Essay

Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals

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In traditional legal analysis, scholars take for granted the effect of Supreme Court doctrine. Lower courts are presumed to adhere to the self-enforcing principle of stare decisis and to apply the doctrines of higher courts to the particular facts of the underlying case.[1] Precedent reputedly controls lower-court decisions.[2] Whether such obedience to legal doctrine occurs as routinely as this analysis suggests, however, has not been adequately addressed in the legal literature. Indeed, there are few empirical studies by legal scholars bearing on the matter at all.[3] In this Essay, we go to the heart of the issue and

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1. The Supreme Court has declared that stare decisis "is a basic self-governing principle within the Judicial Branch." Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989).

2. *See* Kathleen M. Sullivan, *The Supreme Court—1991 Term, Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 64-65 (1992) (reporting the traditional position that "[c]ourts are to stick to law, judgment, and reason in making their decisions and should leave politics, will, and value choice to others"). Archibald Cox refers to the "discipline of legal reasoning" as a means of "minimiz[ing] the danger of writing [Justices'] personal values and preferences" into their opinions. ARCHIBALD COX, THE COURT AND THE CONSTITUTION 70 (1987). David Shapiro contends that requiring judges to give reasons for their opinions serves "a vital function in constraining the judiciary's exercise of power." David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 737 (1987). Chief Judge Harry Edwards of the D.C. Circuit Court of Appeals states that "it is the law—and not the personal politics of individual judges—that controls judicial decision-making in most cases resolved by the court of appeals." Harry T. Edwards, *Public Misperceptions Concerning the "Politics" of Judging: Dispelling Some Myths About the D.C. Circuit*, 56 U. COLO. L. REV. 619, 620 (1985).

3. See sources cited *infra* Section II.B for legal scholarship discussing judicial obedience to doctrine in the context of administrative law. For studies on obedience within the judiciary, consider Richard L. Pacelle, Jr. & Lawrence Baum, *Supreme Court Authority in the Judiciary*, 20 AM. POL. Q. 169 (1992), which concludes through a study of cases remanded by the Supreme Court that lower courts tend to

ask the following question: If judges have personal or partisan policy preferences, why would they follow established legal doctrine when it conflicts with those preferences? While there is undoubtedly more than one valid explanation for principled adherence to legal doctrine, we suggest that the prospect of a "whistleblower" on the court—that is, the presence of a judge whose policy preferences differ from the majority's and who will expose the majority's manipulation or disregard of the applicable legal doctrine (if such manipulation or disregard were needed to reach the majority's preferred outcome)—is a significant determinant of whether judges will perform their designated role as principled legal decisionmakers. We do more than merely propose this theory; we test it empirically and find substantial support for our claim.

To be sure, legal doctrine endorsed by the Supreme Court plays a critical role in the decisionmaking of federal jurists, and it would be an overstatement to claim that most judges casually disregard doctrine when it stands in the way of reaching their desired policy outcome. Nonetheless, much of the scholarship simply assumes the sincere application of legal doctrine without considering the possibility that it may at times be nothing more than a convenient rationalization for political decisionmaking.[4] Indeed, many legal scholars explicitly discard the proposition that judges disregard legal doctrine in favor of partisan or ideological policymaking, or ignore the proposition with silent disdain, even in the face of reputable empirical studies in political science demonstrating the existence of such subversions of legal precedent and doctrine.[5]

The traditional position has been challenged by legal realists, critical legal scholars, and political scientists, who are all highly skeptical of the practical importance of legal doctrine. They contend, and empirically demonstrate, that judges often decide cases according to their political proclivities and use

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recognize high-court authority; and Donald R. Songer et al., *The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court-Circuit Court Interactions*, 38 AM. J. POL. SCI. 673 (1994), which reaches mixed conclusions regarding the effect of Supreme Court precedent on circuit court behavior.

4. *But see* Richard J. Pierce, Jr., *Two Problems in Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking*, 1988 DUKE L.J. 300, 303-07 (surveying a set of administrative law cases in the D.C. Circuit and concluding that the decisions are best explained by the policy predilections of individual judges and by whether a majority of the judges on a panel were appointed by a Republican or a Democratic president).

5. *See* H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 4 (1991) (reporting that legal scholars "ignore with impunity" the empirical research on political decisionmaking by judges); Daniel B. Rodriguez, *The Positive Political Dimensions of Regulatory Reform*, 72 WASH. U. L.Q. 1, 4 (1994) (discussing the reluctance of legal scholars to consider the empirical findings of political scientists). The assumption of the importance of doctrine in judicial decisions is so strong that some commentators have criticized the Supreme Court for paying *too much* attention to precedent in its decisions. *See, e.g.*, Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422, 426-27 (1988) (criticizing reliance on precedent in statutory interpretation); William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361 (1988) (same).

precedent, if at all, as an ex post facto justification for their decisions.[6] This scholarship challenges the presumption that judges follow the law out of a sense of responsibility or role orientation. While the Supreme Court can theoretically play a disciplining role by enforcing adherence to doctrine on appeal, the Court's limited resources may preclude effective control.[7] According to the attitudinal model, lower-court obedience to legal doctrine has little practical effect in determining judicial decisions.[8]

Just as practitioners of the traditional position have ignored political variables, those in the other camp (legal realists, critical legal scholars, and political scientists) have paid little heed to the role legal doctrine might play in judicial decisionmaking.[9] Indeed, many of their claims of political decisionmaking fail to incorporate any legal variables.[10] For the most part, these scholars stand steadfast in the belief that the explanatory value of legal

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6. Among the most prominent presentations of this position is JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993), in which the authors claim that virtually all Supreme Court decisions are determined by the Justices' politics rather than the law. *See id.* at 72-73. The authors present considerable empirical evidence to this effect, showing that Justices' votes can be predicted based on their political attitudes as revealed in prior decisions. *See id.* at 255. As for decisions relying on precedent, the authors claim that "opinions containing such rules merely rationalize decisions; they are not the causes of them." *Id.* at 66. Such rationalization comes rather easily, as precedents are typically available on both sides of any case. *See, e.g.*, Allan C. Hutchinson & Patrick J. Monahan, *Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought*, 36 STAN. L. REV. 199, 206 (1984) (presenting the Critical Legal Studies view that "[l]egal doctrine can be manipulated to justify an almost infinite spectrum of possible outcomes").

7. *See, e.g.*, Peter L. Strauss, *One Hundred Fifty Cases per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1095 (1987) (observing that "the Court's awareness [of] how infrequently it is able to review lower court decisions has led it to be tolerant, even approving, of lower court and party indiscipline in relation to existing law"). Several rational choice models of judicial review of agency decisionmaking have incorporated the notion that actors have limited resources and the derivative proposition that this creates discretion for agencies and lower courts. *See* Pablo T. Spiller, *Agency Discretion Under Judicial Review*, 16 MATHEMATICAL & COMPUTER MODELING 185 (1992) (modeling the role of decision costs in creating discretion for agencies); Pablo T. Spiller & Emerson H. Tiller, *Decision Costs and the Strategic Design of Administrative Process and Judicial Review*, 26 J. LEGAL STUD. 347 (1997) (discussing the ability of Congress to manipulate the resources of agencies and courts for purposes of achieving policies desired by Congress); Emerson H. Tiller, *Controlling Policy by Controlling Process*, 14 J.L. ECON. & ORG. 114 (1998) (modeling the ability of a court to manipulate agency resources to achieve a policy desired by the court); Joseph L. Smith & Emerson H. Tiller, The Strategy of Judging: Evidence from Administrative Law (1997) (unpublished manuscript, on file with the *Yale Law Journal*) (testing empirically models of strategic choice by circuit courts); Emerson H. Tiller & Pablo T. Spiller, Strategic Instruments: Politics and Decision Costs in Administrative and Judicial Process (1997) (unpublished manuscript, on file with the *Yale Law Journal*) (modeling the ability of agencies and courts strategically to select grounds upon which to base a decision in order to impose costs upon reviewing actors).

8. A leading political scientist and lawyer claims that the "evidence overwhelmingly supports the attitudinal model and, equally overwhelmingly, fails to support the legal model as an explanation of why the justices decide their cases as they do." Harold J. Spaeth, *The Attitudinal Model*, *in* CONTEMPLATING COURTS 296, 296 (Lee Epstein ed., 1995). He emphasizes that "the mere fact that a court cites precedent provides no evidence that precedent actually determines the outcome of the case." *Id.* at 302.

9. Perry suggests that political scientists show a "lack of appreciation of the nature of the courts, the law, and the legal system." PERRY, *supra* note 5, at 3.

10. *See* Donald R. Songer & Susan Haire, *Integrating Alternative Approaches to the Study of Judicial Voting: Obscenity Cases in the U.S. Courts of Appeals*, 36 AM. J. POL. SCI. 963, 967 (1992) (reporting that "scholars in the empirical tradition have given little systematic attention to the potential effect of variables that might reflect the traditional model").

variables is at best not capable of being tested or, as is more likely, nonexistent.[11]

The battle over the significance of doctrine has persisted without truly being joined. Traditional legal scholars have assiduously guarded their disciplinary turf against outsiders as have those promoting the more cynical explanations of judicial decisionmaking. In this Essay, we fuse the various judicial decisionmaking models of political scientists and legal scholars to explain and demonstrate empirically under what conditions appellate court judges do obey the legal doctrines the Supreme Court has set out. We examine this proposition in the context of administrative law, where the Supreme Court has laid down a reputedly path-breaking legal doctrine governing judicial review of administrative agencies. We ask whether, and under what conditions, appellate courts adhere to this command.

I. A THEORY OF COMPLIANCE WITH DOCTRINE

Once the Supreme Court sets forth doctrines, lower courts may comply or disobey. If lower courts comply, they may do so for a number of reasons: (1) compliance with doctrine enables the lower courts to effect their political preferences;[12] (2) the lower courts are dutifully performing their roles as sincere jurists, applying the principles in an ideologically (or politically) neutral manner;[13] or (3) the lower courts fear exposure of any noncompliance and consequent reversal. Lower courts may disobey because (4) they wish to effect their political preferences;[14] or (5) they mean to apply doctrine dutifully but are influenced to apply the rules in a way that achieves their political

11. Segal and Spaeth complain that the legal model cannot be objectively operationalized in an empirical study. *See* SEGAL & SPAETH, *supra* note 6, at 33-34. They have recently sought to test the legal model by examining whether Supreme Court Justices followed precedents from which they initially dissented. *See* Jeffrey A. Segal & Harold J. Spaeth, *The Influence of* Stare Decisis *on the Votes of United States Supreme Court Justices*, 40 AM. J. POL. SCI. 971 (1996). While they found that dissenters continued to dissent, notwithstanding the creation of the original precedent, *see id.* at 971, this finding hardly disproves the legal model. That model does not dictate that Justices must follow a precedent they believe to be contrary to the Constitution.

12. In this circumstance, the legal and political models are mutually reinforcing.

13. This is the conventional legal model. For a discussion, see Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 255-63 (1997).

14. *See* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991) (discussing how the Supreme Court's statutory interpretation decisions are restrained by the risk of being overridden by subsequent legislation); McNollgast, *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*, 68 S. CAL. L. REV. 1631, 1643-44 (1995) (claiming that lower courts restrain their rulings so as to avoid higher-court reversal). *But cf.* Pablo T. Spiller & Emerson H. Tiller, *Invitations To Override: Congressional Reversals of Supreme Court Decisions*, 16 INT'L REV. L. & ECON. 503 (1996) (illustrating how the Supreme Court may prod Congress into reversing one of its decisions to maximize the Court's doctrinal and policy preferences).

preferences.[15] Each of these five modes may operate at different times and under different circumstances.[16]

Our first theoretical proposition is simple: Judges are more likely to obey legal doctrine when such doctrine supports the partisan or ideological policy preferences of the court majority. In those cases in which doctrine does not support the partisan or ideological policy preferences of the court majority, we expect somewhat more disobedience. Our second theoretical proposition is that courts are more likely to comply with doctrine (rather than to decide based solely on their political preferences) when the judicial panel is politically or ideologically divided. This results from the presence of a minority position on the panel that creates an opportunity for whistleblowing—a minority member with doctrine on her side and the ability, through a dissent, to expose disobedient decisionmaking by the majority. The minority member may threaten to highlight the disobedience externally to a higher court or to Congress, producing exposure and possible reversal.[17] Alternatively, the minority may expose the subconscious disobedience internally, causing the majority to acknowledge its disregard or unintentional manipulation of doctrine. Consequently, in the presence of such a whistleblower, the majority must sometimes capitulate and keep its decision within the confines of doctrine.

We apply our analysis to the federal courts of appeals.[18] These courts are

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15. Even the behavioralist political scientists who maintain that judges are acting politically do not necessarily claim that these actions are consciously disobedient to legal doctrine. *See* C.K. Rowland, *The Federal District Courts*, *in* THE AMERICAN COURTS: A CRITICAL ASSESSMENT 61, 79 (John B. Gates & Charles A. Johnson eds., 1991) (observing that judges of different ideologies "will often see similar evidence differently, remember evidence that fits their relevant mental constructs more vividly and accurately than evidence that does not, and interpret ambiguous information in ways consistent with their schematic predilections"); *see also* Scott C. Idleman, *A Prudential Theory of Judicial Candor*, 73 TEX. L. REV. 1307, 1318-19 (1995) (indicating that "[m]any omissions of candor, after all, are not conscious ploys on the part of judges, but rather the product of either less-than-thorough or genuinely self-deceptive analysis").

16. It is also possible that a lower court tried to apply the doctrine dutifully but misunderstood that doctrine as it was intended by the Supreme Court. We do not consider this a disobedience of doctrine in our analysis.

17. For an example of a case in which a minority judge (Democrat) chided the majority (Republicans) for not following doctrine, see *Engine Manufacturers Ass'n v. EPA*, 88 F.3d 1075 (D.C. Cir. 1996), which involved an industry association's challenge to an EPA rule where a Republican panel majority vacated one section of the regulation. The lone Democrat dissented, arguing that the *Chevron* doctrine, *see* Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), should have required approval of the entire rule. For the role of dissent more generally, consider a recent study on search-and-seizure cases suggesting that dissents are driven in part by the ideological preferences of judges. *See* Steven R. Van Winkle, Dissent as a Signal: Evidence from the U.S. Courts of Appeals (1997) (unpublished manuscript, on file with the *Yale Law Journal*) (finding dissents more likely to occur on a circuit court panel when the dissenter was of the same ideological position as the full circuit majority, thus suggesting a political whistleblowing effect).

18. The approach taken here is consistent with the recent law and positive political theory movement, which has addressed questions of constitutional law, federalism, administrative law, statutory interpretation, and judicial expansion through rational choice and institutional theory. *See, e.g.*, Jenna Bednar & William N. Eskridge, Jr., *Steadying the Court's "Unsteady Path": A Theory of Judicial Enforcement of Federalism*, 68 S. CAL. L. REV. 1447 (1995) (analyzing the variance in Supreme Court federalism decisions through the insights of positive political theory); Linda R. Cohen & Matthew L. Spitzer, *Judicial Deference to*

organized such that three-judge panels are randomly selected to hear appeals from lower federal district courts or federal regulatory agencies. After these panels make their decisions, the outcome may be appealed to the full circuit sitting en banc or to the Supreme Court. Figure 1 illustrates the likelihood that the panel follows established doctrine given the alignment of preferences within the judicial panel (measured by either party affiliation of the judges or some other independent measure of judicial preferences) and the consistency

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Agency Action: A Rational Choice Theory and an Empirical Test, 69 S. CAL. L. REV. 431 (1996) (using insights of positive political theory to predict when the Supreme Court will manipulate administrative law); William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523 (1992) (analyzing Article I, Section 7 of the U.S. Constitution through the lens of positive political theory as a "sequential game" consisting of interactions among the branches based on their individual preferences); William N. Eskridge, Jr. & John Ferejohn, *Making the Deal Stick: Enforcing the Ordinal Constitutional Structure of Lawmaking in the Modern Regulatory State*, 8 J.L. ECON & ORG. 165 (1992) (applying game-theoretical work in positive political theory to find a more systematic basis for evaluating Supreme Court constitutional decisions regarding the lawmaking functions of agencies); John M. de Figueiredo & Emerson H. Tiller, *Congressional Control of the Courts: A Theoretical and Empirical Analysis of Expansion of the Federal Judiciary*, 39 J.L. & ECON. 435 (1996) (using positive political theory to explain the expansion of the federal judiciary as a product of unified government); Rafael Gely & Pablo T. Spiller, *A Rational Choice Theory of Supreme Court Statutory Decisions with Applications to the* State Farm *and* Grove City *Cases*, 6 J.L. ECON. & ORG. 263, 265 (1990) (using positive political theory models to illustrate that "[t]he ability of other political actors . . . to reverse the Supreme Court . . . is what constrains the scope and power of the Court"); Matthew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987) (using positive political theory to examine how interest groups monitor agency compliance with congressional directives); Matthew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989) (same); McNollgast, *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, LAW & CONTEMP. PROBS., Winter 1994, at 3 (proposing the use of positive political theory as a descriptive model of the legislative process to clarify statutory intent); McNollgast, *supra* note 14, at 1631 (using positive political theory to explain adherence to doctrine and court packing); McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO L.J. 705 (1992) (advocating the use of positive political theory to attain a clearer understanding of statutory intent); Terry M. Moe, *Political Institutions: The Neglected Side of the Story*, J.L. ECON. & ORG., Special Issue 1990, at 213, 230 (using institutional theory to explain how administrative procedure is traded for substance in a way that "public agencies will tend to be structured in part by their enemies—who want them to fail"); Daniel B. Rodriguez, *Management, Control, and the Dilemmas of Presidential Leadership in the Modern Administrative State*, 43 DUKE L.J. 1180 (1994) (considering the role of the President in regulatory reform through an analysis informed by positive political theory); Pablo T. Spiller & Rafael Gely, *Congressional Control or Judicial Independence: The Determinants of U.S. Supreme Court Labor-Relations Decisions, 1949-1988*, 23 RAND J. ECON. 463 (1992) (using positive political theory to analyze the conditions under which the Supreme Court may impose its policy preferences on the Constitution without risking being overruled by constitutional amendment); Pablo T. Spiller & Matthew L. Spitzer, *Judicial Choice of Legal Doctrines*, 8 J.L. ECON. & ORG. 8 (1992) (using positive political theory to suggest why the Supreme Court will use constitutional rather than statutory interpretation in a strategic game with Congress). For some comments on and criticisms of these various approaches, see Linda R. Cohen, *Politics and the Courts: A Comment on McNollgast*, 68 S. CAL. L. REV. 1685 (1995); Murray J. Horn & Kenneth A. Shepsle, *Commentary on "Administrative Arrangements and the Political Control of Agencies": Administrative Process and Organizational Form as Legislative Responses to Agency Costs*, 75 VA. L. REV. 499 (1989); Jack Knight, *Positive Models and Normative Theory: A Comment on Eskridge and Ferejohn*, 8 J.L. ECON. & ORG. 190 (1992); Glen O. Robinson, *Commentary on Administrative Arrangements and the Political Control of Agencies: Political Uses of Structure and Process*, 75 VA. L. REV. 483 (1989); Daniel B. Rodriguez, *The Administrative State and the Original Understanding: Comments on Eskridge and Ferejohn*, 8 J.L. ECON. & ORG. 197 (1992); Peter L. Strauss & Andrew R. Rutten, *The Game of Politics and Law: A Response to Eskridge and Ferejohn*, 8 J.L. ECON. & ORG. 205 (1992); and Emerson H. Tiller, *Putting Politics into the Positive Political Theory of Federalism: A Comment on Bednar and Eskridge*, 68 S. CAL. L. REV. 1493 (1995).

of these preferences with the outcome dictated by adhering to doctrine. The alignment numbers (3-0 and 2-1) do not necessarily indicate the actual voting of the judges (since compromises may be made among the panel members); the numbers indicate only the underlying policy preference alignments of the panel members.

FIGURE 1. LIKELIHOOD THAT DOCTRINE IS FOLLOWED GIVEN THE JUDICIAL PANEL'S POLICY ALIGNMENTS

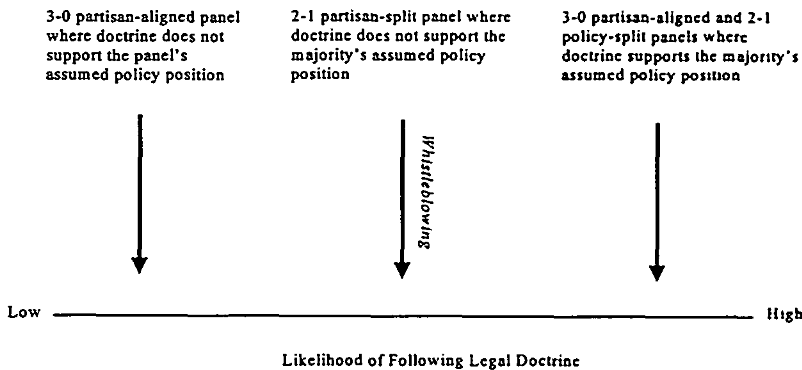

Figure 1 suggests that if the policy favored by the majority of the members on the panel would be accomplished through adherence to the applicable legal doctrine—that is, when there is convergence between sincere application of the doctrine and the policy preferences of the majority—then that panel will be more likely to follow the doctrine than if convergence did not exist. In such a case, legal doctrine is not a constraint upon the pursuance of policy goals; instead, it helps to legitimize the policy outcome of the unified panel. In contrast, if the three members of the panel are unified in their policy preferences and if they would not benefit from sincere application of the doctrine—that is, there is no convergence between the majority's policy preferences and the sincere application of doctrine—then they would be more likely to ignore doctrine. If the members of the panel are divided two-to-one in their policy preferences, however, and if the minority member's policy preferences converge with the application of doctrine while the majority's preferences do not, the minority member could act as a whistleblower, forcing the majority to follow the doctrine more often than if all three members were unified against application of the doctrine. In this sense, doctrine does matter because it is a real constraint upon the court majority's ability to pursue policy goals.

II. JUDICIAL OBEDIENCE TO THE *CHEVRON* DOCTRINE: APPLYING THE THEORY TO ADMINISTRATIVE LAW

The Supreme Court in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[19] seemingly commanded lower courts to grant considerable deference to federal administrative agency interpretations of statutes. The decision was of great import for administrative law and also offers an ideal test case for determining whether Supreme Court doctrine has a material effect in restraining the decisions of lower courts. One can examine lower-court decisionmaking in the wake of *Chevron* and observe whether the lower court is granting deference neutrally, as per doctrine, or is manipulating the deference doctrine to achieve politically desirable outcomes. We employ *Chevron* cases to test our theories of judicial decisionmaking. First, however, some background on *Chevron* and its interpretation is necessary.

A. *The Terms of* Chevron

Chevron arose from a creative statutory interpretation by the Environmental Protection Agency (EPA) that modified the definition of a pollution source to enhance the efficiency of control measures. The rule was challenged by environmentalists and struck down by the D.C. Circuit,[20] which found the EPA's interpretation of the statute contrary to congressional intent. The Supreme Court, however, reversed the D.C. Circuit and, in the process, set forth what has become known as the *Chevron* doctrine of deference to agency statutory interpretations.

On its face, *Chevron* analysis provides for a two-step inquiry. First, a judge must determine if "Congress has directly spoken to the precise question at issue."[21] If so, the agency must adhere to the unambiguous legislative command, and a court may reverse a contrary agency interpretation. In *Chevron* itself, the Court found the statutory language ambiguous and the legislative history silent.[22] If the congressional directive is ambiguous, a court is to move on to the second analytical step—whether the agency's interpretation of ambiguity is reasonable.[23] This reasonableness standard has been analogized to the purportedly deferential arbitrary-and-capricious standard of review.[24]

19. 467 U.S. 837 (1984).

20. *See* Natural Resources Defense Council, Inc. v. Gorsuch, 685 F.2d 718 (D.C. Cir. 1982), *rev'd sub nom.* Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

21. *Chevron*, 467 U.S. at 842.

22. *See id.* at 862.

23. *See id.* at 843-44. Reasonableness in the *Chevron* case was found in part because of the agency's need to reconcile "conflicting policies." *Id.* at 865.

24. *See* Laurence H. Silberman, Chevron—*The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821, 827 (1990); *see also* 5 U.S.C. § 706 (1994).

While the general thrust of *Chevron* is deference to administrative agency interpretations, the opinion did not command mechanistic deference. A lower court can refuse to defer because the agency interpretation is contrary to the plain meaning of the statute (step one) or because the interpretation is unreasonable (step two).[25] A court striking down a rule on these grounds can claim to be obedient to doctrine. Thus obedience to doctrine cannot be measured strictly by the amount of deference given to agencies. Nonetheless, legal commentators considered *Chevron* to represent "a watershed administrative law ruling that would encourage reviewing courts to defer to agency interpretations and policy directions."[26] The decision reputedly made "fundamental alterations . . . in our constitutional conception of the administrative state,"[27] "revolutionized judicial review of agency statutory interpretation,"[28] represents "one of the most important decisions in the history of administrative law,"[29] and constitutes (because *Chevron* is considered by some to be the counter-*Marbury v. Madison*[30] for the administrative state) "a pillar in administrative law for many years to come."[31] In short, most thought that *Chevron* would result in greater deference by the judiciary to administrative agency decisions.

Many commentators criticized the Supreme Court's approach. Some emphasized the judicial province over saying what the law is and objected to the Court's abandonment of this authority.[32] This effect may disrupt the Constitution's separation of powers, unduly weakening the judicial check and transferring excessive control to the President[33] or to the bureaucracy

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25. *See Chevron*, 467 U.S. at 842-43.

26. Peter H. Schuck & E. Donald Elliott, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 991; *see also* Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*, 44 DUKE L.J. 1051, 1051 (1995) (reporting that "[a]dministrative law scholars, whether they agreed or disagreed with the Court's standards, assumed that [*Chevron* and *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983)] were landmark decisions that signaled a turning point in the substantive review of agency decisions").

27. Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 456 (1989).

28. Mark Seidenfeld, *A Syncopated* Chevron: *Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 84 (1994).

29. 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 3.2, at 110 (3d ed. 1994).

30. 5 U.S. (1 Cranch) 137 (1803).

31. Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2075 (1990).

32. *See, e.g.*, Cornell W. Clayton, *Separate Branches—Separate Politics: Judicial Enforcement of Congressional Intent*, 109 POL. SCI. Q. 843, 871 (1994-1995) (arguing that the *Chevron* approach "should cause great concern for those committed to the rule of law"); *see also* Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under* Chevron, 6 ADMIN. L.J. AM. U. 187, 189 (1992) (noting that "[i]ts detractors portray *Chevron* as . . . abandon[ing] to administrative agencies the judicial authority and obligation to 'say what the law is'").

33. *See, e.g.*, Farina, *supra* note 27, at 498 (claiming that if "Congress chooses to delegate regulatory authority to agencies, part of the price of delegation may be that the court, not the agency, must hold the power to say what the statute means"); Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 123 (1994) (explaining that when the President executes a law that is "vague or silent on a key issue . . . the resulting rule—from either rulemaking or adjudication—is a

itself.[34] One critic questioned the basis for deference in political theory, suggesting that judicial restraint could lead to the maintenance of policies contrary to the public interest.[35] Other commentators, however, have defended *Chevron*, arguing that courts should restrain themselves from intervening in fundamentally political decisions made by more accountable administrative agencies.[36] An active approach to judicial review "allows judges to rely on their personal politics to decide statutory issues."[37] Additionally, commentators have argued, courts should defer to the greater experience and expertise of agencies regarding the statutes they administer.[38]

Regardless of the merits of *Chevron*, its two-step procedure creates a loophole through which disobedient courts may advance their policy preferences at the expense of sincere application of doctrine. A court that dislikes the outcome of an agency decision can declare that the interpretation is contrary to plain statutory meaning and still claim obedience to doctrine.[39] This loophole enables a lower court to "transform *Chevron* from a deference doctrine to a doctrine of antideference."[40] Indeed, the two-step test can be a recipe for disobedience, simultaneously providing a command of deference and showing lower courts how to evade it.[41]

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policy choice in much the same way that statutes are policy choices").

34. *See* Theodore J. Lowi, *Two Roads to Serfdom: Liberalism, Conservatism and Administrative Power*, 36 AM. U. L. REV. 295, 296 (1987).

35. *See* Seidenfeld, *supra* note 28, at 104-11.

36. *See, e.g.*, Maureen B. Callahan, *Must Federal Courts Defer to Agency Interpretations of Statutes?: A New Doctrinal Basis for* Chevron U.S.A. v. Natural Resources Defense Council, 1991 WIS. L. REV. 1275, 1289; Richard J. Pierce, Jr., *Political Control Versus Impermissible Bias in Agency Decisionmaking: Lessons from* Chevron *and* Mistretta, 57 U. CHI. L. REV. 481, 484-87 (1990).

37. Seidenfeld, *supra* note 28, at 116.

38. *See* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363 (1986); John P. Dwyer, *The Pathology of Symbolic Legislation*, 17 ECOLOGY L.Q. 233, 311 (1990); Daniel B. Rodriguez, *The Positive Political Dimensions of Regulatory Reform*, 72 WASH. U. L.Q. 1, 122 (1994); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 519.

39. From our sample of cases, consider *American Petroleum Institute v. EPA*, 52 F.3d 1113 (D.C. Cir. 1995), in which the majority decided not to engage in *Chevron* deference but instead used *Chevron* as authority for not deferring. In that case, petitioners, a group of petroleum manufacturers and refiners, challenged an EPA rule in which the EPA had broadly interpreted its power under various environmental statutes to mandate the use of renewable oxygenates in its regulations for the reformulated gasoline program under the Clean Air Act, 42 U.S.C. §§ 7401-7671 (1994). The three-judge panel, all Republican appointees, ruled against the EPA and held for the petroleum trade associations. *See American Petroleum Inst.*, 52 F.3d at 1115. Relying on the "plain meaning" of the statute, the panel stated that the statute was quite clear about what the EPA could consider in promulgating the rule and that the EPA had overstepped the boundaries of the statute. The panel made this finding in spite of statutory language stating that the agency could consider impacts on cost, energy requirements, and other health and environmental impacts and that the EPA had the authority to promulgate such regulations as are necessary for it to carry out its functions under the Act. *See* 42 U.S.C. §§ 7545(k)(1), 7601(a)(1). Moreover, the statute did not explicitly limit those regulations to implementing emission or other particular standards. *See* 42 U.S.C. § 7545(k)(1). The panel, nonetheless, chose against deference, stating that "step one" of the *Chevron* test dictated the outcome. *American Petroleum Inst.*, 52 F.3d at 1119.

40. Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 992 (1992).

41. *See* Shapiro & Levy, *supra* note 26, at 1069-70 (claiming that the *Chevron* doctrine is indeterminate and allows for an open-ended interpretation of its meaning by lower courts).

When examining an individual opinion striking down a rule, it can be difficult to identify disobedience. The opinion will justify its nondeference through reference to statutory language, legislative history, and doctrine itself. While one may disagree with the rationale and even question its sincerity, it is impossible to demonstrate conclusively that any particular opinion's rationale for nondeference is insincere or disobedient. Nevertheless, the opinion may be disobedient, as conclusive demonstrations of sincerity are also lacking. By looking at a pattern of cases, we strive to test for disobedience.

B. *The Political Investigation of* Chevron

The legal model implies that *Chevron* established a neutral principle commanding appellate courts to defer to administrative statutory interpretations and assumes that the courts will adhere faithfully to this command. The initial approach in legal scholarship to *Chevron* tracked this model and analyzed *Chevron* in terms of legal process values. Such analysis, though sensitive to the practical political consequences of *Chevron* deference, generally ignored the prospect that the courts might manipulate *Chevron* for political effect. Indeed, both critics and defenders assumed that *Chevron* would have significant effects on judicial behavior, as the legal model predicted. A leading defender of judicial deference suggested that *Chevron* had "transformed dramatically the approach taken by courts in reviewing agency interpretations of statutory provisions."[42] Few authors considered the possibility that the doctrinal principles of *Chevron* might have little real world impact,[43] though one commentator recently suggested that a new "hypertextualism" in judicial statutory interpretation has undermined the deference that the *Chevron* Court intended.[44]

While legal research has typically ignored the politics of doctrinal evolution, *Chevron* has been something of an exception to the rule. At least two significant empirical studies have considered the role of *Chevron* in appellate decisionmaking.[45] These studies have explicitly acknowledged the claims of legal realism and political science regarding judicial decisionmaking.

42. Richard J. Pierce, Jr., Chevron *and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301, 302 (1988). Pierce has subsequently suggested that the effect of *Chevron* has dissipated somewhat over time. *See* Richard J. Pierce, Jr., *Legislative Reform of Judicial Review of Agency Actions*, 44 DUKE L.J. 1110, 1112 (1995) [hereinafter Pierce, *Legislative Reform*]. Nonetheless, he believes that the "*Chevron* test has largely realized its potential at the circuit court level." Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749, 749 (1995).

43. For a rare exception, see Russell L. Weaver, *Some Realism About* Chevron, 58 MO. L. REV. 129, 130 (1993).

44. Pierce, *Legislative Reform*, *supra* note 42, at 1123. Pierce focused this criticism on the Supreme Court's, rather than the appellate courts', application of *Chevron*.

45. A third study considered the Supreme Court's use of its *Chevron* precedent. *See* Merrill, *supra* note 40.

The first major *Chevron* study was performed by Peter Schuck and Donald Elliott.[46] The authors studied several aspects of the decision, including its effect on appellate court decisionmaking. They hypothesized that "[i]f the Court meant what it said in *Chevron* and its progeny, and if reviewing courts took its words seriously, one would expect the distribution of outcomes in agency cases to reflect the effects of *Chevron*."[47] Specifically, "one would expect the courts to affirm more frequently and to remand less frequently."[48] Schuck and Elliot tested for the relative rate of affirmances immediately after *Chevron*. As realists, the authors were at least somewhat doubtful of this effect.[49]

Schuck and Elliott found that in the immediate wake of *Chevron*, appellate court remands and reversals declined, and the proportion of those remands and reversals grounded in substantive interpretation of the law declined even more pronouncedly.[50] This result, they claimed, contradicted the prediction of the law skeptics and suggested that *Chevron* had a distinct effect on lower-court decisions. These post-*Chevron* results were statistically significant.

Schuck and Elliott examined similar appellate results occurring three years later and found that affirmance rates had begun to creep back down toward (but not as low as) pre-*Chevron* levels.[51] They tentatively attributed the change to the Supreme Court's becoming slightly less deferential to agency constructions. While one can imagine a variety of reasons for this result, the authors suggested "the tantalizing hypothesis that over a large number of cases the results of judicial review may be far more sensitive to subtle changes in legal doctrine than we had anticipated."[52] This study, therefore, offers some support for the legal model of judicial decisionmaking that considers appellate judges to be responsive to changes in doctrine.

Linda Cohen and Matthew Spitzer undertook the second major empirical *Chevron* study in tandem with a major theoretical analysis, again informed somewhat by legal realism.[53] While acknowledging that Schuck and Elliott were "almost certainly correct" in claiming a *Chevron*-effect on appellate courts,[54] they made rather trenchant criticisms of Schuck and Elliott's

46. *See* Schuck & Elliott, *supra* note 26.

47. *Id.* at 1026.

48. *Id.*

49. The authors note that strong law skeptics would claim that "doctrinal changes such as *Chevron* should not affect the pattern of results reached in subsequent cases by lower courts, provided that the judges' personal and political predilections remain essentially unchanged during the period under study." *Id.* at 1029.

50. *See id.* at 1030, 1033.

51. *See id.* at 1038.

52. *Id.* Schuck and Elliott conceded, however, that the results may be attributable to "the passage of time, other changes in legal doctrine, the changing composition of the judiciary, or some other confounding factor." *Id.*

53. *See* Linda R. Cohen & Matthew L. Spitzer, *Solving the* Chevron *Puzzle*, LAW & CONTEMP. PROBS., Spring 1994, at 65.

54. *Id.* at 90.

approach. First, they observed that Schuck and Elliott considered the rates of substantive statutory remands, but not reversals or affirmances, and did not even "indicate how many statutory constructions were upheld."[55] Second, they noted that changes in results may have had nothing to do with the judiciary itself but may have reflected an adjustment by administrative agencies or their challengers.[56]

Cohen and Spitzer also considered the overall rate at which appellate courts upheld agency interpretations and found "a slight increase in the appellate affirm rate in the mid-1980s," though the increase was somewhat smaller than that found by Schuck and Elliott.[57] They also considered contemporaneous Supreme Court certiorari and merits decisions involving judicial review of administrative decisions. This review led to a rational choice conclusion that the (conservative) Supreme Court slowly but steadily approved a higher level of judicial agency supervision as the appellate courts became relatively more conservative.[58] They implied that the Supreme Court rather precisely titrates the amount of deference due agencies (given the political circumstances) and that the appellate courts respond. In short, Cohen and Spitzer argued that appellate courts are responsive to the Supreme Court's doctrinal decisions, though their analysis was grounded more in political science than in the traditional legal model.

The Cohen-Spitzer study, as well as the Schuck-Elliott study, have been cited as evidence that *Chevron* "marked a major change in administrative law."[59] The studies, however, were recently reviewed and reanalyzed by Sidney Shapiro and Richard Levy.[60] Their data suggest that *Chevron* had relatively little effect upon appellate court decisions, as the affirmance rate between 1988 and 1990 was actually lower than the rate before *Chevron*.[61] *Chevron*'s doctrinal indeterminacy, Shapiro and Levy argue, has empowered appellate courts to render essentially political, outcome-oriented decisions.[62] Thus, ironically, an analysis of two studies generally concluding that appellate courts respond to Supreme Court doctrine (though for different reasons) led to the conclusion that appellate courts do not so respond. Plainly, the consequences of the Supreme Court's *Chevron* holding remain uncertain.

Our research builds upon this existing body of empirical work in the hopes of clarifying the issue. We limit our analysis to statutory interpretation of cases

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55. *Id.* at 91.

56. *See id.*

57. *Id.* at 103. One problem recognized by the authors was that their database "included all administrative decisions, rather than just those that addressed statutory interpretation cases." *Id.*

58. *See id.* at 105.

59. Seidenfeld, *supra* note 28, at 84 n.5.

60. *See* Shapiro & Levy, *supra* note 26, at 1070-71.

61. *See id.* This conclusion is somewhat uncertain, as it depends on comparing data from the Schuck-Elliott study with data from the Cohen-Spitzer study, even though the two studies used somewhat different sources of data.

62. *See id.* at 1053.

explicitly invoking *Chevron*, rather than looking at all administrative law opinions. We also consider the political orientations of the judges and match them with outcomes, focusing less on the overall frequency of deference and more on the patterns of applying that deference by ideological outcome.

III. AN EMPIRICAL EXAMINATION

We reviewed all opinions from the D.C. Circuit Court of Appeals between 1991 and 1995 that cited *Chevron*—according to Shepard's Citations, over two hundred in all. Cases that cited *Chevron* for something other than the deference principle were excluded. Each case was then coded for, among other things, (1) whether the court gave deference to the agency statutory interpretation; (2) whether the court upheld or reversed the agency policy;[63] (3) the direction of the policy outcome (liberal vs. conservative) from the agency; and (4) the partisan makeup of the court panel (Democrats vs. Republicans).

With respect to policy direction, our coding tracked practices relatively common in the political science literature.[64] If an industry group was challenging a federal regulation, then the agency position was coded as liberal. If nongovernmental public interest organizations or individual plaintiffs challenged the agency position, we coded the agency position as conservative, unless the organization or individual was clearly conservative in orientation, in which case we coded the agency position as liberal. Cases without any clear political content were winnowed from the database, leaving about 170 decisions coded. If the court reversed the agency in favor of a liberal challenger, we coded the case outcome as liberal; if the court reversed the agency in favor of a conservative challenger, we coded the outcome as conservative.

With respect to coding the preferences of the reviewing court panel, each judge was assigned a political party affiliation according to the President who appointed the judge. We assumed that, in general, Democratic appointees are more liberal and Republicans more conservative in policy orientation. During the time period under consideration, the D.C. Circuit was dominated by Republican appointees, although a significant number of Democratic appointees were present. Each panel therefore had a majority (2-1 or 3-0) of either Republican or Democratic judges. This coding enabled us to test whether the partisanship of the judicial panel influenced the political outcomes of litigation and the degree to which *Chevron* deference affected this association.

63. This coding required some subjective judgment, as administrative law cases commonly raise a variety of discrete issues. If the court upheld the challenge to agency action in any substantial part and granted the challenger a significant measure of the relief sought, the case was coded as upholding the challenge. In a handful of cases where the court deferred on statutory interpretation, yet reversed on other grounds, the case was coded as upholding the challenge.

64. *See* Cross, *supra* note 13, at 290-91.

A simple comparison of judicial party affiliation and political decisions reveals a fairly profound partisan effect. Table 1 displays the political results of cases according to the makeup of the deciding panel of judges. Each cell contains the absolute number of cases.

TABLE 1. POLITICS AND JUDICIAL OUTCOMES

	REPUBLICAN MAJORITY	DEMOCRATIC MAJORITY	TOTALS
CONSERVATIVE CASE OUTCOME	62	13	75
LIBERAL CASE OUTCOME	52	28	80
TOTALS	114	41	155

Thus, a panel consisting of a majority of Republicans rendered a conservative decision 54% of the time (62 of 114), while a panel consisting of a majority of Democrats rendered a liberal decision 68% of the time (28 of 41). The presence of some "liberal" decisions by conservative courts and "conservative" decisions by liberal courts may be a function of a combination of factors. It may be a misspecification problem—politics lie upon a continuum, and some policies may be too conservative for a given "conservative" court or too liberal for a "liberal" court. Or, our coding of agency decisions by nature of the litigant challenging the agency may misidentify some litigants' political affiliations. Alternatively, the mismatch may indicate that doctrine is having a significant effect in constraining all-out partisan decisionmaking. Nonetheless, these simple results suggest that there is a significant political determinant to judicial decisionmaking, at least in *Chevron* review.

Our theory suggests that whether deference is granted (that is, whether the *Chevron* doctrine is being adhered to) is dependent upon the convergence between the partisan policy preferences of the panel's majority and the outcome resulting from the application of *Chevron*. Put differently, the court panel is more likely to follow *Chevron* when the agency has issued a policy consistent with the panel's assumed policy preferences (liberal for Democrats and conservative for Republicans) than when there is no such alignment between the court's policy preferences and the agency policy. To bear out this relationship and to sort out the effects of several other variables that may affect the likelihood that a court will defer to an agency, we ran a statistical test. Using logistic regression techniques, we specified the equation as follows:

$$\text{DEFERENCE} = \text{INTERCEPT} + B_1\text{POLICY CONVERGENCE} + B_2\text{UNIFIED PANEL} + B_3\text{MAJORITY PARTY} + B_4\text{YEAR} + u_i.$$

POLICY CONVERGENCE is both the political variable and the main variable of interest. It indicates whether there is alignment between the assumed preferences of the panel's majority (as measured by the political party affiliation of the majority of members on the panel) and the policy outcome of the agency (as measured by the litigants challenging the agency). We postulate that deference is more likely when the assumed partisan preferences of the panel's majority favor the agency outcome (Republicans favoring conservative agency outcomes and Democrats favoring liberal agency outcomes).

We also include a variable to indicate whether the reviewing panel members were from the same political party (UNIFIED PANEL). Our theory suggests that a politically unified panel, that is 3-0 Republican or 3-0 Democrat, is more likely to disregard the constraints of doctrines that do not support the court's policy preferences when there is no policy convergence. When there is no whistleblower on a panel, that is the panel is politically unified, judges will see doctrine as less of an obstacle to political decisionmaking.

Next, we include a variable for the political party of the majority of the members on the panel (MAJORITY PARTY). It is possible that judges of one party (for a variety of reasons, both political and sincere) are more true to legal doctrine than the judges of the other.[65] Finally, we include the variable YEAR, which represents the actual year in which a particular case was decided, the first year being set at zero. This is intended to capture the possibility that the *Chevron* doctrine has grown weaker over time.

The results are set out in Table 2.

TABLE 2. RESULTS OF LOGIT

INDEPENDENT VARIABLES	COEFFICIENT	(STANDARD ERROR)
INTERCEPT	−140.246	(261.8195)
POLICY CONVERGENCE	1.4655***	(0.4233)
UNIFIED PANEL	−0.7179*	(0.4228)
MAJORITY PARTY	−0.3364	(0.4525)
YEAR	1.0706	(0.1313)

* $p \leq 0.1$; ** $p \leq 0.05$; *** $p \leq 0.01$
Chi-square is 19.605 with 4 DF ($p = 0.0006$)

65. We also include this variable to offset any bias to measuring POLICY CONVERGENCE that may result from the presence of a large number of Republican panels in the sample.

As predicted, the effect of POLICY CONVERGENCE is properly signed and highly significant. The results indicate that when the agency's policy outcome is consistent with the policy preferences of the panel's majority, the court is more likely to defer than if there is no such convergence. We calculate the impact of this variable to be 31%—that is, the panel is 31% more likely to defer (that is, follow doctrine) when its policy preferences are consistent with the agency's policies than when they are not.[66] The results also indicate that whether the panel was politically divided (2-1) or united (3-0) had an effect on whether the panel deferred to the agency, although the significance of these results is somewhat less ($p = 0.09$). We calculated the impact of this variable to be 17%—that is, it is 17% less likely that the court will defer when it is unified than when it is split 2-1. Neither the political party of the panel majority (MAJORITY PARTY) nor the year in which the decision was made (YEAR) proved significant. In other words, neither Democrats nor Republicans appeared any more or less committed to doctrine than judges of the other party. Likewise, the passing of time did not appear to diminish or strengthen the effects of *Chevron*.

While the above results suggest that a division among panel members does affect whether doctrine will be followed (as indicated by the marginal significance of the UNIFIED PANEL variable), they do not necessarily establish that the presence of a whistleblower is the mechanism. It is possible that 2-1 majorities whose policy preferences are consistent with those of the agencies nonetheless decide, with some regularity, to capitulate to the minority member. Recall that our whistleblower theory postulates that there should be an effect when a 2-1 majority is in conflict (in terms of its partisan policy preferences) with the agency over policy outcomes, rather than when the 2-1 majority is in agreement with the agency's policy choice.

To examine the whistleblower hypothesis further, we segregated the data by whether there was a politically unified panel (3-0 Republican and 3-0 Democratic majorities) or politically divided panel (2-1 Republican-to-Democrat majorities and vice versa). We then separated the data with respect to deference (our measure for judicial obedience) and whether there was policy convergence between the deciding court panel and the agency. The data are presented in Table 3.

66. The impact is computed by subtracting the probability of deference when POLICY CONVERGENCE equals 0 from the probability of deference when the variable equals 1. *See generally* TIM FUTING LIAO, INTERPRETING PROBABILITY MODELS: LOGIT, PROBIT, AND OTHER GENERALIZED LINEAR MODELS (Sage Univ. Papers Series, Quantitative Applications in the Social Sciences No. 07-101, 1994).

TABLE 3. POLITICS, LEGAL DOCTRINES, AND JUDICIAL DECISIONMAKING

	UNIFIED PANEL		DIVIDED PANEL		TOTALS	
	POLICY CONVERGE	NO POLICY CONVERGE	POLICY CONVERGE	NO POLICY CONVERGE[67]	POLICY CONVERGE	NO POLICY CONVERGE
DEFERENCE	10	7	37	47	47	54
NO DEFERENCE	4	14	7	29	11	43
TOTALS	14	21	44	76	58	97

Consider first the politically unified panels. In the 21 cases where it appeared to be to the unified panels' policy advantage to disobey *Chevron*, the panels did so two-thirds of the time. In other words, unified panels deferred to the agency only 33% (7 of 21) of the time when the policy outcomes that would have resulted from adhering to doctrine appeared inconsistent with the panel's political preferences. In the 14 cases in which it appeared to be to the advantage of the unified panels to obey *Chevron*, the panels did so 71% (10 of 14) of the time.

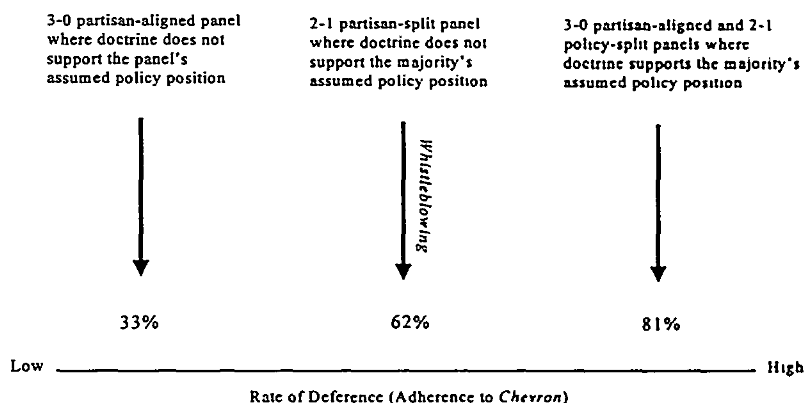
Now consider the divided panels. Of the cases in which it was to the panels' advantage to obey *Chevron*, they did so 84% (37 of 44) of the time. This is not surprising, as doctrine in such cases poses no conflict for the majority. Now consider the 76 cases involving the whistleblower scenario, in which it appeared to be to the advantage of the majority not to defer. These panels continued to obey the doctrine 62% (47 of 76) of the time. Compare this rate of obedience to that of unified panels whose policy preferences seemed inconsistent with the application of the *Chevron* doctrine (33%). In short, the presence of a whistleblower makes it almost twice as likely that doctrine will be followed when doctrine works against the partisan policy preferences of the court majority. These results are consistent with our theory as illustrated in Figure 2.

To determine whether this whistleblower effect was statistically significant, we ran a chi-square test. In running the test, we considered the subset of cases in which application of the doctrine appeared to work against the majority's policy preferences (essentially those cases for which the agency policy and the panel majority's policy preferences were not aligned). The test indicated, at a significance level of 0.05, that obedience to legal doctrine was not independent of the presence of a whistleblower. In other words, the data indicate that the presence of a whistleblower improves the chances that the court will apply the applicable legal doctrine.[68]

67. This column indicates the whistleblowing scenario.

68. For purposes of symmetry, we also tested cases in which it was in the policy interest of the split-panel majority to apply doctrine (that is, policy convergence existed). We looked at the inverse of the whistleblower situation in particular—that is, we wanted to know if the presence of a divided panel (regardless of policy convergence between the agency and the court) meant there would be a significant change in the level of *Chevron* deference. This would suggest that majorities merely capitulate on occasion

FIGURE 2. RATE THAT CHEVRON DOCTRINE WAS FOLLOWED



IV. DISCUSSION

The data raise an intriguing question about decisions to grant deference: Why does panel composition matter so dramatically? Circuit court decisions, of course, are decided by majority vote. Consequently, a 2-1 majority has every bit as much power to effect their partisan inclinations as does a 3-0 majority. Yet in practice, a 3-0 majority will be far more driven by partisanship than a 2-1 majority. While the number of 3-0 Democrat panels is too small to provide convincing results, the results on the Republican side are dramatic. The presence of a single Democrat on a panel appears to have had a distinct political moderating effect on the two Republicans. Republican majorities still decided along partisan lines in a material subset of cases, but the subset was clearly smaller than for politically unified panels.

The most likely explanation for the doctrine's impact on politically divided panels is the whistleblower effect. The presence of a politically opposed minority representative means that there is someone on the panel who can identify the majority's disobedience to doctrine. A traditional rational choice model might suggest that whistleblowing increases the risk of reversal by a higher court or by Congress and that the possibility it might occur thus dissuades judges from disobeying doctrine. On this theory, a minority judge's stormy dissent enhances higher courts' external monitoring of judicial decisions

to minorities, not that the threat of exposure causes majorities to defy *Chevron*. A chi-square test suggested that our whistleblower theory remained intact. There was no significant difference ($p = 0.36$) between a divided panel and a unified panel in following doctrine when the application of *Chevron* would appear to advance policy interests of the majority.

by exposing the partisan biases of a majority that has ignored the dictates of doctrine.[69]

While the increased possibility of reversal as a risk of whistleblowing may well explain some decisions, there are reasons to suspect that the risk of reversal is not always a threat to panel majorities. First, the Supreme Court can review only a small fraction of the cases decided by circuit courts.[70] Congress likewise has a considerable agenda of issues more pressing than reversing typical statutory interpretation by a circuit court. Second, during the entire time period of our study, the Supreme Court was majority Republican and relatively conservative. Hence, if Supreme Court reversal was a risk, it should have been a risk primarily for majority Democrat panels. One would not expect much concern from Republican judges rendering conservative holdings. Yet Republican panels often deferred to liberal agency interpretations. The risk of reversal should be greater for Democrat panels, yet the evidence presented in Table 1 demonstrates that such panels were, if anything, more partisan than Republican panels.

If the risk of reversal cannot explain doctrinal adherence in divided panels, the dynamics of panels themselves are likely to explain whistleblowing. The minority member in such panels may simply force the majority to acknowledge its subconscious disobedience to doctrine and therefore to mend its ways. The collegiality and collaborative decisionmaking of multi-judge panels could largely explain such a result.[71] This theory is consistent with a recent study of the federal district courts, which found that judges are committed to the neutral operation of the legal model of decisionmaking but that the operation of that model is influenced and biased by differing evaluations of evidence and argument.[72] Judges employ "cognitive shortcuts to process imperfect information" under the legal model, and these shortcuts produce apparently political results.[73] In short, on multi-judge panels, the minority judge can serve as a whistleblower by revealing these biasing cognitive shortcuts. Once the majority can no longer readily rationalize its decision under the legal model, it will frequently concede to the commands of that model.

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69. *See* ROBERT A. CARP & RONALD STIDHAM, THE FEDERAL COURTS 179-82 (2d ed. 1991) (suggesting that individual judges can influence the panel majority by threatening to go public with a dissent).

70. *See* Richard S. Higgins & Paul H. Rubin, *Judicial Discretion*, 9 J. LEGAL STUD. 129, 137 (1980) (concluding based on a study "that, if constraints operate on judges, these constraints must come from sources other than possibilities of reversal"); Strauss, *supra* note 7, at 1096 (noting the Supreme Court's limited power of supervision).

71. Two political scientists who generally subscribe to an attitudinal model of decisionmaking acknowledge that most judges "can be swayed by an articulate and well-reasoned argument from a colleague with a differing opinion." CARP & STIDHAM, *supra* note 69, at 176.

72. *See* C.K. ROWLAND & ROBERT A. CARP, POLITICS AND JUDGMENT IN FEDERAL DISTRICT COURTS (1996).

73. *Id.* at 171.

There remain two other explanations for why judges sometimes grant deference to agency interpretations contrary to their politics. Consider first a split panel with two Republicans and one Democrat. With only two Republicans on the panel, an issue might be a higher priority to one of the Republicans than to the other, and the less interested judge would be more likely to defer to the agency than if both other judges were Republicans who favored nondeference. Yet this does not seem to be a politically logical explanation, even given the possibility of judicial logrolling. One would expect the Republican who did not care about the issue to defer to the Republican who did care about the issue, in anticipation of complementary deference when their roles were reversed. The judge generally has more to gain from deferring to a colleague than from deferring to an agency.

A second alternative explanation is the presence of a moderate Republican judge who generally sides with Democrats when given the chance. Examination of individual decisions, however, does not support this theory. Of all the cases in which a majority Republican panel granted deference to a liberal agency interpretation, no specific Republican judge showed up on even half of the panels. Moreover, the Republican who appeared most frequently on this set of panels was Judge David Sentelle, who has a reputation for staunch conservatism.[74] The presence of nonideological deference decisions by majority Republican panels cannot be attributed to a closet liberal on the circuit.

V. CONCLUSION

Partisanship clearly affects how appellate courts review agency discretion. In our study of administrative law decisions by the D.C. Circuit, we have found that panels controlled by Republicans were more likely to defer to conservative agency decisions (that is, to follow the *Chevron* doctrine) than were the panels controlled by Democrats. Similarly, Democrat-controlled panels were more likely to defer to liberal agency decisions than were those controlled by Republicans. Nonetheless, legal doctrine appears to play an important role in the partisan struggle over policy. Minority judges can use doctrine to corral the partisan ambitions of a court majority whose policy preferences would best be accomplished by neglecting the dictates of doctrine. The minority member acts as a whistleblower, ready to expose any cheating by the majority. In our study, we found that the presence of a

74. Judge Sentelle became well known when, shortly after lunching with Senators Jesse Helms and Lauch Faircloth of North Carolina, he replaced Whitewater special prosecutor Robert Fiske with the presumably more aggressive Kenneth Starr. *See* Sara Fritz, *Starr Mixes Ambition, Judicious Style*, L.A. TIMES, Jan. 27, 1996, at A1. The press has described Sentelle as one of the "most conservative members" of the D.C. Circuit. *E.g.*, Nancy Lewis, *Conviction of Drug Gang Leader Upheld*, WASH. POST, Apr. 29, 1995, at A18.

whistleblower—that is, a minority member with *Chevron* deference favoring the minority member's political preference—significantly increases the chances that the court majority will follow doctrine. While a partisan split panel does not negate all partisan influences on *Chevron* review, it clearly moderates such influences and makes doctrine more likely to be followed.