Perspectives from FSF Scholars
November 15, 2017
Vol. 12, No. 41

Chevron Deference at the FCC: An Empirical Assessment from the Circuit Courts

by

Christopher J. Walker *

Introduction and Summary

Over three decades ago in *Chevron v. Natural Resources Defense Council*, the Supreme Court announced a two-step approach to judicial review of federal agency interpretations of statutes the agency administers. The reviewing court must first determine whether the statute is ambiguous. If the statute is ambiguous, the court must uphold the agency's interpretation at step two so long as it is reasonable.[1] This deference doctrine has evolved over the years, but the two-step approach remains. In recent years, however, we have seen a growing call from the federal bench, among Republicans in Congress, and within the legal academy to rethink *Chevron* deference.[2] These calls for reform often overlook the threshold question: Does *Chevron* deference actually matter?

[1] *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984) (instructing).
[2] *See generally* Christopher J. Walker, *Attacking* Auer *and* Chevron*: A Literature Review*, 15 GEO. J. L. & PUB. POL'Y (forthcoming 2018) (reviewing recent criticisms), https://ssrn.com/abstract=3032248.

In an article recently published in the *Michigan Law Review*, Kent Barnett and I explore empirically the impact of *Chevron* deference in the circuit courts.[3] By reviewing every published circuit court decision that refers to *Chevron* deference from 2003 through 2013 – nearly 1,600 decisions – we are able to provide the most comprehensive study to date on *Chevron*'s effect in the federal courts of appeals. This *Perspectives* reports a number of findings from this study, with a particular emphasis on the Federal Communications Commission and how agency-win rates at the FCC compare with those of the rest of the federal administrative state.

As detailed below, *Chevron* deference matters in the circuit courts. Indeed, we found nearly a twenty-five percentage point difference in agency-win rates when courts decided to apply the *Chevron* deference framework, as opposed to a less-deferential standard such as *Skidmore* deference or *de novo* review. It turns out that the FCC's statutory interpretations have fared quite well in the circuit courts. Among the twenty-eight agencies with at least ten cases in the dataset, the FCC ranks fourth in overall win rate (82.5%), fourth in frequency of circuit courts deciding to apply the *Chevron* deference framework (88.8%), and third in win rate when the *Chevron* deference framework is applied (88.7%).

In light of the change in administration (and accompanying change in regulatory agenda), this *Perspectives* concludes with a note about how changes in agency statutory interpretations affect agency-win rates both with and without *Chevron* deference. In short, agencies seeking to change positions should endeavor that their interpretations receive *Chevron* deference and that they rely on grounds such as changed circumstances or accumulated expertise.[4]

Chevron Deference in the Circuit Courts: A 30,000-Foot View

Within our dataset of 1558 instances of judicial review of an agency statutory interpretation from 2003 through 2013, circuit courts applied *Chevron* deference 74.8% of the time.[5] When *Chevron*'s two-step approach applied, the circuit courts resolved the matter at step one (i.e., the step at which the courts ask whether Congress's intent was clear) 30.0% of the time. Of those *Chevron* step-one decisions, agencies prevailed 39.0% of the time.[6] Consistent with prior studies, the vast majority of agency interpretations made it to step two (70.0%).[7] And an even greater

---

[3] Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1 (2017), https://ssrn.com/abstract=2808848.

[4] This *Perspectives* does not address the major questions exception to *Chevron* deference – a doctrine Kent Barnett and I have defended elsewhere based on our dataset. *See* Kent Barnett & Christopher J. Walker, *Short-Circuiting the New Major Questions Doctrine*, 70 VAND. L. REV. EN BANC 147 (2017); *see also* Daniel Lyons, "Net Neutrality's Path to the Supreme Court: *Chevron* and the "Major Questions" Exception," *Perspectives from FSF Scholars*, June 24, 2016 (arguing that some FCC statutory interpretations, such as the classification of Internet service providers at issue in the FCC's current *Restoring Internet Freedom* proceeding, raise "major questions" of economic or political significance such that *Chevron* deference should not apply), http://freestatefoundation.org/images/Net_Neutrality_s_Path_to_the_Supreme_Court__Chevron_and_the_Major_Questions_Exception_062416.pdf.

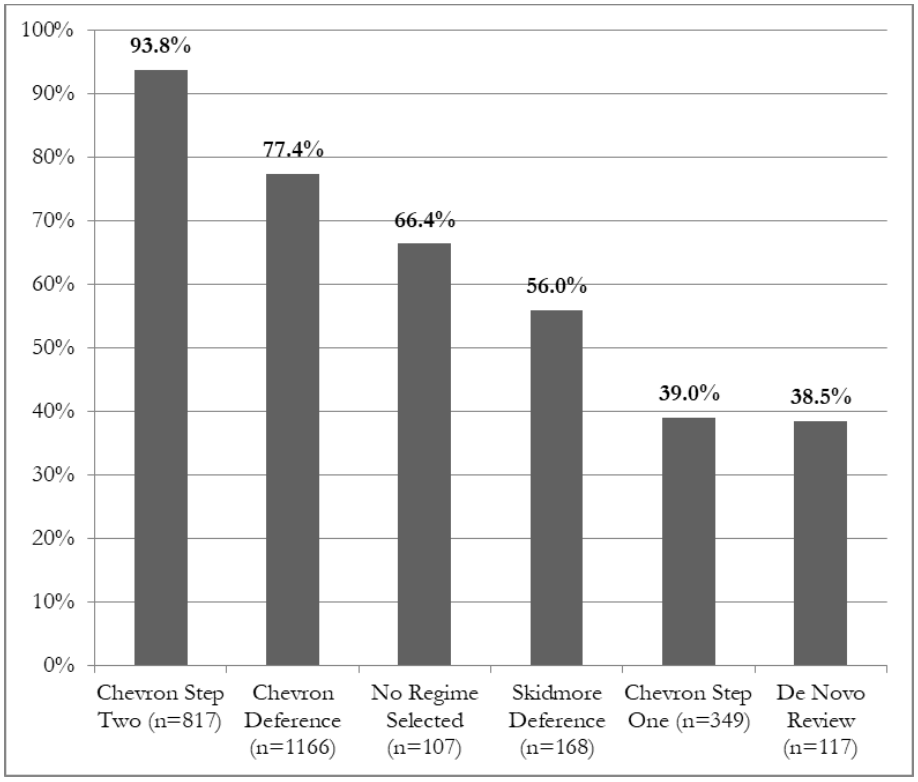
[5] Barnett & Walker, *supra* note 3, at 29. The study methodology and limitations are detailed in *id.* at 21–27.

[6] *See id.* 32–35 & figs.2–3.

[7] *See id.*; *cf.* Orin S. Kerr, *Shedding Light on* Chevron*: An Empirical Study of the* Chevron *Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REG. 1, 31 (1998) (noting that out of 253 interpretations, 72.7%

percentage of interpretations that made it to step two were upheld (93.8%).[8] Figure 1 depicts agency-win rates under each deference standard (*Chevron*, *Skidmore*, and *de novo* review). And it breaks out separately the agency-win rate at *Chevron* steps one and two.[9]

Figure 1. Agency-Win Rates by Deference Standard, Including *Chevron* Steps One and Two (n=1558)



Thus, the conventional wisdom is true: Once a court decides to apply the *Chevron* framework, the critical juncture is step one. If a court finds the statute unambiguous at step one, the agency-win rate is roughly the same as *de novo* review (39.0% and 38.5%, respectively). If the court advances to step two, the agency wins almost every time. But not always. Agencies lost in 51 cases, or 6.2% of the time the court reached *Chevron* step two.

The findings depicted in Figure 1, moreover, suggest that *Chevron* deference matters: agency interpretations were significantly more likely to prevail under *Chevron* deference (77.4%) than *Skidmore* deference (56.0%) or, especially, *de novo* review (38.5%). Put differently, there was

---

were resolved under a "reasonableness" inquiry under a *Chevron* analysis with only one step (72 interpretations) or under step two of a two-step inquiry (112 interpretations)). Tom Merrill, by contrast, found almost the inverse in his study of Supreme Court decisions from 1984 to 1990 – only 44% of *Chevron* decisions made it to step two. *See* Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 980–81 (1992).

[8] *See* Barnett & Walker, *supra* note 3, at 32–35 & figs.2–3.

[9] Figure 1 is reproduced from *id.* at 35 fig.3. The "no regime selected (n=107)" category refers to those cases where the circuit courts declined to choose a deference standard, usually holding that the answer would have been the same under any standard.

nearly a twenty-five percentage-point difference in agency-win rates with *Chevron* deference (77.4%) than without (53.6%).[10] As one would expect, agency interpretations advanced through more formal procedures were more likely to prevail in court than those advanced through less informal procedures.[11] Somewhat surprisingly, interpretations made in formal adjudication (74.7%) were slightly more successful than those made in notice-and-comment rulemaking (72.8%) – though such differences could also reflect differences in agency interpretive practices in each of these procedures.[12]

Before turning to differences by agency, it is important to note that not all circuit courts applied *Chevron* deference in the same manner. For agency-win rates, the First Circuit was the most agency-friendly (82.8%), while the Ninth Circuit was the least agency-friendly (65.8%). As for *Chevron's* application, the D.C. Circuit applied it almost as a matter of course (88.6%), while the Sixth Circuit applied it only 60.7% of the time. Once *Chevron* applied, though, the agency seemed to prevail as a matter of course in the Sixth Circuit (88.2%, the highest rate), while the agency won only 72.3% of the time in the Ninth Circuit, the lowest rate. Table 1 compares the circuits based on three indicators of deference in the dataset: overall agency-win rate, frequency of judicial application of the *Chevron* framework, and agency-win rate when *Chevron* applied. The circuit rankings for each of these indicators are provided in parentheses. The composite score is the average of these three percentages converted into a ten-point scale.[13]

Table 1. Circuit-by-Circuit Composite Deference Scores (n=1558)

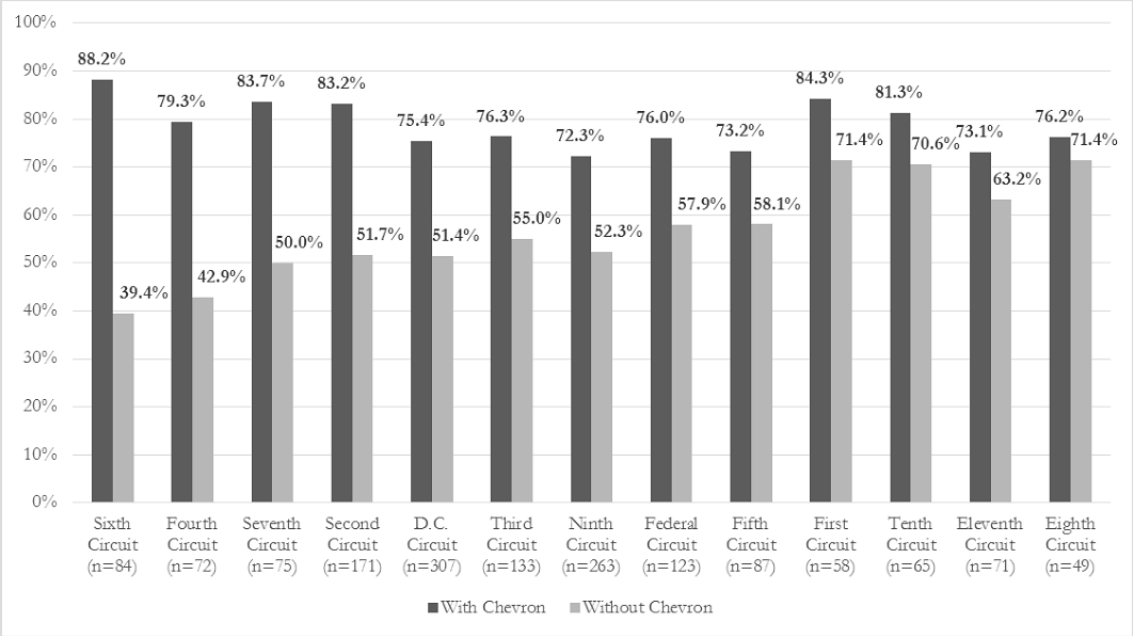
U.S. Court of Appeals	Composite Score	Overall Win Rate	*Chevron* Applied	*Chevron* Win Rate
1. First Circuit (n=58)	8.38	82.8% (1)	84.3% (2)	84.3% (2)
2. Eighth Circuit (n=49)	7.91	75.5% (3)	85.7% (3)	76.2% (7)
3. D.C. Circuit (n=307)	7.89	72.6% (5)	88.6% (1)	75.4% (9)
4. Federal Circuit (n=123)	7.79	73.2% (4)	84.6% (4)	76.0% (8)
5. Fourth Circuit (n=72)	7.74	72.2% (7)	80.6% (5)	79.3% (5)
6. Tenth Circuit (n=65)	7.51	78.5% (2)	73.8% (6)	73.1% (11)
7. Second Circuit (n=171)	7.39	72.5% (6)	66.1% (10)	83.2% (4)
8. Seventh Circuit (n=75)	7.37	72.0% (8)	65.3% (11)	83.7% (3)
9. Sixth Circuit (n=84)	7.27	69.0% (11)	60.7% (13)	88.2% (1)
10. Eleventh Circuit (n=71)	7.22	70.4% (9)	73.2% (7)	73.1% (12)
11. Third Circuit (n=133)	7.21	69.9% (10)	69.9% (8)	76.3% (6)
12. Fifth Circuit (n=87)	6.85	67.8% (12)	64.4% (12)	73.2% (10)
12. Ninth Circuit (n=263)	6.85	65.8% (13)	67.3% (9)	72.3% (12)

Another way to visualize the circuit differences is to look at differences in agency-win rates based on whether the circuit court decides to apply the *Chevron* framework. Figure 2 depicts

[10] *See id.* at 28–32 & fig.1.
[11] *See id.* at 25–44.
[12] *Id.* at 37 fig.4.
[13] Table 1 is reproduced from *id.* at 49 tbl.1.

those findings.[14] The differential between agency-win rates with and without *Chevron* indicates that agencies prevailed more in all circuits when *Chevron* applied. The most striking was the Sixth Circuit, with its nearly fifty-percentage-point difference in agency-win rates. Only the Eighth Circuit had a differential that was less than five percentage points, and the Eleventh Circuit was the only other circuit with a differential of less than ten percentage points.[15]

Figure 1. Agency-Win Rates by Circuit with and without *Chevron* Deference (n=1558)



How the FCC Compares to the Rest of the Federal Administrative State

Just as agency-win rates differed by circuit, they also differed by agency. In particular, the FCC (82.5% agency-win rate), Treasury Department (78.9%), and, perhaps surprisingly, National Labor Relations Board (78.1%) were a few of the most victorious among the agencies with at least ten cases in the dataset. By contrast, the Equal Employment Opportunity Commission (42.9%), Energy Department (45.5%), and Department of Housing and Urban Development (54.2) were among the biggest losers.[16] The findings were similar as to subject matter.[17]

Among the twenty-eight agencies with at least ten cases in the dataset, the FCC was one of the big winners: it ranked fourth in overall win rate (82.5%), fourth in frequency of circuit courts deciding to apply the *Chevron* deference framework (88.8%), and third in win rate when the *Chevron* deference framework is applied (88.7%). Just like Table 1 for circuit differences, Table

[14] Figure 2 is reproduced from *id.* at 48 fig.9.
[15] *See id.* at 44–49 & figs.7–9 & tbl.1.
[16] *See id.* at 52–56 & tbl.3.
[17] *See id.* at 49–52 & tbl.2.

2 compares the agencies based on the three indicators of deference in the dataset, with ranks in parentheses, and also provides a composite score on a ten-point scale.[18]

Table 2. Agency-by-Agency Composite Deference Scores (n=1558)

Agency	*n*	Composite Score	Overall Win Rate	Chevron Applied	Chevron Win Rate
1. ICC/STB	16	9.38	100.0% (1)	81.3% (10)	100.0% (1)
2. FCC	80	8.67	82.5% (4)	88.8% (5)	88.7% (3)
3. Treasury	19	8.37	78.9% (7)	78.9% (13)	93.3% (2)
4. NLRB	32	8.26	78.1% (8)	87.5% (6)	82.1% (11)
5. Commerce	46	8.18	76.1% (11)	87.0% (7)	82.5% (9)
6. Defense/ Armed Forces	23	8.13	87.0% (3)	69.6% (19)	87.5% (4)
7. FDA	20	8.08	75.0% (12)	85.0% (8)	82.4% (10)
8. Education	20	8.06	80.0% (5)	75.0% (15)	86.7% (5)
9. HHS	85	7.89	80.0% (5)	72.9% (17)	83.9% (7)
10. Veterans Administration	27	7.88	77.8% (9)	77.8% (14)	81.0% (13)
11. ITC	11	7.79	72.7% (15)	90.9% (2)	70.0% (20)
12. Interior	31	7.66	77.4% (10)	74.2% (16)	78.3% (14)
13. EPA	159	7.49	67.9% (20)	89.3% (4)	67.6% (21)
14. Agriculture	35	7.45	68.6% (19)	80.0% (11)	75.0% (17)
15. SEC	24	7.43	75.0% (12)	66.7% (22)	81.3% (12)
16. FERC	38	7.37	60.5% (24)	100.0% (1)	60.5% (26)
17. OPM	13	7.30	61.5% (23)	84.6% (9)	72.7% (19)
18. Immigration Agencies	477	7.23	67.7% (21)	72.7% (18)	76.4% (16)
19. Labor	98	7.14	70.4% (16)	59.2% (24)	84.5% (6)
20. Transportation	26	7.04	69.2% (17)	65.4% (23)	76.5% (15)
21. Social Security Administration	13	6.84	69.2% (17)	69.2% (20)	66.7% (22)
22. Bureau of Prisons	19	6.79	73.7% (14)	68.4% (21)	61.5% (25)
23. IRS	45	6.78	66.7% (22)	53.3% (25)	83.3% (8)
24. Justice	29	6.77	58.6% (25)	79.3% (12)	65.2% (24)
25. FTC	11	6.74	90.9% (2)	36.4% (28)	75.0% (17)
26. Energy	11	6.21	45.5% (27)	90.9% (2)	50.0% (28)
27. HUD	24	5.19	54.2% (26)	41.7% (27)	60.0% (27)
28. EEOC	14	5.08	42.9% (28)	42.9% (26)	66.7% (22)

[18] Table 2 is reproduced from *id.* at 54 tbl.3.

Another way to disaggregate the findings by agency is to compare executive and independent agencies. Independent agencies outperformed executive agencies as to overall agency-win rate (77.0% to 70.2%) and frequency of *Chevron* application (82.5% to 73.2%), but agency-win rates evened out when *Chevron* applied (79.6% to 76.8%).[19] The FCC outperformed these rates for all independent agencies as to overall win rate (82.5% to 77.0%), frequency of circuit courts deciding to apply the *Chevron* deference framework (88.8% to 82.5%), and agency-win rate when the *Chevron* deference framework is applied (88.7% to 76.8%).

In comparing agency-win rates by agency, it is important to note that our coding does not take into account differences in agency approaches to statutory interpretation. Some agencies are no doubt more aggressive in their interpretive efforts than others. For instance, it is possible that the FCC's higher overall win rates reflect a more cautious approach to implementing its statutory mandates. Coding judicial decisions does not lend itself to comparing such agency-by-agency differences.

Conclusion: A Note on Changing Agency Statutory Interpretations

As one would expect with a change in presidential administration, the Trump Administration has embarked on a new regulatory agenda or, better said, a *de*regulatory agenda. Such deregulatory agenda involves delaying or outright withdrawing regulations promulgated during the Obama Administration.[20] This agenda has not been limited to executive agencies. The FCC, too, has made headlines for reversing course from former-Chairman Wheeler's approach.[21] Chairman Pai's current attempt to reverse the Wheeler FCC's net neutrality regulations that imposed public utility-like regulation on Internet service providers is perhaps the current FCC's most ambitious deregulatory action.[22]

Deregulation sometimes requires an agency to proffer a new statutory interpretation – one that departs from or even conflicts with the agency statutory interpretation embraced by the prior administration. Our dataset sheds some light on how changes in agency interpretations affect agency-win rates in the circuit courts.[23] It is no surprise that longstanding agency interpretations prevailed under all deference regimes combined at a much higher rate (82.3%) than those that were new and replaced no earlier interpretation (65.9%), those that were inconsistent with a prior interpretation (59.8%), and those whose duration we could not discern from the decision (67.8%). The circuit courts applied the *Chevron* deference framework consistently to longstanding and new interpretations. Perhaps more surprising, circuit courts applied the *Chevron* deference framework at an even higher rate to inconsistent interpretations.

[19] *Id.* at 56–57 & fig.10.
[20] For a highly critical take, see Lisa Heinzerling, *The Legal Problems (So Far) of Trump's Deregulatory Binge*, HARV. L. & POL'Y REV. (forthcoming 2018), https://ssrn.com/abstract=3049004.
[21] *See, e.g.*, Mike Snider, *6 Changes the FCC Has Made in Just Six Weeks*, USA TODAY (Mar. 18, 2017), https://www.usatoday.com/story/tech/news/2017/03/08/fcc-ajit-pai-net-neutrality-cable-box/98894350/.
[22] *See, e.g.*, Cecelia Kang, *F.C.C. Head Plots Course To Ease Rules on Internet*, N.Y. TIMES, at B1 (Apr. 27, 2017), https://www.nytimes.com/2017/04/26/technology/net-neutrality.html.
[23] These findings are explored in greater detail in Barnett & Walker, *supra* note 3, at 62–66 & figs.12–13.

Inconsistent agency interpretations, however, prevailed under *Chevron* much less frequently (65.6%) than recent (74.7%) and long-standing interpretations (87.6%). Indeed, agencies' inconsistent interpretations prevailed significantly less than other interpretations under every review standard except *de novo* review (although much more frequently under *Chevron* than other review standards). Inconsistent interpretations based on new political administrations or unclear reasons were the least likely to prevail.

In other words, as the FCC and other federal agencies in the Trump Administration seek to change positions in the context of ambiguous statutory provisions, they should endeavor to ensure that their interpretations receive *Chevron* deference and that they rely on grounds such as changed circumstances or accumulated expertise. Conversely, those challenging such deregulatory efforts should underscore the agency's failure to "show that there are good reasons for the new policy."[24] Citing a change in administration, without more, is not a recipe for deregulatory success.

* Christopher J. Walker is an Associate Professor of Law at The Ohio State University Moritz College of Law and a member of the Free State Foundation's Board of Academic Advisors. The Free State Foundation is an independent, nonpartisan free market-oriented think tank located in Rockville, Maryland.

[24] Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2126 (2016) (quoting FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009)); *see also id.* at 2125–26 (refusing to apply *Chevron* deference when an agency fails to provide "a reasoned explanation for the change" in the agency's interpretation of an ambiguous statutory provision).