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Panel Effects in Administrative Law: A Study of Rules, Standards, and Judicial Whistleblowing

Morgan Hazelton
Saint Louis University, Morgan.hazelton@slu.edu

Kristin E. Hickman
University of Minnesota Law School, khickman@umn.edu

Emerson Tiller
Northwestern University School of Law, tiller@law.northwestern.edu

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Panel Effects in Administrative Law: A Study of Rules, Standards, and Judicial Whistleblowing

Morgan Hazelton, Kristin Hickman**, and Emerson H. Tiller****

ABSTRACT

*In this article, we consider whether "panel effects"—that is, the condition where the presence, or expected voting behavior, of one judge on a judicial panel influences the way another judge, or set of judges, on the same panel votes—varies depending upon the form of the legal doctrine. In particular, we ask whether the hand of an ideological minority appellate judge (that is, a Democrat-appointed judge with two Republican appointees or a Republican-appointed judge with two Democrat appointees) is strengthened by the existence of a legal doctrine packaged in the form of a rule rather than a standard. Specifically, we unbundle the panel interaction under rule and standard conditions and provide a framework for understanding a court's relative deference to agency interpretations based on the diversity of the judicial panel's political-ideological makeup and the form of the legal doctrine. In addition, we test our framework using the two major legal doctrines from the last sixty years covering judicial review of agency interpretations—*Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), and* Chevron U.S.A. Inc. v. Natural Resource Defense Council, Inc.*, 467 U.S. 837 (1984)—the former representing a standard, the latter a rule.*

* Saint Louis University, Department of Political Science.

** Distinguished McKnight University Professor and Harlan Albert Rogers Professor in Law, University of Minnesota Law School.

*** J. Landis Martin Professor of Law and Business, Northwestern Pritkzer School of Law.

TABLE OF CONTENTS

I. INTRODUCTION 446
II. PANEL EFFECTS LITERATURE 447
III. PANEL EFFECTS AND DOCTRINAL FORM: THE ROLE OF RULES VERSUS STANDARDS 451
IV. ADMINISTRATIVE LAW DOCTRINES AND PANEL EFFECTS 454
A. Rules and Standards in Administrative Law 455
B. The Ambiguity–Deference Model 460
V. THE EMPIRICS 465
A. Design 465
B. Results 467
C. Discussion 469
VI. CONCLUSIONS 473
APPENDIX: CHALLENGING PARTY POSITION 475

I. INTRODUCTION

DOES the form of legal doctrine—rule versus standard—impact the federal appellate courts' fidelity to the law? Is a political minority judge on a panel of three judges more empowered by a rule or a standard? Does such empowerment lead to more doctrinally consistent decisions? More moderate decisions? Do Democrat and Republican appointed minority panel judges behave differently? In this article, we consider whether "panel effects"—that is, the condition where the presence, or expected voting behavior, of one judge on a judicial panel influences the way another judge, or set of judges, on the same panel votes—varies by the form of the legal doctrine in place. In particular, we consider whether the hand of an ideological minority appellate judge (that is, a Democrat appointee with two Republican appointees or a Republican appointee with two Democrat appointees) is strengthened by a doctrine packaged in the form of a rule rather than a standard.[1]

We consider these panel effects questions in the context of judicial review of agency interpretations of statutes—a fundamental issue in administrative law scholarship. The question of how (and how should) courts review agencies' interpretations of statutes has been extensively studied from traditional legal, positive political theory as well as empirical perspectives. In this article, traditional legal scholarship informs our understanding of the characteristics of various administrative law doctrines, in both form and substance, which we then employ for our positive theory of panel effects in administrative law—a theory we then examine empirically.

1. This particular type of panel effects is an expanded version of the phenomenon known as the "whistleblower" effect. *See* Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeal*, 107 Yale L.J. 2155 (1998).

We consider here, in particular, whether judges on a three-judge appellate panel reviewing an agency's interpretation of a statute interact differently with each other based on whether the guiding review doctrine comes in the form of a rule or a standard. We unbundle the panel interaction under rule and standards conditions and provide a framework for understanding a court's relative deference to agency interpretations based on the diversity of the judicial panel's political-ideological makeup and the form of the legal doctrine (rule versus standard) in place.

In addition to a framework, we offer a preliminary empirical evaluation of our theory using the two major doctrines covering judicial review of agency interpretations—*Skidmore v. Swift & Co.*[2] and *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[3] Our study covers the years 1974 through 1994. *Skidmore* represents a prototypical doctrinal standard applied routinely by courts reviewing agencies' interpretations of statutes during the first ten years of our study. *Chevron* is a comparatively rule-like doctrine that dominated judicial review of agency legal interpretations the latter ten years of our study. Comparing judicial panel dynamics across the two periods helps to inform our understanding of the differences in panel effects under rule and standard legal regimes.

II. PANEL EFFECTS LITERATURE

There are multiple theories of so called "panel effects"—the condition of having judges on a three-judge panel where the presence, or expected voting behavior, of one judge may affect the voting behavior of other judges, and vice versa. The theories draw upon a number of disciplines and approaches—including political science, psychology, and the economics of information. With some variation, the common phenomenon the theories attempt to explain is the ability of one judge, usually in the political minority, to influence or change the expected vote of the other two judges in the panel majority. In other words, why would a two-judge panel majority (e.g., a panel majority made up of two Democrat appointees or two Republican appointees) behave any differently than a three-judge panel majority (e.g., a panel made up of three Democrat appointees or three Republican appointees). In either case, the political majority has the power to control the case outcome. The psychological explanation rests on group cohesion theory where a unified group of judges (that is, three judges with the same political-ideological make-up) is more likely to make an ideologically extreme, unchecked decision than if the group had more ideological balance (that is, an ideological minority member on the panel).[4] The information economics theory stresses the incentives of a minority member to engage in costly efforts to find more factual information on the case and its policy implications, and to share that information

2. 323 U.S. 134 (1944).
3. 467 U.S. 837 (1984).
4. CASS R. SUNSTEIN, DAVID SCHKADE, LISA M. ELLMAN & ANDRES SAWICKI, ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY (2006).

with the other members of the panel, who will then moderate their more extreme positions.[5] One political science approach focuses on the ability of a minority member, who is aligned with the circuit en banc or the Supreme Court, to act as the higher court's agent and threaten exposure through a possible dissent of any decision by a panel majority that runs counter to the higher court's ideological preferences.[6] These theoretical approaches are not necessarily inconsistent with each other and all could be at work in any given case. The key to each approach is the diversity, or lack of it, on the appellate panel.

For the most part, these various panel effects theories are neither dependent in any manner on the presence of legal doctrine nor the form of that doctrine (rules or standards). They rely, instead, on other political, social, and informational factors. Perhaps overstated, but to the point, Cox and Miles observe the following:

> Studies of judicial decisionmaking typically link judicial ideology to ultimate case outcomes without tracing the impact of ideology through the analytical framework of the applicable legal doctrine. For political scientists who adhere to the more extreme versions of the attitudinal model, the inattention to law is unsurprising. They believe that the pursuit of judicial policy preferences fully explains judicial behavior; legal variables are irrelevant. But for legal academics, empirical evidence about the relationship between doctrinal structure and ideology should have paramount importance.[7]

The main exception to this criticism, at least with respect to studies of judicial panel effects, is Whistleblowing Theory ("WT"), which identifies legal doctrine as a central element affecting how judges engage each other on ideologically mixed or unified judicial panels.[8] WT posits that ideological minority judges in mixed panels can threaten to expose "disobedience" of legal doctrine by the majority (and the minority member is incentivized to play this guardian role when the doctrine supports her desired policy outcome) and thus prevent extreme, doctrinally unsupportable, outcomes by the panel majority. By contrast, when the panel lacks political diversity (unified panel), the three like-minded judges are less inclined to feel any doctrinal constraints in pursuit of their preferred policy outcomes, as the risk of negative exposure to higher courts, other judges, the legal and academic community, and the public is lower than when a panel member with an ideologically opposed position is present

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5. Matthew Spitzer & Eric Talley, Left Right and Center: Strategic Information Acquisition and Diversity in Judicial Panels (August 23, 2010) (unpublished manuscript) (on file with authors).

6. *See, e.g.*, Jonathan P. Kastellec, *Panel Composition and Voting on the U.S. Courts of Appeals over Time*, 64 POL. RESEARCH Q. 377 (2011); Jonathan P. Kastellec, *Hierarchical and Collegial Politics on the U.S. Courts of Appeals,* 73 J. POL. 345, 345 (2011).

7. Adam B. Cox & Thomas J. Miles, *Judicial Ideology and the Transformation of Voting Rights Jurisprudence*, 75 U. CHI. L. REV. 1493, 1494 (2008).

8. Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2158–59 (1998).

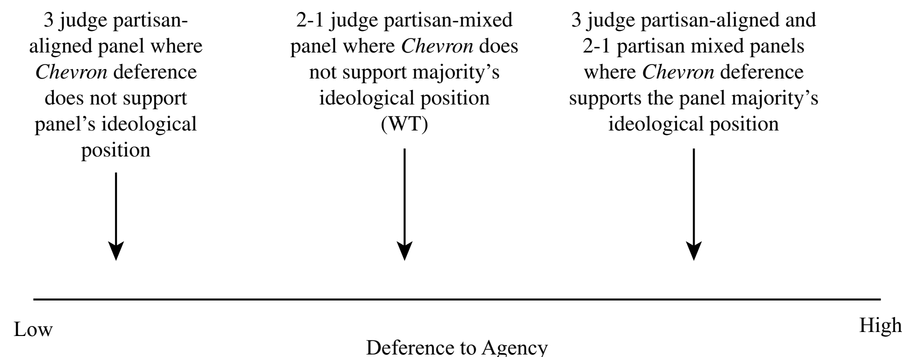
and willing to dissent. The key determinants of the WT model, with respect to moderation or compromise among the panelists, are the diversity of the panel and the legal doctrine in place—that is, whether the substance of the legal doctrine favors the minority or majority members when faithfully applied. The hierarchical principal–agent explanation of panel effects (that is, high court disciplinary control over wayward panels) can be thought of as one version of WT. In that approach, the threat of a minority judge who can signal doctrinal disobedience to a higher reviewing court moderates that panel majority. Yet another version of WT could be based on deliberative conditions among the judges—that is, a minority judge may be able to convince the other judges to follow the applicable legal doctrine by argument and collegial forces (rather than threat of higher court exposure). In either version of WT, panel diversity and the direction/substance of legal doctrine (to the extent that it correlates with ideological preferences) work in combination to produce an outcome.

In the context of administrative law, the judicial whistleblowing influence can be empirically observed in the behavior of three-judge circuit panels reviewing agency statutory interpretation. In 1998, Cross and Tiller examined 170 cases in which the D.C. Circuit reviewed agency interpretations of regulatory statutes.[9] They examined whether partisan-aligned panels (that is, three Republican or three Democrat appointees sitting on the three-judge panel together) and partisan-mixed federal court panels (two Democrat and one Republican appointees, or two Republican and one Democrat appointees) were more likely to apply, in an unbiased and consistent manner, the *Chevron* doctrine (a doctrine the substance of which counsels strong deference towards agency interpretations of statutes) based on whether the agency's policy matched the panel majority's ideological preferences (that is, ideologies aligned with the partisanship of the judges' appointing president). In other words, would panels dominated by Republican (Democrat) appointees be more likely to obey the *Chevron* doctrine's push towards deference when the agency likewise produced Republican-friendly (Democrat-friendly) regulatory outcomes? Consistent with theory, they found that when the judges were partisan-aligned, the panel's willingness to apply *Chevron* deference was high when the agency policy matched the assumed policy preferences of the judicial panel and low when the agency policy did not match the assumed policy preferences of the panel majority. They called this selective application of legal doctrine based on partisan-ideological panel matchup of doctrine to case outcome as *doctrinal disobedience*. With respect to partisan-mixed panels, Cross and Tiller found, as expected, that there remained a high level of *Chevron* deference when the agency's policy outcome was in line with that of the panel majority's partisan preferences (that is, the *Chevron* deference would produce the outcome preferred by the two-judge partisan majority). However, when the partisan-mixed

9. *See id*. at 2168 (introducing this figure).

panel's preferences did not match the agency outcome (that is, *Chevron* deference would not produce the outcome preferred by the panel majority), there was more *Chevron* deference than when a three-judge partisan aligned panel was in same position. Put differently, the presence of a minority panel member increased adherence to doctrinal precedent (*Chevron* deference) when the doctrine was not politically favorable to the panel partisan-majority. Cross and Tiller concluded that the partisan two-judge majority would be sensitive to the minority panel member's incentive to act as a "whistleblower" should the partisan majority go against doctrinal demands, and thus the majority was more inclined to follow the legal doctrine in place—a victory for legal doctrine. The figure below illustrates the result.

Figure 1: Whistleblowing Theory[10]



WT is not inconsistent with the other theories of panel effects. The other theories occasionally suggest that the whistleblowing phenomenon may be part of the moderation observed in their studies.[11] Nonetheless, WT poses some challenges to the other theories of panel effects in the sense that WT suggests that there should be controls for (1) legal doctrine, and (2) whether the legal doctrine works in favor or against the minority member in a given case context. Not controlling for these effects may result in empirical panel effects studies that overstate, or understate, the amount of moderation attributable to the group cohesion, information costs, or political–hierarchical forces upon mixed panels. Indeed, if the ability of a minority member to force the other members to compromise (and thus moderate their decisionmaking) is driven in part by whether the minority member has a strong doctrinal position (that is, the honest/credible application of doctrine suggests the outcome preferred by the minority member should obtain), then such a condition may act as a trigger for moderation observed under the other theories.

10. *Id.* at 2173.
11. *Id.* at 2158.

The doctrinally based whistleblowing approach has been further refined by Cox and Miles who look at the effect of the *form* of doctrine (rule or standard) on the interaction of judges on a panel.[12] They consider the Supreme Court's sequential two-part doctrine (rules-plus-standard) in *Thornburg v. Gingles*[13] for evaluating claims brought under Section 2 of the Voting Rights Act and use that structure to test relationships among rules, standards, and ideological differences between judges. The first stage of the *Gingles* doctrine is more rigidly rule-like and the second stage involves a softer totality of the circumstances standard.[14] Cox and Miles found empirical evidence that ideological divisions in judicial voting patterns were more pronounced in the standard-like second stage of *Gingles* than in the evaluation of the more rule-like factors in part one of the test. From this they concluded that panel effects were dependent in part on the form of legal doctrine: ideological extremism was more pronounced in the second stage (standard) than in the first (rule) when the panel was diverse (politically mixed).

While Cox and Miles offer a natural extension to WT, they do not advance it as such, perhaps because they attribute their effects strictly to the form of the doctrine (rules, on their own, constrain more than standards) rather than the empowerment of the minority member to reign in the majority in the presence of a rule (whistleblowing effect). Moreover, their study is somewhat compromised by the fact that they were studying the two doctrinal forms in the context of one sequential two-part doctrine (rule in first part, standard in second part) such that moving to the standard part of the doctrine was dependent on meeting the conditions in the first, rule-like, part of the doctrine, thus creating endogeneity concerns. In any event, along with the doctrinal focus of WT, Cox and Miles' identification of doctrinal form as an essential feature of panel effects brings one of the essential debates of law—rules versus standards—into sharp focus and reintroduces important legal factors, nearly extinct in studies of panel effects, back into their natural habitat of judicial decisionmaking.

III. PANEL EFFECTS AND DOCTRINAL FORM: THE ROLE OF RULES VERSUS STANDARDS

The characteristics of rules and standards have been fully explored in the legal literature.[15] The key difference between rules and standards is

12. Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1, 28 (2008).

13. 478 U.S. 30, 79 (1986).

14. The *Gingles* framework for determining if vote dilution had occurred under the Voting Right Act included three rule-like preconditions for liability in part one: it required plaintiffs to prove (1) that the minority group is sufficiently large and geographically compact; (2) that the minority group is politically cohesive; and (3) that white voters vote as a bloc and thereby typically defeat minority-preferred candidates. Part one was necessary but not sufficient. If part one was met, then the court would need to engage in a multifactor balancing inquiry focusing on factors set out in a 1982 Senate report. *See id.* at 50.

15. *See, e.g.*, LARRY ALEXANDER & EMILY SHERWIN, THE RULE OF RULES: MORALITY RULES AND THE DILEMMA OF LAWS (2001); FREDERICK SCHAUER, PLAYING BY THE

the relative discretion they afford to the decisionmaker. It is the form of the doctrine that determines the extent of discretion available to a lower court. The signature feature of a rule, in contrast to a standard, is the high level of constraint it places on the decisionmaker.[16] This practical distinction between rules and standards is evident, for example, in antitrust law. In that field, courts have doctrinally defined certain actions as *per se* violations of the law and, thus, establish a rule-like principle of their illegality. Other actions, by contrast, are judged by the more standard-like "rule of reason"—these actions may be illegal or not, depending upon the circumstances and how the court weighs them in an individual case.[17]

While a pure standard allows a court "to take into account all relevant factors or the totality of circumstances,"[18] many other formulations of standards are possible. For example, a classic doctrinal standard in law is the "balancing test" under which a court considers the equities between the parties before deciding the outcome.[19] Another common standard is the multi-factorial test, under which a lower court considers a series of factors as relevant to the decision's outcome but has no particular direction as to how those factors are to be weighed. The *Skidmore* standard of administrative law,[20] discussed more below, relies on multiple factors and is thus a good example of this type of multi-factorial standard.

In addition to its substantive formulation, the form of legal doctrine can be thought of as a managerial choice for higher courts to consider in controlling the discretion of lower courts as well as a tool for managing disputes among judges on a panel. Indeed, the ex-ante choice between rule and standard is often the essential feature of such managerial control.[21] A high court overseeing a lower court comprised of many "unfaithful" agents (that is, lower court judges with political ideologies or legal preferences that differ from the higher court and who cannot be trusted to advance the higher court's preferences when there is ambiguity in law and facts) may be better served with issuing a doctrine as a rule as opposed to a standard, thereby giving less discretion to the lower courts in the substantive choices available to them, and increasing the ease with which the higher court can monitor noncompliance. The power of the

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RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE (1991); Tonja Jacobi & Emerson H. Tiller, *Legal Doctrine and Political Control*, 23 J. L., ECON. & ORG. 326 (2007); Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953 (1995); Louis Kaplow, *Rules versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992); Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

16. SCHAUER, PLAYING BY THE RULES, at 231–32.

17. Mark A. Lemley & Christopher R. Lesle, *Categorical Analysis in Antitrust Jurisprudence*, 93 IONA L. REV. 1207, 1213–15 (2008).

18. Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 59 (1992).

19. *Id.* at 60–61.

20. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

21. Frank B. Cross, Tonja Jacobi & Emerson H. Tiller, *A Positive Political Theory of Rules and Standards*, 2012 U. ILL. L. REV. 1 (2012).

higher court to monitor may be dependent in part on the presence of a least one member on the lower court panel who may act as a whistleblower if the majority disobeys the rule. The power of the minority member would be greatly weakened if the doctrine were a standard, as clear disobedience to the doctrine by the majority would be more difficult for the minority member to claim relative to a doctrinal rule. By contrast, a high court overseeing a lower court comprised mostly of faithful agents (that is, lower court judges with political ideologies or legal preferences that align with the high court and who can be trusted to advance the higher court's preferences when there is ambiguity in law and facts) may be best served by a standard, thereby allowing lower court judges the opportunity to fine tune the application of law to generate outcomes most desired and shared by the lower court and higher court.

Within a panel of judges, the power of doctrinal form to manage disputes plays out most clearly when the panel members are diverse. When multi-member panels are nondiverse—that is, politically unified with members who all share the same ideological or legal preferences—the presence of a controlling doctrinal rule whose application would produce an outcome at odds with the majority's preferences could be easily overlooked or discounted by the panel without fear that a fellow judge on the panel with opposing preferences will invest in exposing the majority's disobedience of the rule (impacting reputation costs or creating reversal risks for the majority members), or that the majority would need to undertake considerable costs to tailor their opinion around a dissent (draining resources and weakening precedential value). When the panel is diverse, the majority is more inclined to follow the dictates of a rule if such is the doctrinal regime in place. This is not a problem when the rule aligns with the majority's outcome preferences because the panel majority achieves its desired outcome. When the rule aligns with the minority member's preferences, the doctrine is in conflict with the majority's outcome preferences. While the panel majority may wish to ignore the doctrine, they cannot—the minority member will convince them to follow doctrine, perhaps through the threat of dissent. Indeed, the minority judge poses a threat to expose the majority's contempt for the law and reduces the likelihood that the majority would take such an action.

Figures 2 and 3 below illustrate the expected behavior of panel judges under conditions of rules and standards, respectively.

Figure 2: Whistleblowing and Rules

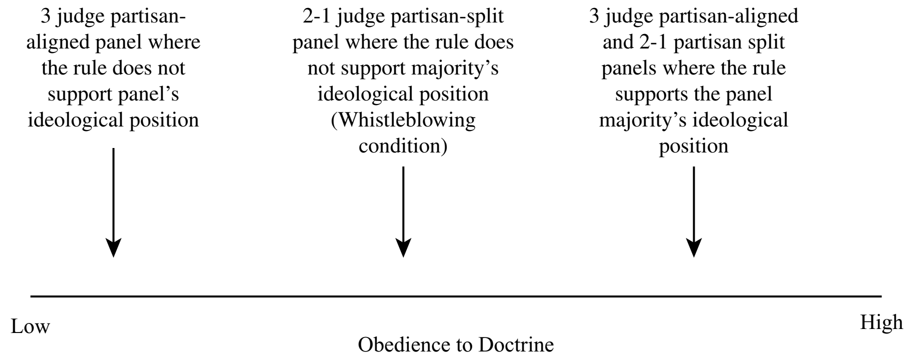
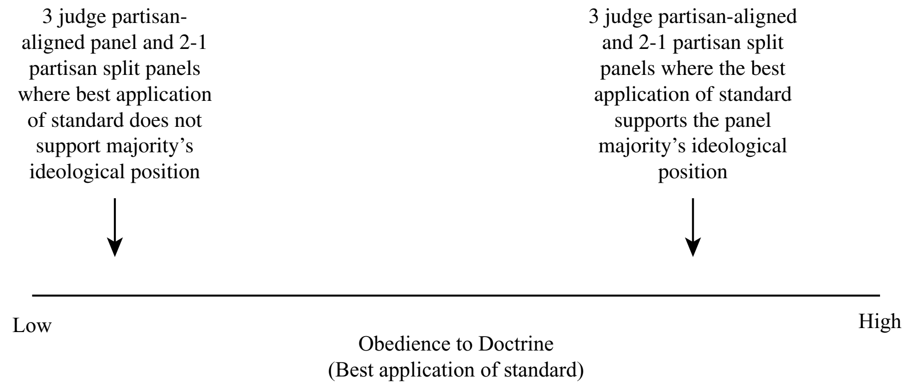


Figure 3: Whistleblowing and Standards



The rules/standards distinction has implications for other theories of panel effects. From the information economics approach, one could conjecture that a minority member would be more empowered by standards than rules because standards would call for a broader range of information from which a minority panel member could convince the majority—basically more opportunity for persuasion through effort. This prediction is opposite of the WT prediction which suggests that a standard would work in favor of the panel majority who would see little restraint from the doctrine. Group cohesion theory, on the other hand, would likely make no prediction about the effects of doctrinal form—either force (information management or whistleblowing) could be at work, or doctrine could be irrelevant.

IV. ADMINISTRATIVE LAW DOCTRINES AND PANEL EFFECTS

The set of doctrines governing judicial review of agency legal interpretations offers an excellent opportunity to study panel effects theories and the influence of the form of legal doctrine in an important, and often politicized, area of judicial practice.

A. Rules and Standards in Administrative Law

Over the last half-century, the set of administrative law doctrines endorsed by the Supreme Court has, to one degree or another, varied between a more standard-based approach and a more rule-based approach. These doctrines, each emanating from the Supreme Court, have dominated much of the administrative law literature. While legal academics have debated at length the merits, requirements, and parameters of these doctrines, they are well understood from a legal perspective for their structural forms and implications for judicial review of agency behavior. The doctrines have been routinely, if not consistently, applied by three-judge panels of the circuit courts of appeals to thousands of cases involving dozens of federal administrative agencies and hundreds of statutes.

Although the courts apply several different doctrines to evaluate agency interpretations of statutes,[22] for most of the last half-century, two doctrines have been particularly prominent. The first, chronologically at least, is most readily associated with the 1944 case *Skidmore v. Swift & Co.*[23] The second, and more prominent, derives from the 1984 case *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[24] Both *Skidmore* and *Chevron* represent "standards of judicial review," articulating the frame of mind that judges must assume in approaching agency interpretations of statutory language rather than dictating substantive outcomes.[25] Nevertheless, while the *Chevron* doctrine possesses some standard-like elements, it is substantially more rule-like than *Skidmore*, which presents all the features of a classic standard.[26] Closely associated with these frames of rules and standards is the level of deference a court should give an agency's interpretation of a statute. The more standard-like doctrine encourages less deference to the agency ("weak deference"), while the more rule-like doctrine encourages comparatively substantial deference to the agency's interpretation ("strong deference").

In *Skidmore*, the Supreme Court considered an interpretation of the Fair Labor Standards Act advanced by the Administrator of the Department of Labor's Wage and Hour Division.[27] Recognizing that the Administrator's experience administering that statute gave him a certain

22. *See* William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 Geo. L.J. 1083, 1099–1100 (2008) (recognizing a deference continuum in Supreme Court cases consisting of seven separate doctrines).

23. 323 U.S. 134 (1944).

24. 467 U.S. 837 (1984).

25. *See, e.g.*, Universal Camera Corp. v. NLRB, 340 U.S. 474, 487 (1951) (describing standards of review as reflecting moods); *see also* Nicholas R. Bednar & Kristin E. Hickman, Chevron*'s Inevitability*, 85 Geo. Wash. L. Rev. 1392, 1444–46 (2017) (discussing the nature of standards of review, including *Chevron*).

26. *See* Thomas W. Merrill, *The* Mead *Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 Admin. L. Rev. 807, 808 (2002) (describing *Chevron* as "more rule-like" and *Skidmore* as "more standard-like").

27. *See Skidmore*, 323 U.S. at 136.

expertise regarding its interpretation, the Court described its approach toward evaluating such administrative statutory interpretations:

> [T]he rulings, interpretations, and opinions of [the agency], while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.[28]

Consistent with the Supreme Court's recognition that other factors beyond thoroughness, validity, and consistency might hold persuasive value, courts employing the *Skidmore* standard have incorporated into the analysis several other considerations: the formality of the agency's decision-making process,[29] the longevity of an agency's interpretation,[30] the contemporaneity of an agency's interpretation with the legislature's adoption of the statutory language,[31] and the degree of agency expertise required in answering the interpretive question,[32] among others. The Court has not, however, offered guidance regarding how reviewing courts ought to balance the various factors vis-à-vis one another.[33] Disparaged by Jus-

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28. *Id.* at 140. Specifically, the Fair Labor Standards Act requires employers to pay overtime when employees work more than forty hours per week. *See* 29 U.S.C. § 207(a)(1) (1938). The statutory question in *Skidmore* was whether time that employees of the fire-fighting department of a meat packing plant spent waiting for fire alarms to arise ought to be taken into account in determining eligibility for overtime pay. *See Skidmore*, 323 U.S. at 135–36. The Administrator of the Wage and Hour Division of the Department of Labor filed an amicus brief before the Supreme Court concluding that some but not all such time was compensable. *See id.* at 139. In reaching his conclusion, the Administrator cited earlier informal rulings issued by his office concerning analogous workplace scenarios. *See id.*

29. *See, e.g.*, United States v. Mead Corp., 533 U.S. 218, 228 & n.9 (2001) (citing Reno v. Koray, 515 U.S. 50, 61 (1995) (recognizing formality as a *Skidmore* factor); Doe v. Leavitt, 552 F.3d 75, 81 (1st Cir. 2009) ("Greater weight ordinarily is due to interpretations that result from a structured interpretive process as opposed to a catch-as-catch-can interpretive process."); Miller v. Herman, 600 F.3d 726, 734 (7th Cir. 2010) (weighing agency's use of formal procedures for nonbinding action in favor of deference).

30. *See, e.g.*, Alaska Dep't of Envtl. Conservation v. EPA, 540 U.S. 461, 487 (2004) ("We 'normally accord particular deference to an agency interpretation of "longstanding" duration.'"); Estate of Landers v. Leavitt, 545 F.3d 98, 107 (2d Cir. 2008) (granting agency's "longstanding" interpretation "a great deal of persuasive weight"); Ammex, Inc. v. United States, 367 F.3d 530, 535 (6th Cir. 2004) (deferring to agency interpretation left "virtually unchanged for over three decades").

31. *See, e.g.*, Wong v. Doar, 571 F.3d 247, 262 (2d Cir. 2009) ("We give 'substantial weight' to an agency's construction of a statute that it is charged with enforcing, 'particularly when the construction is contemporaneous with the enactment of the statute.'"); Cathedral Candle Co. v. U.S. Intern. Trade Comm'n, 400 F.3d 1352, 1367 (deferring to agency interpretation in part because it "was contemporaneous with the enactment of the" relevant statutory language); *see also* David R. Woodward & Ronald M. Levin, *In Defense of Deference: Judicial Review of Agency Action*, 31 ADMIN. L. REV. 329, 333 (1979) ("Special weight is given to a construction which the agency has followed since its governing statute was adopted, especially if the agency participated in the drafting of the legislation.").

32. *See, e.g.*, *Mead Corp.*, 533 U.S. at 228, n.10 (listing the agency's "relative expertness" as a *Skidmore* factor and citing Aluminum Co. of Am. v. Cent. Lincoln Peoples' Util. Dist., 467 U.S. 380, 390 (1984)).

33. *See Mead Corp.*, 533 U.S. at 218.

tice Scalia as "th'ol' 'totality of the circumstances' test,"[34] the *Skidmore* standard calls upon reviewing courts to give agency statutory interpretations more or less "weight" based on the presence or absence of all of these various factors.[35] *Skidmore* does not, however, give an administrative interpretation the power to "control" a court's ultimate decision.[36] Instead, where *Skidmore* applies, courts rather than agencies remain the primary interpreters of statutory language. Hence, scholars often describe *Skidmore* as prescribing "weak deference."[37]

Note that *Skidmore*'s weak deference standard can only apply if the reviewing court has determined that the statutory language is unclear and susceptible to more than one interpretation. If the court panel believes that the statute is clear on its face, then the court will go ahead with that interpretation and give no deference to an alternative agency definition. Therefore, *Skidmore* is really a two-step doctrine where the more "standard-like" application comes in Step Two, after the court has decided implicitly, if not explicitly, that the statute in question is ambiguous.[38]

The *Chevron* doctrine, by comparison, is substantially less fluid and more formalistic in its approach to judicial review. Like *Skidmore*, it has two steps for ordering judicial review of agency legal interpretations, although the second step takes a more rule-like formulation than *Skidmore*: In *Chevron*, the court asks (1) whether the statute in question clearly and unambiguously resolves the interpretive question; and if not, then (2) whether the agency's interpretation of the statute is a permissible one.[39] In contrast to the weak deference of *Skidmore*, *Chevron* represents "strong" or "controlling," more rule-like deference.[40] If a reviewing court decides that a statute is susceptible of more than one permissible interpretation, then so long as the agency's choice falls within that range of options, the court must defer even if the judges would prefer a different alternative. According to one study of the federal courts of appeals that broke down *Chevron* outcomes between the two steps, once judges determined the statutes to be ambiguous, they deferred to the agency's interpretation in 89% of cases—evidence of the rule-like deference that

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34. *Id.* at 241 (Scalia, J. dissenting).

35. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

36. *Id.*

37. Richard W. Murphy, *Judicial Deference, Agency Commitment, and Force of Law*, 66 OHIO ST. L.J. 1013, 1037 (2005); William Funk, *Legislating for Nonlegislative Rules*, 56 ADMIN. L. REV. 1023, 1042 (2004); Jim Rossi, *Respecting Deference: Conceptualizing* Skidmore *Within the Architecture of* Chevron, 42 WM. & MARY L. REV. 1105, 1117 (2001).

38. *See* Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 COLUM. L. REV. 1235, 1280 (2007) (finding an implicit "Step One" in federal circuit court applications of the *Skidmore* standard).

39. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984).

40. *See, e.g.*, William Funk, *A Primer on Nonlegislative Rules*, 53 ADMIN. L. REV. 1321, 1341–43 (2001) (describing *Chevron*'s "strong deference" as in contrast to *Skidmore*'s "weak deference") (internal quotations omitted); Jim Rossi, *Respecting Deference: Conceptualizing* Skidmore *Within the Architecture of* Chevron, 42 WM. & MARY L. REV. 1105, 1110, 1117 (2001) (describing same).

Chevron commands.[41]

The seeming rigidity of *Chevron*'s two steps disguises the potential malleability of the doctrine.[42] Legal scholars have argued for years over the precise inquiry required by each step.[43] Some judges are quite prepared to find ambiguity at *Chevron* Step One in all but the most straightforward statutes,[44] while other judges are more inclined toward a robust inquiry into congressional intent using all available tools of statutory construction.[45] In some instances, the Supreme Court has seemed to cast *Chevron* Step One as a purely textualist inquiry.[46] In other cases, the Court has relied heavily on legislative history in the course of Step One analysis.[47] The circuit courts of appeals are divided over whether legislative history may be considered at all in evaluating statutory clarity at *Chevron* Step One.[48] Courts and scholars similarly disagree over whether the inquiry at *Chevron* Step Two ought to be limited to the substantive permissibility of the agency's interpretation[49] or extended to include the thoroughness of the agency's deliberative process.[50]

41. Orin S. Kerr, *Shedding Light on* Chevron*: An Empirical Study of the* Chevron *Doctrine in the U.S. Courts of Appeals*, 15 YALE J. REG. 1, 31 (1998).

42. *See* Nicholas R. Bednar & Kristin E. Hickman, *Chevron's Inevitability*, 85 GEO. WASH. L. REV. 1392, 1418–42 (describing different variations of *Chevron* represented in the jurisprudence); Thomas W. Merrill, *The* Mead *Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. 807, 810 (2002) (labeling *Chevron*'s "rule-like appearance" as "deceptive").

43. *See, e.g.*, Gary Lawson, *Outcome, Procedure and Process: Agency Duties of Explanation for Legal Conclusions*, 48 RUTGERS L. REV. 313 (1996); Ronald M. Levin, *The Anatomy of* Chevron*: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253 (1997); Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L.Q. 351 (1994); Cass Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071 (1990).

44. *See, e.g.*, Mayo Found. for Med. Educ. & Research v. United States, 568 F.3d 675, 680 (8th Cir. 2009) ("[W]hen the context is a provision of the Internal Revenue Code, a Treasury Regulation construing the words is nearly always appropriate.").

45. *See, e.g.*, Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 520–21 (suggesting that the meaning of a statute is more rather than less often "apparent from its text and from its relationship with other laws," but rejecting that "absolute equipoise" is necessary for deference).

46. *See, e.g.*, Dept. of HUD v. Rucker, 535 U.S. 125, 132 (2002) ("[R]eference to legislative history is inappropriate when the text of the statute is unambiguous."); National R.R. Passenger Corp. v. Boston & Maine Corp., 503 U.S. 407, 417 (1992) ("If the text is ambiguous and so open to interpretation in some respects, a degree of deference is granted to the agency . . . ."); *see also* Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L.Q. 351, 358 (reading the Supreme Court's *Chevron* jurisprudence as shifting to a purely textualist Step One).

47. *See, e.g.*, FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 130–155 (2000).

48. *See* Intermountain Ins. Serv. of Vail, LLC v. Comm'r, 134 T.C. 211, 234–36 (2010) (Halpern & Holmes, J.J. concurring) (summarizing circuit positions regarding the issue).

49. *See, e.g.*, Gary Lawson, *Outcome, Procedure and Process: Agency Duties of Explanation for Legal Conclusions*, 48 RUTGERS L. REV. 313 (1996). Notably, in the only two cases in which the Supreme Court has rejected agency action at *Chevron* Step Two, the Court has restricted its analysis to the substantive validity of the agency's interpretation vis-à-vis statutory text, history, and purpose. *See* Rapanos v. United States, 547 U.S. 715 (2006); AT&T Corp. v. Iowa Util. Bd., 537 U.S. 807 (2002).

50. *See, e.g.*, Mark Seidenfeld, *A Syncopated* Chevron*: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83 (1994). The

Notwithstanding these disagreements, *Chevron*'s two steps and its mandate that courts defer to permissible agency interpretations of ambiguous statutes is at least more outcome determinative and mechanical in application than *Skidmore*'s fuzzier multi-factor approach. The mandatory nature of *Chevron* Step Two in many cases may influence courts to narrow the scope of their inquiry at *Chevron* Step One,[51] although courts in other cases may push the envelope of statutory clarity at *Chevron* Step One in order to avoid deferring at *Chevron* Step Two.[52] Furthermore, as Thomas Merrill has observed, *Chevron* "narrows significantly the range of factors that courts may consult" in evaluating agency legal interpretations.[53]

Until 1984 and the Court's decision in *Chevron*, courts generally employed the multifactor standard now most closely associated with *Skidmore* in reviewing most agency legal interpretations.[54] The Supreme Court counseled a stronger, more controlling deference where Congress specifically granted agencies the authority to adopt binding rules and regulations elaborating a particular statutory requirement[55] or in cases implicating an agency's interpretation of its own regulations.[56] Nevertheless, most agency actions occurred under conditions warranting only the lesser *Skidmore* standard-like review.[57]

The Court's *Chevron* decision in 1984 expanded the scope of the controlling deference mandate to a substantially broader collection of agency actions.[58] Although the courts' application of *Skidmore* factors never entirely died away,[59] the *Chevron* doctrine gained such prominence that

United States Court of Appeals for the District of Columbia Circuit has been particularly vocal in its sometime embrace of process considerations, also known as "hard look review," within *Chevron* Step Two, *see, e.g.*, Covad Commc'ns v. FCC, 450 F.3d 528, 537 (D.C. Cir. 2006), and the Supreme Court has signaled its receptivity to combining the two inquiries. *See, e.g.*, Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2125–26 (2016); Judulang v. Holder, 132 S. Ct. 476, 483 n.7 (2011).

51. *See, e.g.*, Yellow Transp., Inc. v. Michigan, 537 U.S. 36, 45–46 (2002) (framing *Chevron* Step One very narrowly in deferring to agency interpretation as permissible).

52. *See, e.g.*, Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 131–61 (2000) (framing *Chevron* Step One broadly and engaging in extensive analysis at that step to avoid deferring to novel FDA interpretation); *see also* Bednar & Hickman, *supra* note 42, at 1419–23 (describing how the *Chevron* decision itself can be read to support alternative approaches to *Chevron* Step One).

53. Thomas W. Merrill, *The* Mead *Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. 807, 810 (2002).

54. *See* 1 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE (2d ed. 1978).

55. *See, e.g.*, Schweiker v. Gray Panthers, 453 U.S. 34, 44 (1981); Batterton v. Francis, 432 U.S. 416, 425–26 (1977); Atchison, Topeka & Santa Fe Ry. Co. v. Scarlett, 300 U.S. 471, 474 (1937); AT&T Corp. v. United States, 299 U.S. 232, 236–37 (1936).

56. *See, e.g.*, Udall v. Tallman, 380 U.S. 1, 16 (1965); Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945).

57. *See* Batterton v. Francis, 432 U.S. 416, 424–25 & n.9 (1977) (observing at that time that agency interpretations "ordinarily" though not always received *Skidmore*-like deference); 1 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE (2d ed. 1978).

58. *See, e.g.*, KENNETH CULP DAVIS, ADMINISTRATIVE LAW OF THE EIGHTIES: 1989 SUPPLEMENT TO ADMINISTRATIVE LAW TREATISE 508, 525 (2d ed. 1989) (acknowledging *Chevron's* expansion of strong deference).

59. *See, e.g.*, Bright v. Houston Nw. Med. Ctr. Survivor, Inc., 888 F.2d 1059, 1061 (5th Cir. 1989), on reh'g, 934 F.2d 671 (5th Cir. 1991); Elizabeth Blackwell Health Ctr. for

some questioned *Skidmore*'s continuing vitality as a standard of review.[60]

In 2000, in *Christensen v. Harris County*, the Court reinvigorated *Skidmore* as a competing standard to *Chevron*.[61] In 2001, in *United States v. Mead Corp.*,[62] the Court articulated a new test for discerning case by case whether *Chevron* or *Skidmore* provides the appropriate review doctrine for agency legal interpretations. As a result of these cases, both *Chevron* and *Skidmore* now enjoy a robust jurisprudence in the courts of appeals, although most cases continue to fall within *Chevron's* coverage.

Table 1 below summarizes the two main doctrines at their Step Two forms. Both share the Step One condition (ambiguity) and, at least in their formulation, cannot be differentiated readily at that stage.

Table 1: Skidmore Standard and Chevron Rule Summarized

Skidmore Standard (multifactor test)[63]	*Chevron Rule*[64]
"The *weight* [given to an agency's interpretation] . . . in a particular case *will depend upon the thoroughness* evident in its consideration, the *validity* of its reasoning, its *consistency* with earlier and later pronouncements, and *all those factors which give it power to persuade*, if lacking power to control." Added factors: the *formality* of the agency's decisionmaking process, the *longevity* of an agency's interpretation, the *contemporaneity* of an agency's interpretation with the legislature's adoption of the statutory language, and the degree of agency expertise required in answering the interpretive question.	"[T]he court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather . . . the question for the court is *whether the agency's answer is based on a permissible construction of the statute*." "The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding."

B. The Ambiguity–Deference Model

We now bring the features of the rule–standard continuum of judicial review of agency interpretation of statutes to the analysis of panel effects. To do this, we consider the dynamics within a judicial panel faced with

Women v. Knoll, 61 F.3d 170, 191 (3d Cir. 1995); Reich v. Newspapers of New England, Inc., 44 F.3d 1060, 1072 (1st Cir. 1995).

60. *See, e.g.*, Christensen v. Harris County, 529 U.S. 576, 589–90 (2000) (Scalia, J. concurring) (objecting to Court's reliance on *Skidmore* on ground that *Chevron* replaces *Skidmore* review); Arab Amer. Oil Co., 499 U.S. at 260 (1991) (Scalia, J. concurring)(same); *see also* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511 (Justice Scalia elaborating on his view of *Chevron*).

61. Christensen v. Harris County, 529 U.S. 576, 587 (2000).

62. United States v. Mead Corp., 533 U.S. 218, 234–35 (2001).

63. Skidmore v. Swift & Co. 323 U.S. 134, 140 (1944) (emphasis added).

64. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) (emphasis added).

review of an agency's interpretation of a statute. The key questions for the panel are (1) is the statute ambiguous, and (2) should the court defer to the agency's interpretation (based on the exogenous rule or standard in place at the time). The "ambiguity–deference" questions are endogenous and need to be further unbundled. We begin with a few key assumptions and characterizations of the panel dynamics. They are summarized as follows:

- Most regulatory statutes interpreted by agencies and challenged in the courts are subject to claims (and judicial arguments) of "ambiguity."
- Ambiguity (dispute over meaning or lack of meaning) for the panel decreases when judges are ideologically similar (3-0 political lineup); ambiguity increases when judicial panels are diverse (2-1 political line up).
- Dissenting views about ambiguity of statute is a management problem within the panel—that is, the panel majority does not want a dissent on the ambiguity issue.
- Default doctrinal mechanism (set up in advance by the Supreme Court and embedded in the doctrinal precedent) helps to solve ambiguity–dissent problem:[65] When there is split panel (ambiguity in statute):
  - *Skidmore* standard: panel majority decides meaning in Step Two;
  - *Chevron* rule: status quo (agency interpretation) decides meaning in Step Two.

The first assumption, that most challenged statutory interpretations by agencies are subject to the claim (and judge argument) that the statute is ambiguous, is easily supported. That most words are generally subject to multiple meanings reveals itself in various areas of law requiring the interpretation of legal texts, such as contract law and administrative law. In contract law, for example, courts routinely wrestle with the decision of whether to allow extrinsic evidence (evidence outside the written words of a contract) to prove that a term in a contract, seemingly plain on its face, is actually ambiguous and subject to the varied meaning that each of the parties advance.[66] The often-cited concern is that once extrinsic evidence is allowed to be admitted for consideration, almost any word in a contract can appear ambiguous. In administrative law, and statutory interpretation cases more generally, a fairly elaborate set of "tools of statutory interpretation"—including legislative history, statutory purpose, and canons of statutory construction—have developed to aid judges in dis-

65. To be sure, the doctrinal regime in place is not exogenous to the broader decision-making structure within a judicial hierarchy. As described earlier, the Supreme Court likely has set out its choice of governing rules and standards in advance in anticipation of how panels will engage over large numbers of cases. Nonetheless, the doctrinal choice generally is not in play for any given panel decision—it is static. Of course, this does not mean the panel will obey it.

66. *See, e.g.*, 11 RICHARD A. LORD, WILLISTON ON CONTRACTS § 33.42 AMBIGUITY AS A PREREQUISITE (4th ed. 2017).

cerning meaning from statutory text. But, as with the use of extrinsic evidence for contract interpretation, these tools of statutory interpretation also may be used to create ambiguity out of what otherwise appears to be plain meaning.[67]

Relatedly, and our second assumption, the likelihood that the panel will consider the statute to be ambiguous increases with the diversity of membership on the panel. Contextual understanding of words increases with diversity of experiences among individuals. The more similar the panel (that is, for our model when the panel members all share the same political–ideological background—three Democrat or three Republican appointees together on a panel), the less disagreement the members will have over the meaning of the statutory text. The more diverse the panel (two Democrats and one Republican, or two Republicans and one Democrat), the more likely that one judge will find the meaning of a statutory term or phrase to be different than another judge on the panel. Add to this that there are ideological incentives for the minority member on the panel to threaten to dissent about the ambiguity dimension (Step One in both *Skidmore* and *Chevron*), thus challenging the panel majority's desire to set a particular meaning for the statute in the first step with a conclusion that the statute's meaning is plain. Put differently, the credibility of the panel majority's conclusion in Step One that the statute has a definite singular meaning and is not ambiguous is put at risk when there is one judge of the three who disagrees about that conclusion (as almost by definition a statutory term is ambiguous when even judges cannot agree about the meaning). Consequently, a minority-minded judge has significant power to push the question to Step Two, especially if Step Two analysis would increase the chances of a case outcome preferred by that judge.

For a panel of like-minded judges (as with those sharing the same partisan leanings), the ambiguity question of *Skidmore/Chevron* Step One is typically not a problem, as they share contextual understandings and preference goals. For partisan-split panels, the problem is acute. As statutory language (and the agency's interpretation, or the panel majority's interpretation, of that language) can easily be challenged, and as minority judges have incentives to challenge such language, a management dilemma for the panel is posed. Voting unity among the panel members strengthens precedent value because other judges in future cases, or upon review of the present case, will view the decision as less assailable than one where there is a fracture among the judges represented by a dissent. Dissent, especially if followed by a higher court reversal, threatens the reputation of the other judges and perhaps their promotion prospects. Moreover, judges prefer collegiality (in the form of panel voting unanimity) over dissents as it avoids tit-for-tat decisionmaking and poor relations

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67. *See generally, e.g.*, FRANK B. CROSS, DECISION MAKING IN THE U.S. CIRCUIT COURTS OF APPEALS (2007).

among colleagues.[68]

Given the ambiguity–deference problem of Step One, *Skidmore* and *Chevron* present two different Step Two mechanisms to solve the managerial dilemma within the panel when the panel is ideologically diverse. *Skidmore* uses a standard (multi-factorial test), which essentially allows the majority to control the statutory meaning in Step Two (either by deferring to the agency or not, considering the list of unweighted factors). By contrast, *Chevron* creates a strong rule-like presumption that the court defers to the agency interpretation (based on whether the agency's interpretation was "permissible"—that is, a plausible, even if not the best, reading of the statute). *Chevron* empowers the minority member with the ability to more easily force the majority to accept the agency's interpretation (in Step One, forcing a finding of ambiguity, and in Step Two forcing "obedience" to the *Chevron* rule's presumption of deference).

Note that the form of doctrine is most important for diverse panels (ideologically "split-panels"). The managerial dilemma is not a problem (or is much less of a problem) when the panel is ideologically unified—they more likely share a common understanding of statutory meaning and policy preferences generally, thereby greatly reducing threat of dissent.

Table 2 below maps out the expected outcomes of cases under the *Skidmore* (standard) and *Chevron* (rule) doctrines.

Table 2: Panel Outcomes Under Rule and Standard

Panel Political Make-Up	Majority/Agency Policy Match	Deference Under Standard (*Skidmore*)	Deference Under Rule (*Chevron*)
3-0 (Partisan-Unified Panel) (3D-0R: 3R-0D)	Yes	Yes	Yes
	No	No	No
2-1 (Partisan-Split Panel) (2D-1R; 2R-1D)	Yes	Yes	Yes
	No	No	Yes

As illustrated by the table, partisan-unified panels under either doctrinal form (*Skidmore* standard or *Chevron* rule) essentially behave the same in terms of deference to agency interpretations. When deference serves the policy preferences of the panel as a whole, they defer (either through Step One or Step Two conclusions). These decisions go unchallenged because they accord well with the doctrine in place and there are no likely dissenters (as the panel lacks diversity and ideological conflict). If deference does not serve the ideological purposes of the panel, they defer much less to the agency. Under the *Skidmore* standard regime, this is done through either Step One or Step Two conclusions (Step One: "Statute is clear and the agency got it wrong"; Step Two: "Statute is am-

68. *See* Lee Epstein, William M. Landes, & Richard A. Posner, *Why (and When) Judges Dissent: A Theoretical and Empirical Analysis*, 3 J. LEGAL ANALYSIS 1 (2011).

biguous; agency deserves no deference based on multi-factors; policy invalid."). Under the *Chevron* rule, the nondeference must generally be resolved at Step One ("Statute is clear; agency misinterpreted statute) rather than Step Two (which counsels deference to any permissible reading). Again, in a partisan-unified panel there is no likely dissenter to challenge any Step One conclusions regarding ambiguity of statute, so for such a panel there is little distinction between *Skidmore* and *Chevron* analysis as that panel dictates the meaning of the statute.

The dynamics change when the panel is an ideologically partisan-split panel. If the policy of the agency matches with the panel majority, then the panel will defer to the agency, although even more likely under Step Two analysis than Step One. The potential for dissent with a Step One conclusion ("statute is clear") is more problematic than for Step Two, where *Skidmore* has a flexible standard allowing for deference and *Chevron* counsels deference in a rule-like manner. Step Two deference would appear to stay within the doctrinal boundaries with ease. If the policy of the agency does not match the panel majority, then we would expect to see differences between the standard and rule regimes in terms of case outcome. Under the *Skidmore* standard, we would not expect the court to defer to the agency, instead finding in the multi-factor test of Step Two that the agency's decision is not entitled to deference. This is not a monumental task given the variety of factors the panel may consider to reach that conclusion. By contrast, under the *Chevron* rule the panel would have a more difficult task to oppose deference. If the panel chose to override the agency in Step One ("statute is not ambiguous and it means what we say it means, not what the agency says it means"), the minority panel member could easily make a credible dissent based on ambiguity, thus causing a problem for the panel majority's credibility; if the panel admits ambiguity in Step One and attempted Step Two nondeference, the minority would then stress that the strong deference presumption of the *Chevron* rule is being ignored, thus raising the concern for the higher court that doctrine may have been ignored. These risks push the panel majority to accept the agency's policy, more often than it would wish. This last scenario is the whistleblowing effect and represents the differential impact of the *Skidmore* and *Chevron* doctrines.

In sum, the main panel effects difference in having a standard versus a rule as the guiding doctrinal regime occurs when the panel is diverse, when agency policy does not match the panel majority's policy preferences, and when the doctrinal rule works in favor of the minority member's preferences. In this situation the panel majority is less able to pursue its policy preferences when a rule (*Chevron*) is in place than when a standard (*Skidmore*) is in place. Another way to state it is that adherence to doctrine is more likely to take place when (1) panels are diverse and (2) rules, rather than standards, are in place.

V. THE EMPIRICS

Having above laid out a basic theory of doctrinal form, panel effects, and obedience to legal doctrine, we now explore the subject with a preliminary empirical analysis of both the *Skidmore* and *Chevron* doctrines. The broad empirical questions are whether doctrine matters in judicial review of agency statutory interpretation (in particular, whether the form of a doctrine matters as it is represented in a standard-like *Skidmore* form or a more rule-like *Chevron* form) and under what political conditions on the court (panel partisan composition) do these doctrines matter. Given the limited tools available to collect and analyze the nuanced meaning of legal doctrines, our analysis is exploratory and preliminary. Nonetheless, we find results from our study that invite further theoretical and empirical analyses.

A. Design

Our dataset consists of all federal court of appeals opinions published ten years before and after the *Chevron* decision (between June 25, 1974 and June 25, 1994) that were included under the Westlaw headnote for executive statutory construction (361k219).[69],[70] This resulted in a sample consisting of 1,176 cases, 478 from the *Skidmore* (pre-*Chevron*) era and 698 from the *Chevron* era. We excluded a number of observations as ineligible because a federal agency was neither a party nor participant in the case. Additionally, decisions from emergency appellate panels were removed. We also determined that a number of cases were too complicated to include on the basis that there was inter-agency conflict regarding authority to interpret the statute. En banc panels were also excluded. Fi-

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69. Due to the complexity of the questions before us and the unique nature of aspects of the project, we undertook a pilot study to assess sample size for and the feasibility of a larger project. First, we identified the population of cases in which a federal agency participated and that involved a challenge to the federal agency's interpretation of a statute. To do so, we used the Westlaw headnote for executive statutory construction (361k219) to find candidate cases. Within the headnote, we specifically sampled federal appellate court cases decided between December 4, 1944 and August 9, 2011. We took a stratified random sample of 400 observations divided equally among three eras: before Chevron (December 4, 1944 to June 24, 1984); after *Chevron* but before *Mead* (June 25, 1984 to June 17, 2001); and after *Mead* (June 18, 2001 to August 9, 2011). Sampling weights were used in the analyses to correct for any bias that this stratification could cause. After identifying eligible observations in line with the study reported in this article, we were left with 251 observations.

By including the *Mead* era as a distinct era in our sampling scheme, we were able to consider the robustness of our results in light of any potential confounding effect caused by the decision. Ultimately, we concluded that the *Mead* era was predominantly an extension of the *Chevron* period with few cases falling into the *Mead-Skidmore* type. Thus, we believe that our findings in this article are helpful in thinking about the influence of *Chevron* even in the *Mead* era.

70. We took advantage of the Westlaw headnote to identify cases involving statutory interpretation rather than relying on case citations due to issues regarding endogeneity: panels could behave strategically as to citing *Skidmore*, *Chevron*, etc. *See* Cass R. Sunstein, *Chevron Step Zero*, 92 Va. L. Rev. 187, 191 (2006). Based on the feedback regarding the pilot, we decided to narrow the range of years from which we sampled in order to reduce the potential for omitted variable bias.

nally, cases where the agency's interpretation lacked an identifiable ideological direction were dropped. Ultimately, we were left with 929 observations, 370 from the *Skidmore* period and 559 from the *Chevron* period.[71]

For each observation, we included the basic identifying information for the case: name, citation, decision date, and circuit. Our outcome variable is binary and captures whether the panel ruled in favor of the agency's interpretation (deference). Qualitative textual analysis was used to code this variable. We also collected the name of each panel judge member from the decisions. Using the Biographical Directory of Federal Judges,[72] we were able to identify the party of the appointing president for each panel member. Based on this information, we were able to code the political ideology of the panel majority and whether the panel was partisan-unified (all Democrat or Republican appointees) or partisan-split (two Republican and one Democrat appointees, or one Democrat and two Republican appointees). The partisan composition of the observations broke down with 368 panels with a Democrat appointed majority and 561 panels with a Republican appointed majority.

For challengers, we captured the challenging party type and the ideological direction of the challenging party. The ideological direction of the agency's position (conservative or liberal) was coded in terms of the challenging party: where a challenging party is liberal, the agency's position is coded as conservative (and vice versa). The variable for policy convergence—that is, whether the agency's policy and the panel majority's policy preferences align—was created by comparing the party of the appointing president for the panel majority to the ideological direction of the agency's position. The coding conventions used to determine the ideological direction of the challenging party can be found in the Appendix.

Considering Whistleblower Theory in terms of rules and standards requires a complex analysis among the role of policy convergence between the agency and the court panel majority ("Convergence/Non-Convergence"), the make-up of the panel ("Unified/Split Panel Partisanship"), and the legal regime ("*Skidmore* Standard/*Chevron* Rule") in which the case occurs: in short, it requires a triple interaction. Estimating such an interaction is quite data intensive. We also included controls for partisan control of the circuit (and, thus, en banc panel) and whether a dissent accompanied the opinion.

71. This left us with 820 cases. Due to the possibility of mixed outcomes on multiple issues, some cases were coded as multiple observations.

72. *Biographical Directory of Article III Federal Judges*, 1789–present (2018), https://www.fjc.gov/history/judges/search/advanced-search [https://perma.cc/WBQ3-SLYA].

B. Results

The results of the logistic regressions are as follows:

Table 3: Democratic Majority Panels

Table 3: Democratic Majority Panels				
	Coef.	Std. Err.	z	Pr>|z|
Convergence	0.867	0.667	1.3	0.194
Chevron Era	-0.849	0.833	-1.02	0.308
Split Panel	0.434	0.597	0.73	0.467
Convergence · *Chevron* Era	1.290	1.063	1.21	0.225
Convergence · Split Panel	-0.545	0.756	-0.72	0.471
Chevron Era · Split Panel	0.257	0.900	0.29	0.775
Convergence · Split Panel · *Chevron* Era	-0.294	1.200	-0.25	0.806
Republican Circuit	0.307	0.302	1.02	0.31
Dissent	-0.392	0.315	-1.25	0.212
Intercept	0.034	0.539	0.06	0.95

Table 4: Republican Majority Panels

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	Coef.	Std. Err.	z	Pr>|z|
Convergence	-0.213	0.767	-0.28	0.781
Chevron Era	-0.343	0.565	-0.61	0.543
Split Panel	-0.665	0.573	-1.16	0.246
Convergence · *Chevron* Era	0.183	0.859	0.21	0.831
Convergence · Split Panel	0.200	0.868	0.23	0.817
Chevron Era · Split Panel	0.075	0.647	0.12	0.908
Convergence · Split Panel · *Chevron* Era	0.142	0.994	0.14	0.887
Republican Circuit	-0.012	0.275	-0.04	0.965
Dissent	-0.358	0.277	-1.29	0.196
Intercept	1.393	0.546	2.55	0.011

In the context of logistic regressions with interactions, the coefficients in the tables are of limited use. Thus, we provide various graphic representations of the data based on predicted probabilities:[73]

73. We took advantage of simulation to calculate the predicted probabilities and significance. The simulation code we use is similar to the approach used in Clarify and Zelig. *See, e.g.*, Kosuke Imai, Gary King & Olivia Lau, *Toward a Common Framework for Statistical Analysis and Development*, 17 J. Computational & Graphical Statistics 892–913 (2008); Gary King, Mike Tomz & Jason Wittenberg, *Making the Most of Statistical Analyses: Improving Interpretation and Presentation*, Am. J. Pol. Sci. 44:347–361 (2000); Bennet A. Zelner, *Using Simulation to Interpret Results from Logit, Probit, and Other Nonlinear Models*, 30 Strategic Mgmt. J. 1335 (2009).

For each set of predicted probabilities, we held the control variables constant at their mode: the probabilities are calculated assuming a panel in a Republican circuit in which no dissent was filed.

Figure 4: Democratic majority panels, *Skidmore* era

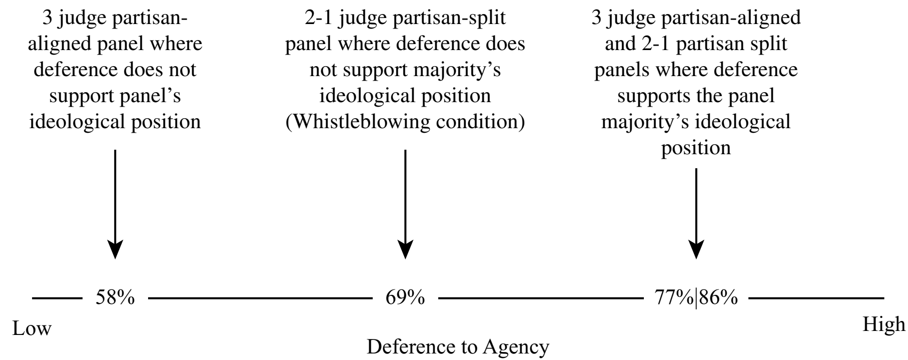


Figure 5: Democratic majority panels, *Chevron* era

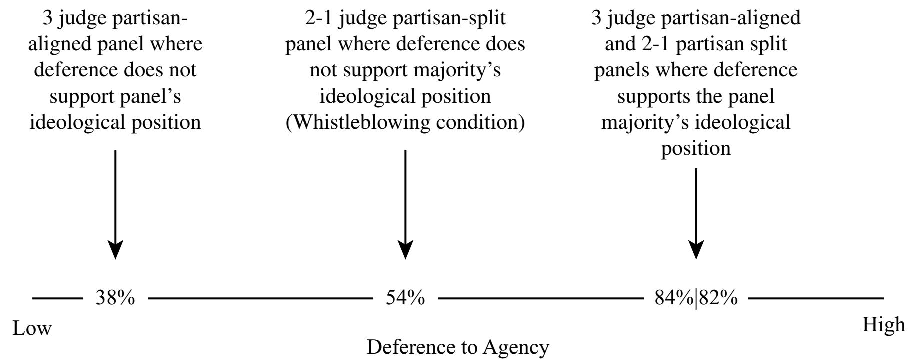


Figure 6: Republican majority panels, *Skidmore* era

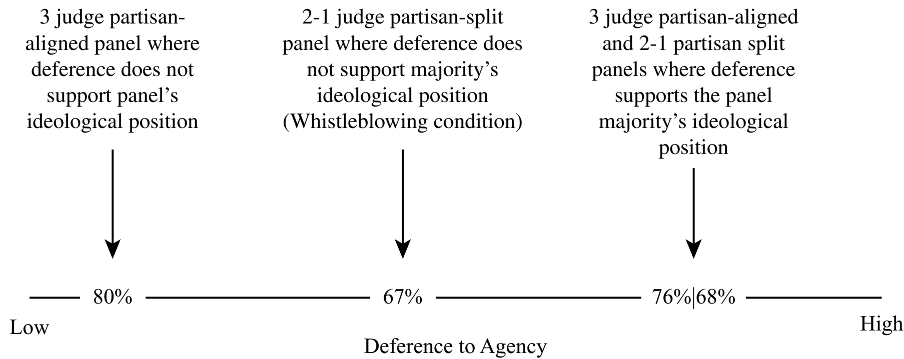
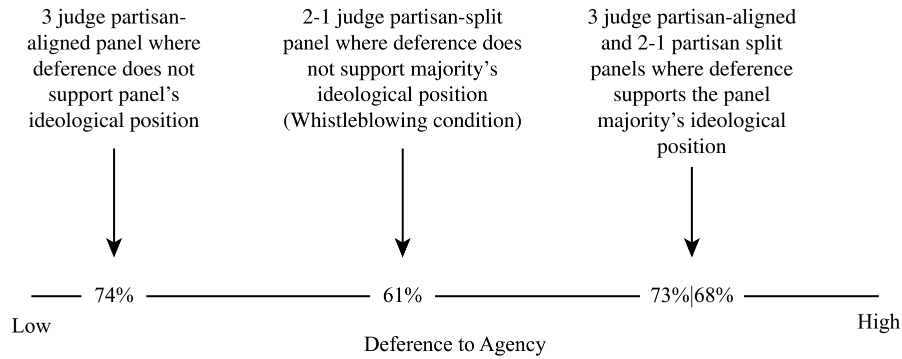


Figure 7: Republican majority panels, *Chevron* era



C. Discussion

The detailed nature of the theory dictates a statistical model including a triple interaction and thus many different configurations upon which to bring data to bear. Furthermore, this study indicates that the behavioral patterns of the panels vary by the partisan orientation of the panel majority, indicating that analysis of the panels must be split into two separate regressions—one for each type of panel majority, Republican and Democrat.[74] Thus, in an ideal world without data availability and resource constraints we would bring quite a bit more varied data to bear on this problem. Unfortunately, we face limitations in available data and data collection, and our study is under-powered accordingly.[75],[76]

We do consider the suggestive patterns in the data that we believe help advance the conversation regarding panel effects and doctrinal form, and we suggest future avenues of inquiry. First, the point estimates for the rate of deference in instances where the agency position is ideologically opposed to the panel majority are lower in the *Chevron* era than in the pre-*Chevron* era in all instances. For example, in the *Skidmore* era, unified majority Democrat panels deferred 58% of the time, while in the *Chevron* era this rate fell to 38%. As Figures 3–7 illustrate, this pattern holds whether the panel is majority Democrat or Republican and split or unified. This is the opposite of what we would anticipate given the fact that *Chevron* is generally understood to require more deference. Selection bias likely influences the level of observed deference before and after *Chevron*: likely changes in the legal environment caused by the

74. We set the number of observations for the data collection based on the results of the pilot study we conducted. The pilot indicated that there were not differences in the way that Democrat majority and Republican majority panels behaved. This is not true of the data we collected for the full study.

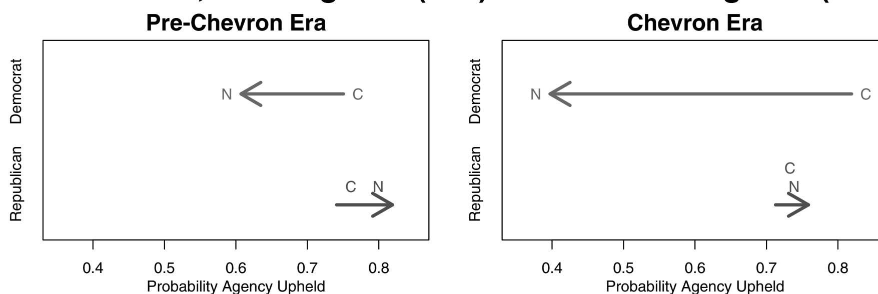
75. Unfortunately, there is no way of defining the population of published cases that will ensure that we have sufficient observations to calculate the effect.

76. Based on cross-tabulations of the data, we also found that the patterns in appeals arising from agency adjudication generally followed the patterns that we would anticipate but that appeals from rule-making did not. Unfortunately, we have insufficient data to run multivariate models on the data separating these types of appeals.

Chevron opinion could change what cases are appealed by litigants, lower court (where applicable) behavior, and agency behavior, in addition to behavior at the court of appeals.[77] Specifically, agencies, litigants, and lower court judges very likely altered their behavior based on the *Chevron* decision to reflect the new, more deferential environment.[78] For example, litigants seeking to overturn agency decisions would be less likely to pursue appeals after *Chevron* than before because the likelihood of success was diminished after the decision.[79] Thus, the types of cases appealed before and after *Chevron* may vary in important ways that create the appearance that less deference is occurring even where the courts are more deferential. We do not, however, know of any obvious form of litigant selection that would cause us to overstate the whistleblower effect. Additionally, to the extent that reviewing courts rely on whistleblowers to signal non-compliance after *Chevron*,[80] it may be that unified, non-convergent panels have learned that they can rule with relative impunity.

One of the most striking aspects of the results is the fact that Democrat majority and Republican majority panels appear to behave in very different ways. Figure 8 helps illustrate the differences. In panels where at least two members were appointed by a Democratic president, the influence of ideology generally follows the anticipated pattern. Where a panel is ideologically aligned with an administrative action, the panel is more likely to find in favor of the agency. This effect appears to be more pronounced in the *Chevron* era. The same pattern does not hold for panels where two members were appointed by a Republican president. In those instances, ideological alignment overall seems to have little to no influence.

Figure 8: Predicted Probabilities



One potential cause of differences among the types of panels is selection bias. Over 75% of the Republican panels in the data occurred in Republican-dominated circuits. Thus, liberal litigants facing the prospect

77. Linda R. Cohen & Matthew L. Spitzer, *Solving the* Chevron *Puzzle*, 57 LAW & CONTEMP. PROBS. 65 (1994); *see also* George Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984).

78. *Id.* at 94–96.

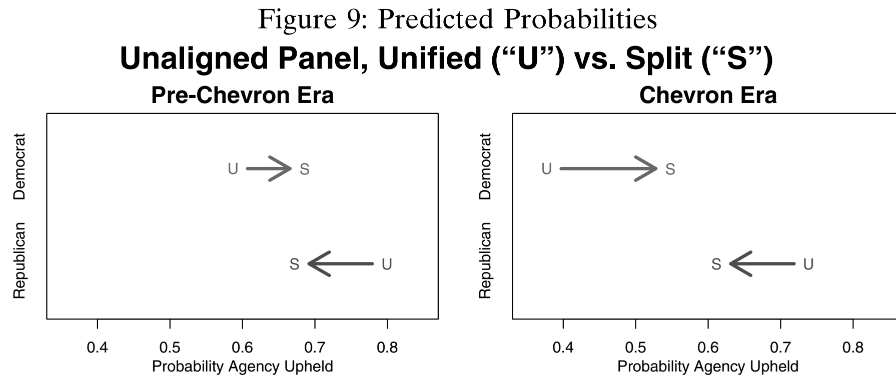
79. *Id.*

80. Cross & Tiller, *supra* note 11.

of appealing a case involving an administrative agency action in these circuits would know that they were likely to confront an unfriendly panel and no promising avenue of appeal (en banc panel or Supreme Court). Thus, they would be unlikely to appeal. Instead, liberal litigants would only appeal unusual cases. Liberal litigants in Democrat dominated circuits, on the other hand, would be more likely to appeal because a decision at the court of appeals level is almost always the court of last resort.[81]

The effect of the presence of a potential whistleblower before and after *Chevron*, represented in Figure 9, also appears to vary based on the partisan make-up of the panel. For majority Democrat panels, the presence of a whistleblower increased deference to agencies not aligned with the panel majority in both eras. For example, in cases where the panel is sitting in a Republican circuit and there is no dissent, the increase in the *Chevron* era is 16% compared to 11% in the pre-*Chevron* era. The presence of a Democrat on a Republican panel, on the other hand, is associated with a 13% decrease in outcomes in favor of an ideologically opposed administrative agency in both eras.

Figure 9: Predicted Probabilities



The differences between Democratic and Republican panels could be explained by a number of factors related to external and internal panel effects. The patterns may lend themselves to a more ideological explanation that is related to external panel effects. The asymmetric nature of the patterns is in large part in keeping with some prior findings.[82] Kastellec found evidence that the presence of a potential whistleblower (counter-judge) has an asymmetric effect across Democrat and Republican majority panels.[83] He attributes this effect to external panel effects due to the

81. *See, e.g.*, Jonathan P. Kastellec, *Hierarchical and Collegial Politics on the U.S. Courts of Appeals*, 73 J. Pol. 345, 345 (2011).

82. *Id.*; Jonathan P. Kastellec, *Panel Composition and Voting on the U.S. Courts of Appeals over Time*, 64 Pol. Research Q. 377 (2011); *see also* Jason J. Czarnezki, *An Empirical Investigation of Judicial Decisionmaking, Statutory Interpretation, and the* Chevron *Doctrine in Environment Law*, 79 U. Colo. L. Rev. 767 (2008) (finding that Republican judges were more likely to defer to the EPA in cases decided between 2003–05).

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

hierarchical nature of the federal judiciary.[84] Specifically, he believes that Republican control of the Supreme Court, with some influence from the partisan make-up of the respective circuit courts, accounts for evidence of a whistleblower effect for Republicans sitting with two Democrats. Kastellec found evidence that ideological voting was a more recent phenomenon and more pronounced among Democrat majority panels.[85]

These patterns, however, may also arise from differences in doctrinal approaches. In both the *Skidmore* and *Chevron* eras, a chief concern of the panel is the meaning of the statute. Statutory interpretation is an area of great controversy as to the proper ways of interpreting and understanding meaning. One explanation of outcomes in administrative cases is that modes of statutory interpretation, rather than ideology, account for differences.[86] Kerr refers to at least one strain of this approach as the interpretative model:

> The interpretive model predicts that deference in individual cases depends upon a judge's approach to statutory interpretation—in particular, the likelihood that text will be considered ambiguous at *Chevron*'s Step One. In contrast to the contextual and political models, the interpretive model accepts that judges will attempt to apply the two-step test objectively. Nonetheless, the doctrine is considered inherently unstable because individual judges will defer more or less often depending upon how readily they perceive ambiguity in statutory text.[87]

Scholars have disagreed as to the relationship between interpretation modes and deference: some assert that textualists will defer less, while others believe textualists will defer more.[88] Additionally, it is unclear how these approaches map onto panel effects: existing studies provide mixed results at best that partisanship correlates with interpretative approaches and that interpretative approaches map neatly onto outcomes.[89] In order to consider the possibility that doctrinal differences are driving the results, we would need to analyze the interpretative approach set forth in the opinions. This is a possible avenue for further research.

Additionally, the results as to Republican majority panels are perplexing. They imply that the introduction of a Democrat to a Republican majority panel would decrease the chances that the panel would uphold an agency's liberal action. We are aware of no theory of internal or external panel effects that would explain this effect. Of course, these, along with

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84. Kastellec also finds evidence of internal effects.

85. Jonathan P. Kastellec, *Panel Composition and Voting on the U.S. Courts of Appeals over Time*, 64 POL. RESEARCH Q. 377 (2011).

86. Orin S. Kerr, *Shedding Light on* Chevron: *An Empirical Study of the* Chevron *Doctrine in the U.S. Courts of Appeals*, 15 YALE J. REG. 1, 3 (1998).

87. *Id.* at 4 (*citations omitted*).

88. *Id.* at 13–17.

89. *See, e.g.*, FRANK B. CROSS, DECISION MAKING IN THE U.S. CIRCUIT COURTS OF APPEALS (2007); David S. Law & David Zaring, *Law Versus Ideology: The Supreme Court and the Use of Legislative History*, 51 WM. & MARY L. REV. 1653 (2009).

the other estimates, are merely suggestive and are not statistically significant results. Additional data could easily obliterate such differences.

Another potential issue is that judges may have always been ideological, but the extent to which partisanship is correlated with such positions has changed. In other words, it may be that our ways of coding liberal and conservative issues is primarily defined by current understandings of those terms. Thus, measures built on these understandings may be in some ways time-bound.[90] Kastellec implicitly discusses this possibility in terms of polarization, but it is not limited to polarization.[91] This is another possible avenue for future research in this area.

VI. CONCLUSIONS

This article makes important theoretical contributions and highlights areas for further inquiry. Building on several literatures and important pieces, we consider how the effect of panel diversity is influenced by the legal context in terms of the form of the legal doctrine considered. This inquiry avoids the artificial dichotomies present in many studies and seriously considers the influence of both political conditions and legal doctrine. Furthermore, this article provides a detailed application of this theory in the context of agency statutory interpretation, which has serious implications for our understanding of administrative law and the separation of powers. Unlike prior work regarding this question, we are able to consider the influence of doctrinal form over many cases rather than interdependent decisions within the same case. Our work suggests that the influence of the form of legal doctrine is conditional of the ideological alignment of the panel majority.

We should, of course, note that our results are not significantly significant. To the extent that we look at the basic patterns in the data, we find indication that patterns of deference and whistleblower vary based on the partisan affiliation of the panel majority. While some patterns conform to our expectations, others do not. We believe that our failure to find any significant differences flows from issues related to available data. Additionally, as we discuss in this article, though often ignored in empirical work, the threat of bias due to selection effects is omnipresent in studies of cases and should be taken seriously. We offer a frank discussion of the types of selection bias we anticipate may exist and their potential to distort the empirical picture the results offer.

Ultimately, this is an area where further inquiry is warranted. Although there are robust and sophisticated bodies of work regarding panel effects and legal doctrine, these conversations are far from over. The distribution of cases that we observe indicates that panel effects are shaped by the intricacies of the legal context in ways that have not been fully explored.

90. *See* William M. Landes and Richard A. Posner, *Rational Judicial Behavior: A Statistical Study*, 1 J. LEGAL ANALYSIS 775 (2009).

91. Jonathan P. Kastellec, *Panel Composition and Voting on the U.S. Courts of Appeals over Time*, 64 POL. RESEARCH Q. 377 (2011).

Continuing work in this area should focus on untangling these complexities.

APPENDIX: CHALLENGING PARTY POSITION

Liberal (typical)

- Employees Union challenging agency (such as, NLRB, DOL, FLRA) or Employer—issues typically relating to safety, pay, union rights, etc.
- Employee seeking workers compensation
- Employee challenging NLRB
- Employee challenging employer (may involve interpretation of EEOC regulation, safety regulation, or other agency regulation)
- Environmental group challenging EPA for lax standard
- Consumer group challenging CPSC for weak product safety standard
- Consumer or debtor challenging business practice as unfair
- Person seeking social security, welfare rights, etc.
- Person seeking asylum or immigration rights (challenge to INS/BIA decision)
- Minority employees challenging agency hiring/promotion practices
- Civil rights challenges (where interpretation of agency regulation involved)
- Prisoner challenging Bureau of Prisons
- Veteran challenging Board of Veteran Appeals denial of benefits
- Tribe asserting sovereignty
- Democrats\liberals challenging elections

Conservative (typical)

- Business/Employer challenge to agency decision favoring employees, consumers, environmental protection, anti-regulation, etc. (but not challenge to agency decision that just favors another/competing business or industry). Typical agencies challenged include EPA, NLRB, DOL, CPSC, FDA, EEOC, OSHA, OSHC.
- Trade Association challenge to agency
- Hospital challenging HHS on Medicare reimbursement denials
- Chamber of Commerce challenging agency rule (too strict safety standard, etc.)
- Bank challenging banking regulation
- Taxpayer challenging taxation
- State or local entity making a federalism claim
- Private School avoiding application of civil rights legislation
- Land owner or state or local entity opposing EPA
- Land Owner asserting property right
- Republicans\conservatives challenging elections

No ideological position (typical)

- Business challenge to agency (such as FCC, FERC, or ICC) where competitor business or industry benefits from regulation
- Heirs claiming entitlement to benefits
- Union opposing member's claim
- State or local entity seeking compensation from federal government