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## What Do the Studies of Judicial Review of Agency Actions Mean?

Richard J. Pierce Jr

*George Washington University Law School, [rpierce@law.gwu.edu](mailto:rpierce@law.gwu.edu)*

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## What Do the Studies of Judicial Review of Agency Actions Mean?

Richard J. Pierce, Jr.<sup>1</sup>

Over the past twenty years, scholars have published numerous empirical studies of the patterns of decisions of reviewing courts.<sup>2</sup> Each of the studies subjected to statistical analysis large numbers of decisions in which courts at all levels of the judiciary have applied six administrative law doctrines to a wide variety of agency decisions. In this article, I will summarize the findings of ten of those studies and attempt to explain what they mean to lawyers, judges, teachers, and scholars.

In section one, I describe the six doctrines. In section two, I summarize the findings of the studies, and address the question: how much does doctrine matter? In section three, I address the question: what other factors can explain the patterns of decisions? I focus particular attention on two variables that many scholars have studied – the political or ideological preferences of the judges, and the composition of panels of circuit court judges. In section four, I address the question: is the D.C. Circuit different, and if so, why? In section five, I address the question: what do these studies mean for lawyers, judges, teachers and scholars?

### I. The Six Doctrines

The doctrine that has been studied the most was announced in the Supreme Court's 1984 opinion in *Chevron v. Natural Resources Defense Council*:

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.<sup>3</sup>

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<sup>1</sup> Lyle T. Alverson Professor of Law, George Washington University. I am grateful to the participants in a work in progress luncheon at George Washington University School of Law for providing helpful comments on an earlier version of this essay. I am also grateful to David Zaring for encouraging me to complete this project.

<sup>2</sup> David Zaring, *Reasonable Agencies*, 96 Va. L. Rev. 2317 (2010); Thomas Miles & Cass Sunstein, *The Real World of Arbitrariness Review*, 75 U. Chi. L. Rev. 761 (2008) (hereinafter referred to as Miles & Sunstein II); William Eskridge & Lauren Baer, *The Continuum of Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 Geo. L. J. 1083 (2008); Kristin Hickman & Matthew Krueger, *In Search of the Modern Skidmore Standard*, 107 Colum. L. Rev. 1235 (2007); Thomas Miles & Cass Sunstein, *Do Judges Make Regulatory Policy?* 73 U. Chi. L. Rev. 823 (2006) (hereinafter referred to as Miles & Sunstein I); Paul Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 Wm. & M. L. Rev. 679 (2002); Frank Cross & Emerson Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeal*, 107 Yale L. J. 2155 (1998); Orin Kerr, *Shedding Light on Chevron: An Empirical Study of the Chevron Doctrine in the U.S. Courts of Appeals*, 15 Yale J. Reg. 1 (1998); Richard Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 Va. L. Rev. 1717 (1997); Peter Schuck & Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 Duke L. J. 984.

<sup>3</sup> 467 U.S. 837, 842-843 (1984).

In other parts of its opinion, the Court equated “permissible” with “reasonable.”<sup>4</sup>

Some scholars argue that only the second part of the *Chevron* test is important.<sup>5</sup> They maintain that the first part of the test has no independent meaning because any agency construction of a statute that is inconsistent with congressional intent is, by definition, unreasonable. In this view, the *Chevron* doctrine can be simplified and restated as: a reviewing court must uphold any reasonable agency construction of an agency-administered statute.

Between 1984 and 2000, the *Chevron* doctrine dominated judicial review of agency statutory interpretations. Before 1984, the doctrine the Court applied most frequently in reviewing agency statutory interpretations was announced in the Court’s 1944 opinion in *Skidmore v. Swift & Co.*:

We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.<sup>6</sup>

The *Skidmore* doctrine largely disappeared between 1984 and 2000. Most scholars and judges believed that it had been displaced by the *Chevron* doctrine. In 2001, however, a majority of the Court resurrected the *Skidmore* doctrine and held that it, rather than the *Chevron* doctrine, applies to some uncertain category of cases.<sup>7</sup> Since 2001, the Justices have engaged in a lively debate about the circumstances in which each of the two competing doctrines applies.<sup>8</sup> That debate indicates that all Justices believe that the doctrines differ and that the *Chevron* doctrine is more deferential than the *Skidmore* doctrine.

The third doctrine that has been studied was announced in the Court’s 1983 opinion in *Motor Vehicle Manufacturers’ Association v. State Farm Automobile Insurance Co.*:

Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.<sup>9</sup>

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<sup>4</sup> Id. at 844.

<sup>5</sup> Matthew Stephenson & Adrian Vermeule, *Chevron Has Only One Step*, 95 Va. L. Rev. 597,599 (2009).

<sup>6</sup> 323 U.S. 134, 140 (1944).

<sup>7</sup> *United States v. Mead Corp.* 53 U.S. 218, 231-33 (2001).

<sup>8</sup> For a thorough discussion of the debate, see Lisa Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 Vand. L. Rev. 1443 (2005).

<sup>9</sup> 463 U.S. 29, 43 (1983).

The *State Farm* doctrine is often described as imposing a duty to engage in reasoned decision making, i.e., a court will uphold an agency action if, but only if, the agency adequately explains how it reasoned from the language of the relevant statute and the available evidence to the conclusions it reached.<sup>10</sup> The *State Farm* doctrine is based on the Court's interpretation of the arbitrary and capricious standard of review. The Administrative Procedure Act (APA) instructs reviewing courts to apply that standard to all agency actions.<sup>11</sup>

There is broad agreement that the *Chevron* and *State Farm* doctrines overlap, but there is disagreement with respect to the extent of the overlap between the two.<sup>12</sup> Some scholars believe that step two of *Chevron* is the same as the duty to engage in reasoned decision making announced in *State Farm*, i.e., a statutory interpretation is "reasonable" within the meaning of *Chevron* step two if, but only if, the agency adequately explained why it adopted that interpretation. It follows that a scholar who believes that step two of *Chevron* renders step one irrelevant by subsuming that step sees a complete overlap between the two doctrines.

The fourth doctrine that has been studied is the substantial evidence doctrine. It was originally announced by the Court in its 1938 opinion in *Consolidated Edison Co. v. NLRB* and was qualified by the Court's 1951 opinion in *Universal Camera v. NLRB*. Combining the critical passages from the two opinions, the Court defined the doctrine to require: "[S]uch relevant evidence as a reasonable mind might accept as adequate to support a conclusion, . . ."<sup>13</sup> "tak[ing] into account whatever [evidence] in the record detracts from its weight."<sup>14</sup>

In its original form, the substantial evidence doctrine had a narrower role than the first three doctrines. It applied only to agency findings of fact made in formal adjudications. Gradually, however, it has taken on a broader meaning. The transformation of the substantial evidence test into a broad doctrine of judicial review has taken place through three mechanisms. First, while the APA instructs reviewing courts to apply the substantial evidence standard only to findings of fact made in formal adjudications,<sup>15</sup> modern agencies use informal adjudication and informal rulemaking to "find" the facts that are the predicates for their actions in a high proportion of cases.<sup>16</sup> As a technical matter, an agency is not required to make findings of fact when it acts through informal adjudication or informal rulemaking, but courts require agencies to identify the factual predicates for their actions in both contexts.<sup>17</sup> Reviewing courts also require agencies to

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<sup>10</sup> For detailed discussion of *State Farm*, see Richard Pierce, I Administrative Law Treatise §7.4 (5<sup>th</sup> ed. 2010).

<sup>11</sup> 5 U.S.C. §706(2)(A).

<sup>12</sup> For discussion of this debate, see Pierce *supra*. note 10, at pages 218-21.

<sup>13</sup> 305 U.S. 197, 229(1938).

<sup>14</sup> 340 U.S. 474, 488(1951).

<sup>15</sup> 5 U.S.C. §706(2)(E).

<sup>16</sup> See generally Pierce, *supra*. note 10, at chapters 7 and 8.

<sup>17</sup> In a rulemaking, the agency must incorporate in its final rule a statement of basis and purpose in which it discusses the relationship between the available evidence and the factual predicates for its action. See *State Farm*, 463 U.S. 29. If a party petitions for review of an agency decision taken in an informal adjudication,

explain why they have chosen the factual predicates on which they rely. Since the APA does not authorize a court to apply the substantial evidence standard for this purpose, courts usually use the ubiquitous arbitrary and capricious standard for that purpose. Thus, courts regularly refer to the choice between arbitrary and capricious review and substantial evidence review as a choice between doctrines that perform the same functions.<sup>18</sup>

Second, while the APA authorizes courts to apply the substantial evidence standard only to findings of fact made in formal adjudications, some important agency-specific statutes require courts to apply that standard to all actions agencies take to implement the statute, including informal adjudications and informal rulemakings.<sup>19</sup> That congressional instruction to courts to apply the substantial evidence standard to all agency actions and not just to formal adjudications has forced courts to adapt the doctrine to the quite different contexts of informal adjudication and informal rulemaking.<sup>20</sup> In those contexts, agencies are not required to make formal findings of fact based on “evidence” of the type courts usually consider in “hearings” of the type familiar to courts. The “evidence” on which the agency relies in informal adjudications and rulemakings usually consists of scientific and economic studies contained in a “record” that consists solely of written submissions to the agency. As a result, the version of the substantial evidence doctrine courts apply in such cases is virtually identical to the version of the arbitrary and capricious standard that was the basis for the Court’s opinion in *State Farm*. A court can apply the substantial evidence doctrine to uphold an agency action taken through use of informal adjudication or informal rulemaking only by determining whether the agency engaged in reasoned decision making, including a statement of the agency’s reasons in support of the factual predicates for its action.

Third, even in the original context of judicial review of findings of fact made in formal adjudications, courts now combine the substantial evidence standard with the duty to engage in reasoned decision making announced in *State Farm*. Thus, courts often apply the substantial evidence doctrine as the basis to reject an agency finding because the agency has not stated adequate reasons for crediting some evidence and discrediting other evidence.<sup>21</sup> As one circuit court described the modern version of the substantial evidence doctrine in 2007, an agency “must give specific, cogent reasons for [its] findings” in the common situation in which there is conflicting evidence in the record.<sup>22</sup>

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the reviewing court requires the agency to provide a statement of its reasons for acting that includes a discussion of the relationship between the available evidence and the factual predicates for the agency action. See *LTV Corp. v. PBGC*, 496 U.S. 633, 654-55(1990).

<sup>18</sup> E.g., *Bangor Hydro-Electric C. v. FERC*, 78 F.3d 659,663 n.3(D.C. Cir. 1996).

<sup>19</sup> E.g., 15 U.S.C. §717r.

<sup>20</sup> Initially, courts found this task difficult. See, e.g., *Industrial Union Dep’t v. Hodgson*, 499 F.2d 467,469(D.C. Cir. 1974). Over time, however, they became comfortable with the process. E.g., *American Public Gas Ass’n v. FPC*, 567 F.2d 1016 (D.C. Cir. 1977).

<sup>21</sup> See cases described in *Pierce*, supra. note 10, at pages 988-89, 997-99.

<sup>22</sup> *Chen v. Mukasey*, 510 F.3d 797, 801-02 (8<sup>th</sup> Cir. 2007).

The Supreme Court has recognized that the substantial evidence standard and the arbitrary and capricious standard perform analogous functions today.<sup>23</sup> The Court also has characterized the substantial evidence standard as more demanding than the arbitrary and capricious standard.<sup>24</sup> Circuit courts and scholars have expressed skepticism that the two doctrines actually differ, however.<sup>25</sup> Even the Supreme Court has recognized that the doctrines rarely, if ever, yield different results.<sup>26</sup>

The fifth doctrine that has been the subject of empirical studies had its origin in the Supreme Court's 1945 opinion in *Bowles v. Seminole Rock*<sup>27</sup> though the Court now refers to it by reference to its 1997 opinion in *Auer v. Robbins*:

Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words is in doubt. The intention of Congress or the principles of the Constitution in some situations may be relevant in the first instance in choosing between various constructions. But the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation....<sup>28</sup>

The *Auer* doctrine performs the same function as the prior four doctrines except that it applies to agency interpretations of rules rather than to agency interpretations of statutes. Of course, a court must apply both the *Auer* doctrine and one or more of the other doctrines in the common situation in which the agency supports its action based on both an interpretation of a statute and an interpretation of a rule.<sup>29</sup>

The sixth doctrine is *de novo* review. It differs significantly from the other five, at least in theory. Each of the other five doctrines instructs a reviewing court to confer some uncertain degree of deference on the agency decision the court is reviewing. As the name suggests, *de novo* review refers to an approach to judicial review in which the court does not confer any deference on the agency; it resolves the issue before it as if the agency had never addressed the issue.<sup>30</sup>

## **II. The Findings of the Studies: Does Doctrine Matter?**

Most of the studies analyzed patterns of decisions by circuit courts, but two analyzed Supreme Court opinions and one analyzed district court decisions. Bill Eskridge and Lauren Baer analyzed 1014 Supreme Court opinions issued between 1984 and 2005.<sup>31</sup> They found that the overall affirmance rate was 68.3%.<sup>32</sup> Disaggregating the

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<sup>23</sup> *Dickenson v. Zurko*, 527 U.S. 150, 162-62 (1999).

<sup>24</sup> E.g., *American Paper Institute v. American Electric Power Service Corp.* 461 U.S. 402, 412 n.7 (1983).

<sup>25</sup> See cases discussed in *Pierce*, supra. note 10, at pages 1020-21.

<sup>26</sup> *Dickenson v. Zurko*, 527 U.S. at 162-63.

<sup>27</sup> 325 U.S. 410,414 (1945).

<sup>28</sup> 519 U.S. 452, 461 (1997).

<sup>29</sup> E.g., *Shipbuilders Council v. Coast guard*, 578 F.3d 234 (4<sup>th</sup> Cir. 2009).

<sup>30</sup> *Verkuil*, supra. note 2, at 688.

<sup>31</sup> Eskridge & Baer, supra. note 2, at 1094..

cases by doctrine, they found the following affirmance rates: *Chevron*, 76.2%; *Skidmore*, 73.5%; *Auer*, 90.9%; and, de novo, 66.0%.<sup>33</sup> The only other study of Supreme Court decisions was published by Miles & Sunstein in 2006.<sup>34</sup> They analyzed the sixty-nine Supreme Court opinions issued between 1989 and 2005 in which the Supreme Court invoked the *Chevron* doctrine.<sup>35</sup> They found that the Court affirmed 67% of agency actions,<sup>36</sup> an affirmance rate approximately 9 per cent lower than the rate Eskridge & Baer found for the period 1984 to 2005. Since the period studied by Miles and Sunstein overlaps almost completely with the last fifteen years of the period studied by Eskridge and Baer, the lower affirmance rate found by Miles and Sunstein implies a decline in the Supreme Court's rate of affirmance in *Chevron* cases after 1990.

Most of the studies analyzed circuit court decisions. Several studies reported rates of affirmance in circuit courts when they apply the *Chevron* doctrine. The findings are 81.3% in 1985,<sup>37</sup> 75.5% in 1988,<sup>38</sup> 65.2% in 1991-1995,<sup>39</sup> 73% in 1995-1996,<sup>40</sup> and 64% in 1996-2006.<sup>41</sup> The findings are in a narrow range: 64 to 81.3% and do not indicate any trend toward more or less deference over time.

The studies included several findings with respect to the rate of affirmance when courts apply the *Skidmore* doctrine. They are: 55.1% in 1965,<sup>42</sup> 60.6 % in 1975,<sup>43</sup> 70.9% in 1984,<sup>44</sup> and 60.4% in 2001-2005.<sup>45</sup> Again, the range of findings is narrow – 55.1 to 70.9% and they do not indicate a clear trend toward more or less deference over time.

Two studies included findings with respect to the affirmance rate when courts apply the substantial evidence doctrine and one included a finding with respect to the rate of affirmance when courts apply the *State Farm* doctrine. The findings are: *State Farm* 64% in 1996-2006,<sup>46</sup> substantial evidence 64% in 1996-2006<sup>47</sup> and 71.2% in 2000-2004.<sup>48</sup> The range of findings for the *State Farm* and substantial evidence doctrines is even narrower than the ranges of findings applicable to the *Chevron* and *Skidmore* doctrines – 64 to 71.2%--and again the findings do not show any clear temporal trend.

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<sup>32</sup> Id. at 1100.

<sup>33</sup> Id. at 1142.

<sup>34</sup> Miles & Sunstein I.

<sup>35</sup> Id. at 825.

<sup>36</sup> Id. at 849.

<sup>37</sup> Schuck & Elliott, supra. note 2, at 1038.

<sup>38</sup> Id. at 1038.

<sup>39</sup> Cross & Tiller, supra. note 2, at 2169.

<sup>40</sup> Kerr, supra. note 2, at 30.

<sup>41</sup> Miles & Sunstein II at 849.

<sup>42</sup> Schuck & Elliott, supra. note 2, at 1007.

<sup>43</sup> Id. at 1007-08.

<sup>44</sup> Id. at 1030.

<sup>45</sup> Hickman & Krueger, supra. note 2, at 1275.

<sup>46</sup> Miles & Sunstein II at 776.

<sup>47</sup> Id. at 779.

<sup>48</sup> Zaring, supra. note 2, at 2360.

I have found only one empirical study of district court review of agency decisions. Paul Verkuil studied district court decisions that applied the substantial evidence doctrine to Social Security disability decisions and district court decisions that engaged in de novo review of agency denials of requests for information under the Freedom of Information Act (FOIA).<sup>49</sup> He found that district courts affirmed disability decisions in only 50% of cases, while they affirmed agency decisions under FOIA in 90% of cases.<sup>50</sup> Those findings differed dramatically both from the findings in the studies of Supreme Court decisions and circuit court decisions and from the pattern of decisions Verkuil hypothesized based on the highly deferential nature of the substantial evidence doctrine and the non-deferential nature of de novo review.<sup>51</sup>

With one notable exception, the studies suggest 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. The ranges of affirmance rates by doctrine are: *Chevron* – 60-81.3%, *Skidmore* -- 55.1-73.5%, *State Farm*—64%, substantial evidence—64-71.2%, de novo—66%. All of the ranges of findings overlap and doctrinally-based differences in outcome are barely detectable. The one notable exception is the *Auer* doctrine. The Supreme Court affirms agency interpretations of agency rules at a much higher rate – 90%--than the roughly 70% rate at which it upholds other agency decisions.<sup>52</sup> There are no studies of circuit court decisions that apply *Auer*, but the Supreme Court seems to be sending the lower courts an unmistakable if implicit message that they should confer extraordinary deference on agency interpretations of agency rules.

The unusually high rate at which the Court affirms agency interpretations of agency rules suggests strongly that the Court has rejected John Manning's sophisticated argument against judicial deference to agency interpretations of agency rules.<sup>53</sup> The Court seems instead to have internalized the traditional common sense reasons in support of such deference—agencies are in a much better position than courts to know what their rules mean and to understand the functional implications of alternative interpretations of their rules.

The contrast between the findings of the studies of Supreme Court and circuit court decisions, on one hand, and the findings in Verkuil's study of district court decisions, on the other, adds credence to Verkuil's interpretation of his findings. Verkuil argued that the stark disparity between the results he hypothesized and the results he found suggested the need to study in greater detail the two decision making contexts in an effort to identify and to address the institutional flaws that led to such anomalous results.<sup>54</sup> The studies of Supreme Court and circuit court decision making indicate that the norm for the results of judicial review of agency decisions is about a 70% affirmance

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<sup>49</sup> Verkuil, *supra*. note 2.

<sup>50</sup> *Id.* at 719.

<sup>51</sup> *Id.* at 719.

<sup>52</sup> Eskridge & Baer, *supra*. note 2, at 1142.

<sup>53</sup> John Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 *Colum. L. Rev.* 612 (1996).

<sup>54</sup> Verkuil, *supra*. note 2, at 724-33.

rate. Any study that finds an affirmance rate that varies significantly from that norm in some context suggests the need for detailed study of the decision making context to identify and to address the causes of the variation from the norm.

While the studies demonstrate that a court's choice among the six doctrines has little if any explanatory value, it does not follow that doctrine is irrelevant to the decision making process if we conceive of doctrine more broadly. In the final section of this essay I argue that five of the six doctrines courts apply are just alternative ways of stating the same broad doctrine – a court should uphold a reasonable agency action. If we conceive of doctrine in that broader way and ignore the subtle differences in the Court's description of the doctrines, the studies provide no direct evidence with respect to the explanatory value of doctrine. Through a process of differential diagnosis, however, the studies allow us to infer that doctrine is by far the most dominant explanatory variable if we conceive of doctrine in this much broader way.

### **What Factors Can Explain the Patterns of Decisions?**

If choice of doctrine explains little if any of the variation in the outcome of cases in which courts review agency actions, it would be helpful to know what other factors help to explain the pattern of decisions. The studies have identified five other variables that may help to explain outcomes – procedures used to produce the agency decision, agency consistency over time, extent of judicial comfort with the subject matter of the agency decision, ideological perspectives of the judges and Justices, and panel effect, i.e., whether a circuit court panel consists of three judges of the same political party or of a mixture of judges of different political parties.

The findings with respect to an agency's choice of decision making procedures suggest that this factor has little, if any, effect on the rate of judicial affirmance of agency actions. Eskridge and Baer found that the Supreme Court upholds agency actions taken through use of notice and comment rulemaking in 72.5% of cases versus 65.4% for actions taken through formal adjudication.<sup>55</sup> That difference is modest, however, and its significance is called into question by some of Eskridge and Baer's other findings, e.g., the Court upholds agency positions taken in amicus briefs and in various informal documents at a rate higher than the rate at which the court upholds positions taken in legislative rules or formal adjudications.<sup>56</sup> Moreover, Elliott and Schuck found that circuit courts uphold agency adjudications more frequently than agency rules,<sup>57</sup> while Kerr found no difference in the rate of affirmance of rules and adjudications.<sup>58</sup>

Several studies found that the rate of affirmance is higher with respect to longstanding agency positions than for newly adopted agency positions.<sup>59</sup> The

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<sup>55</sup> Eskridge & Baer, *supra*. note 2, at 1147.

<sup>56</sup> *Id.* at 1148.

<sup>57</sup> Schuck & Elliott, *supra*. note 2, at 1021-22.

<sup>58</sup> Kerr, *supra*. note 2, at 30.

<sup>59</sup> E.g., Eskridge & Baer, *supra*. note 2, at 1148-49; Hickman & Krueger, *supra*. note 2, at 1286-87; Kerr, *supra*. note 2, at 33.

differences were small, however. Those findings are consistent with applicable doctrine. The Court has long said that an agency can depart from precedent or change its policy if, but only, if the agency acknowledges and explains the change.<sup>60</sup> That aspect of applicable doctrine suggests a pattern of decisions like that found in the studies—courts uphold longstanding agency positions only slightly more often than they uphold newly adopted positions.

Several studies found differences in affirmance rates depending on the substantive context of the agency decision. Thus, for instance, Eskridge and Baer found that the Supreme Court affirms agency decisions involving bankruptcy or business regulation in 75 to 77% of cases but that it affirms decisions involving criminal law or labor law in only 62 to 65% of cases.<sup>61</sup> This difference also fits reasonably well with applicable doctrine. The Court has long emphasized comparative institutional advantage and specialized agency expertise as bases for its deference doctrines.<sup>62</sup> It is not surprising that it attaches less significance to an agency's comparative advantage when the agency is addressing a subject like labor law or criminal law that is relatively familiar to the Justices, than when the agency is addressing a subject like bankruptcy or business regulation where the agency has a distinct expertise advantage over the Justices.

Comparative institutional advantage may explain some of the other findings of differences in affirmance rates based on subject matter as well. Thus, for instance, Zaring found that the D.C. Circuit affirms agencies that appear before it frequently 12% less often than agencies that appear before it less frequently.<sup>63</sup> It is not surprising to learn that a court gains confidence in its ability to understand a subject as it gains experience in addressing the subject.

Many studies found that the ideological preferences of judges and Justices have considerable explanatory power in the context of judicial review of agency actions.<sup>64</sup> The findings with respect to the voting patterns of the two former administrative law professors who are now Justices are illustrative. Eskridge and Baer found that Justice Breyer votes to uphold 79.5% of liberal agency actions, while Justice Scalia votes to uphold only 53.8% of liberal agency actions.<sup>65</sup> That 25.7% difference suggests strongly that the ideological preferences of the Justices are far more important than any of the other factors that have been studied in explaining their votes in cases in which the Court reviews agency actions.

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<sup>60</sup> See, e.g., *FCC v. Fox Television Stations*, 129 S. Ct. 1800 (2009) (agency need only assert its belief that new policy is better than old policy to have new policy upheld); *INS v. Yang*, 519 U.S. 26, 32 (1996) (court will overturn an unexplained departure from precedent). See generally *Pierce*, II Administrative Law Treatise §11.5.

<sup>61</sup> Eskridge & Baer, *supra*. note 2, at 1144.

<sup>62</sup> E.g., *Baltimore Gas & Electric Co. v. NRDC*, 462 U.S. 97, 103 (1983).

<sup>63</sup> Zaring, *supra*. note 2, at 2366. See also *Miles & Sunstein II* at 796-97 (finding that courts that review an agency more frequently uphold the actions of that agency less frequently).

<sup>64</sup> Zaring was the only scholar who looked at this question and did not find a significant difference in voting patterns based on the ideological preference of judges. Zaring, *supra*. note 2, at 2362-64.

<sup>65</sup> Eskridge & Baer, *supra*. note 2, at 1154.

Eskridge and Baer found a smaller disparity between the votes of Justices Breyer and Scalia when the Court reviews conservative agency actions. Justice Scalia votes to uphold such actions in 71.6% of cases, while Justice Breyer votes to uphold them in 64.9% of cases – a difference of only 6.7%.<sup>66</sup> The difference between those two voting patterns reflects another robust finding in the studies. Liberal judges and Justices vote to uphold agency actions more often than do conservative judges and Justices.<sup>67</sup> This finding also illustrates the insignificance of doctrine. Justice Scalia is the most outspoken proponent of the highly deferential *Chevron* doctrine,<sup>68</sup> while Justice Breyer is the most vocal critic of that doctrine.<sup>69</sup> Yet, Justice Breyer’s voting pattern shows that he is more deferential than Justice Scalia. Justice Breyer votes to uphold agency actions more often than any other Justice, while Justice Scalia votes to uphold agency actions less often than any other Justice.<sup>70</sup>

Every study of circuit court decisions that has looked at the question has found that ideological preferences help to explain patterns of decisions in cases in which courts review agency actions. Most studies found large ideologically-based differences in outcomes. Remarkably, three of the studies had identical findings with respect to the explanatory power of the ideological preferences of judges. Each of the three found that a circuit court panel was 31% more likely to uphold an agency action when the action was consistent with the ideological preferences of the members of the panel than when the action was inconsistent with those preferences.<sup>71</sup> Thus, ideology is by far the most important of the explanatory variables that have been studied.

Many studies also analyzed the patterns of decisions in an effort to detect a panel effect, i.e., a difference in patterns of decisions that varies depending on whether a panel consists of three judges of the same political party or instead consists of two judges of one party and one judge of the other party. Every study found large panel effects. Again, three of the studies included remarkably consistent findings with respect to panel effects. The tendency of circuit judges to vote in a manner consistent with their ideological preferences is about half as strong when judges sit in politically mixed panels as when they sit in politically unified panels.<sup>72</sup>

Scholars have identified two plausible reasons for the panel effect. It may be attributable to a whistle-blower effect, i.e., the members of the majority party are deterred from voting in accordance with their ideological preferences by fear that their colleague

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<sup>66</sup> Id. at 1154.

<sup>67</sup> E.g., Miles & Sunstein I, at 855; Miles & Sunstein II, at 796.

<sup>68</sup> See Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L. J. 511 (1989) (praising *Chevron*).

<sup>69</sup> See Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363 (1986) (criticizing *Chevron*).

<sup>70</sup> Eskridge & Baer, *supra*. note 2, at 1154; Miles & Sunstein I at 826.

<sup>71</sup> Miles & Sunstein I, at 856; Miles & Sunstein II, at 789-90; Cross & Tiller, *supra*. note 2, at 2171. See also Kerr, *supra*. note 2, at 40 (finding a 20% differential based on ideology); Revesz, *supra*. note 2 (finding large ideologically-based differences in every time period studied). But see Zaring, *supra*. note 2, at 2362-64 (finding only small ideologically-based differences).

<sup>72</sup> Miles & Sunstein I, at 856; Miles & Sunstein II, at 789-90; Cross & Tiller, *supra*. note 2, at 856.

of the other party will write a scorching dissent that will embarrass them.<sup>73</sup> Alternatively, it may be attributable to the effects of collegiality, i.e., when judges with differing ideological preferences are forced to discuss their differences they tend to temper their views.<sup>74</sup>

I suspect that the panel effect is caused by some combination of both factors. Whatever may be its cause, the effect seems to disappear when the number of decision makers increases from three to nine. Ideology is about as important a determinant of the decisions of the Justices as it is of circuit court judges even though the nine Justices differ significantly with respect to their ideological preferences and the majority can be certain that its opinion will elicit a highly critical dissent in every case that has significant ideological content.<sup>75</sup>

#### **IV. Is the D.C. Circuit Different?**

Every study that has looked at the question has found that the D.C. Circuit is less deferential to agencies than any other circuit. That robust finding is important because the D.C. Circuit decides far more cases involving judicial review of agency action than any other circuit. The D.C. Circuit decides over one-quarter of cases in which circuit courts review agency actions.<sup>76</sup> Like many of the other findings in the studies, the findings with respect to the D.C. Circuit's affirmance rate are remarkably consistent. Schuck and Elliott found that the D.C. Circuit affirmed agencies in 12% fewer cases than other circuits in 1984,<sup>77</sup> while Miles and Sunstein found that the D.C. Circuit affirmed agencies in 11% fewer cases than other circuits during the period 1996 to 2006.

There are at least four plausible explanations for the D.C. Circuit's consistently less deferential posture in cases in which it reviews agency actions. First, it might be attributable to the D.C. Circuit's greater familiarity with the subject matter of many of the administrative law cases it decides. A regional circuit court might decide one case involving telecommunications law every few years, for instance, while the D.C. Circuit typically decides several such cases each year. Over time, a judge who is regularly exposed to a body of law may come to believe that he does not suffer from a significant institutional disadvantage vis a vis the agency charged with responsibility to implement that body of law. The judge may come to believe that he need not defer to the agency because he knows as much about the subject as do the agency decision makers. This explanation for the D.C. Circuit's less deferential posture fits well with the finding that circuit courts have lower affirmance rates with respect to agencies they review frequently than with respect to agencies they review infrequently and with the finding that the

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<sup>73</sup> Cross & Tiller, *supra*. note 2, at 2173-74.

<sup>74</sup> Harry Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 Va. L. Rev. 1335, 1358-62 (1998).

<sup>75</sup> See text at notes 64-70 *supra*.

<sup>76</sup> Miles & Sunstein II, at 794-95.

<sup>77</sup> Schuck & Elliott, *supra*. note 2, at 1041-42; Miles & Sunstein II, at 796.

Supreme Court affirms agencies less frequently in substantive contexts in which the Justices believe that they are not at a comparative institutional disadvantage.<sup>78</sup>

Second, the D.C. Circuit's less deferential posture may be attributable to the composition of the court. The process of appointing judges to the D.C. Circuit differs markedly from the process of appointing judges to the regional circuit courts. In nominating people to be members of regional circuit courts, the President traditionally defers to the preferences of the Senators and/or Governor of each state who are members of the President's party. Thus, for instance, when a Democrat President has the opportunity to nominate someone to the "Maryland seat" on the Fourth Circuit, the President traditionally solicits and acts on the recommendation of the senior (Democrat) Senator from Maryland. The D.C. Circuit is one of only three courts to which the President can make nominations of people of his own choosing. The process of nominating people to the D.C. Circuit is dominated by the President's political advisors. This selection process may yield nominees with unusually powerful political and ideological perspectives who are less likely to defer to the (often rival) politicians who run agencies.

Third, the D.C. Circuit's less deferential posture may be attributable to the ambitions of many of the members of the D.C. Circuit. The President often chooses members of the D.C. Circuit as nominees for the Supreme Court. Four of the members of the current Supreme Court were members of the D.C. Circuit when they were nominated. It may be that members of the D.C. Circuit believe that they can improve their chances of being nominated to the Supreme Court by deciding high visibility cases in ways that coincide with the ideological preferences of the leaders of their party.

Finally, the D.C. Circuit's workload may contribute to its less deferential posture. The D.C. Circuit decides less than one quarter of the average number of cases per judge decided by the other circuit courts.<sup>79</sup> It takes a much longer time to read and understand the record in a typical administrative law case than in a typical criminal law or contract law case. Moreover, it takes much longer to write an opinion reversing an agency action than an opinion affirming that action. The D.C. Circuit can devote much more time to each case in which it reviews an agency action than can a regional circuit court. This explanation for the D.C. Circuit's greater willingness to overturn agency actions fits well with the finding that the D.C. Circuit writes much longer opinions than other circuits in such cases.<sup>80</sup>

I believe that each of these four factors contributes to the D.C. Circuit's unusually low rate of upholding agency actions. My belief is reinforced by an explanation I once heard from a friend who is a member of another circuit. As he described the process his court often uses in deciding administrative law cases, he and his colleagues use *Chevron* as a verb. Thus, for instance after a long day of hearing oral arguments in several cases, one of which involved review of an agency action, the senior member of the panel would

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<sup>78</sup> See text at notes 61-63.

<sup>79</sup> Administrative Office of the United States Courts, Judicial Business 2009 41 (2009).

<sup>80</sup> Schuck & Elliott, *supra*. note 2, at 1004.

ask: “Should we *Chevron* that case?” In most administrative law cases, the other members would respond affirmatively for several good reasons. The record in a typical agency review case is extremely long. It often includes multiple scientific studies with conflicting conclusions with respect to issues that are unfamiliar to the judges. Given their heavy load of other cases, the judges can not devote nearly enough time to study of the record and the issues to be confident that they understand the issues well enough to pass judgment on the adequacy of the agency’s treatment of those issues. They fear that they might cause more harm than good by attempting to grapple with the issues in a serious way. Finally, they can dispose of the case with relatively little use of scarce resources by instructing a clerk to write a short draft of an opinion in which he summarizes the facts and issues, recites the applicable doctrines, and assures the reader that the court has dutifully applied those doctrines and has detected no fatal flaws in the agency’s decision making process. Of course, regional circuit courts overturn about one-third of the agency actions they review, so the judges must at least take a quick look at factors like the relationship between the agency’s legal conclusions and the language of the applicable statute and the quality of the agency’s reasoning before they *Chevron* a case.

My friend went on to express the opinion that the members of the D.C. Circuit can take a less deferential attitude toward such cases largely because of their much lower caseload. Of course, he might have added that the members of the D.C. Circuit often can obtain a decent understanding of the issues in less time than the members of a regional circuit court because of their greater familiarity with the subject matter addressed in most agency decisions.

I do not intend my stylized and necessarily hypothetical description of the decision making process of either the regional circuit courts or the D.C. Circuit as a criticism of either decision making process or of the judges who engage in either process. If my description is accurate, it may well be that both institutions are doing about what each should be doing given their quite different circumstances. What is clear, however, is that the D.C. Circuit is systematically different from the other circuit courts in its tendency to be less deferential to agencies. I leave until the last section of this essay, the question of what, if anything, we should do about that tendency.

## **V. Implications of the Studies**

### **A. Implications for practitioners**

The findings of the studies have several implications for practitioners. First, lawyers who play roles in administrative law cases should spend less time and energy arguing about which doctrine a court should apply, e.g., whether an agency action is subject to *Chevron* deference or *Skidmore* deference. There is no empirical support for the widespread belief that choice of doctrine plays a major role in judicial review of agency actions. I am not suggesting that lawyers ignore doctrine completely. There is anecdotal evidence that a court’s choice of doctrine can be outcome determinative in a

few otherwise close cases.<sup>81</sup> Moreover, courts expect to read briefs and listen to arguments that include some discussion of applicable doctrine, and it is always a costly mistake to fail to meet the expectations of an individual or an institution. It is a waste of time and energy, however, to make a lengthy argument about the particular standard of review the court should apply to an agency action.

Lawyers should focus their arguments instead on the common elements of the doctrines, e.g., is the action consistent with the applicable statute and the available evidence, and has the agency adequately explained the reasoning process it used? Lawyers also should emphasize the consequences of the action under review, e.g., this action will have the following [good or bad] consequences. Arguments of that type are far more likely to influence a reviewing court than are arguments with respect to the particular doctrine that a court should apply to an action.

Of course, it would be helpful to know the ideological preferences of the members of the panel at the time the lawyer drafts a brief, since liberals are likely to find some consequential arguments more persuasive than conservatives and vice versa. In most cases, however, the lawyer will not know the composition of the panel until after briefs are submitted. In that common situation, the briefs should include as many consequential arguments as the record can support, preferably including some that are likely to appeal to conservatives and some that are likely to appeal to liberals. That will create a situation in which the lawyer can emphasize one or the other set of consequential arguments at oral argument once he knows the composition of the panel.

The findings also suggest that lawyers should put a lot of thought into selection of the forum in which to seek review of an agency action in the common situation in which the petitioner can choose among several forums. Some courts have a high proportion of liberal Democrats, while others have a high proportion of conservative Republicans. The findings of the studies indicate that forum selection can be a powerful determinant of outcome. Of course, *ceteris paribus*, the D.C. Circuit is a good choice for a petitioner, since it consistently reverses agencies more often than any regional circuit court.

## **B. Implications for teachers**

I have long struggled with the question of how I should treat this subject in my administrative law course. I believe that it remains important that I devote considerable class time to teaching doctrine because it is the vocabulary all lawyers must master to communicate effectively with agencies, courts, and clients. I also believe, however, that we owe our students a candid description of the role of doctrine. Thus, I feel the need to tell my students about the studies that show that choice of doctrine is not an important determinant of the outcome of administrative law disputes.

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<sup>81</sup> In a few cases, a court has applied *Chevron* and upheld an agency action when the same court previously applied *Skidmore* and rejected the action. E.g., *Schisler v. Sullivan*, 3 F.3d 563 (2d Cir. 1993); *Satellite Broadcasting & Communications Ass'n v. Oman*, 17 F.3d 344 (11<sup>th</sup> Cir. 1994).

I provide that candid description of the largely inconsequential role of choice of doctrine with some regret, however. I fear that my students' knowledge of the minor role that choice of doctrine plays will discourage them from devoting time and energy to the study of doctrine and will induce them to resent the amount of course time I devote to the study of doctrine. I temper my description of the relatively minor role that is played by a court's choice of a particular doctrine with emphasis on the common elements of the competing doctrines. No matter which doctrine a court applies, it invariably looks at three factors in deciding whether to uphold or reject an agency action: (1) the relationship between the agency action and the applicable statute; (2) the relationship between the agency action and the available evidence; and, (3) the quality of reasoning the agency used to explain its action.

I have even more ambivalence about telling my students about the studies that have found that the ideological preferences of judges are an important determinant of the outcome of many administrative law disputes. I fear that such a revelation will induce in my students a cynical perspective that is not healthy for them either as young lawyers or as citizens. I swallow hard and tell them about those findings as well, however, because I believe that my overriding duty to them is to be honest in describing the realities of the practice of administrative law. At a minimum, I will have provided them with information that will allow them to decide whether they want to devote their careers to this field, rather than to some other area of law that is less affected by politics.

I also temper my description of the findings with respect to the important role that politics and ideology play in the decision making process by emphasizing the more reassuring inferences we can draw from the studies. If, as the studies suggest, 26 to 31% of the votes of judges and Justices can be explained as a function of the ideological preferences of the judges and Justices, it follows that 69 to 74% of the votes of judges and Justices are unaffected by their ideological preferences. Thus, it is fair to infer that in over two-thirds of cases in which courts review agency actions, the court engages in a politically and ideologically neutral decision making process in which it focuses on the common elements of the competing doctrines: Is the action consistent with the applicable statute? Is the action consistent with the available evidence? Has the agency explained adequately why it took the action under review?

### **C. Implications for courts**

The Supreme Court should respond to the robust finding that choice of doctrine is not an important determinant of the outcome of a review proceeding by simplifying review doctrine. I endorse David Zaring's suggestion that the Supreme Court should replace all six of the doctrines that it now applies with one simple doctrine – a reviewing court must uphold any reasonable agency action.<sup>82</sup> The Court should recognize that it, lower courts, lawyers, and scholars are wasting scarce time and energy tilting at windmills by arguing about which doctrine applies to a particular agency action.

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<sup>82</sup> Zaring, *supra*. note 2, at 2368-69.

Every study of the subject has found that choice of doctrine is not an important determinant of the outcome of an administrative law dispute. Moreover, the doctrines are not mutually inconsistent. The Court can, and should, acknowledge that each of the existing doctrines is just a restatement of, and an elaboration on, Zaring's proposed universal test.

Thus, *Chevron* step one serves as a reminder that an agency interpretation of a statute cannot be reasonable if it is inconsistent with clear legislative intent. It follows that both agencies and reviewing courts must attempt to determine what Congress intended when it included a particular provision in an agency-administered statute. Similarly, the *State Farm* test is just a reminder that an agency must explain how it reached a decision and that a court must review the agency's reasoning process as part of its task of deciding whether the agency action is reasonable. The *Skidmore* doctrine is a similar reminder that courts should consider the thoroughness of the agency's reasoning process as part of the judicial task of deciding whether the agency's action is reasonable. The substantial evidence doctrine is just a reminder that one of the tasks of a reviewing court is to look at the record of a proceeding to see whether the factual predicates for the agency action bear some reasonable relationship to the available evidence. And, of course, the *Auer* doctrine is simply a paraphrase of Zaring's proposed test transposed to the context of review of agency interpretations of agency rules.

That leaves only the de novo review doctrine. The Court should acknowledge that the de novo review doctrine does not exist, and that it never has existed. It would make no sense for a court to ignore completely an agency's reasons for acting as it did, and I doubt that any court has actually acted in that irrational matter. Once some other institution of government has devoted time and energy to resolution of a dispute, no court should ignore that institution's reasons for resolving the dispute as it did. The studies are consistent with common sense. Courts consider an agency's reasoning for what it is worth, whether or not Congress chooses to label the review process de novo.<sup>83</sup>

I believe that adoption of Zaring's proposal would respond adequately to the finding that doctrine is not an important determinant of the outcome of a review proceeding. I find it far more difficult to identify a promising response to the troubling finding that the ideological preferences of judges and Justices are the most important determinant of the outcome of review proceedings.

I once believed that the Court could reduce significantly the role of politics and ideology in the process of judicial review of agency actions by announcing a more objective and less malleable doctrine that all courts must apply. For years, I argued that *Chevron* was such a doctrine.<sup>84</sup> For a while, I could point to studies that supported that argument. The more recent studies do not support my prior view, however. Any beneficial effect *Chevron* once had has now disappeared. I now share the view of many scholars that courts will never announce a doctrine that cannot accommodate the

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<sup>83</sup> See Eskridge & Baer, *supra*. note 2, at 1142.

<sup>84</sup> E.g., Richard Pierce, I Administrative Law Treatise §3.4 at 148 (4<sup>th</sup> ed. 2002).

powerful tendency of judges and Justices to act in ways that are consistent with their strongly held political and ideological perspectives.<sup>85</sup>

The findings with respect to the role of panel composition in the review process tempts me to urge circuit courts to adopt a practice of assigning a politically mixed panel to every review proceeding. The studies suggest that such a practice might cut in half the explanatory power of the political and ideological views of judges in the review process.<sup>86</sup> I am not prepared to make such a proposal at present, however. I fear that adoption of such a practice might have unintended adverse effects that would more than offset its beneficial effects. In particular, I fear that treating judges as members of a political party might reinforce their tendency to think and act as members of a political party.

I am troubled by the D.C. Circuit's consistently less deferential posture in agency review cases, particularly when I factor in the robust finding that a high proportion of judicial decisions that reject agency actions are primarily driven by the ideological preferences of the judges. It is not healthy for a handful of politically unaccountable judges to make a high proportion of the nation's policy decisions under the guise of reviewing actions taken by politically accountable agencies. The only action I can suggest that might have a beneficial effect on the D.C. Circuit's approach to review actions is one the Supreme Court has taken on many prior occasions – issuance of a unanimous opinion in which the Court chastises the D.C. Circuit harshly for misperceiving its role and overstepping the appropriate boundaries of judicial review.<sup>87</sup> There is little evidence that the D.C. Circuit has internalized that message when the Court has sent it in strong language in the past, but I can think of no other means of trying to keep the D.C. Circuit within permissible bounds.

#### **D. Implications for Scholars**

The studies have several implications for scholars. We should spend less time engaging in meaningless debates about the alleged differences among the remarkably similar judicial review doctrines and about the circumstances in which each should be applied. We should focus instead on the three common elements of the doctrines – consistency with applicable statutes, consistency with available evidence, and quality of agency reasoning. We should also devote more attention to consequential arguments, e.g., if the [EPA or FCC] takes the following action, it will have the following [good or bad] effects.

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<sup>85</sup> E.g., Miles & Sunstein I, at 869-70; Sidney Shapiro & Richard Levy, Judicial incentives and Indeterminacy in Substantive Review of Administrative Decisions, 44 Duke L. J. 1051, 1063-64 (1995).

<sup>86</sup> See text at notes 71-75 supra.

<sup>87</sup> The Court has issued at least three unanimous opinions in which it has criticized the D.C. Circuit harshly for exceeding the appropriate boundaries of judicial review. *Chevron v. NRDC*, 467 U.S. 837, 845; *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 544-45 (1978); *FPC v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 333 (1978). See generally Antonin Scalia, *Vermont Yankee, The APA, the D.C. Circuit, and the Supreme Court*, 1978 Sup. Ct. Rev. 345 (1978).

Most importantly, we should put more time and effort into the kinds of empirical studies I have discussed in this essay. Teachers, scholars, lawyers, agency heads, judges, Justices, and legislators need to know what courts do and why. The language courts use to describe what they do and why they do it is a useful starting point in that process, but empirical studies can provide additional insights into judicial practices that can help all of us gain a better understanding of the roles reviewing courts play in the administrative state.