Chevron* become more successful in meeting its accountability and uniformity goals. Indeed, the results that we present here only amplify an earlier call that two of us made after presenting a descriptive account of our circuit-by-circuit data and discussing the wide variability in how the circuits reviewed agency statutory interpretations.<sup>172</sup> For instance and perhaps most urgently, which tools of statutory construction should courts use at step one to determine whether a statute is ambiguous? Is there an order in which courts should use them? Which agency actions have the "force of law"? What exactly is the domain of the major-questions exception to *Chevron* deference? What is the proper role for courts in *Chevron* step two? In short, the fact that *Chevron* deference promotes two of its goals does not mean that it achieves them as well as it could.

Our results provide the empirical basis for courts (and Congress) to reassess not only the viability of *Chevron* deference but also its mechanics. That reassessment need not have a clear ideological valence. For instance, conservative judges may be predisposed to the major-questions doctrine because it helps limit what they perceive as aggressive and usually liberal agency actions that go beyond the agency's statutory authority. But *Chevron*'s utility in limiting partisan judging and promoting uniformity, for instance, may undermine the value of the major-questions doctrine. Not only may *Chevron* provide additional value for major questions (as opposed to run-of-the-mill ones) by helping to keep partisanship in check during judicial review of especially contentious issues, but *Chevron*'s ability to provide nationwide uniformity may be more important because of the questions' significance. At the same time, conservatives have largely sought to limit *Chevron* step one to a textual inquiry to promote their preferred method of statutory interpretation.<sup>173</sup> A textual step one, whatever its

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172. Barnett & Walker, *supra* note 12, at 71 ("[T]he Supreme Court needs to provide better guidance to lower courts if it seeks to create a stabilizing doctrine.").

173. See Jellum, *supra* note 36, at 761–71.



demerits in identifying ambiguity, may allow for less judicial discretion at step one by permitting the use of only one interpretive device and thus promote uniform interpretation.

Our goal here, however, is not to take a position on these disputes. Other considerations (including perhaps *Chevron's* conflicting theoretical underpinnings, such as expertise or delegation) can affect the normative debates over *Chevron's* domain or mechanics. Instead, we demonstrate only how our findings can affect these debates and provide a more complete understanding of how *Chevron* functions. Regardless of one's position on *Chevron's* future, administrative law's political dynamics should not be ignored because they go to the heart of *Chevron's* theoretical grounding.