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What Factors Can an Agency Consider in Making a Decision?

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It is hard to imagine any administrative law issue more basic than identifying the factors that an agency must, can, and cannot consider in making a decision. Every agency must confront the issue every day, and circuit courts address it on a regular basis. Until 2007, it appeared that both the D.C. Circuit and the Supreme Court had adopted a consistent and sensible method of distinguishing between the decisional factors that an agency can and cannot consider in making a class of decisions. In a pair of opinions it issued in 2007, however, the Supreme Court appeared to adopt a strange new method of distinguishing between the decisional factors that an agency can and cannot consider that is a sharp departure from the method it and the D.C. Circuit had long used. After discussing some of the background legal norms and tests, I will discuss those problematic opinions and their potential interpretations. I will then argue that the Supreme Court needs to change its general approach toward administrative law disputes both to eliminate the confusion created by the two poorly reasoned 2007 opinions and to move away from its unfortunate trend of ignoring or distorting doctrine to allow the Justices to decide cases in a manner consistent with their political and ideological preferences.

The logical starting point in discussing this issue is the Supreme Court's landmark 1983 opinion in Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Company.[2] In *State Farm*, the Court held unanimously that the National Highway Transportation Safety Administration's decision to rescind a rule that required automakers to install passive restraints in all new autos was arbitrary and capricious. In its opinion in *State Farm,* the Court drew a distinction between "relevant factors" that an agency must consider in the process of making a decision and impermissible "factors which Congress has not intended it to consider." The Supreme Court instructed lower courts to reject an agency decision as arbitrary and capricious if it either failed to consider a "relevant" factor or relied on an "impermissible" factor.[3] The opinion said nothing that is helpful, however, to an agency or a court that has the task of distinguishing between relevant and irrelevant factors or between permissible and impermissible factors. The most interesting question that is raised by *State Farm* is whether an agency can or cannot consider a factor that is logically relevant to a decision but that is not mentioned at all in the statute the agency is implementing.

The same question arises in a somewhat different form under the Supreme Court's 1984 landmark opinion in Chevron v. Natural Resources Defense Council.[4] In *Chevron*, the Court announced a two-part test applicable to judicial review of agency interpretations of agency-administered statutes:

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[1] Lyle T. Alverson Professor of Law, George Washington University. This article was inspired by conversations with Jerry Mashaw and Lisa Heinzerling. I am indebted to the participants in a works in progress luncheon at George Washington University and in a symposium at Michigan State University for providing helpful comments on earlier versions of this article.

[2] 463 U.S. 29 (1983).

[3] Id. at 42-43.

[4] 467 U.S. 837 (1984).

> 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.[5]

Under *Chevron,* the analogous question is whether congressional silence with respect to a logically relevant decisional factor renders a statute ambiguous or instead supports a judicial interpretation of the statute that precludes the agency from considering the potential decisional factor.

I will begin by discussing three opinions in which the Supreme Court has answered the easy questions that arise in the process of identifying mandatory, permissible, and impermissible decisional factors. I will then discuss the pre-2007 opinions in which the Supreme Court and the D.C. Circuit adopted a consistent and sensible approach to the more difficult question of how to interpret congressional silence. Thereafter, I will discuss the 2007 opinions in which the Court seems to have adopted a different and problematic method of answering this important question. I will then suggest ways in which the Court can change its approach to administrative law disputes that will both avoid the confusion created by its 2007 opinions and reduce its tendency to distort doctrine to further the political and ideological goals of the Justices.

An Agency Is Not *Required* to Consider Related Statutes or Related Problems

The Supreme Court has provided definitive answers to some of the relatively easy questions that any agency or court must address in the process of distinguishing between mandatory and discretionary decisional factors and between permissible and impermissible decisional factors. In a pair of opinions issued in 1990 and 1991, the Court clarified the *State Farm* test by identifying factors that an agency is not *required* to consider when it makes a decision.

In LTV Corporation v. Pension Benefit Guaranty Corporation (PBGC),[6] the Court held that an agency is not required to consider factors made relevant by statutes related to the statute the agency is implementing when it makes a decision even when the decision the agency is making has effects on pursuit of the policies that underlie the related statutes. The Supreme Court reversed a circuit court that held that PBGC must consider the policies that underlie labor law and bankruptcy law when it makes a pension decision that implicates the policies on which those two related fields of law are premised:

[5] Id. at 842-843.
[6] 496 U.S. 633 (1990).

The Court of Appeals first held that the restoration decision was arbitrary and capricious under § 706(2)(A) because the PBGC did not take account of all the areas of law the court deemed relevant to the restoration decision. The court expressed the view that "[b]ecause ERISA, bankruptcy and labor law are involved in the case at hand, there must be a showing on the administrative record that PBGC, before reaching its decision, considered all of these areas of the law, and to the extent possible, honored the policies underlying them." The court concluded that the administrative record did not reflect thorough and explicit consideration by the PBGC of the "policies and goals" of each of the three bodies of law. As the court put it, the PBGC "focused inordinately on ERISA." The Court of Appeals did not hold that the PBGC's decision *actually conflicted* with any provision in the bankruptcy or labor laws, or that the PBGC's action "trench[ed] upon the ... jurisdiction" of another agency. Rather, the Court held that because labor law and bankruptcy law are "involved in the case at hand," the PBGC had an affirmative obligation, which had not been met, to address them.

The PBGC contends that the Court of Appeals misapplied the general rule that an agency must take into consideration all relevant factors . . . by requiring the agency explicitly to consider and discuss labor and bankruptcy law. We agree.

First, and most important, we do not think that the requirement imposed by the Court of Appeals upon the PBGC can be reconciled with the plain language of § 4047, under which the PBGC is operating in this case. This section gives the PBGC the power to restore terminated plans in any case in which the PBGC determines such action to be "appropriate and consistent with its duties *under this title* [*i.e.,* Title IV of ERISA]" (emphasis added). The statute does not direct the PBGC to make restoration decisions that further the "public interest" generally, but rather empowers the agency to restore when restoration would further the interests that Title IV of ERISA is designed to protect. Given this specific and unambiguous statutory mandate, we do not think that the PBGC did or could focus "inordinately" on ERISA in making its restoration decision.

Even if Congress' directive to the PBGC had not been so clear, we are not entirely sure that the Court of Appeals' holding makes good sense as a general principle of administrative law. The PBGC points out problems that would arise if federal courts routinely were to require each agency to take explicit account of public policies that derive from federal statutes other than the agency's enabling Act. To begin with, there are numerous federal statutes that could be said to embody countless policies. If agency action may be disturbed whenever a reviewing court is able to point to an arguably relevant statutory policy that was not explicitly considered, then a very large number of agency decisions might be open to judicial invalidation. [citations omitted].[7]

[7] Id. at 645-46.

Thus, except in the special case of an agency action that would violate another statute or that would trespass on the jurisdiction of another agency, an agency does not have a duty to consider the effects of its decision on the policies that other related statutes are designed to further. The agency can limit its consideration to the factors that Congress identified in the statute the agency is implementing.

Similarly, in Mobil Oil Exploration & Producing Southeast v. United Distribution Companies,[8] the Court held that an agency is not required to consider a problem that is related to the problem it is addressing in the action it is taking even if the action it is taking has the potential to exacerbate the related problem. The Supreme Court reversed a circuit court that held that the Federal Energy Regulatory Commission (FERC) must consider the potential effect of its action on a related problem within FERC's jurisdiction when it decides whether to take an action that is intended to address one problem but that has the potential to aggravate a related problem:

> The court clearly overshot the mark if it ordered the Commission to resolve the [related] problem in this proceeding. An agency enjoys broad discretion in determining how best to handle related, yet discrete, issues in terms of procedures and priorities.
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> The court likewise erred if it meant that the Commission should have addressed the [related] problem insofar as Order No. 451 "exacerbated" it. This rationale does not provide a basis for invalidating the Commission's orders. As noted, an agency need not solve every problem before it in the same proceeding. This applies even where the initial solution to one problem has adverse consequences for another area that the agency was addressing. [citations omitted].[9]

An Agency Cannot Consider a Factor Congress Prohibited it From Considering

The Court addressed another relatively easy question in American Trucking Associations v. Whitman.[10] It held that an agency cannot consider a factor that Congress explicitly or implicitly prohibited it from considering. Congress rarely explicitly forbids an agency from considering a decisional factor that is logically relevant to a decision or class of decisions. It sometimes chooses decisional standards that implicitly preclude consideration of a logically relevant decisional factor, however. The clearest example of such a decisional standard is the Delaney Clause that is included in the Food, Drug, & Cosmetics Act and the Federal Insecticide, Fungicide, and Rodenticide Act.[11] That provision forbids FDA and EPA from approving the use of any food additive,

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[8] 498 U.S. 211 (1991).
[9] Id. at 230-31.
[10] 531 U.S. 457 (2001).

[11] 21 U.S.C. §§348(c)(3), 376(b)(5)(B). See Richard Merrill, Regulating Carcinogens in Food: A Legislator's Guide to the Food Safety Provisions of the Federal Food, Drug and Cosmetic Act, 77 Mich. L. Rev. 171 (1978).

color additive, or cosmetic that has been "found to induce cancer when ingested by man or animals." Circuit courts are unanimous in holding that the Delaney Clause implicitly forbids EPA or FDA from considering costs or benefits in deciding whether to allow an animal carcinogen as a food additive[12] even though many substances that induce cancer in animals are safer for human consumption than many substances that are regularly ingested by humans.[13]

The provision at issue in *American Trucking* presented a somewhat closer case. Section 109(b) of the Clean Air Act instructs EPA to set ambient air quality standards that "are requisite to protect the public health" "allowing an adequate margin of safety."[14] Petitioners argued that the language of the provision was sufficiently ambiguous to permit EPA to consider costs in the process of setting ambient air quality standards. The Court rejected that argument and held that the language in section 109(b) is "absolute," i.e., it requires EPA to ignore the costs of alternative standards and to set a standard that protects the public health even if the costs of the standard exceed its benefits.[15]

Opinions Interpreting Agency Silence

It is important to recognize what this trilogy of sensible Supreme Court opinions did and did not hold. *American Trucking* held that an agency cannot consider a decisional factor that Congress implicitly prohibited it from considering and illustrated that principle with reference to a statutory provision that cannot be reconciled with agency consideration of a logically relevant decisional factor, i.e., cost benefit analysis. *American Trucking* said nothing, however, about what, if any, inference a court should draw based on congressional silence with respect to a decisional factor.

In *LTV* and *Mobil*, the Court held that an agency is not *required* to consider the potential effects of an action on the policies that underlie related statutes or on related problems within the agency's jurisdiction. It is important to recognize what the Court did not hold in *LTV* and *Mobil*, however. The *LTV* Court did not say that, when PBGC decides whether to take an action that is intended to further the policies of pension law, it is prohibited from considering the potential effects of its actions on the policies that underlie labor law or bankruptcy law, and the *Mobil* Court did not say that, when FERC decides whether to take an action that is intended to address one problem, it is prohibited from considering the effects of a potential solution to one problem on a related problem. The *LTV* and *Mobil* opinions do not address those questions. It is hard to imagine, however, why the Court would hold that it is *impermissible* for an agency to consider the

[12] Les v. Reilly, 968 F. 2d 985 (9th Cir. 1992); Public Citizen v. Young, 831 F. 2d 1108(D.C. Cir. 1987).

[13] See, e.g., Bruce Ames & Gold, Too Many Rodent Carcinogens: Mitogenesis Increases Mutagenesis, 249 Science 970 (1990); Cass Sunstein, Interpreting Statutes in the Regulatory State, 103 Harv. L. Rev. 405, 496–497 (1989); National Research Council, Regulating Pesticides in Food: the Delaney Paradox (1987); Margaret Gilhooley, Plain Meaning, Absurd Results and the Legislative Purpose: The Interpretation of the Delaney Clause, 40 Admin. L. Rev. 267 (1988); Lester Lave, The Strategy of Social Regulation 9–26 (1981).

[14] 42 U.S.C. §7409(a).
[15] 531 U.S. at 464-71.

potential effects of an action it is considering on the policies that underlie other federal statutes or on a related problem within the agency's jurisdiction. Those are clearly factors that are relevant to an agency's decision, and there is no reason to believe that Congress intended to prohibit an agency from considering them. It would defy common sense to interpret congressional silence as a prohibition on agency consideration of such logically relevant decisional factors.

The D.C. Circuit's Opinions

In a long line of cases, the D.C. Circuit has held that it will interpret congressional silence with respect to a factor that is logically relevant to a decision to allow the agency to consider the factor in its decision making.[16] Moreover, the D.C. Circuit has long held that it is willing to conclude that Congress has forbidden an agency from considering a logically relevant decisional factor only when "there is clear congressional intent" to preclude agency consideration of the factor.[17] The court has applied these two related holdings in the context of many classes of agency decisions and many logically relevant decisional factors. Thus, for instance, the D.C. Circuit has held that: (1) EPA could consider cost in deciding whether emissions in one state contribute "significantly" to air pollution in another state where the statute was silent with respect to EPA consideration of cost but where cost was one of several potential measures the agency could rationally use to determine whether migration of air pollutants is "significant";[18] (2) EPA could consider "the magnitude of annual VOC" (volatile organic compounds) and "regulatory efficiency and program considerations" in deciding whether and to what extent to limit VOCs in certain products where the statute listed five other decisional factors and made no reference to the other two logically relevant factors that EPA considered;[19] (3) FAA could consider the needs of the air tour industry in deciding how to implement a statute that required "substantial restoration of the natural quiet" of the Grand Canyon where the statute was silent with respect to the needs of the air tour industry but where the agency was required to restore "substantial … natural quiet" rather than complete natural quiet;[20] and, (4) EPA could consider both the effects of alternative methods of regulation on the price and supply of gasoline and the consistency of alternative methods of regulation with international law and U.S. treaty obligations in implementing a provision of the Clean Air Act where "maintenance or improvement of air quality" was the "overriding . . . purpose" of the statutory provision and the other factors EPA considered were not mentioned in the statute.[21]

The D.C. Circuit's approach to this recurrent issue is based on common sense and is consistent with the recommendation that Jerry Mashaw and David Harfst made on the basis of their comprehensive study of the long and complicated decision making process that spawned the Supreme Court's landmark decision in *State Farm*. After analyzing that decision making process in detail, Mashaw and Harfst gave NHTSA sound advice:

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[16] See cases cited in notes 17-21 infra.
[17] Michigan v. EPA, 213 F.3d 663, 678 (D.C. Cir. 2000).
[18] Id. at 677-79.
[19] Allied Local and Regional Manufacturers Caucus v. EPA, 215 F.3d 61, 77-78 (D.C. Cir. 2000).
[20] Grand Canyon Air Tour Coalition v. FAA, 154 F.3d 455, 475 (D.C. Cir. 1998).
[21] George E. Warren Corp. v. EPA, 159 F. 3d 616, 622-24 (D.C. Cir. 1998).

> This agency, any agency, should always read between the lines of its statute an implicit qualification of the form: "Don't forget that this statute does not exhaust our vision of the good life or the good society. Remember that we have other goals and other purposes that will sometimes conflict with the goals and purposes of this statute. If we forgot to mention all those potential conflicting purposes in your instructions, take note of them anyway. For heaven's sake, be reasonable."[22]

Mashaw and Harfst provided that advice in an interesting context. Before it first issued and then rescinded the passive restraint rule that was the subject of the Supreme Court's opinion in *State Farm*, NHTSA had issued another passive restraint rule that was one of the most cost-effective, life-saving rules ever issued by a federal agency. Congress created NHTSA to improve highway safety. At the time of NHTSA's creation in 1966 and extending for over three decades thereafter, the largest easily avoidable loss of lives on the nation's highways was attributable to "second collisions," i.e., collisions between body parts such as heads and parts of the interior of automobiles.[23] Second collisions were causing over 10000 deaths a year at his time. It was easy to identify a cost-effective method of avoiding those deaths – seat belts. In its initial attempt to reduce this large unnecessary source of highway carnage, NHTSA required all auto makers to include seat belts in all new cars.[24] That step was non-controversial but it was also largely ineffective. Seat belts are highly effective when they are worn, but over 80 per cent of the public refused to use them when they were first installed in autos.[25] NHTSA lacked the power to require their use, and states refused to require their use.

NHTSA responded to that problem by issuing a rule that required car makers to install in each new car an ignition interlock that made it impossible to start the car when the driver or other front seat occupant was not wearing a seatbelt.[26] The rule was inexpensive, easy to implement, and highly effective.[27] It saved thousands of lives at a trivial cost during the brief period in which it was in effect. There was only one problem. The public hated the ignition interlock rule.[28] Congress responded to the widespread public antipathy to the rule by enacting a statute that rescinded the rule and prohibited NHTSA from issuing any similar rule in the future.[29] That overwhelming bipartisan rejection of the most cost-effective form of passive restraint available was a major setback for NHTSA's efforts to address the largest source of avoidable deaths on the nation's highways.

Mashaw and Harfst note that, while Congress did not tell NHTSA to consider public acceptance of its rules as a decisional factor, the congressional reaction to the ignition interlock rule illustrated beyond any doubt that NHTSA had to consider public acceptance as an important factor in choosing among alternative ways of regulating to

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[22] Jerry Mashaw & David Harfst, The Struggle for Auto Safety 214-15 (1990).
[23] Jerry Mashaw & David Harfst, Regulation and Legal Culture: The Case of Motor Vehicle Safety, 4 Yale J. Reg. 257, 280-81 (1987).
[24] 32 Fed. Reg. 2408, 2415 (Feb. 3, 1967).
[25] See 34 Fed. Reg. 11,148 (July 2, 1969).
[26] 37 Fed. Reg. 3911 (Feb. 24, 1972).
[27] Mashaw & Harfst, supra. note 23, at 298.
[28] Id. at 298.
[29] Id. at 298-99.

further its mission of improving highway safety.[30] As Mashaw and Harfst recognize, however, this same principle applies to all agencies in all contexts.[31] It makes no sense to assume that, when Congress identifies one, two, five, or even thirty, factors that an agency is required to consider when it makes a class of decisions, Congress intends the list of mandatory decisional factors to serve as a limit on the factors an agency is allowed to consider. The list of goals and purposes shared by most members of the public and by most members of Congress is far longer than any list of decisional factors Congress has included, or could include, in any single statute. It is far more sensible to assume that Congress intended to permit the agency to consider any other factor that is logically relevant to the decision unless there is clear evidence that Congress intended to forbid the agency from considering some factor that is logically relevant to the decision at issue. This reasoning applies to all of the contexts in which the D.C. Circuit has allowed agencies to consider logically relevant decisional factors that were not mentioned in the statute the agency was implementing and to the logically relevant decisional factors that the Supreme Court held that agencies are not *required* to consider in *LTV* and *Mobil*.

The Supreme Court's Pre-2007 Opinions

Until 2007, the Supreme Court had addressed the question of how to interpret congressional silence in three opinions that were consistent with the D.C. Circuit's approach.

In a section of the *LTV* opinion that is separate from the section in which the Court held that PBGC is not required to consider labor law or bankruptcy law in making pension decisions, the Court also held that PBGC had the discretion to consider a factor that was not mentioned in the pension statute it was implementing.[32] The Supreme Court's reasoning on this issue in *LTV* is remarkably similar to the D.C. Circuit's reasoning in the many cases in which it has addressed the same question:

> The Court of Appeals also rejected the grounds for restoration that the PBGC *did* assert and discuss. The court found that the first ground the PBGC proffered to support the restoration-its policy against follow-on plans-was contrary to law because there was no indication in the text of the restoration provision, § 4047, or its legislative history that Congress intended the PBGC to use successive benefit plans as a basis for restoration. The PBGC argues that in reaching this conclusion the Court of Appeals departed from traditional principles of statutory interpretation and judicial review of agency construction of statutes. Again, we must agree.
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> Here, the PBGC has interpreted § 4047 as giving it the power to base restoration decisions on the existence of follow-on plans. Our task, then, is to determine whether any clear congressional desire to avoid restoration decisions

[30] Mashaw & Harfst, supra. note 22, at 212-16.
[31] Id. at 212-16.
[32] 496 U.S. at 647-52.

based on successive pension plans exists, and, if the answer is in the negative, whether the PBGC's policy is based upon a permissible construction of the statute.

In *Chevron*, we set forth the general principles to be applied when federal courts review an agency's interpretation of the statute it implements:

> "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."

Turning to the first half of the inquiry, we observe that the text of § 4047 does not evince a clear congressional intent to deprive the PBGC of the ability to base restoration decisions on the existence of follow-on plans. To the contrary, the textual grant of authority to the PBGC embodied in this section is broad. As noted above, the section authorizes the PBGC to restore terminated plans "in any such case in which [the PBGC] determines such action to be appropriate and consistent with its duties under [Title IV of ERISA]." The PBGC's duties consist primarily of furthering the statutory purposes of Title IV identified by Congress. These are:

> "(1) to encourage the continuation and maintenance of voluntary private pension plans for the benefit of their participants,
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> "(2) to provide for the timely and uninterrupted payment of pension benefits to participants and beneficiaries under plans to which this subchapter applies, and
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> "(3) to maintain premiums established by [the PBGC] under section 1306 of this title at the lowest level consistent with carrying out the obligations under this subchapter."

On their face, of course, none of these statutorily identified purposes has anything to say about the precise question at issue-the use of follow-on plans as a basis for restoration decisions.

> Nor do any of the other traditional tools of statutory construction compel the conclusion that Congress intended that the PBGC not base its restoration decisions on follow-on plans.
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> In short, the PBGC's construction based upon its conclusion that the existence of follow-on plans will lead to more plan terminations and increased PBGC liabilities is "assuredly a permissible one." Indeed, the judgments about the way the real world works that have gone into the PBGC's anti-follow-on policy are precisely the kind that agencies are better equipped to make than are courts. This practical agency expertise is one of the principal justifications behind *Chevron* deference. [citations omitted].[33]

The Court used similar reasoning to support the same result in two later opinions. In INS v. Yang,[34] the Court held unanimously that the Attorney General can consider an alien's reliance on fraud as his means of entering the country in the process of deciding whether to waive the deportation of an "otherwise admissible" alien even though the statute made no reference to entry fraud as a decisional factor:

> Unlike the prior version of the waiver-of-deportation statute . . . under which the Attorney General had no discretion to deny a waiver if the statutory requirements were met, satisfaction of the requirements under § 1251(a)(1)(H), including the requirement that the alien have been "otherwise admissible," establishes only the alien's *eligibility* for the waiver. Such eligibility in no way limits the considerations that may guide the Attorney General in exercising her discretion to determine who, among those eligible, will be accorded grace.[35]

Similarly, in Lopez v. Davis,[36] the Court held that the Bureau of Prisons can rely on a factor that is not mentioned in a statute as the basis for a categorical rule that excludes a class of federal prisoners from a benefit they would otherwise be eligible to receive:

> Beyond instructing that the Bureau has discretion to reduce the period of imprisonment for a nonviolent offender who successfully completes drug treatment, Congress has not identified any further circumstance in which the Bureau either must grant the reduction, or is forbidden to do so. In this familiar situation, where Congress has enacted a law that does not answer "the precise question at issue," all we must decide is whether the Bureau, the agency empowered to administer the early release program, has filled the statutory gap "in a way that is reasonable in light of the legislature's revealed design."[37]

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[33] Id. at 647-52.
[34] 519 U.S. 26 (1997).
[35] Id. at 30-31.
[36] 531 U.S. 230 (2001).
[37] Id. at 242.

Based on that trio of opinions, the Supreme Court's approach to the question of what, if any, inference to draw from silence seemed to be entirely consistent with the D.C. Circuit's approach. Two opinions issued in 2007 raised serious questions about the Supreme Court's approach to the question, however. Each case is complicated, and the majority opinion in each is difficult to interpret, so I will provide a detailed description of each.

The 2007 Opinions

In Massachusetts v. EPA,[38] the Court reviewed a decision in which EPA denied a petition to begin a rulemaking to set limits on emissions of greenhouse gases (carbon dioxide in this context) by new cars sold in the U.S. EPA denied the petition both on the basis that it lacked the statutory authority to regulate such emissions under the Clean Air Act (CAA) and on the basis that, if it had that authority, it would choose not to exercise it at the present time. The Court divided five-to-four with respect to both issues. The majority held that EPA had the authority to regulate greenhouse gas emissions from cars and that its decision not to exercise that authority at the time was arbitrary and capricious.[39] For present purposes, I am interested only in the manner in which the Court addressed the arbitrary and capricious issue. Counsel for the petitioners has candidly acknowledged that this was the issue that most concerned her:

> To my mind, the trickiest part of the briefing of the merits of this case was in explaining to the Court why EPA had erred in saying that it had discretion to decline to regulate even if it had authority to regulate. Courts typically give agencies a good deal of leeway when they decline to take an action.[40]

EPA devoted many pages to a detailed explanation of the four reasons why it decided not to regulate carbon dioxide emissions from cars at the time: (1) new cars sold in the U.S. are only one small source of the many sources of greenhouse gas emissions, and it makes no sense to take a piecemeal approach to the problem of global warming rather than to approach it in a comprehensive manner; (2) regulation of greenhouse gas emissions in the U.S. would have little beneficial effect unless other major nations engaged in similar regulation, and unilateral regulation of greenhouse gases by the U.S. is likely to interfere with efforts to obtain the international agreements needed to make any global greenhouse gas regulation program effective; (3) the technology needed to reduce greenhouse gas emissions from cars does not exist and no promising technology is on the drawing boards, so EPA can reduce such emissions only by mandating improvements in the mileage cars get, and Congress has given the Department of Transportation exclusive jurisdiction to regulate car mileage; and, (4) there are continuing uncertainties with respect to the causal relationship between greenhouse gas

[38] 127 S Ct. 1438 (2007).
[39] Id. at 1459-63.
[40] Lisa Heinzerling, Climate Change in the Supreme Court, 38 Envtl. L 3,12 (2008).

emissions and global warming.[41] The D.C. Circuit held that EPA's reasons for deferring a judgment that greenhouse gases do or do not cause air pollution were permissible.[42]

The majority acknowledged that it has "neither the expertise nor the authority to evaluate these policy judgments."[43] It dismissed EPA's reasons for not initiating the proposed rulemaking as a "laundry list" that is unrelated to the language of the statute.[44] The statute provides that EPA "shall by regulation prescribe … standards applicable to the emission of any air pollutant from any class . . . of new motor vehicles . . . which in [the Administrator's] judgment cause . . . air pollution . . . ."[45] In the view of the majority, that provision required EPA to regulate emissions of greenhouse gases from new cars unless it "determines that greenhouse gases do not contribute to climate change *or if it provides some reasonable explanation for why it cannot or will not exercise its discretion to determine whether they do.*"[46] [Emphasis added]. The majority then concluded that none of the reasons given by EPA were permissible.[47]

This part of the majority opinion in *Massachusetts* is troubling. Once the majority recognized that EPA could exercise its discretion to defer a judgment that greenhouse gases cause air pollution, as it did in the italicized passage, the majority's rejection of EPA's reasons for deferring that judgment as impermissible is strange. As the dissenting Justices noted, nothing in the statute requires EPA to make the judgment that triggers its duty to regulate in response to the filing of a petition for rulemaking;[48] EPA has made no such judgment;[49] nothing in the statute limits EPA's discretion to defer making such a judgment;[50] and, "[t]he reasons the EPA gave are surely considerations executive agencies *regularly* take into account (and *ought* to take into account) when deciding whether to consider entering a new field . . . ."[51] [emphasis in original]. In short, Congress was silent with respect to the factors EPA can consider in deciding whether to defer a judgment that greenhouse gas emissions from cars are a pollutant, and all of the factors that EPA considered are logically relevant to that decision. Yet, the majority interpreted that congressional silence to prohibit EPA from considering any of those factors.

The dissenting Justices noted that the majority opinion was inconsistent with precedent by inferring from congressional silence a congressional decision to make a long list of logically relevant reasons for a decision to defer a judgment impermissible.[52] That is my main concern. I fear that the majority opinion in *Massachusetts* will be interpreted to reject the long line of D.C. Circuit opinions in which that court has interpreted congressional silence to permit an agency to consider a logically relevant

[41] 68 Fed. Reg. 52,928-32 (Sep. 8, 2003).
[42] Massachusetts v. EPA, 415 F. 3d 50, 58 (D.C. Cir. 2005).
[43] 127 S. Ct. at 1463.
[44] Id. at 1462.
[45] 42 U.S.C. §7521.
[46] 127 S. Ct. at 1462.
[47] Id. at 1463.
[48] Id. at 1472.
[49] Id. at 1472.
[50] Id. at 1473.
[51] Id. at 1473.
[52] Id. at 1473.

decisional factor and to overrule the Supreme Court's opinions to the same effect in *LTV*, *Yang*, and *Lopez*.

The other 2007 opinion that concerns me was also issued in a complicated case in which the Justices divided five-to-four. In National Association of Home Builders v. Defenders of Wildlife,[53] the Court confronted what the majority characterized as "a clash of seemingly categorical – and at first glance, irreconcilable – legislative commands."[54] The Clean Water Act (CWA) provides that EPA "shall" transfer permitting authority to a state if the state satisfies nine conditions,[55] while the Endangered Species Act (ESA) provides that no agency can take any action that has any potential effect on any endangered species without first consulting with the Secretary of the Interior to insure that the action does not threaten any endangered species.[56] If, upon consultation with the action agency, DOI issues a biological opinion in which it concludes that the proposed action will threaten any endangered species, the agency cannot take the proposed action although it can reach agreement with DOI to take a "reasonable and prudent" alternative action.[57]

The majority concluded that the ESA requires EPA to consult with DOI only when it takes a discretionary action and that EPA has no discretion to decline to transfer CWA permitting authority to a state that satisfies the nine criteria for transfer set forth in CWA.[58] ESA does not limit the duty to consult to discretionary actions, but the majority upheld an EPA interpretation of an EPA rule that had that effect.[59] The majority opinion in *Home Builders* is difficult to interpret for reasons that I will discuss later,[60] but parts of it suggest that the majority concluded that EPA *cannot* consult with DOI before it transfers permitting authority to a state, i.e., that such consultation is an *impermissible* decisional factor under *State Farm*. That is certainly the interpretation of the opinion that is suggested by the majority's summary of its opinion: "The question presented is whether §7(a)(2) [of ESA] effectively operates as a tenth criterion on which the transfer of permitting power under the first statute [CWA] must be conditioned. We conclude that it does not."[61]

It is also the interpretation of the majority opinion that is suggested by the way the majority criticized and seemingly rejected all alternative interpretations of the two statutes. A majority of the en banc Ninth Circuit had interpreted the two statutes to require EPA to consult with DOI before it transfers permitting authority to a state.[62] The Supreme Court majority characterized the effect of that interpretation as adding an additional factor to the nine conditions that CWA imposes on transferring permitting authority to a state.[63] The majority criticized the Ninth Circuit for adopting an

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[53] 127 S. Ct. 2518 (2007).
[54] Id. at 2531.
[55] 33 U.S.C. §1342(b).
[56] 16 U.S.C. §1536(a)(b).
[57] 16 U.S.C. §1536(b)(3)(A).
[58] 127 S.Ct. at 2534-38.
[59] Id. at 2534-37.
[60] See text at notes 68-85 infra.
[61] 127 S. Ct. 2525.
[62] National Association of Home Builders v. Defenders of Wildlife, 420 F. 3d 946 (9th Cir. 2005), reh. en banc den. 450 F. 3d 394 (9th Cir. en banc 2006).
[63] 127 S. Ct. at 2532.

interpretation of CWA that is based on an implied amendment through enactment of ESA; the majority rejected the Ninth Circuit's interpretation based on its assertion that implied amendments, like implied repeals, are disfavored.[64]

The dissenting opinion also suggested potential ways of reconciling the two statutes. First, it suggested that EPA could engage in the consultation with DOI that is seemingly required by ESA, and then work with DOI and the state to identify a "reasonable and prudent alternative" to the proposed transfer, as authorized by ESA, if DOI expressed its opinion that the transfer as proposed would threaten any endangered species.[65] The dissent suggested that the alternative agreed to by EPA, DOI, and the state might consist of a transfer of permitting authority conditioned on the state's willingness to conduct its permitting in a manner that is consistent with ESA and/or EPA's willingness to engage in heightened oversight of the state's permitting process to insure that it acts in a manner that is consistent with ESA.[66] Second, the dissenting opinion suggested that EPA could incorporate increased oversight of state permitting to insure compliance with ESA in the Memorandum of Understanding (MOU) that EPA always enters into with a state when it transfers permitting authority to a state.[67] The majority rejected both of those potential alternative constructions on the basis that they, like the Ninth Circuit's construction, would impermissibly "alter the CWA's statutory command."[68]

Interpreting the 2007 Opinions

I have no doubt that many petitioners will argue that *Massachusetts* and/or *Home Builders* stand for the proposition that congressional silence with respect to a decisional factor should be interpreted as congressional rejection of that factor and as a prohibition on agency consideration of that factor in making decisions, thereby implicitly overruling *LTV* and disapproving of the long line of opinions in which the D.C. Circuit has held that silence with respect to a logically relevant decisional factor should be interpreted to permit the agency to consider the factor. I fear that at least some circuit courts will find that argument persuasive. Both majority opinions include significant passages that support that interpretation. In both, the majority concluded that an agency could not consider a factor that was logically relevant to the agency decision and that Congress had not addressed in any manner in the statute at issue. Congress did not prohibit EPA from considering the many practical factors that induced it to defer initiation of a rulemaking to set limits on emissions of greenhouse gases by new cars, and Congress did not prohibit EPA from considering the potential effects on endangered species of a transfer of CWA permitting power to a state.

I hope that circuit courts reject the argument that *Massachusetts* and/ or *Home* B*uilders* should be interpreted in that broad manner. There are many ways of arguing against the broad interpretation of *Massachusetts* and *Home Builders* that concerns me. The opinions can be interpreted narrowly and distinguished from *LTV* and the D.C.

[64] Id. at 2532-33.
[65] Id. at 2544-47.
[66] Id. at 2546.
[67] Id. at 2547-48.
[68] Id. at 2532 n. 7.

Circuit opinions by referring to the difference between "may" and "shall." *LTV*, *Yang*, *Lopez*, and the D.C. Circuit cases involved statutes that authorized an agency to make decisions based on consideration of specified decisional factors. Each used "may" or some equivalent word that permits, but does not require, an agency to take the action at issue. In each case, the court held that the agency could exercise its discretion in deciding whether to act by, inter alia, considering factors in addition to the factors identified in the statute.

By contrast, both of the statutes the Court interpreted in *Massachusetts* and *Home Builders* used "shall" or some equivalent language of command. In that situation, it is arguable that the Supreme Court majority simply engaged in a version of the non-controversial interpretative process the Court used in *American Trucking.* The majority properly interpreted the statute as an implicit congressional prohibition on consideration of any factor other than, or in addition to, the factors set forth in the statutes. Thus, for instance, if Congress commands an agency to act in a specified manner when X occurs, Congress has implicitly prohibited the agency from declining to act for some reason that is not mentioned in the statute when X occurs. The agency's task is ministerial and non-discretionary.

Both majority opinions include language that can be interpreted in this manner. Thus, the *Massachusetts* majority seemed to say that, since Congress instructed EPA to regulate emissions of any substance emitted by a car that, in EPA's judgment, qualifies as an air pollutant, Congress implicitly prohibited EPA from exercising its discretion not to regulate once it makes the judgment that greenhouse gases are pollutants.[69] EPA cannot consider any other factor in making a judgment that greenhouse gases are a pollutant because Congress implicitly prohibited it from doing so. Similarly, the *Home Builders* majority seemed to say that, since Congress commanded EPA to transfer permitting authority to a state when the state satisfies nine criteria, Congress implicitly prohibited EPA from considering any other factor.[70] EPA cannot add a tenth factor, consultation with DOI, because Congress implicitly precluded EPA from considering that factor.

There are some obvious problems with these potential narrow interpretations of *Massachusetts* and *Home Builders*, however. Both cases raise troublesome questions about how seriously to take the distinction between "may" and "shall." As the dissenting opinion in *Home Builders* noted, all courts, including the Supreme Court, often interpret "shall" to mean "may" when the context in which the term appears suggests strongly that Congress did not mean what its literal choice of words suggested.[71] My favorite example of this longstanding practice is the Supreme Court's 1868 opinion in which it held that "shall" meant "may" in the context of the 1789 statute that stated that U.S. Attorneys "shall" prosecute all offenses against the United States.[72] The Court concluded that Congress was unlikely to have intended to require that U.S. Attorneys prosecute all such offenses given the mismatch between their resources and the magnitude of the task.

There were certainly good reasons for the Court to take a skeptical view of the meaning of "shall" urged by the petitioners in each of the two cases. In the context of

[69] 127 S.Ct. at 1462-63.
[70] 127 S. Ct. at 2532-33.
[71] Id. at 2548 n. 12.
[72] Confiscation Cases, 74 U.S. (7 Wall) 454 (1868).

Massachusetts, it is hard to believe that the Congress that enacted the Clean Air Act intended to mandate regulation of greenhouse gases when it is unlikely that most members had ever heard of anthropogenic global warming when they chose to place "shall" in the statute.[73] It is also a stretch to attribute to Congress an intent to mandate regulation of greenhouse gases when the only action Congress had ever taken with respect to global warming at the time *Massachusetts* was decided was the 99 to 0 Senate vote for a resolution stating that the United States should not enter into the Kyoto Protocol.[74] There is also a linguistic problem with the majority's interpretation of the applicable provision of the Clean Air Act. As the dissenting Justices pointed out, while the statute instructs EPA to regulate auto emissions of any substance that, "in its judgment," is a pollutant, the statute does not require EPA to make such a "judgment" and EPA had made no such "judgment."[75] It follows that Congress did not limit the factors EPA can consider in deciding whether or when to make the "judgment" that triggers a duty to regulate emissions of greenhouse gases from new autos. In other words, the statute was ambiguous with respect to the question before the Court.

In the context of *Home Builders*, there were equally compelling reasons for the Court to reject the interpretation of "shall" urged by the petitioners. Since Congress gave EPA a command in ESA that was inconsistent with the command it gave EPA in CWA, it is hard to believe that Congress wanted EPA or the courts to interpret the language of command in CWA to trump the language of command in the subsequently enacted ESA. While implied amendments by statutory enactment are disfavored, judicial interpretations of pre-existing statutes that have the effect of amending subsequently enacted statutes are even more suspect. Moreover, as the dissenting Justices pointed out, the nine criteria Congress instructed EPA to apply in deciding whether to transfer CWA permitting authority to a state include several that are sufficiently broad and malleable that EPA enjoys considerable discretion in making transfer decisions.[76] Given the breadth of the factors EPA is explicitly required to consider before it transfers permitting authority to a state, the majority's characterization of the transfer decision as non-discretionary was a linguistic stretch. Like the CAA provision at issue in *Massachusetts*, the CWA provision at issue in *Home Builders* was ambiguous with respect to the issue before the Court.

The realization that the CWA provision at issue in *Home Builders* was ambiguous leads logically to discussion of another potential way of interpreting the majority opinion in the case that would avoid the broad interpretation that concerns me. The majority opinion can be interpreted as an opinion in which the majority simply upheld as reasonable the agency's interpretation of an ambiguous statute. At one point in its opinion, the *Home Builders* majority stated that the CWA provision is ambiguous and then said that EPA's "interpretation is reasonable in light of the statute's text and the overall statutory scheme, and that it is therefore entitled to *Chevron* deference."[77]

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[73] As the majority notes: "When Congress enacted these provisions, climate silence was in its infancy." 127 S.Ct. at 1447.
[74] Senate Resolution 98, 105th Cong., 1st Sess. (July 25, 1997).
[75] 127 S. Ct. 1472-73.
[76] See 127 S. Ct. at 2548-50.
[77] Id. at 2534.

There is a problem with this interpretation of the majority opinion in *Home Builders,* however. It is hard to reconcile the part of the majority opinion in which the majority characterizes the statute as ambiguous with the parts of the opinion in which the majority criticizes harshly the interpretations adopted by the Ninth Circuit and in the dissenting opinion.[78] If the majority simply upheld the current EPA interpretation of an ambiguous provision of CWA as one of several reasonable interpretations of the statute, EPA has the discretion in the future to adopt the interpretation of the Ninth Circuit and/or the interpretation of the dissenting Justices. The Supreme Court would be required to uphold either of those interpretations as long as EPA provides an adequate explanation for its decision. That result would be compelled by the Court's opinions in *Chevron* and *Brand X*.[79] Yet, it is hard to imagine the *Home Builders* majority upholding such an EPA interpretation given its harsh criticism of the reasoning and conclusions of the Ninth Circuit and of the dissenting Justices.

The majority opinion in *Home Builders* is internally inconsistent It can be interpreted either as an opinion in which the majority upheld an agency interpretation of an ambiguous statute or as an opinion in which the majority adopted that interpretation as its own and rejected the alternative interpretations adopted by the circuit court and the dissenting Justices. EPA is likely to force courts to choose which of these interpretations of *Home Builders* to adopt. Before President Bush took office, EPA had adopted the interpretation of CWA that the Ninth Circuit and the dissenting Justices adopted and the majority criticizes.[80] In all likelihood, EPA will switch back to that interpretation once President Bush leaves office.

Even if the majority opinion in *Home Builders* is interpreted merely as an opinion in which the Court upheld one of several permissible interpretations of CWA, the majority opinion in *Massachusetts* cannot bear a similar interpretation. The dissenting Justices in *Massachusetts* expressed the view that the relevant provision of CAA is ambiguous, and that the Court should accord EPA's interpretation *Chevron* deference,[81] but the majority explicitly rejected that view.[82] There is an analogous ambiguity in the majority opinion in *Massachusetts*, however. In the passage I italicized earlier, the majority suggested that on remand EPA might be able to explain its decision to defer a judgment about whether carbon dioxide is a pollutant to the satisfaction of a court.[83] The Court may have an opportunity to clarify its opinion in *Masssachusetts.* EPA took no action on remand during the Bush Administration, and newly-elected President ___ has indicated his intent to take aggressive actions with respect to global warming.[84] Imposing

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[78] See text at notes 60-68 supra.

[79] In National Cable & Telecommunications Ass'n v. Brand X Internet Services, 545 U.S. 967 (2005), the Court held that a judicial decision with respect to the meaning of an agency-administered statute is stare decisis only when the court concludes that the interpretation it approves is the *only* permissible interpretation. If the court instead upholds an agency interpretation as reasonable, the opinion is not stare decisis and a court must uphold any other reasonable agency interpretation of the statute. This distinction follows logically from *Chevron*, but it is difficult to apply when courts write sloppy internally inconsistent opinions that are hard to interpret. See Richard Pierce, Reconciling *Chevron* and Stare Decisis, 85 Geo. L. J. 2225 (1996).

[80] See 127 S. Ct. at 2530-31.

[81] 127 S. Ct. at 1473-74.

[82] Id. at 1463.

[83] Text at note 46 supra.

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limits on emissions of carbon dioxide by new cars is such a strange and ineffective way of addressing global warming, however, that EPA in the ___ Administration is likely to choose to take a far more effective approach to the problem.[85]

There is another compelling reason to reject an argument that *Massachusetts* and *Home Builders* should be interpreted broadly to adopt a canon of statutory interpretation that requires a court to interpret congressional silence as a prohibition on agency consideration of a factor that is logically relevant to a decision. Both decisions were decided by five-to-four margins and, in both cases, the majority used a method of reasoning that suggested adoption of that principle of statutory construction, while the four dissenting Justices rejected the principle. In that situation, it is tempting to conclude that a five-Justice majority has adopted the principle that silence equals prohibition. If the same five Justices formed the majority in both cases, I would have little choice but to recognize that a majority of Justices have adopted an interpretative technique I dislike.

The opinions cannot bear that interpretation, however, given the identity of the Justices who signed the majority and dissenting opinions in the two cases. Four of the Justices who were members of the majority in *Massachusetts* dissented in *Home Builders*, while four of the Justices who were members of the majority in *Home Builders* dissented in *Massachusetts*! Thus, if we were to take the doctrinal content of the four opinions seriously, we would have to conclude that nine Justices have adopted the principle that congressional silence with respect to a logically relevant decisional factor must be interpreted as a prohibition on agency consideration of that factor, while eight Justices have adopted the opposite principle.

This suggests that the Justices paid little attention to doctrine or to the potential broad implications of their decisions on other statutory interpretation disputes. Instead, the opinions in the two cases suggest that they are part of the new trend of the Justices to pay little attention to doctrine or to the long term implications of the reasoning they use in a case and to cast their votes the way members of the House and Senate do – based on their political and ideological preferences. The division among the Justices in the two cases makes no sense as a reflection of differing views on the way courts should identify permissible and impermissible decisional factors. The division is exactly what a political scientist would expect, however, if the Justices decided the case based on their political and ideological preferences. The Justices who favor aggressive environmental regulation voted for that result in each case, while the Justices who are skeptical about the desirability of aggressive environmental regulation voted for that result in each case, with Justice Kennedy casting the swing vote in each.

What Should the Court Do Now?

I doubt that any Justice actually wants lower courts to interpret *Massachusetts* and *Home Builders* to stand for the broad proposition that congressional silence with respect to a factor that is logically relevant to an agency decision must be interpreted to prohibit the agency from considering the factor. If I am correct in that belief, the Court must at a minimum issue an opinion in the near future in which it adopts narrow

[85] For an introduction to the extreme difficulty of the task of adopting an effective means of mitigating global warming and a discussion of the few measures that have some chance of being effective, see Richard Pierce, Energy Independence and Global Warming, 37 Environmental Law 595 (2007).

interpretations of its opinions in *Massachusetts* and *Home Builders*, reaffirms the broad reasoning and holdings in *LTV, Yang*, and *Lopez,* and indicates its approval of the long line of D.C. Circuit opinions that are consistent with those opinions.

I would like to see the Court go far beyond that minimal step, however. *Massachusetts* and *Home Builders* are symptomatic of a disturbing trend. The Justices have shown an increasing tendency to discount or to distort doctrine in order to reach conclusions that fit comfortably with their political and ideological preferences. This trend reached a crescendo during the 2007 Term, when the Court decided ___ cases by a five-to-four margin, with the division of Justices in each case coinciding perfectly with each Justice's well-known political and ideological preferences.[86] I would like to see this trend abate. The most effective step the Justices can take to try to restore some sense of self-discipline is to take doctrine seriously. Studies show that doctrines have the potential to reduce the role of political and ideological differences in judicial decision making.[87]

Many administrative law doctrines have high potential to further this goal. Indeed, when the Court announced the deferential *Chevron* test, it explicitly based the test on its desire to reduce the role of courts in political decisionmaking and to leave political decision making to Congress and the President.[88] Studies conducted by scholars in the years immediately following the issuance of the *Chevron* decision found that it was having this socially-beneficial effect.[89] Unfortunately, more recent empirical studies have found that courts, including the Supreme Court, have become less serious about applying the deferential *Chevron* test and have devised numerous means of evading its effects.[90] If the Court shares my desire to reduce the role of politics in judicial decision making, the most important step it can take to further that goal is to take doctrine more seriously.

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[87] Thus, for instance, Dean Revesz found large differences between Democrat and Republican judges in their applications of the relatively open-ended State Farm doctrine but no difference in their applications of the more determinate Chevron doctrine. Richard Revesz, Environmental Regulation, Ideology, and the D.C. Circuit, 83 Va. L. Rev. 1717, 1748, 1763 (1997). See also Richard Pierce, The Relationship Between the District of Columbia Circuit and Its Critics, 67 Geo. Wash. L. Rev. 797, 801-03 (1999)(explaining the relationship between doctrine and the tendency of judges to vote in accordance with their political preferences); Sidney Shapiro & Richard Levy, Judicial Incentives and Indeterminacy in Substantive review of Administrative Decisions, 44 Duke L. J. 1051,1062-72 (1995)(arguing that judges prefer indeterminate doctrines so that they can reach outcomes that fit their ideology).

[88] 467 U.S. at 865-66.

[89] E.g., Orin Kerr, Shedding Light on Chevron: An Empirical Study of the *Chevron* Doctrine in the U.S. Courts of Appeals." 15 Yale Journal on Regulation 1-60 (1998); Revesz, supra. note 87, at 1748; Peter Schuck & Donald Elliott, To the Chevron Station: An Empirical Study of Federal Administrative Law, 1990 Duke L.J. 984 (1990).

[90] E.g., Ann Graham, Searching for *Chevron* in Muddy *Watters*: The Roberts Court and Judicial Review of Agency Regulations, 60 Admin. L. Rev. 229 (2008); Thomas Miles & Cass Sunstein, Do Judges Make Regulatory Policy? An Empirical Investigation of *Chevron*, 73 Chicago L. Rev. 823 (2006); Lisa Bressman, How *Mead* Has Muddled Judicial Review of Agency Action, 58 Vand. L. Rev. 1443 (2005).