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Author

Semet, Amy

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Statutory Interpretation and *Chevron* Deference in the Appellate Courts: An Empirical Analysis

Amy Semet*

What statutory methods does an appellate court use in reviewing decisions of an administrative agency? Further, in doing this review, are appellate judges more likely to use certain statutory methods when they expressly cite the Chevron *two-step framework than if they do not? This Article explores the answers to these questions using an original database of over 200 statutory interpretation cases culled from more than 2,500 cases decided in appellate courts reviewing National Labor Relations Board (NLRB or the Board) adjudications from 1994 through 2020. In particular, the study examined the use of text, language canons, substantive canons, legislative history, precedent, policy, and practical considerations. It then compared how use of those methods varied depending on whether or not the appeals court expressly cited or applied* Chevron.*

Most notable was how appellate courts used precedent and policy in contrasting ways when ruling on Board statutory interpretation cases. While precedent was used more when courts reversed the Board's pro-employee interpretation to reach an anti-employee outcome, courts referenced policy more to uphold Board rulings that were pro-employee in orientation. Both Democrat- and Republican-majority courts exhibited different tendencies in their choice of methods as well. When ruling on anti-employee interpretations, Democrat-majority courts often cited and relied on text more than Republican-majority courts. In addition, Republican-majority courts disproportionately used substantive canons to uphold anti-employee interpretations while Democrat-majority courts favored language canons when reversing such appeals.

The study also yielded interesting observations about Chevron *deference. Courts citing and applying* Chevron *had much higher agency-win rates than when* Chevron *was not used. Courts overwhelmingly cited* Chevron *or employed a* Chevron-*like "reasonableness" standard more when they upheld the agency's statutory interpretation than when they reversed the agency, thus suggesting that courts may use* Chevron *to cabin judges' ideological proclivities. The study also revealed a divergence in statutory methods depending on how a court employed* Chevron. *Courts expressly citing the* Chevron *two-step framework cited and relied on the statutory text and employed language canons more in the writing of the opinion than when they did not specifically cite* Chevron. *In addition, Republican-majority courts upholding Board interpretations often employed substantive canons more when citing* Chevron *than when not.* Chevron-*citing courts also disproportionately invoked policy considerations compared to non-*Chevron-*citing courts when upholding the Board's interpretation. Courts declining to cite or apply* Chevron *at all had different tendencies. Those that declined to cite* Chevron, *or employ even a similar* Chevron-*like "reasonableness" standard, were more likely to cite precedent. Substantive canons were also employed to reverse the Board's interpretation more by courts that declined to apply* Chevron *than courts that applied* Chevron *or a* Chevron-*like reasonableness standard.*

Although the study is limited to one area of law and to the workings of a single agency—and one of the most politically charged agencies at that—it offers fresh insight into how empirical analysis can be used to look beyond the black box of federal court statutory interpretation and Chevron *deference to see what shapes judicial opinions in their review of agency statutory interpretations.*

INTRODUCTION

The role that the appellate courts should have in review of the administrative state is constantly evolving. In 1984, in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[1] the Supreme Court set forth the two-step framework by which courts review agency statutory interpretations. First, the court inquires whether the statutory provision is ambiguous.[2] If the court answers that question in the negative, they should end the analysis by abiding by the unambiguous statutory meaning.[3] However, if the court deems the provision ambiguous, the court goes on to "*Chevron* step two" where it questions whether the agency's interpretation of the ambiguous statute is reasonable.[4] A court finding the interpretation reasonable will then enforce the agency's statutory interpretation.[5] If the court finds instead, however, that the agency's interpretation is not reasonable, it will not adopt the interpretation.[6]

In the nearly forty years since *Chevron*, scholars have analyzed, critiqued, and debated the procedural aspects of *Chevron*, how it operates in practice, and how or whether it should be reformed.[7] Criticism of *Chevron* increased as the federal judiciary became more dominated by conservative judges,[8] with some critics questioning *Chevron*'s foundations or even calling for its demise.[9]

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1. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).
2. *Id.* at 842–43.
3. *Id.*
4. *Id.* at 845.
5. *Id.*
6. *Id.*
7. *See generally* Connor R. Raso & William N. Eskridge, Jr., Chevron *as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727 (2010); Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of* Chevron, 73 U. CHI. L. REV. 823 (2006); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969 (1992). For studies of the appeals courts, see, e.g., Kent Barnett, Christina L. Boyd & Christopher J. Walker, *The Politics of Selecting* Chevron *Deference*, 15 J. EMPIRICAL LEGAL STUD. 597 (2018) [hereinafter Barnett, Boyd & Walker, *Politics*]; Kent Barnett, Christina L. Boyd & Christopher J. Walker, *Administrative Law's Political Dynamics*, 71 VAND. L. REV. 1463 (2018) [hereinafter Barnett, Boyd & Walker, *Political Dynamics*]; Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1 (2017) [hereinafter Barnett & Walker, *Circuit Courts*]; Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 COLUM. L. REV. 1235 (2007); Lisa Schultz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443 (2005); 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 (1998); Peter H. Schuck & E. Donald Elliot, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984 (1990).
8. *See, e.g.*, Craig Green, *Deconstructing the Administrative State:* Chevron *Debates and the Transformation of Constitutional Politics*, 101 B.U. L. REV. 619, 624–25 (2020) (noting "[a]ssaults" concerning *Chevron* increased as Republican Presidents appointed more conservative judges, reflecting a "broad[er] effort[] to dismantle federal institutions").
9. *See, e.g.*, Pereira v. Sessions, 138 S. Ct. 2105, 2121 (2018) ("[I]t seems necessary and appropriate to reconsider, in an appropriate case, the premises that underline *Chevron* and how the courts have implemented that decision."); *Id.* at 2129 (Alito, J., dissenting) ("In recent years, several Members of this Court have questioned *Chevron*'s foundations."); *see also* Cass R. Sunstein, Chevron *Without* Chevron, 2018 SUP. CT. REV. 59, 60 (2019) ("It seems clear that *Chevron* is entering a period

Questions still remain over the technical aspects of *Chevron*'s application and agency statutory interpretation more generally, such as (1) when courts interpret agency statutes, what methods do they apply; and (2) what role does *Chevron* really have when a court interprets an agency's statutory interpretation? Little inquiry has focused on what statutory methods a court actually uses in reviewing agency interpretations in particular. For example, in interpreting the "reasonableness" of an agency interpretation, to what extent and under what circumstances do courts use text, language or substantive canons, or legislative history, or reference precedent or the policy or practical implications of the agency's interpretation? Moreover, when reviewing an agency's statutory interpretation, do appellate courts even expressly cite or apply *Chevron*; if they do—either as an express two-step framework or as a general reasonableness inquiry—what statutory methods do agencies use; and do the methods used in a *Chevron* or *Chevron*-like inquiry differ from those used when courts apply a non-*Chevron* deference regime? Moreover, even when *Chevron* is expressly cited or applied, what exactly do courts use *Chevron* for?[10] Is *Chevron* simply "a standard of review—a judicial 'mood' that affects how parties structure their arguments and how a court perceives its role vis-à-vis agencies, but that is flexible and not so outcome determinative"?[11] Or is it a "rule of decision that dictates outcomes," resulting in appellate judges deciding cases contrary to their personal ideological preferences to follow the dictates of the law?[12] Or is it instead a "canon of statutory interpretation" with *Chevron* simply being a "plus factor" to "justify" the agency's statutory interpretation?[13]

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of serious reconsideration. In the fullness of time, it might be seriously qualified or even abandoned."); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2135–36 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)) (noting that legislative history, the avoidance canon, and *Chevron* deference are triggered by an ambiguity finding); Michael Herz, Chevron *Is Dead; Long Live* Chevron, 115 COLUM. L. REV. 1867, 1868 (2015) (describing demise); PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 316 (2014) ("[T]he deference to interpretation is an abandonment of judicial office."); Jack M. Beermann, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can Be and Should Be Overruled*, 42 CONN. L. REV. 779, 850 (2010) (describing demise); Linda Jellum, Chevron*'s Demise: A Survey of* Chevron *from Infancy to Senescence*, 59 ADMIN. L. REV. 725, 727 (2007) (same). There have also been proposals before Congress. *See, e.g.*, Separation of Powers Restoration Act of 2016, S. 2724, 114th Cong. § 2 (2016) (proposing courts to decide de novo all relevant questions of law, including the interpretation of constitutional and statutory provisions, and rules made by agencies); *see also* Separation of Powers Restoration Act of 2016, H.R. 4768, 114th Cong. § 2 (2016) (same). For more recent discussion of the arguments for and against overruling *Chevron*, see Elizabeth Fisher & Sidney Shapiro, *Disagreement about* Chevron*: Is Administrative Law the "Law of Public Administration"?*, 70 DUKE L.J. ONLINE 111, 113–19 (2021) (for literature review on arguments for and against overruling *Chevron*); Cass R. Sunstein, Chevron *as Law*, 107 GEO. L.J. 1613, 1613 (2019) (analyzing arguments regarding criticism of *Chevron*).

    10.   Kristen E. Hickman & R. David Hahn, *Categorizing* Chevron, 81 OHIO ST. L.J. 611, 615 (2020).

    11.   *Id.* Hickman notes that many of *Chevron*'s "harshest critics" view it as a "rule of decision" that mandates outcomes, with the Supreme Court also using such "mandatory rhetoric" to describe *Chevron*. *Id.*

    12.   *Id.*

    13.   *Id.*

Most scholarly work on both choice of statutory methods as well as empirical application of *Chevron* has largely focused on the Supreme Court.[14] However, scholars are missing much if they simply study how statutory methods and deference apply at the Supreme Court and then "treat [study of the issue in the lower courts] as 'exceptions' to be dismissed in a footnote."[15] As such, increasingly in recent years, scholars have turned to look at how federal courts and even state courts apply statutory methods,[16] with some of the focus being on how choice of method varies horizontally among federal courts reviewing the same statute.[17] Further, scholars have turned to examine empirically the application of *Chevron* in the appellate courts.[18] Both types of studies make clearly apparent that lower federal courts may differ from the Supreme Court in what statutory methods they apply, as well as how they apply *Chevron* deference. As one scholar put it when discussing statutory methods, "[C]ourts at different levels of the system are both *doing different things* and *doing things differently*."[19] Moreover, lower federal court judges may very likely use *Chevron* differently than Supreme Court justices do. While scholars have found that application of *Chevron* deference generally does not cabin judicial partisan leanings at the Supreme Court or otherwise affect agency-win rates there,[20] scholars

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14. *See, e.g.*, 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 (2008) (analyzing Supreme Court cases).

15. Aaron-Andrew P. Bruhl, *Hierarchy and Heterogeneity: How to Read a Statute in a Lower Court*, 97 CORNELL L. REV. 433, 439 (2012).

16. *See, e.g.*, FRANK B. CROSS, THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION 180–200 (2008) (studying federal appeals courts); James J. Brudney & Lawrence Baum, *Protean Statutory Interpretation in the Courts of Appeals*, 58 WM. & MARY L. REV. 681 (2017) (analyzing federal appeals courts) [hereinafter Brudney & Baum, *Protean*]; Aaron-Andrew P. Bruhl, *Communicating the Canons: How Lower Courts React When the Supreme Court Changes the Rules of Statutory Interpretation*, 100 MINN. L. REV. 481 (2015) [hereinafter Bruhl, *Communicating the Canons*] (federal appeals courts); Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750 (2010) (analyzing several state supreme courts); Jonathan H. Choi, *An Empirical Study of Statutory Interpretation in Tax Law*, 95 N.Y.U. L. REV. 363 (2020) (comparing statutory interpretation decisions in Internal Revenue Service decisions and federal courts).

17. *See* Aaron-Andrew P. Bruhl, *Statutory Interpretation and the Rest of the Iceberg: Divergences Between the Lower Federal Courts and the Supreme Court*, 68 DUKE L.J. 1, 1 (2018) [hereinafter Bruhl, *Statutory Interpretation*] (studying the difference in interpretive methods between the Supreme Court and appellate/district courts); Bruhl, *Communicating the Canons, supra* note 16, at 481.

18. *See, e.g.*, Barnett, Boyd & Walker, *Politics, supra* note 7; Barnett, Boyd & Walker, *Political Dynamics, supra* note 7; Barnett & Walker, *Circuit Courts, supra* note 7; Kerr, *supra* note 7; Miles & Sunstein, *supra* note 7.

19. Bruhl, *Statutory Interpretation, supra* note 17, at 6 (emphasis in original).

20. *See, e.g.*, Richard J. Pierce, Jr., *What Do the Studies of Judicial Review of Agency Actions Mean?*, 63 ADMIN. L. REV. 77, 93 (2011) ("There is no empirical support for the widespread belief that choice of doctrine plays a major role in judicial review of agency actions."); David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 135 (2010) ("[T]he variance of the validation rates of agency action, regardless of the standard of review, is small."); Richard W. Murphy, *Abandon* Chevron *and Modernize Stare Decisis for the Administrative State*, 69 ALA. L. REV. 1, 3 (2017) ("Notwithstanding overheated charges, there is little reason to think that applying *Chevron*, as opposed to a supposedly tighter standard of review, such as *Skidmore* deference, is frequently outcome determinative in significant cases."); Eskridge & Baer,

studying the appeals courts' application of *Chevron* have reached mixed results, with some concluding that *Chevron* may cabin the influence of judicial ideology in influencing decisions.[21] Further, these two strands of research concerning statutory methods and deference regimes have largely run in parallel, with little intermixing. Indeed, debates about *Chevron* deference have largely taken place divorced from empirical discussion about statutory methods and on any patterns that may exist between the statutory methods a court applies when ruling on the reasonableness of an agency interpretation and the citation and application of *Chevron* deference.

This Article makes an attempt to fill that empirical gap by merging the two strands of research on statutory methods and *Chevron*, focusing particularly on how these questions may be answered when appellate courts review the decisions emanating from an administrative agency's adjudication decisions. It undertakes an analysis of what statutory methods appellate courts use to review administrative agency statutory interpretation decisions and tries to describe any relationship between the methods chosen and the deference regime applied. It also offers insight into how and when appellate courts apply the *Chevron* framework. This study attempts to answer these questions in the context of reviewing the statutory interpretation decisions heard at the appellate courts from a single agency: the National Labor Relations Board (NLRB or the Board). The NLRB is an ideal agency to study because it does almost all of its decision making through adjudications.[22] The NLRB also mostly interprets only one statute, the National Labor Relations Act (NLRA or the Act), though on occasion it rules on another labor statute or on how an interpretation of the NLRA intersects with another statute.[23] Further, appellate court decisions concerning the NLRA abound, and oftentimes, the same statutory interpretation issue is litigated in multiple appellate courts, offering insight

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supra note 14, at 1142 (finding that the Supreme Court affirmed agency decisions at similar rates whether applying *Chevron* or *Skidmore*); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 980–982 (1992) (noting that the *Chevron* two-step framework was applied only about one-third of the time where a deference question was brought up in a study of all decisions of the Supreme Court from the end of the Supreme Court's 1983 term to 1990).

21.   *See, e.g.*, Barnett, Boyd & Walker, *Politics*, *supra* note 7, at 598 ("[T]he *Chevron* framework limits judicial interpretive primacy and seeks to separate judges from their policy preferences."); Barnett, Boyd & Walker, *Political Dynamics*, *supra* note 7, at 1463 (noting that *Chevron* "was based in part on the Court's desire to temper administrative law's political dynamics by vesting federal agencies, not courts, with primary authority to make policy judgments"); *id.* at 1468 ("We find that *Chevron* deference significantly curbs (but does not fully constrain) judicial discretion."); Barnett & Walker, *Circuit Courts*, *supra* note 7, at 6 (finding that different forms of judicial deference result in substantially different rates of affirmation at circuit courts).

22.   Samuel Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking*, 37 ADMIN. L. REV. 163, 175 (1985) (noting that the Board uses adjudication as opposed to rulemaking to make policy).

23.   See *infra* Section II.A for examples. Some scholars point out how the terms "statutory interpretation" and "statutory construction" are distinguishable. *See generally* Lawrence B. Solum & Cass R. Sunstein, Chevron *as Construction*, 105 CORNELL L. REV. 1465 (2020). For purposes of this project, I use the terms interchangeably, as does the Supreme Court. *See, e.g.*, Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 986 (2005); Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

into how appellate courts use different methodologies to interpret the very same statutory provision. As such, over the period under study, I isolated 201 appellate court opinions involving 209 statutory interpretations concerning NLRB adjudications from 1994 through 2020 where the courts engaged in review of the agency's statutory interpretation in order to decipher the statutory methods used by the appellate courts and the courts' application of *Chevron* or a similar reasonableness analysis.

This study is a follow-up to my previous study published in the *Minnesota Law Review*, which focused exclusively on the statutory methods used by the NLRB in its decisions from 1993 through 2016.[24] That study concluded that there was little ideological coherence to statutory methods, with Democrat-majority Boards being as likely as Republican-majority Boards to employ textual or purposive methods.[25] The study also found that the Board varied the statutory methods it used over time. The Obama Board, for instance, relied more on policy pronouncements than prior Boards.[26] Further, the type of dueling between majority and dissenting Board opinions changed over time; while Board members quarreled about precedent during the Clinton years, the Obama Board most frequently bickered over "whether text or policy should resolve the interpretive dilemma at hand."[27] Although limited to analysis of only one agency—and one of the most politically charged agencies at that—both the *Minnesota* analysis and this one represent a first step to extend the study of empirical statutory interpretation beyond the study of cases decided by federal courts to see how the agencies themselves interpret statutes and how appellate courts in turn review the agencies.

This study finds that anecdotally, appellate courts reviewing decisions of the NLRB are quite heterogenous in their choices of which statutory methods to apply. Most notable was how courts used precedent and policy in contrasting ways when ruling on Board statutory interpretation cases. The courts relied on precedent most often when the courts' own statutory interpretation ruled against the employee. Courts often used precedent to reverse the Board's pro-employee interpretations rather than to uphold them. Courts used policy in a different way. While precedent was used more when courts ruled in an anti-employee direction, policy was used more to uphold pro-employee Board interpretations.

Both Democrat-majority and Republican-majority courts exhibited different tendencies in their choice of methods. Democrat-majority courts often cited and relied on text more than Republican-majority courts, especially when ruling on anti-employee interpretations of the Board. Republican-majority courts disproportionately used substantive canons to uphold anti-employee interpretations while Democrat-majority courts favored language canons when reversing such

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24. Amy Semet, *An Empirical Examination of Agency Statutory Interpretation*, 103 MINN. L. REV. 2255, 2257, 2282 (2019).

25. *Id.* at 2259.

26. *Id.*

27. *Id.*

anti-employee appeals. Moreover, while Democrat-majority courts always used precedent to buttress their reversals of ideologically consistent pro-employee interpretations, Republican-majority courts employed precedent to uphold ideologically consistent anti-employee interpretations. Further, policy was especially invoked to uphold pro-employee Board interpretations for Democrat-majority and Republican-majority courts alike.

In addition, the data supports the conclusions of other scholars who point out that courts often do not cite *Chevron* in reviewing agency interpretations[28] and that use of *Chevron* may cabin judicial ideological impulses to a certain extent.[29] Republican-majority courts were less likely than Democrat-majority courts to actually cite and use the *Chevron* two-step framework. The data also revealed some descriptive patterns between the choice of deference regime and the statutory methods a court used. Courts cite and refer to text and the language canons more when the courts literally cite the *Chevron* two-step framework (as opposed to using a reasonableness analysis or another deference regime). The differences in text citation and language canons did not persist if the courts did not explicitly cite *Chevron*. This thus provides some descriptive evidence that the courts' decision to expressly adopt *Chevron* as a formal test could possibly have some linkage on how courts view what statutory methods to apply or vice versa. In addition, Republican-majority courts upholding Board interpretations often employed substantive canons more when citing *Chevron* than when not. *Chevron*-citing courts also disproportionately invoked policy considerations compared to non-*Chevron*-citing courts when upholding the Board's interpretation.

Likewise, some statutory methods were more prevalent when courts used non-*Chevron*-related deference regimes compared to when the courts cited or applied *Chevron* or a *Chevron*-like reasonableness analysis. Precedent, for instance, was more likely to be employed when the court neither cited nor applied a *Chevron*-like reasonableness analysis. Substantive canons were also employed more often by non-*Chevron*-applying courts than *Chevron*-applying ones in reversing the Board. This might suggest that courts feel a greater need to use precedent or substantive canons to justify decisions when they choose affirmatively not to apply *Chevron* when they otherwise should in reviewing an agency's statutory interpretation.

This Article also contributes to normative debates in academia concerning how appellate courts should review agency interpretations and how *Chevron* applies in practice in reviewing agency interpretations. While the perspective offered in this Article may be unique to the study of the NLRB, it is notable that the majority of appellate courts in NLRB cases do not expressly cite the *Chevron* two-step

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28. Eskridge & Baer, *supra* note 14, at 1090 (finding that the Supreme Court applied *Chevron* in 8.3% of agency statutory interpretation cases between 1984 and the end of the Supreme Court's 2005 term).

29. *See* sources cited *supra* note 21.

framework when engaging in review of statutory interpretations of the NLRA. Rather, they most often apply a "reasonableness" analysis to review, with no reference whatsoever to *Chevron*. Indeed, in litigating the statutory interpretation of the very same issue or statutory provision across different appellate circuits, often one appellate court cited *Chevron* while another did not. Even when courts cited the *Chevron* two-step framework, they rarely engaged in a detailed analysis of the steps. Clearly, in practice, at least with respect to the NLRB, there is little consistency or uniformity in how *Chevron* is used.

The question then becomes this: how should appellate courts review agency interpretations of the agency's own purpose and mission?[30] Should there be a "*Chevron* space" where courts do whatever is permissible within that space?[31] As presently applied, many statutory interpretation issues heard concerning the NLRA result in circuit splits, with courts reaching dramatically different conclusions on the very same statutory issue.[32] This result is the opposite of what *Chevron* sought to accomplish as it interjects more partisanship and inconsistency into the process and results in the judiciary having less of a role in policing the agency. Indeed, if *Chevron* adequately guided courts, we might expect *more* consistency between circuits (and even within circuits) than what the empirics bear out. Although this Article is descriptive and it is beyond its scope to propose an alternative deference regime to *Chevron*, clearly appellate courts need more express guidance on what factors they should look for in assessing reasonableness because it should not be the case that there is such disharmony vertically across the courts of appeals in interpreting the very same statute. Otherwise, the appellate courts risk being completely ignored by the agency, a troubling development that subverts constitutional limitations of separation of powers and checks and balances.

Indeed, it may be that the courts themselves have already signaled the future of *Chevron* by de facto ignoring it and changing the analysis to either an analysis based on "reasonableness" or one more similar to the Administrative Procedure Act's (APA) "arbitrary and capricious" standard. As such, perhaps debate on *Chevron* should focus more clearly on how to define the "reasonableness" of an agency's statutory interpretation so as to ensure greater national uniformity of statutory interpretation among the appellate courts.[33] One's view on *Chevron* may largely depend on one's political view of the role of the administrative state and the

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30.   *See, e.g.*, Kristen E. Hickman & Aaron L. Nielson, *Narrowing* Chevron*'s Domain*, 70 DUKE L.J. 931, 938 (2021) (arguing that the Supreme Court should narrow *Chevron*'s domain to exclude or at least reduce judicial deference to agency statutory interpretations established in administrative adjudications).

31.   *See* Peter L. Strauss, *"Deference" is Too Confusing—Let's Call Them "*Chevron *Space" and "*Skidmore *Weight"*, 112 COLUM. L. REV. 1143, 1144–45 (2012); *accord* United States v. Mead Corp., 533 U.S. 218, 247 (2001) (Scalia, J., dissenting) (observing that statutory ambiguities subject to *Chevron* "create a space, so to speak, for the exercise of continuing agency discretion").

32.   *See infra* Section II.B.

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

broader debate about what role unelected bureaucrats should play in making policy when statutory dictates do not spell out details. Indeed, my review of over 2,500 NLRB appellate court cases indicated that courts rarely used text as a definitive source. As with most things in this political era, text of most statutes was seen through a political lens. Example after example abound in which the majority and dissent bickered over the text being plain, with each side offering its own spin on the same words.[34] In practice, it is clear that judges adopt more of a practice of "intentional eclecticism" with using both textual and purposive sources to achieve a desired outcome.[35]

This Article proceeds as follows. Part I details the literature on empirical statutory interpretation, focusing on several recent studies of the statutory methods applied by appellate courts. This Part also details the rich literature concerning the empirical study of *Chevron* deference, both at the Supreme Court and the lower federal courts. After Part II.A briefly explains to the reader the history and institutional structure of the NLRB, Part II.B proceeds with describing the construction of the database. Then, Part III sets forth the two-fold nature of the analysis. Part III.A descriptively sets forth the statutory methodology choices made by the appellate courts in reviewing statutory interpretations conducted in NLRB adjudications. Part III.B then turns to discussing *Chevron* deference and the patterns of statutory methods in NLRB cases broken down by deference regimes. Finally, the Conclusion briefly discusses the normative implications of the findings, concluding with some thoughts on how the study can be improved.

I. LITERATURE REVIEW

A. Theoretical Accounts on How Agencies and Courts Construe Statutes

Scholars argue that courts may not necessarily construe statutes the same way agencies do.[36] Each body occupies a different role within our separation-of-powers system and may have different goals. Agencies may want to "energ[ize]" a statutory program and thus engage in a more activist policymaking interpretation.[37] Unlike courts, agencies may not be as constrained by norms like stare decisis or a desire to impose a greater coherence to the larger legal order.[38] Agencies may also be more cognizant of political realities and of devising a statutory interpretation that appeases political superiors.[39] Additionally, agencies may differ in the way they

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34.   *See infra* Section II.B.

35.   *See* Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298, 1302 (2018).

36.   *See* Jerry L. Mashaw, *Between Facts and Norms: Agency Statutory Interpretation as an Autonomous Enterprise*, 55 U. TORONTO L. REV. 497, 519 (2005); Peter L. Strauss, *When the Judge Is Not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History*, 66 CHI.-KENT L. REV. 321, 328–29 (1990).

37.   Mashaw, *supra* note 36, at 507, 510.

38.   *Id.* at 503–05.

39.   *Id.*

approach statutory interpretation.[40] Federal courts hear many different cases across a broad spectrum of subject matter,[41] while agencies hear cases generally of the same subject matter and interpret a much smaller number of statutes. The resources available to interpret statutes may differ as well.[42] The specialized nature of agency decision making may result in courts having less of an opportunity to meaningfully engage with the statutory materials and legislative history.[43] As such, agencies, as opposed to courts, may be more intimately familiar with the statute's text, purpose, and legislative history. Further, the close relationship between an agency and Congress may allow the agency to more reliably access "those considerations that served to shape the legislation, the legislative history wheat, [and distinguish it] from the manipulative chaff."[44] The greater institutional memory of agencies may also allow agencies to more readily interpret congressional intent.[45] Moreover, because agencies are supposed to be guided by underlying "intelligible guiding principles,"[46] they may be better able to develop a reading of the statute that adopts and effectuates the statute's underlying purpose.[47]

Even if courts interpreted statutes from administrative agencies de novo instead of deferring to agencies under *Chevron*, there are many reasons to expect some divergence between how agencies and federal courts may interpret a given statute. There is no consensus on the single right way to interpret a statute.[48] Interpretive canons can be "fuzzy" and decision makers may differ on when they consider a statute "ambiguous."[49] As two scholars put it, interpretive methodology

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40. Although this study focuses on the appellate courts, the divergence between the agency and the Supreme Court may be even greater, as cases before the Supreme Court often have amicus briefs from various organizations advancing a statutory interpretation. Bruhl, *Statutory Interpretation*, *supra* note 17, at 12; *see also* Allison Orr Larsen & Neal Devins, *The Amicus Machine*, 102 VA. L. REV. 1901, 1902–04 (2016) (explaining amicus briefing at the Supreme Court). There were too few NLRB cases heard at the Supreme Court during the period under study to do a reliable comparison of statutory method. Moreover, while there were some cases at both the Board and the appellate courts where amicus briefs were filed, the number of cases was too small to be useful for this analysis. *See* Linda Sandstrom Simard, *An Empirical Study of Amici Curiae in Federal Court: A Fine Balance of Access, Efficiency, and Adversarialism*, 27 REV. LITIG. 669, 686–87 (2008).

41. Bruhl, *Statutory Interpretation*, *supra* note 17, at 13–14 (discussing court caselaw and case mix).

42. *See* Frank H. Easterbrook, *The Absence of Method in Statutory Interpretation*, 84 U. CHI. L. REV. 81, 96 (2017) (observing that "[r]ules of interpretation must reflect the resources available to the task").

43. Bruhl, *Statutory Interpretation*, *supra* note 17, at 16.

44. Strauss, *supra* note 36, at 347.

45. Mashaw, *supra* note 36, at 503, 508.

46. *Id.* at 503.

47. *See* Kevin M. Stack, *Purposivism in the Executive Branch: How Agencies Interpret Statutes*, 109 NW. U. L. REV. 871, 876 (2015); *see also* Evan J. Criddle, *The Constitution of Agency Statutory Interpretation*, 69 VAND. L. REV. EN BANC 325, 326–27 (2016) (responding to Aaron Saiger, *Agencies' Obligation to Interpret the Statute*, 69 VAND. L. REV. 1231 (on *Chevron* deference)).

48. Bruhl, *Statutory Interpretation*, *supra* note 17, at 10; Lawrence Baum & James J. Brudney, *Two Roads Diverged: Statutory Interpretation by the Circuit Courts and the Supreme Court in the Same Cases*, 88 FORDHAM L. REV. 823, 832 (2019) [hereinafter Baum & Brudney, *Two Roads*].

49. Bruhl, *Statutory Interpretation*, *supra* note 17, at 11.

is similar to "a web of considerations with differing and varying weights rather than a set of hierarchical rules."[50] Moreover, while the agency itself could have an incentive to impose methodological consistency in how it interprets a statute, the appellate courts—widely scattered across the country—have no such incentive. This only encourages appellate courts to follow their own circuit precedent instead of trying to give the statute a consistent meaning.[51] Few NLRB decisions are ultimately reviewed by the Supreme Court, thus resulting in no judicial body having an incentive to police that the statute is consistently interpreted nationwide.[52]

Most importantly, the application of deference and the role of precedent are different between the two bodies.[53] Courts are guided by *Chevron* deference or another deference regime in interpreting agency decisions, while the Board reviews the statutory interpretation done by lower-level administrative law judges de novo. The role of precedent in guiding decisions also differs. The NLRB widely engages in a policy of nonacquiescence to circuit court decisions, preferring instead to interpret a statute uniformly within the Board rather than interpreting a statute inconsistently nationwide just to abide by circuit precedent.[54] Indeed, the Board has so strongly pursued a policy of nonacquiescence that it not only ignores precedent of regional circuit courts (intercircuit nonacquiescence) but it also fails to follow precedent of even the same regional circuit court that might ultimately review that very same decision (intracircuit nonacquiescence).[55] The Board justifies its policy of nonacquiescence by referring to its expertise in fielding labor adjudication cases as well as its goal of ensuring national uniformity in interpreting the labor law.[56] Within the Board itself, as a matter of practice, it has made apparent that cases should be decided under Board precedent rather than circuit law.[57] Because most statutory interpretation cases are made by the five-member Board,[58] the Board is free to devise its own precedent, though in many cases, it is still guided by other Board and circuit court decisions.[59] By contrast, appellate courts are guided and bound by both Supreme Court and internal circuit court precedent.[60] Thus, there are many cases in

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50.   Raso & Eskridge, *supra* note 7, at 1811.

51.   *See* Bruhl, *Statutory Interpretation*, *supra* note 17, at 11.

52.   *Id.*

53.   *See* Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073, 1093 (1992).

54.   Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 705 (1989).

55.   James J. Brudney, *Isolated and Politicized: The NLRB's Uncertain Future*, 26 COMP. LAB. L. & POL'Y 221, 237–38 (2005) [hereinafter Brudney, *Isolated*].

56.   *Id.* at 238. A policy of nonacquiescence may also be practical; since cases can be appealed either to the D.C. Circuit or the regional courts, the Board may not necessarily be able to anticipate which circuit's law applies to a given case. *Id.*

57.   Joan Flynn, *The Costs and Benefits of "Hiding the Ball": NLRB Policymaking and the Failure of Judicial Review*, 75 B.U. L. REV. 387, 420–21 (1995) [hereinafter Flynn, *Costs*].

58.   Semet, *supra* note 24, at 2288.

59.   Flynn, *supra* note 57, at 420–21.

60.   *Id.*

which the appellate court overrules the Board, arguing that its own circuit precedent or that of another circuit, rather than Board precedent, should guide the decision.[61]

Further, we might expect the role of ideology to play a different role across courts.[62] The familiar left-right divide assumes that textualism is more favored by conservative judges while application of legislative history or discussion of the statute's purpose is seen as more relevant by liberal-leaning judges.[63] More importantly, judges may have different ideological opinions in how they approach agency deference.[64]

At the same time, however, any divergence in methodology and result between the agency and courts should stay "within certain bounds."[65] It may not matter so much if the judge uses a different interpretive method than the agency to arrive at the same substantive result (with both entities deciding the case in favor of the employee, for example). Too much divergence, however, calls into question how well the appellate courts oversee agency decisions. Moreover, because courts should be applying deference to an agency's reasonable interpretation of a statute that is within the agency's expertise, too much divergence also might suggest that the court is usurping the role of the agency in interpreting the statute. In addition, we might expect less divergence in methodology between agencies and courts than between the Supreme Court and appellate courts. Unlike the Supreme Court, both agencies and lower-level courts have busy, non-discretionary dockets[66] and receive few amicus briefs, thus creating little "pressure" for the decision maker to pay attention to methodological approaches.[67] Further, certain rules, like *Chevron* deference, are meant to cabin in ideology.[68] Rules may also serve as a "reminder" to the judges, thus making "ideology . . . less salient" with the rules having a "performative function."[69]

B. *Empirical Studies of Statutory Methods*

In the early years of *Chevron*, qualitative and empirical studies focused on examining trends in statutory interpretation at the Supreme Court in particular.

61.	*Id.*
62.	*See, e.g.*, CASS R. SUNSTEIN, DAVID SCHKADE, LISA M. ELLMAN & ANDRES SAWICKI, ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY 24–40 (2006) (explaining the impact of ideology on federal court decisions).
63.	Bruhl, *Statutory Interpretation*, *supra* note 17, at 20–21.
64.	Barnett & Walker, *Circuit Courts*, *supra* note 7, at 51.
65.	Bruhl, *Statutory Interpretation*, *supra* note 17, at 23 (noting that all federal courts are part of the same system).
66.	From 2005 to 2015, the appeals courts participated in several hundred merits decisions involving the NLRB, with the most in the Ninth Circuit. *See* Brudney & Baum, *Protean*, *supra* note 16, at 695 & n.37.
67.	Baum & Brudney, *Two Roads*, *supra* note 48, at 826.
68.	*See, e.g.*, Barnett, Boyd & Walker, *Politics*, *supra* note 7, at 598; Barnett, Boyd & Walker, *Political Dynamics*, *supra* note 7, at 1463, 1468; Barnett & Walker, *Circuit Courts*, *supra* note 7, at 6.
69.	Gluck, *supra* note 16, at 1855.

Articles were devoted to studying trends in using text,[70] canons,[71] dictionaries,[72] and legislative history,[73] among others. Traditionally, scholars focused their empirical studies on how the Supreme Court interprets statutes.[74] Scholars also assessed in a quantitative fashion how federal courts and even administrative agencies interpreted statutes.[75] Some even investigated how administrative agencies interpreted statutes through the use of surveys of congressional staff and administrators,[76] while others embarked on a more qualitative analysis of agency-specific statutory interpretations, picking out a few examples of cases from a single agency to illustrate given points.[77]

1. Statutory Interpretation and the Supreme Court

One strain of the literature looks at how federal judges, particularly those at the Supreme Court, used tools of statutory interpretation, such as textual analysis,

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70.   *See, e.g.*, John F. Manning, *Second-Generation Textualism*, 98 CALIF. L. REV. 1287 (2010); Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1 (2006).

71.   *See, e.g.*, James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1 (2005) [hereinafter Brudney & Ditslear, *Canons*]; Edward L. Rubin, *Modern Statutes, Loose Canons, and the Limits of Practical Reason: A Response to Farber and Ross*, 45 VAND. L. REV. 579 (1992) (responding to Daniel A. Farber, *The Inevitability of Political Reason: Statutes, Formalism, and the Rule of Law*, 45 VAND. L. REV, 561 (1992), and Stephen F. Ross, *Where Have You Gone, Karl Llewellyn? Should Congress Turn Its Lonely Eyes to You?*, 45 VAND. L. REV. 561 (1992)).

72.   *See, e.g.*, James J. Brudney & Lawrence Baum, *Oasis or Mirage: The Supreme Court's Thirst for Dictionaries in the Rehnquist and Roberts Eras*, 55 WM. & MARY L. REV. 483 (2013) [hereinafter Brudney & Baum, *Oasis*]; Ellen P. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 ARIZ. ST. L.J. 275 (1998); *see also* James J. Brudney & Lawrence Baum, *Dictionaries 2.0: Exploring the Gap Between the Supreme Court and Courts of Appeals*, 125 YALE L.J. F. 104, 104–05, 119 (2015); Bruhl, *Statutory Interpretation*, *supra* note 17, at 59 fig.5.

73.   *See, e.g.*, James J. Brudney & Corey Ditslear, *Liberal Justices' Reliance on Legislative History: Principle, Strategy, and the Scalia Effect*, 29 BERKELEY J. EMP. & LAB. L. 117 (2008) [hereinafter Brudney & Ditslear, *Liberal Justices'*]; Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and its Interpretation*, 151 U. PA. L. REV. 1417 (2003); David S. Law & David Zaring, *Law Versus Ideology: The Supreme Court and the Use of Legislative History*, 51 WM. & MARY L. REV. 1653 (2010).

74.   Anita S. Krishnakumar, *Dueling Canons*, 65 DUKE L.J. 909, 934 (2016) (examining the use of dueling canons of construction in Supreme Court majority and dissenting opinions).

75.   *See generally* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901 (2013) [hereinafter Gluck & Bressman, *Part I*]; Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725 (2013) [hereinafter Bressman & Gluck, *Part II*]; Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999 (2015) [hereinafter Walker, *Inside Agency*]; Christopher J. Walker, *Legislating in the Shadows*, 165 U. PA. L. REV. 1377 (2017); *see also* Adoption of Recommendations, 80 Fed. Reg. 78161 (Dec. 16, 2015) (summarizing Administrative Conference of the United States's findings).

76.   Gluck & Bressman, *Part I*, *supra* note 75, at 902; Bressman & Gluck, *Part II*, *supra* note 75, at 731 (conducting a survey among congressional staffers); Walker, *Inside Agency*, *supra* note 75, at 999–1000 (conducting a survey among agency staffers).

77.   *See, e.g.*, Daniel P. O'Gorman, *Construing the National Labor Relations Act: The NLRB and Methods of Statutory Construction*, 81 TEMP. L. REV. 177, 178 (2008) (providing examples of how the NLRB interprets statutes and offering theories for how the Board should interpret statutes).

language or linguistic canons, substantive canons, and legislative history. Frank Cross conducted a book-length study measuring justices' use of statutory methods at the Supreme Court in particular to assess how those methods constrain justices from reaching outcomes inapposite to what one would predict from looking at judicial ideology alone.[78] Cross concluded that most methods had far less constraining effects than textualists would predict and that justices were largely "interpretive pluralists."[79] But Cross also argued that justices' ultimate decisions were in part motivated by partisan considerations, as the justices chose the method that best reached the result they wanted.[80] Use of textualism, however, he found, did not always result in conservative outcomes.[81] Cross concluded that legislative history was more constraining than plain meaning[82] and that legislative history was used most often to advance liberal outcomes.[83] He also found that the use of practical considerations was not "ideologically manipulable."[84]

A study by James Brudney and Corey Ditslear looked at interpretive canons in every Supreme Court decision in workplace matters from 1969 to 2003, detailing whether canons were used in an "ideologically conscious manner."[85] In the limited subject matters studied, they found that there was an increase in reliance on canons in the Rehnquist Court compared to the Burger Court and that canon usage aligned with partisan leanings.[86] Moreover, canon usage was greatest in closely divided cases where they were used to justify conservative results.[87] Brudney and Ditslear's findings also disputed the contention that canons can serve as a way to foster "consistent or predictable" statutory interpretations.[88] Indeed, by contrast, they found that the majority's invocation of both language and substantive canons was associated with the dissent's same invocation of the canons, thus inferring that "[j]ustices . . . are inclined to disagree about the clarity or predictability of canon-based reasoning."[89] Brudney and Ditslear also found that the use of legislative history decreased over time since the late 1980s.[90]

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78. CROSS, *supra* note 16, at 178.
79. *Id.* ("Reliance on textualism shows no constraining effect . . . .").
80. *Id.*
81. *Id.* at 169.
82. *Id.* at 160–77.
83. *Id.* at 172.
84. *Id.* at 174.
85. Brudney & Ditslear, *Canons*, *supra* note 71, at 5–6, 111 (finding little constraint by linguistic and substantive canons); *see also* James J. Brudney & Corey Ditslear, *The Warp and Woof of Statutory Interpretation: Comparing Supreme Court Approaches in Tax and Workplace Law*, 58 DUKE L.J. 1231, 1231 (2009) [hereinafter Brudney & Ditslear, *Warp and Woof*] (showing the use of legislative history); Brudney & Ditslear, *Liberal Justices'*, *supra* note 73, at 117 (looking at constraining effects of legislative history on workplace cases).
86. Brudney & Ditslear, *Canons*, *supra* note 71, at 6.
87. *Id.* In particular, close cases where the majority relied on substantive canons were more likely to be ideologically conservative compared to when the canons were not invoked. *Id.*
88. *Id.*
89. *Id.* at 7.
90. *Id.* at 35.

In follow-up work analyzing over 300 majority opinions in Supreme Court cases in workplace matters from 1969 to 2006, Brudney and Ditslear surprisingly found that liberal justices were actually more likely to vote in favor of employers when using legislative history by using such history to detail the congressional bargains that favor anti-employee views.[91] When justices used legislative history to support anti-employee outcomes, they did so to "amplify or unpack" how to interpret "employer defenses or exemptions," to detail how congressional compromises arose, and to show overreach in pro-employee legal arguments.[92] Since 1985, however, both liberal and conservative justices have employed legislative history more in line with their ideological preferences.[93] In a later study extending their database to include cases through 2008, Brudney and Ditslear compared how legislative history and canons were used in workplace matters versus how they were used in tax cases.[94] With respect to legislative history, they concluded that the Court cited legislative history at a higher, statistically significant rate in tax cases compared to workplace cases.[95] They explained this discrepancy by noting that for workplace statutes (which they argued generally arose from a "more traditionally politicized legislative process"), justices cited legislative history to illuminate the congressional bargains reached while using legislative history in tax cases so as to leverage congressional expertise in the highly complex and specialized field of tax law.[96] They also found that compared to workplace cases, the Supreme Court relied on language and other structural canons in tax cases where the Court interpreted a largely "coherent and self-contained" statute as embodied in the Internal Revenue Code.[97] Finally, Brudney and Ditslear concluded the use of substantive canons to be similar in both fields.[98]

Another study by David Law and David Zaring analyzed the use of legislative history in Supreme Court cases from 1953 to 2006.[99] Law and Zaring found that dissenting justices were more likely to cite legislative history when the majority also cited legislative history, suggesting that justices were sensitive to their colleagues' arguments.[100]

Nina Mendelson undertook an empirical study of textual and substantive statutory canons used by the Supreme Court from 2005 through 2014 in majority, dissenting, plurality, and concurring opinions.[101] She found that except for recently

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91.   Brudney & Ditslear, *Liberal Justices', supra* note 73, at 117, 121, 139, 144 tbl.6.

92.   *Id.* at 122.

93.   *Id.*

94.   Brudney & Ditslear, *Warp and Woof, supra* note 85.

95.   *Id.* at 1235.

96.   *Id.* at 1231–32, 1235–36.

97.   *Id.* at 1232, 1235–36.

98.   *Id.* at 1235–36.

99.   Law & Zaring, *supra* note 73, at 1654, 1738.

100.   *Id.*

101.   Nina A. Mendelson, *Change, Creation, and Unpredictability in Statutory Interpretation: Interpretive Canon Use in the Roberts Court's First Decade*, 117 MICH. L. REV. 71, 77 (2018).

appointed Justice Neil Gorsuch, all the justices applied at least one canon in their authored statutory interpretation cases.[102] Her data suggested that new canons continued to develop while others disappeared from use over time.[103] On a substantive front, her data indicated that the Supreme Court commonly relied on canons that other analyses indicated were of dubious utility to congressional drafters and, likewise, that the canons congressional drafters believed were the most useful were actually ones that were least applied.[104] She concluded that "canon use is of dubious value to interpretive predictability and in turn to judicial constraint or a stable interpretive background for Congress."[105]

Anita Krishnakumar conducted a few empirical analyses of Supreme Court statutory interpretation. In one article, she analyzed the role that "dueling canon[s]" played in Supreme Court decisions in the Roberts Court from 2005 through 2010.[106] She found that conservative justices used canons to reach conservative outcomes in about 60% of cases, while liberal justices used those same canons to reach liberal outcomes at similar rates in the same case.[107] She also noted that canons did not constrain justices to vote against their ideology and that practical reasoning led to greater rates of dueling between the majority and the dissent than traditional methods of construction.[108] Krishnakumar also looked more thoroughly at the Roberts Court's use of substantive canons, finding that they have been infrequently invoked as a justification in statutory interpretation.[109] Rather, she uncovered that Supreme Court precedents, as well as reliance on practical considerations, served as the "real gap-filling interpretive tool[s]" that the Court relied on.[110]

Krishnakumar also examined all Roberts Court decisions between 2006 and 2017, finding that "purposivism is alive and well," considering regular invocation of statutory purpose, intent, and legislative history, and "textualist" justices' use of "pragmatic reasoning."[111] In a more recent study, drawing on empirical data from a study of 574 interpretation cases decided by the Roberts Court, Krishnakumar examined how the Supreme Court employed legislative history to determine a statute's substantive meaning.[112] The study found that the justices "exercise[d] significant discretion when drawing inferences from statutory history."[113] Additionally, while some of the statutory inferences made were "consistent with the

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102. *Id.* at 75.
103. *Id.* at 78.
104. *Id.* at 79.
105. *Id.* at 78 (noting that "[c]onsiderable reform would be required for canon use to positively contribute to interpretive predictability").
106. Krishnakumar, *supra* note 74, at 909–10, 916.
107. *Id.* at 954.
108. *Id.* at 955.
109. *See* Anita S. Krishnakumar, *Reconsidering Substantive Canons*, 84 U. CHI. L. REV. 825, 825 (2017).
110. *Id.* at 887.
111. Anita S. Krishnakumar, *Backdoor Purposivism*, 69 DUKE L.J. 1275, 1275–76 (2020).
112. Anita S. Krishnakumar, *Statutory History*, 108 VA. L. REV. (forthcoming 2022).
113. *Id.*

theoretical justifications textualists have offered, many involve[d] unenacted legislative materials or venture[d] beyond traditional text-based analysis."[114]

Lawrence Solan explored the use of precedent in guiding statutory decisions.[115] Examining the use of precedent in split 5-3 or 5-4 decisions before the Supreme Court, Solan painted a "chaotic picture" of the use of precedent in statutory interpretation.[116] He concluded that justices on opposing sides cited contrasting precedent or strategically cited precedent to advance their preferred outcome.[117]

2. Comparative Statutory Interpretation in the Lower Federal Courts

Scholars have also analyzed statutory methods at lower federal courts. Cross, in his book, devoted a chapter to a comparison and analysis of lower federal court and Supreme Court statutory methods.[118] Like at the Supreme Court, he found that federal judges used all interpretive methods.[119] Legislative history references have generally declined since the 1980s, with references to conference reports, in particular, evidencing a steady decline.[120] Cross hypothesized that this decline was not due to an increase in conservative judges (who may see legislative history as less reliable) but due to changes in the courts themselves or due to litigants believing that history was less valuable as a method.[121] Cross also found a "pronounced" increase in the use of textualism and pragmatism since the 1990s.[122] In addition, he found that usage of the formal Latin-named language canons increased until 1990, then has steadily declined since 2000.[123] Overall, Cross concluded that the conventional wisdom—that textualism was "ascendant" over legislative history and that language canons were most associated with textualism—was more true of the appellate courts than the Supreme Court.[124]

Scholars have also compared use of statutory methods hierarchically across federal courts. In one of the latest studies, Aaron-Andrew Bruhl undertook an empirical analysis of statutory methodologies at three distinct layers of the judicial hierarchy (the Supreme Court, appellate court, and district court) over a forty-year

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114.   *Id.*

115.   Lawrence M. Solan, *Precedent in Statutory Interpretation*, 94 N.C. L. REV. 1165, 1172 (2016).

116.   *Id.* at 1174.

117.   *Id.* There are other studies as well. Kristen M. Blankley performed the first empirical study that analyzed the Supreme Court's methods of statutory interpretation under the Federal Arbitration Act (FAA). Kristen M. Blankley, *Standing on Its Own Shoulders: The Supreme Court's Statutory Interpretation of the Federal Arbitration Act*, 55 AKRON L. REV. (forthcoming 2022). The study analyzed 114 separate Supreme Court arbitration opinions and found that the Supreme Court relied on prior FAA precedent, the text, and the Supreme Court-created arbitration canon. *Id.*

118.   CROSS, *supra* note 16, at 181.

119.   *See id.* at 199.

120.   *Id.* at 185.

121.   *Id.* at 186–87.

122.   *Id.* at 188–89.

123.   *Id.* at 190.

124.   *Id.* at 191.

time span.[125] He analyzed the use of key interpretive tools, such as legislative history, textual canons, linguistic canons, and dictionaries. Bruhl found that federal courts in general have become more textualist over time, with this tendency less pronounced at lower district courts than the Supreme Court.[126] Bruhl also found that, except for precedent, almost every method was used less at the lower federal courts and that while all courts commonly used legislative history, lower courts relied on the "most accessible and authoritative kinds," such as congressional committee reports rather than the *Congressional Record*.[127] Bruhl also looked at over twenty common canons to identify the ones that were over- and underrepresented at the Supreme Court compared to the lower federal courts.[128] He applied a "matched-corpus" method studying the same case at three levels and discovered that courts at different hierarchical levels applied different methods to analyze the same statutory interpretation issues in a single case.[129] Overall, he concluded that, compared to the Supreme Court, lower courts applied fewer and simpler interpretive tools and that matches across the hierarchy were rare, with *Chevron* deference being the doctrine that matched most across courts.[130] Indeed, Bruhl found no matches in the lower courts for some cases in which the Supreme Court employed a linguistic canon, a legislative hearing, or the avoidance canon.[131] Overall, Bruhl was surprised by the degree of "methodological discontinuity" within cases.[132] Bruhl also looked at trends over time and found that legislative history, although used more often at the Supreme Court, has generally declined, while the use of dictionaries, textual tools, and linguistic tools has increased over time.[133]

James Brudney and Lawrence Baum also conducted two studies comparing statutory methods at the Supreme Court and the circuit courts.[134] In one article, Brudney and Baum looked at decisions of the Supreme Court and three courts of appeals in criminal law, business and commercial law, and labor and employment law from 2005 through 2015.[135] Finding that appellate courts used statutory methods in disparate "protean" ways, they noted that the Supreme Court used dictionaries and legislative history more than appellate courts did.[136] Brudney and

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125. Bruhl, *Statutory Interpretation*, *supra* note 17.

126. *Id.* at 7. Bruhl also found that lower courts tend to follow shifts in trends at the Supreme Court. *Id.* at 27.

127. *Id.* at 7, 24.

128. *Id.* at 26.

129. *Id.* Brudney and Baum used a similar technique to compare the use of dictionaries and legislative history in several selected areas of statutory law. *See* Brudney & Baum, *Protean*, *supra* note 16, at 701–02.

130. Bruhl, *Statutory Interpretation*, *supra* note 17, at 23, 51.

131. *Id.* at 53.

132. *Id.* at 53–54.

133. *Id.* at 57–60.

134. Baum & Brudney, *Two Roads*, *supra* note 48, at 823; Brudney & Baum, *Protean*, *supra* note 16, at 687.

135. Brudney & Baum, *Protean*, *supra* note 16, at 687. The three circuits were the Second, Seventh, and Tenth Circuits. *Id.*

136. *Id.* at 682, 687.

Baum also concluded that appellate court judges used legislative history in a different way than Supreme Court justices.[137] Supreme Court justices tended to stress how changes in text occurred over a statute's history with less emphasis being placed on committee reports.[138] By contrast, appellate court judges used legislative history "to resolve ambiguities, confirm apparent meaning, or simply explicate legislative intent."[139] Brudney and Baum suggested that the "eclecticism" of the appellate courts and its "protean" approach "limit[s] judicial discretion" more successfully than the Supreme Court's "presumptively consistent" approach.[140]

In their 2019 article, Baum and Brudney concluded that the Rehnquist and Roberts Courts' focus on ordinary meaning, language canons, and dictionary usage, and the Supreme Court's declining reliance on legislative history, were trends that the appeals courts adhered to with a lag of a few years.[141] Like Bruhl, however, Baum and Brudney also found divergent practices with circuit courts adopting simpler interpretive frameworks than the Supreme Court.[142] They found that the circuit courts were more likely than the Supreme Court to rely on ordinary meaning (78.2% versus 61.1%) and agency deference (23.4% versus 17.1%) and were less likely to rely on legislative purpose than the Supreme Court (48.0% versus 74.1%).[143] They also found a pro-employee tendency in the appellate courts when invoking agency deference, a finding consistent with the general tendency of the NLRB as a whole to be more pro-employee given the nature of its "congressional mission."[144] Co-reliance between the Supreme Court and appellate courts was highest for legislative history and language canons, with legislative purpose and dictionaries having the least amount of co-reliance.[145] Overall, Baum and Brudney concluded that achieving uniformity between the two layers of courts (the Supreme Court and the courts of appeals) often was secondary to institutional needs at the

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137.   *Id.* at 682.

138.   *Id.*

139.   *Id.*

140.   *Id.*

141.   Baum & Brudney, *Two Roads*, *supra* note 48, at 823.

142.   *Id.* at 824.

143.   *Id.* at 840. The spread for dictionaries was 7.2% versus 9.0%, language canons 24.0% versus 23.1%, legislative history 35.2% versus 35.8%, and agency deference 23.4% versus 17.1%. *Id.* Baum and Brudney found similar patterns for their analysis of the National Labor Relations Act (NLRA) and the Railway Labor Act: 65.3% versus 41.6% for ordinary meaning, 2.8% versus 1.4% for dictionary, 15.3% versus 12.5% for language canons, 29.2% versus 30.6% for legislative history, 44.4% versus 81.9% for legislative purpose, and 34.7% versus 25% for agency deference. *Id.* at 842. In all, they found higher reliance on agency deference for the NLRA and its related statute, most likely due to the fact that there is no private right of action under the NLRA, ensuring that courts are "effectively required" to address agency deference issues, though they do only a third of the time. *Id.* at 842 & n.89.

144.   *Id.* at 882–83.

145.   *Id.* at 855. Baum and Brudney also found some evidence to suggest that agreement about reliance on sources depends on the ultimate outcome in the case. *Id.* at 857–58. They also found co-reliance increased over time, perhaps because the Supreme Court became more transparent about interpretive sources. *Id.* at 858.

appellate level, the circuit court's reluctance to adopt certain textual methods, and the "inevitability and value of methodological contestation" between the levels.[146]

Other studies focused on particular courts. One early study looked at interpretive methods at the Seventh Circuit, finding that judges with similar interpretive methods were no more likely to agree on outcomes.[147] Others have looked at particular issues before federal district courts or state courts.[148]

3. Comparing Statutory Interpretation at Agencies and Federal Courts

More recently, Jonathan Choi has applied natural language processing to explore statutory interpretation trends in tax law cases, comparing trends at the agency versus those at the federal courts.[149] His analysis of Internal Revenue Service (IRS) decisions indicated that the agency has grown more purposive in its interpretations over time, with decisions rooted more in achieving goals like efficiency and uniformity, while the Tax Court (the federal court charged to review IRS decisions) has grown more textualist by putting a greater emphasis on *Chevron* deference and text-based tools of interpretation.[150] Choi also found that different courts favored different kinds of sources. Compared to the district court, the Tax Court, for example, preferred "congressional reports . . . over hearings, holistic-textual canons (those emphasizing a cohesive reading of the tax code) over language canons, and *Chevron* deference over constitutional canons."[151] Choi also discovered that Democratic-appointed Tax Court judges used more purposive and less textual methods than Republican appointees.[152] Yet, he found that the end result of the case (whether the court ruled for or against the taxpayer) bore no relationship to purposive or textual methodology.[153]

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146.   *Id.* at 829.
147.   Jason J. Czarnezki & William K. Ford, *The Phantom Philosophy? An Empirical Investigation of Legal Interpretation*, 65 MD. L. REV. 841, 874–86 (2006) (looking at cases in the Seventh Circuit).
148.   *See, e.g.*, Thomas O. Main, Jeffrey W. Stempel & David McClure, *The Elastics of Snap Removal: An Empirical Case Study of Textualism*, 69 CLEV. ST. L. REV. 289, 289, 297, 302 (2020) (finding that judges appointed by Republican presidents, female judges, and young judges, among other predictors, were more likely to agree with a "textualist outcome" to permit a snap removal compared to the "purposivist" outcome of disallowing a snap removal in district court cases); *see also* Daniel M. Schneider, *Empirical Research on Judicial Reasoning: Statutory Interpretation in Federal Tax Cases*, 31 N.M. L. REV. 325, 338–51 (2001) (analyzing statutory interpretation methods in federal tax cases in trial courts); James P. Nehf, *Textualism in the Lower Courts: Lessons from Judges Interpreting Consumer Legislation*, 26 RUTGERS L.J. 1, 33–81 (1994) (examining interpretive methods used in consumer cases in state and federal courts).
149.   Choi, *supra* note 16, at 363.
150.   *Id.*
151.   *Id.* at 369.
152.   *Id.*
153.   *Id.*

4. Surveys of Statutory Method

Abbe Gluck and Judge Richard Posner undertook a survey of forty-two appellate court judges to discover their opinions on statutory methods, focusing on questions that asked judges how they regarded statutory text, dictionaries, canons of construction, legislative history, and purpose.[154] The survey also included questions concerning pragmatism, the role of agencies, and the value of judges to understanding congressional inner workings.[155] Gluck and Posner found that the judge's "generation" and whether the judge previously worked on Capitol Hill were important considerations in statutory interpretation, more so than even political ideology.[156] The study loosely divided judges into a few types. One group of judges was older and went to law school prior to the period in which courses in legislation and regulation were commonly taught at law schools, and therefore the judges viewed the task of statutory interpretation more as a delegation from Congress to the courts.[157] This older cohort of judges tried to make sense of the law by looking at the statute's text, using whatever source they thought would help them.[158] Gluck and Posner also discovered that another group of judges who previously held positions in the legislative or executive branch of the federal government, particularly those who worked in Congress, focused more on how statutes were actually drafted by Congress, looking at how canons of construction may differ from how statutory drafting occurs in practice.[159] This later group of judges often consisted of textualists who used canons and legislative history to discern statutory meaning, attempting to align with congressional intention and the realities of congressional drafting.[160] The younger cohort of judges that were educated about canons in law school often used them as "tiebreakers" but also considered the role of pragmatism.[161]

C. Empirical Studies of Chevron Deference

1. Supreme Court

A similarly rich literature exists on the empirical application of *Chevron* deference, with studies largely concluding that the Supreme Court often does not cite or apply *Chevron* when it should. William and Lauren Baer compiled a comprehensive database of Supreme Court decisions involving a statutory interpretation issue between when *Chevron* was first decided in 1984 and the end of 2005, focusing on analyzing what deference regime the Court used and whether the

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154.   Gluck & Posner, *supra* note 35, at 1301.
155.   *Id.*
156.   *Id.* at 1303.
157.   *Id.* at 1303–04.
158.   *Id.*
159.   *Id.* at 1304.
160.   *Id.*
161.   *Id.* at 1305.

Court agreed with the agency's statutory interpretation.[162] They found that in over half of the cases (53.6%), the Court failed to invoke any deference regime[163] and that the *Chevron* two-step framework was applied in only 8.3% of the cases before the Supreme Court involving statutory interpretation.[164] Further, agency-win rates did not differ markedly based on the deference regime applied; while the agency won in 76.2% of cases where *Chevron* deference was invoked, the agency similarly won in 66.0% of cases where no deference regime was invoked and in 73.5% of cases where the lessened *Skidmore v. Swift & Co.* deference standard was used.[165] Eskridge and Baer also hypothesized that deference regimes could be used strategically and that justices primarily invoked them when they aligned with the justices' preferred ideological outcome, "jettison[ing]" them when they were not useful to pursue an ideological result.[166]

In one recent analysis, Natalie Salmanowitz and Holger Spamann revisited Eskridge and Baer's conclusion that the Supreme Court does not apply *Chevron* in most of the cases where it was deemed applicable.[167] After a thorough review of submitted briefs, they found that this figure was far lower and, indeed, closer to zero.[168] Specifically, they discovered that the parties often did not raise the issue of *Chevron* deference in the briefings and that even the Solicitor General failed to cite *Chevron* in a majority of the briefs submitted.[169] They concluded that the Supreme Court actually did apply *Chevron* when it was applicable by "addressing at least one sufficient element of the *Chevron* framework."[170]

2. Appellate Courts

In the wake of the Eskridge and Baer analysis, there have been many follow-up studies analyzing how the lower federal courts apply *Chevron*.[171] Many of these studies reached similar results concerning the high agency-win rate when courts applied *Chevron*. Thomas Miles and Cass Sunstein looked specifically at both Environmental Protection Agency (EPA) and NLRB appeals and found results

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162.   Eskridge & Baer, *supra* note 14, at 1094.

163.   *Id.* at 1100. Eskridge and Baer devise a "continuum of deference" regime. *Id.* at 1099 tbl.1.

164.   *Id.* at 1099 tbl.1, 1121.

165.   *Id.* at 1118. *Skidmore* deference references the Supreme Court's decision in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Courts applying *Skidmore* may look at factors such as the agency's expertise, the contemporaneity and the longevity of the agency's interpretation, the formality of the interpretation, congressional acquiescence, and alignment between how the agency interprets the statute and how Congress might. *Id.* at 140.

166.   Eskridge & Baer, *supra* note 14, at 1120.

167.   Natalie Salmanowitz & Holger Spamann, *Does the Supreme Court Really Not Apply* Chevron *When It Should?*, 57 INT'L REV. L. & ECON. 81, 81 (2019).

168.   *Id.*

169.   *Id.* at 82.

170.   *Id.*

171.   *See, e.g.*, Kerr, *supra* note 7, at 32 (finding that courts upheld regulations at a rate of 58% one year after *Chevron*, 82% two to four years after *Chevron*, then back to 72% after ten years); Miles & Sunstein, *supra* note 7, at 849, 853 fig.2 (noting validation rates).

similar to Eskridge and Baer concerning the high agency-win rate when *Chevron* was applied.[172]

Many of these studies also considered whether the presence of a whistleblower—a judge on the court panel who hailed from a different political party than the judges forming the majority—had any effect in "disciplining" the majority's ruling to be less in tandem with "political preferences."[173] Indeed, especially when the majority and agency have different ideological orientations, the presence of a whistleblower may lead to the majority agreeing with the agency and adhering to precedent.[174] Analyzing a small group of cases in the D.C. Circuit, Cross and Tiller, for example, found that when a unified appellate panel (an all-Democratic or all-Republican panel) disagreed ideologically with the agency's interpretation, it deferred just 33% of the time, whereas when the panel was split ideologically, and the majority disagreed with the agency, it deferred at a much higher rate of 62%.[175]

Other scholars focused in particular on how choice of a *Chevron* deference regime differed from a lessened deference regime. Kent Barnett and Christopher Walker engaged in a wide-ranging empirical study of *Chevron* application in the federal courts of appeals across many different administrative agencies.[176] Studying over 1,500 agency interpretations reviewed by the appellate courts over a ten-year period from 2003 through 2013 where the court expressly cited *Chevron*, Barnett and Walker found that courts deferred to the agency 77% of the time and upheld 71% of agency interpretations overall.[177] But they found nearly a 25% difference in the agency-win rate when courts cited and applied *Chevron* versus when they applied

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172.   Miles & Sunstein, *supra* note 7, at 849, 853 fig.2.

173.   Barnett, Boyd & Walker, *Politics*, *supra* note 7, at 603. Whistleblowers may affect majority decisions because they may raise counterarguments to their co-panelists or their mere presence may serve as a signal that other bodies would be alerted to the majority's disobedience of precedent. *Id.* Cross and Tiller, for example, found that the presence of judges of opposing ideologies on a panel resulted in the majority being more likely to defer to the agency. Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Court of Appeals*, 107 YALE L.J. 2155, 2172 (1998) ("[T]he presence of a whistleblower makes it almost twice as likely that doctrine will be followed when doctrine works against the partisan policy preferences of the court majority."); *see also* Miles & Sunstein, *supra* note 7, at 849 (finding that politically mixed panels lessen ideological effects); Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1732 (1997) (testing hypotheses concerning how partisan panel composition may result in judges voting less ideologically when in politically mixed panels compared to politically homogenous panels); Miles & Sunstein, *supra* note 7, at 855, 857 (finding mixed Democrat-majority panels were 11% more likely to issue conservative rulings than fully-Democrat panels, while mixed Republican-majority panels were only 5% more likely to issue liberal rulings than fully-Republican panels).

174.   Barnett, Boyd & Walker, *Politics*, *supra* note 7, at 603–04.

175.   Cross & Tiller, *supra* note 173, at 2172.

176.   Barnett & Walker, *Circuit Courts*, *supra* note 7, at 1.

177.   *Id.*

a lessened deference regime.[178] They also uncovered a great deal of discrepancy across circuits, agencies, agency types, and subject matters concerning the application of *Chevron* deference.[179] For example, the D.C. Circuit was the most friendly *Chevron*-citing circuit (applying it 88.6% of the time), while the Sixth Circuit was the least likely to cite *Chevron* (60.7%).[180] Agencies simply won more in circuits where *Chevron* was applied.[181]

Kent Barnett, Christina Boyd, and Christopher Walker also expanded beyond looking at the outcome to statistically examine whether the choice of whether or not to cite *Chevron* deference was based on partisan leanings.[182] They found the *Chevron* framework to be motivated in part by political preference, with liberal panels advancing liberal rulings and conservative panels ruling in the predicted ideological direction.[183] Barnett, Boyd, and Walker found, however, that express citation of *Chevron* seemed to cabin in the impact of judicial ideology, because when *Chevron* was faithfully applied, it "demand[ed] a high degree of adherence to agency statutory interpretation decisions."[184] By contrast, courts turned to less deferential review standards when they reached an outcome different from the agency's interpretation.[185] Barnett, Boyd, and Walker also argued that ideological agreement with the agency's interpretation should increase the proclivity to apply *Chevron* instead of a less deferential standard since citation to *Chevron* permits judges to "shroud their chosen outcome under the cover of neutral principles of judicial review that appear independent from the merits."[186] As such, analyzing circuit court decisions over the same ten-year period, they found that when courts—irrespective of ideological makeup of the panel—reviewed liberal agency interpretations, they were equally likely to apply *Chevron* than not, but that liberal panels reviewing conservative agency rulings contrary to their ideological persuasion were significantly less likely than conservative panels to pick the *Chevron* framework.[187] Unlike Cross, Tiller, and others, Barnett, Boyd, and Walker found no evidence of judicial whistleblower or disciplinary effects when panels were composed of cross partisans.[188]

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178. *Id.* at 6. Agency-wins rates were 77.4% when applying *Chevron* deference, 53.8% when applying the lessened *Skidmore* form of deference, and 38.5% when applying the lowest form of deference in the form of de novo review. *Id.*

179. *Id.*

180. *Id.* at 7.

181. *Id.* For example, in the Sixth Circuit, once the decision to apply *Chevron* was made, the agency prevailed 88.2% of the time, the highest agency win-rate of all the circuits. *Id.*

182. Barnett, Boyd & Walker, *Politics*, *supra* note 7, at 597.

183. *Id.*

184. *Id.* at 598.

185. *Id.*

186. *Id.* at 601.

187. *Id.* at 599. In particular, Barnett, Boyd, and Walker found that in conservative decisions, liberal judges were less likely to apply *Chevron* compared to their conservative colleagues by 16%. *Id.* at 614.

188. *Id.* at 613 fig.2, 615–16.

Finally, a more limited branch of the scholarship on *Chevron* considers the intersection between choice of statutory methods and application of *Chevron*. Scholars disagree over what tools may be eligible for consideration at *Chevron* step one, with some scholars contending that *Chevron* step one is primarily a text-based step, and others contending that even at step one, courts can consider the full plethora of statutory interpretation tools such as text, legislative history, and language and substantive canons.[189] Scholars also disagree over which tools to use at step two, with debates centered on what reasonableness means. Some have focused step two's reasonableness inquiry on the text, legislative history, and policy, while others have considered other factors.[190] It is also unclear how courts should interpret agency reasonableness.[191]

II. EMPIRICAL STUDY

In this Part, I first provide background information on the NLRB. Second, I discuss how the database was constructed, noting the limitations inherent in the case selection process. Finally, I detail general observations about the database before moving on in the next Part to discuss the results.

A. Background on the National Labor Relations Board

In 1935, Congress enacted the National Labor Relations Act (NLRA or the Act), also known as the Wagner Act, to protect employees' rights to organize and bargain collectively.[192] The NLRB can both prosecute unfair labor practice cases and supervise union elections.[193] In the pre-New Deal era, courts were often seen as hostile to labor rights, so there was a desire to form an "alternative" to courts to adjudicate rights.[194] Congress thus created the NLRB to reduce strikes and industrial strife, which had burdened interstate commerce, and to increase employee bargaining power.[195] The NLRB's legislative chief architect, Senator Robert

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189.   Courts, for example, are divided on whether legislative history can be considered at step 1.

190.   *See generally* Hickman & Hahn, *supra* note 10.

191.   *See generally* Ronald M. Levin, *The Anatomy of* Chevron: *Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253 (1997) (surveying different approaches to the reasonableness inquiry and advocating in favor of a combination with arbitrariness or reasoned decision-making analysis); Gary Lawson, *Outcome, Procedure and Process: Agency Duties of Explanation for Legal Conclusions*, 48 RUTGERS L. REV. 313 (1996) (making the case for a narrow *Chevron* step two analysis focused purely on statutory interpretation outcomes).

192.   *See* National Labor Relations (Wagner) Act, Pub. L. No. 74-198, 49 Stat. 449, § 3 (1935) (codified as amended at 29 U.S.C. §§ 151–169 (2012)).

193.   29 U.S.C. § 153.

194.   Michael J. Hayes, *After "Hiding the Ball" Is Over: How the NLRB Must Change Its Approach to Decision-Making*, 33 RUTGERS L.J. 523, 554 (2002) ("[I]n passing the [NLRA], Congress continued the process of diminishing the role of courts in the labor area by creating an *alternative* to the courts . . . .").

195.   29 U.S.C. § 151; *see also* IRVING BERNSTEIN, THE NEW DEAL COLLECTIVE BARGAINING POLICY 90 (1950) (noting the two-fold purpose "to voice an economic philosophy and to lay a constitutional foundation for the Act").

Wagner, intended the Board to be a nonpartisan tribunal that would make decisions detached from the whims of changing administrations.[196] Appointments to the Board in the first half of the century were generally of a nonpartisan nature.[197] The Board was also designed as an independent agency in order to make it less partisan and distinct from the political branches.[198]

The NLRB's founding act, the Wagner Act, was amended in 1947 by the Taft-Hartley Act to stretch the Act's provisions to include disputes against unions.[199] In addition to permitting allegations to be made against unions for unfair labor practices, the Taft-Hartley Act expanded the size of the NLRB itself.[200] The Taft-Hartley Act also created an Office of General Counsel, which was a unique institutional feature of the NLRB that separated out the adjudicative and the prosecutorial functions of the agency.[201]

In contrast to other agencies, which commonly operate through rulemaking, the NLRB proceeds mainly through adjudication.[202] The General Counsel brings a charge that is then heard before an Administrative Law Judge (ALJ) based in different regions of the country.[203] The Board hears appeals of the ALJ's decisions if the losing party or the General Counsel files what are known as "exceptions" to the ALJ's decision to point out errors which are then briefed and generally heard by

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196.   1 NAT'L LAB. RELATIONS BD., LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 1428 (1949) (noting Senator Robert Wagner stating, "[f]or years lawyers and economists have pleaded for a dignified administrative tribunal, detached from any particular administration that happens to be in power, and entitled to deal quasi-judicially with issues with which the courts have neither the time nor the special facilities to cope").

197.   JAMES A. GROSS, THE RESHAPING OF THE NATIONAL LABOR RELATIONS BOARD: NATIONAL LABOR POLICY IN TRANSITION 1937–1947, at 226 (1981) [hereinafter GROSS, THE RESHAPING]; JAMES A. GROSS, THE MAKING OF THE NATIONAL LABOR RELATIONS BOARD: A STUDY IN ECONOMICS, POLICY, AND THE LAW 149 n.2 (1974).

198.   GROSS, THE RESHAPING, *supra* note 197, at 227.

199.   Actions against employers were already included under the 1935 Act. Labor Management Relations (Taft-Hartley) Act of 1947, Pub. L. No. 80-101, 61 Stat. 136 (codified at 29 U.S.C. §§ 141–144). The business community petitioned Congress to provide that unfair labor practice can be leveraged against unions in addition to employers, as they wanted to ensure that unions could be "accountable for their contractual agreements and . . . for their participation in illegal secondary picketing." Brudney, *Isolated*, *supra* note 55, at 231–32.

200.   Labor Management Relations Act of 1947, ch. 120, 61 Stat. 136 (codified at 29 U.S.C. §§ 141–187). Unlike other agencies, the Board has an independent General Counsel, who is appointed by the President, and who is separate from the Board, with adjudicatory and prosecutor functions divided. *Id.*

201.   *Id.*

202.   Estreicher, *supra* note 22, at 175 (noting that the Board uses adjudication as opposed to rulemaking to make policy); *see also* Flynn, *Costs*, *supra* note 57, at 391 n.21 (same). The NLRB has engaged in rulemaking only once in its seventy-five-year history. The NLRB has faced criticism of its failure to use rulemaking, with critics contending that an adjudicatory approach results in the Board frequently changing policies. Flynn, *Costs*, *supra* note 57, at 392.

203.   Claire Tuck, Note, *Policy Formulation at the NLRB: A Viable Alternative to Notice and Comment Rulemaking*, 27 CARDOZO L. REV. 1117, 1137 n.162 (2005) (noting the role of the General Counsel); ROBERT A. GORMAN & MATTHEW W. FINKIN, BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING 11–12 (2d ed. 2004) (noting procedures).

a three-member Board panel randomly assigned.[204] The full five-member Board chooses to hear a subset of Board decisions. Board decisions are not necessarily constrained by strict stare decisis from non-five-member Board decisions; only cases heard by the full five-member Board are generally treated as binding in practice.[205]

Appeals of Board decisions arise from two mechanisms. First, a party losing an unfair labor practice case before the Board can appeal to the federal appellate courts.[206] However, the Board does not see itself as bound by circuit precedent.[207] Instead, the Board follows a policy of nonacquiescence to circuit court precedent under the reasoning that it is more important to fashion nationally uniform labor rules than to be bound by contrasting circuit precedent from different regions of the country.[208] Appeals also can come from the NLRB's General Counsel. Unlike a regular court decision or even an agency decision, the Board's orders are not self-enforcing, so unless the parties voluntarily agree to enforce the NLRB's decision, the General Counsel must seek an order of enforcement in the federal courts to officially execute the Board decision.[209] Most cases involve both types of appeals, with the losing party appealing the merits of the case and the General Counsel seeking enforcement of the Board order. Only 1% of NLRB cases are appealed.[210] Parties have a choice of forum for appeal; they can file "wherein such person resides or conducts business" (which is usually the district where the original NLRB ALJ decision was heard) or in the U.S. Court of Appeals for the District of Columbia.[211] NLRB adjudications fall under the purview of the Administrative Procedure Act (APA), so their reasoning should be assessed to ensure that they are not "arbitrary and capricious."[212]

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204.   Estreicher & Revesz, *supra* note 54, at 705**;** Brudney, *supra* note 55, at 237–38 (noting how the NLRB has been "unusually determined and aggressive" in pursuing nonacquiescence). Less than 1% of decisions ever reach the Board, as most cases are decided by a regional hearing officer on or before they are heard by administrative law judges, who are bound by Board precedent in issuing their decisions. Flynn, *Costs*, *supra* note 57, at 421.

205.   Flynn, *Costs*, *supra* note 57, at 421.

206.   *Id.* at 424 n.156.

207.   *Id.* at 421 (noting that the General Counsel does not look to circuit precedent in deciding whether or not to issue a complaint).

208.   Estreicher & Revesz, *supra* note 54, at 681; *see also* Flynn, *Costs*, *supra* note 57, at 421 (noting that the General Counsel does not look to circuit precedent in deciding whether or not to issue a complaint); Rebecca Hanner White, *Time for a New Approach: Why the Judiciary Should Disregard the "Law of the Circuit" When Confronting Nonacquiescence by the National Labor Relations Board*, 69 N.C. L. REV. 639, 644–45 (1991) (same).

209.   Losing parties can seek judicial review of an adverse Board decision in the federal court where they petition for relief or seek enforcement of a Board order. 29 U.S.C. § 160(e)–(f). The General Counsel can also seek enforcement of a Board order. *Id.* § 160(f).

210.   Flynn, *Costs*, *supra* note 57, at 421.

211.   29 U.S.C. § 160(f).

212.   5 U.S.C. § 706(2)(A). Because the NLRA is silent as to the standard for reviewing nonfactual matters, the standard of review for such matters is provided by section 10(e) of the Administrative Procedure Act (APA). Errors of law are reviewed by the court de novo. In evaluating whether the "arbitrary and capricious" standard is met, courts determine whether the "agency has

Unlike other agencies that have dozens of statutory mandates to enforce, most of the NLRB's cases come under the umbrella of the NLRA and a few other statutes. Congress has not amended the NLRA in any significant way since 1974 when it added several healthcare-related provisions; no major changes have been made since 1959.[213] Since the NLRB's statutory mandate from Congress rarely changes—and indeed, has stayed relatively static for the past seventy-five years—statutory interpretation of new provisions of the NLRA is rare. As such, compared to other agencies, the NLRB hears more routine matters where they simply apply the existing statute.

The NLRB hears two main types of cases: (1) unfair labor practice allegations against employers or unions[214] and (2) election representation cases or bargaining unit determination cases which do not enjoy rights of appeal in the federal courts.[215] Unlike other statutory regimes that provide a private right of action to sue in courts, the NLRA puts enforcement authority solely on the Board.[216] In unfair labor cases, a party alleges that either the union or employer engaged in "unfair labor" acts, such as discharging an employee for engaging in union activity, unilaterally altering the terms and conditions of a union contract, or refusing to bargain with the union in "good faith."[217] In election representation cases, the Board reviews cases related to union elections. Many of these cases include certifying whether the bargaining unit is appropriate.[218] In many cases, two types of cases are brought—an unfair election case alleging a violation of an unfair labor practice provision as well as an election-related case concerning the appropriateness of the bargaining unit.[219]

Despite early attempts in the Board's history to create a nonpartisan adjudicative body,[220] Board voting today is generally highly partisan, with Republican-appointed members routinely voting in favor of management and

'examine[d] the relevant [considerations] and articulate[d] a satisfactory explanation for its action[,] including a rational connection between the facts found and the choice made.'" FERC v. Elec. Power Supply Ass'n, 136 S. Ct. 760, 782 (2016) (citations omitted). "[A]n agency's unexplained departure from precedent is arbitrary and capricious . . . ." ABM Onsite Servs-West, Inc. v. NLRB, 849 F.3d 1137, 1142 (D.C. Cir. 2017). A decision that rests on "clearly distinguishable precedent" could also meet the arbitrary and capricious standard. Exxel/Atmos, Inc. v. NLRB, 147 F.3d 972, 976 (D.C. Cir. 1998).

213. Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1530 (2002). While there were congressional efforts at labor law reform, they failed in the Senate. *Id.* at 1540–41 (detailing failed efforts at labor law reform in 1977–78, 1992, and 1994). The last major change was in 1959. *See* Labor-Management Reporting & Disclosure (Landrum-Griffin) Act, Pub. L. No. 86-257, 73 Stat. 519 (1959) (codified at 29 U.S.C. §§ 401–503). Congress, however, added amendments in 1974 directed toward the healthcare industry. *See* Pub. L. No. 93-360, 88 Stat. 395 (1974).

214. 29 U.S.C. § 160.

215. 29 U.S.C. § 159.

216. Brudney, *Isolated*, *supra* note 55, at 231.

217. 29 U.S.C. § 158(a)(1)–(5), (7)(d).

218. 29 U.S.C. § 159(b).

219. *Id.*

220. GROSS, THE RESHAPING, *supra* note 198, at 227. For a history of how the Board changes over time see generally Joan Flynn, *A Quiet Revolution at the Labor Board: The Transformation of the NLRB, 1935–2000*, 61 OHIO ST. L.J. 1361 (2000) [hereinafter Flynn, *Quiet Revolution*].

Democratic members voting in favor of labor.[221] In some cases, the Board reverses many of the decisions of the prior presidential administration when a new partisan majority gains control of the Board.[222] Board appointments have become more ideological over time.[223] Indeed, the Obama Administration operated with a two-member Board because of the difficulty of getting its nominees passed.[224]

B. *Construction of the Database*

1. *Choice of Cases and Deference Regimes*

A database was first constructed of appellate court cases involving the NLRB involving a statutory interpretation. Searches on Westlaw and Lexis Advance indicated that the appellate courts reviewed over 2,500 decisions from January 1993 through December 2020 concerning review and/or enforcement of decisions at the NLRB.[225] Analysis was then restricted to a review of cases that were first heard by the Board during the Bill Clinton, George W. Bush (Bush II), Barack Obama, and Donald Trump presidencies so as to have a complete record of Board decision making across four different and politically diverse presidencies.[226] Each of the approximately 2,500 decisions was read and coded for standard variables,[227] such as the date of the decision; the judge panel; the author of any opinions; the statutory section of the NLRA invoked in the case; whether the case concerned an appeal of an unfair labor practice of either an employer or a union;[228] whether the

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221.   *See, e.g.*, Catherine L. Fisk & Deborah C. Malamud, *The NLRB in Administrative Law Exile: Problems with Its Structure and Function and Suggestions for Reform*, 58 DUKE L.J. 2013, 2020 (2009) (noting that "[a]cross a range of doctrinal areas, it is apparent that Bush II labor policy made a decisive shift in favor of protecting managerial prerogatives and augmenting the ability of employers and employees to oppose unionization"); Ronald Turner, *Ideological Voting on the National Labor Relations Board*, 8 U. PA. J. LAB. & EMP. L. 707, 712 (2006) (noting the predictive value of ideology in votes at the Board); Flynn, *Quiet Revolution*, *supra* note 220, at 1411 (noting the partisan-based voting patterns); William N. Cooke & Frederick H. Gautschi III, *Political Bias in NLRB Unfair Labor Practice Decisions*, 35 INDUS. & LAB. RELS. REV. 539, 549 (1982).

222.   Tuck, *supra* note 203, at 1153.

223.   Flynn, *Quiet Revolution*, *supra* note 220, at 1366–67.

224.   NLRB v. Noel Canning, 573 U.S. 513, 520 (2014) (noting that the NLRB during the Obama administration operated with a two-member Board).

225.   The study excluded cases in which a party sought an injunction under the NLRA because those decisions concern review of a district court decision. The study is also limited to only cases available on Westlaw or Lexis Advance.

226.   To be specific, analysis was restricted to review of Board decisions dated from January 1, 1993, through December 31, 2020, to capture Board decision making across four complete presidencies. Court cases dated after January 20, 2021, were excluded since those cases arose during the presidency of Joseph Biden.

227.   This Article is part of a larger study of appellate court decision making of NLRB cases, and future work will look in more detail at all appellate court cases involving the NLRB.

228.   The Taft-Hartley Act expanded the NLRA so that parties could bring unfair labor practice charges against unions. Most cases concern unfair labor practice charges directed against employers ("CA" cases). Cases involving unfair labor practices directed at unions come under section 8(b) of the NLRA ("CB," "CC," "CD," or "CE" cases, collectively, "non-CA cases"). Generally, cases in which the court ruled in favor of the employee or the union were considered pro-employee decisions, while

decision of the court, the Board, and the ALJ was in favor of the employer or employee; and other case-specific variables.[229]

Analysis was then further restricted to the 201 cases in which the appellate court engaged in statutory interpretation in the majority opinion. It was a judgement call on whether or not a case even concerned statutory interpretation. Cases were read multiple times and coded three times to ensure intercoder reliability.[230] Specifically, the database was limited to decisions in which the appellate courts were tasked to review challenges concerning substantive and procedural issues relating to unfair labor practice decisions under the NLRA, the Landrum-Griffin Act, or the Railway Labor Act; the few cases involving a statutory challenge to other statutes were excluded since the NLRB has no special expertise to review those decisions.[231] The database, however, included cases where the courts opined on how interpretation of the NLRA interplays with another federal statute. For example, in several cases, courts were tasked to explore whether a statute on Native American rights impacted how the Board interpreted whether or not someone was an "employee" under the NLRA.[232] In another series of cases, courts analyzed the interplay between the Federal Arbitration Act or the Immigration and Naturalization Act and the NLRA to assess how a statutory term in the NLRA should be construed.[233]

Although time-consuming, reading the cases was the most reliable way of adequately capturing the cases where the courts were reviewing a statutory interpretation. In order to ensure that no obvious cases were missed, I conducted additional searches on Westlaw as well as Lexis Advance to separately analyze a

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cases in which the court ruled in favor of the employer or against the union were considered anti-employee decisions. Cases brought by an employee against a union for unfair practices were coded as pro-employee if the court decided in favor of the employee.

229.   These variables include: whether a union was involved, the procedural posture of the union (i.e., if the union intervened in the case or was a petitioner or respondent), the procedural posture of the case (i.e., whether the case concerned review of the NLRB decision or whether the NLRB General Counsel was simply moving to enforce the decision, or whether the case was a combination of both), the state in which the facts occurred, the main industry of the case (i.e., agriculture, health, etc.), and the number of cases that were part of the appeal, among other issues. In addition, it was also noted if the case exclusively concerned appeal of the remedy (rather than the merits of the unfair labor practice decision).

230.   Intercoder reliability refers to the likelihood that different coders will give the same score to the same document. *See generally* Matthew Lombard, Jennifer Snyder-Duch & Cheryl Campanella Bracken, *Content Analysis in Mass Communication: Assessment and Reporting of Intercoder Reliability*, 28 HUM. COMMC'N. RSCH. 587 (2002) (discussing the concept of intercoder reliability).

231.   Courts reviewing NLRB decisions review the interpretation of a statute other than its governing statute de novo. *See, e.g.*, Delta Sandblasting Co. v. NLRB, 969 F.3d 957, 965–66 (9th Cir. 2020) (applying de novo review on whether collective bargaining agreement violated section 302 of the Labor Management Relations Act, 29 U.S.C.A. § 186(a)). In addition, the few decisions concerning review of NLRB regulations were excluded.

232.   *See, e.g.*, San Manuel Indian Bingo & Casino v. NLRB, 475 F.3d 1306 (D.C. Cir. 2007); Pauma v. NLRB, 888 F.3d 1066 (9th Cir. 2018).

233.   *See, e.g.*, Agri Processor Co. v. NLRB, 514 F.3d 1 (D.C. Cir. 2008) (interpreting the term "alien"); NLRB v. Kolkka, 170 F.3d 937 (9th Cir. 1999) (same).

subset of the over 2,500 cases that were most likely to concern statutory interpretation.[234] In addition to using the search string used by Bruhl in his analysis of statutory interpretation of all issues,[235] I separately undertook a search for all cases in which the majority opinion mentioned "*Chevron*," "deference," "statutory interpretation," or "statutory construction." In addition, I looked particularly at all cases mentioning legislative history, the *Congressional Record*, or congressional committees, as well as any specific mention of language or substantive canons.[236] Certain tools, such as discovering the use of precedent or the use of policy or practical implications, required "human intervention" and were discovered through the careful reading of all cases that were identified as involving statutory interpretation.[237]

Many scholars undertaking empirical analysis of statutory interpretation and *Chevron* deference create their universe of cases by relying on whether the court actually cited the *Chevron* decision.[238] This method is consistent and straightforward. However, relying exclusively on whether or not *Chevron* was expressly cited results in both an underinclusive and overinclusive representation of how *Chevron* is employed in statutory interpretation cases. This is particularly the case concerning NLRB decisions because appellate courts analyzing the NLRA rarely cite *Chevron* even when it is clear they are interpreting a statute and that *Chevron* is applicable. Of all the statutory interpretation cases, courts expressly cited and applied *Chevron* only about one-quarter of the time.[239] In some cases, the court applied the *Chevron* standard yet cited another Supreme Court case that cited or referenced *Chevron*.[240] As such, any coding decision relying on whether the court expressly cited *Chevron* would not have found those cases. Further, cases that cited *Chevron* versus those that did not may differ in some fundamental ways. For example, a court that

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234.   Specifically, I searched for all cases between January 1, 1994, and January 19, 2021, that contained the following words: "canons," "legislative history," "Senate," "Congress," "congressional committees," "legislative history," "statutory interpretation," "statutory construction," "Chevron," "permissible construction," "reasonable construction," "permissible interpretation," "reasonable interpretation," as well as the names of the Latin-named canons and substantive canons like "constitutional avoidance," "extraterritoriality," "Indian canon," and canons that call for consultation of the common law.

235.   For the language and Latin canons, Bruhl ran the following search in Westlaw: "adv: OP(((expressio or expresio or inclusio or "last antecedent" or "noscitur a sociis" or "ejusdem generis") /50 (statut! or act or legislat! or congress! or U.S.C.)) or ((expressio or expresio or inclusio or "last antecedent" or "noscitur a sociis" or "ejusdem generis") /p (statut! or act or legislat! or congress! or U.S.C.))) and DA([year])." Bruhl, *Statutory Interpretation*, *supra* note 17, at 30–31. For the *Congressional Record*, he ran the following search: "adv: OP("Cong.Rec." or "Cong. Rec." or "Congressional Record") and OP((statut! or legislat! or congress! or U.S.C.) /s (interpret! or constru! or meaning or reading)) and DA([year])." *Id.* at 31.

236.   Some of these searches yielded irrelevant results. For example, the textual canon of *ejusdem generis* often came up in cases in which the courts engaged in contract, not statutory, interpretation.

237.   Bruhl, *Statutory Interpretation*, *supra* note 17, at 31–32.

238.   *See generally* Barnett & Walker, *supra* note 7.

239.   There were six statutory interpretation cases where *Chevron* was cited in passing but not applied.

240.   *See* sources cited *infra* note 253.

mentioned but then declined to apply *Chevron* may be already more willing to reject the agency's interpretation.[241]

In addition, scholars have used other methods to discern whether *Chevron* applied. Salmanowitz and Spamann employed the methodological innovation of using the litigant's and Solicitor General's briefs.[242] Instead of relying on the researchers to decide applicability based on case facts as Eskridge and Baer did, they reviewed the briefs of the cases from the Eskridge and Baer study to minimize coding errors because brief writers would have the "incentive, expertise, and resources to get it right."[243] Their study concerned analysis of 191 Supreme Court cases.[244] Looking carefully at the briefs, they concluded that the Supreme Court should not have even applied *Chevron* in the majority of cases studied by Eskridge and Baer.[245] This Article's study, however, concerns analysis of over 2,500 appellate court opinions whose briefs are often not as well-done as Supreme Court briefs (with some even written pro se).[246] In addition, appellate court briefs are not as readily available to those without access to advanced versions of Westlaw or Lexis Advance. These data accessibility issues, as well as the nature and breadth of the present study, precluded use of this method to check the robustness of whether the case concerned statutory interpretation or *Chevron* applicability.[247] Moreover, study of the appellate courts differs from study of the Supreme Court. Instead of using the briefs to guide whether *Chevron* should have applied, I used the NLRB decisions to inform narrowing the pool of cases where *Chevron* was or should have been cited or applied. Given that my prior study of the NLRB's statutory interpretations identified all the published cases where the NLRB interpreted a statute,[248] I was able to follow those cases through the appellate courts to see how the courts ultimately reviewed them. This would have minimized errors, because I relied on both the agency and court decisions to discern whether the case concerned a statutory interpretation issue that merited *Chevron* deference. In addition, unlike both the Eskridge and Baer study and the Salmanowitz and Spamann analysis, my study focused on only adjudications where it is more clear whether *Chevron* applied or not.[249] Still, relying solely on the decisions instead of the briefs may result in a

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241. Hickman & Hahn, *supra* note 10, at 627.

242. Salmanowitz & Spamann, *supra* note 167, at 83.

243. *Id.*

244. *Id.* at 81.

245. *Id.* at 83.

246. However, like the Solicitor General in Supreme Courts briefs, one would expect that the General Counsel at the NLRB would have a similar incentive to "argue for deference when deference is actually due." *Id.* at 83–84 (making arguments about the Solicitor General).

247. For instance, looking at the briefs would allow the researcher to discern whether cases in which the appellate court issued a summary opinion involved a statutory interpretation issue.

248. Semet, *supra* note 24, at 2282.

249. In addition to agency adjudications, courts are also asked to review agency interpretations made through rulemaking, as well as interpretations from policy statements, agency manuals, and enforcement guidelines, among other sources. Salmanowitz & Spamann, *supra* note 167, at 83. The present analysis focused exclusively on adjudications. In United States v. Mead, 533 U.S. 218, 226–27

selection effect, because it could be that the agency or the parties did not raise *Chevron* as an issue. Judges differ in their proclivity to apply *Chevron*, with debate ranging on whether *Chevron* can be "waived" by the parties if not raised.[250] Some judges, for example, argue that agencies must raise *Chevron* as a legal argument and that their failure to do so means that the court need not address *Chevron*'s applicability.[251] The current study and the Salmanowitz and Spamann study underscore the importance of engaging more thoroughly with context to discern whether *Chevron* applies, rather than using methods that simply look to whether courts simply cite *Chevron*.[252]

To code for the deference regime, I first coded all cases in which *Chevron* or the *Chevron* two-step framework was expressly mentioned and employed in the analysis. This resulted in only fifty-six interpretations over the time frame under study that expressly applied the *Chevron* two-step framework. I then read the remaining cases, focusing specifically on the several hundred cases in which the courts applied a reasonableness analysis without actually citing the *Chevron* decision[253] or citing a Supreme Court case that in turn cited *Chevron*.[254] In many of the cases where *Chevron* was not cited, the courts contended that they would uphold the NLRB decision if it was "permissible,"[255] "rational and consistent,"[256] "reasonably defensible,"[257] or generally "reasonable."[258] Other cases used an

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(2001), the Supreme Court set forth the standard for when *Chevron* applies. As Salmanowitz and Spamann note, "this dividing line is notoriously difficult to draw." Salmanowitz & Spamann, *supra* note 167, at 83.

250.   Hickman & Hahn, *supra* note 10, at 641–42 (noting that *Chevron* can be more readily waived if considered a "rule of decision" versus if it is a "standard of review" or a "canon").

251.   *Id.* at 616.

252.   Over the course of five years, I have personally read over 7,000 Board decisions and 2,500 appellate court decisions. Although others may have a different judgment call on whether the case concerned statutory interpretation or *Chevron*, my familiarity with this particular agency's decisions plus the fact that the NLRB largely only interprets one statute that has rarely been updated over a limited range of issues results in the analysis being more straightforward than it might be if reviewing the decisions of an agency that interprets many statutes or an agency whose governing statute is constantly changing.

253.   For example, in *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 787–88 (1996), the Court cited, among other cases, *Beth Israel Hosp. v. NLRB*, 473 U.S. 483, 500–01 (1978), instead of *Chevron*. In *Beth Israel*, the Court stated "[t]he judicial role is narrow," and that "[t]he rule which the Board adopts is judicially reviewable for consistency with the Act, and for rationality." *Beth Israel*, 437 U.S. at 501; *see also* Eskridge & Baer, *supra* note 14, at 1106–08 (noting continued citation of non-*Chevron* deference regimes in labor cases and how in "specialized practices" like labor, courts may "prefer their particular deference precedents and continue to cite them, often leading the [Supreme] Court to follow suit").

254.   *See, e.g.*, NLRB v. United Food & Com. Workers Union, Local 23, 484 U.S. 112, 123 (1987) (quoting *Chevron*, 467 U.S. at 843).

255.   *Id.*

256.   *See, e.g.*, NLRB v. General Teamsters Local No. 439, 175 F.3d 1173, 1176 (9th Cir. 1999); Media General Operations, Inc. v. NLRB, 560 F.3d 181, 197 (4th Cir. 2009).

257.   *See, e.g.*, Miss. Power v. NLRB, 284 F.3d 605, 612 (5th Cir. 2002).

258.   *See, e.g.*, Cellular Sales of Mo., LLC v. NLRB, 824 F.3d 772, 775 (8th Cir. 2016).

"arbitrar[y] and capricious[]" test.[259] Regardless of whether or not *Chevron* applies, all NLRB adjudications are subject to review under the APA and, in particular, are reviewed to determine whether the agency's decision is "arbitrary and capricious."[260] While there is debate over the interrelationship between the *Chevron* test and "arbitrary and capricious" review, I included the four cases that cited only the "arbitrary and capricious" standard as applying a *Chevron*-like "reasonableness" analysis.[261] All told, approximately 120 interpretations—more than the cases that actually cited *Chevron* and a majority of the cases involving statutory interpretation—used reasonableness terminology instead of citing *Chevron*. I then combined these decisions with the fifty-six interpretations that specifically invoked *Chevron* to form the corpus of cases where courts either expressly cited *Chevron* or used a reasonableness analysis (176 total interpretations). For most of my analysis, I collectively referred to this group of cases as well as the cases that expressly cited *Chevron* as using a *Chevron*-like "reasonableness" framework. In alternative specifications, I coded the non-*Chevron*-citing cases as applying a non-*Chevron* deference regime as one could argue that the court's application of a "reasonableness" analysis is a less stringent standard than the express two-step *Chevron* analysis. Moreover, I also wanted to test whether there were any patterns between the choice of statutory method and the choice to expressly cite *Chevron*, so it was important to differentiate these cases: those where *Chevron* was expressly invoked and those in which it was invoked in spirit through a reasonableness analysis.

In addition, there was a series of cases in which the courts either did not note the standard or where the courts inserted standard language about the great deal of deference given to the Board given its expertise in the field; the courts, however, did not expressly mention a reasonableness or permissiveness analysis in these cases. For some of these cases, it was clear that the issue concerned a matter of statutory interpretation, yet the courts chose to rely on the "substantial evidence" analysis to disguise their decision to effectively overturn the Board's statutory interpretation.[262] In other words, the court chose not to note that *Chevron* should have applied to the case. In another group of cases where the courts failed to note a standard or even

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259. *See, e.g.*, Raymond F. Kravis Ctr. for Performing Arts, Inc. v. NLRB, 550 F.3d 1183, 1187 (D.C. Cir. 2008).

260. Scholars debate how intertwined the arbitrary and capricious standard is with *Chevron* step two. *See, e.g.*, Elizabeth V. Foote, *Statutory Interpretation or Public Administration: How* Chevron *Misconceives the Function of Agencies and Why It Matters*, 59 ADMIN. L. REV. 673, 710 (2007) (describing how certain scholars have argued that "arbitrary and capricious" is the appropriate standard for reasonableness under *Chevron* step two, and citing recent decisions by lower federal courts and the Supreme Court embracing this view); Ronald M. Levin, *The Anatomy of* Chevron: *Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253, 1254 (1997) (arguing that the "arbitrary and capricious" standard and reasonableness under *Chevron* "should be deemed not just overlapping, but identical").

261. *See, e.g.*, Hickman & Hahn, *supra* note 10, at 617–18 (noting that *Chevron* is an "evolving judicial construction of the . . . [APA] § 702(a)(A) arbitrary and capricious standard"). The results were the same irrespective of how these cases were characterized.

262. *See, e.g.*, Dorsey Trailers, Inc. v. NLRB, 233 F.3d 831, 840–41 (4th Cir. 2000).

mention application of a substantial evidence standard, it was clear from the nature of the opinion that the courts chose to ignore application of *Chevron* because the courts went on to reverse the decision on policymaking grounds, often to the chagrin of the dissenters, who argued that *Chevron* should apply.[263] In still other cases, the courts made clear that they were applying "traditional" deference rather than *Chevron* deference, or that they were reviewing the case de novo.[264] In a final category, the courts made clear that they actually applied *less* deference due to the Board's history of biased decision making in favor of labor or due to the inconsistent nature of the Board's decisions.[265] In all, there were approximately thirty-three statutory interpretations coded with a non-*Chevron*/non-reasonableness standard.

To make sure I did not mistake any cases that should properly be included as statutory interpretation cases, I also conducted other Westlaw and Lexis Advance searches. After having read over 7,000 NLRB cases previously for my other study on NLRB agency statutory interpretation published in the *Minnesota Law Review*, it became clear to me that there are about a dozen issues under the NLRA for which it was common for the Board to engage in statutory interpretation. For example, I searched cases in which the courts were asked to rule on whether or not someone was a "supervisor" or an "employee," or whether a particular entity constituted a "labor organization," among other terms which are listed in the statute.[266] I did not include in the corpus for review decisions in which the courts merely applied established court or Board precedent and then based their decision on whether "substantial evidence" supported the agency's decision. For instance, the Board has an established test to determine whether or not someone (often a nurse) was a "supervisor" under the Act.[267] I included appellate court cases in which the employer or other entity challenged the Board's statutory construction of the term "supervisor." I did not include cases in which the parties either conceded or did not contest the statutory interpretation and simply asked the court to rule whether, based on established Board and/or circuit precedents, "substantial evidence" supported the Board's decision on whether they met the requirements of being a supervisor as a factual matter.

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263.   In all there were thirty-three statutory interpretations where there was a companion dissent case. While some of these cases centered on whether *Chevron* should apply or not, most involved debates about application of law to facts. There were twenty-one additional cases where the dissent bickered about the standard of review and the majority's application or non-application of *Chevron*.

264.   *See, e.g.*, Bob Evans Farms, Inc. v. NLRB, 163 F.3d 1012, 1020 (7th Cir. 1998).

265.   *See, e.g.*, Spentonbush/Red Star Companies v. NLRB, 106 F.3d 484, 492 (2d Cir. 1997).

266.   *See, e.g.*, Entergy Miss., Inc. v. NLRB, 810 F.3d 287, 291 (5th Cir. 2015) ("employee"); Glenmark Associates, Inc. v. NLRB, 147 F.3d 333, 334–35 (4th Cir. 1998) ("supervisor"); Pikeville United Methodist Hosp. of Ky., Inc. v. United Steelworkers, 109 F.3d 1146, 1151 (6th Cir. 1997) ("political subdivision"); Providence Alaska Med. Ctr. v. NLRB, 121 F.3d 548, 550 (9th Cir. 1997) ("supervisor").

267.   *See, e.g.*, NLRB v. Ky. River Comm. Care, Inc., 532 U.S. 706, 712–13 (2001) (noting test for whether nurses qualify as "supervisors").

The initial search was overinclusive to some extent. I picked up a fair share of contract interpretation cases in which the courts cited language canons (such as *ejusdem generis*) to assist the courts in determining how a particular collective bargaining agreement should be reviewed; these cases were eliminated.[268] Because I wanted to restrict the analysis to only those cases heard by the NLRB, I eliminated cases in which a party or the NLRB sought an injunction at a district court that was later heard on appeal. I also generally excluded unpublished cases, though I included a handful of unpublished cases where the court engaged in new statutory interpretation analysis.[269]

The study is by necessity limited to only cases with an opinion available on Westlaw or Lexis Advance. Scholars have found these services offer incomplete coverage of federal appellate decisions.[270] There are many cases in which the court either summarily affirmed the Board or in which the court only issued a short opinion, citing *Chevron* but not discussing the statutory interpretation issue. Thus, the study is underinclusive of the extent to which courts engage in statutory interpretation or apply *Chevron*. As a further robustness check, as part of the *Minnesota Law Review* project, I created a separate database of all cases in which the Board engaged in statutory interpretation.[271] I went back and looked at the appellate court follow-up to those cases to see if, after the creation of the database using Westlaw and Lexis Advance searches, any cases remained outstanding. I did not find any additional cases.

This database differs from databases analyzing hierarchically Supreme Court/ appellate court/district court interactions in some significant ways. First, it is simply not possible to have a unique "matched" pair for each Board/court decision, as was done, for example, in the Bruhl analyses.[272] This is because the Board may interpret the statute in a single Board decision (usually by the five-member Board), and then that very same interpretation issue from a single Board decision was litigated in multiple appellate courts under different fact patterns. For example, the Board may interpret who qualifies as an "employee" under the NLRA in a single Board decision. Other NLRB cases then applied that interpretation, and those cases were then appealed to various circuit courts across the country. Technically, any match could be made between the NLRB case that simply applied the five-member Board's decision and the appellate court case. But

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268.   Appellate courts review contract interpretation de novo.

269.   Bruhl included unpublished opinions in his analysis. As he notes, since there is a choice on whether or not to publish a decision (and publication practices may vary among courts), considering just published decisions may be limiting as far as the conclusions one may draw. Bruhl, *Statutory Interpretation*, *supra* note 17, at 34–35. One might expect the methods used in unpublished decisions to differ from those in published ones. For example, except for the use of precedent, one might expect that the use of all other methods to generally be less in unpublished decisions. *Id.* at 25.

270.   *See, e.g.*, Merritt E. McAlister, *Missing Decisions*, 169 U. PA. L. REV. 1101, 1101 (2021) (noting that at least 25% of merits terminations are missing from commercial databases).

271.   Semet, *supra* note 24, at 2281–87.

272.   *Cf.* Bruhl, *Statutory Interpretation*, *supra* note 17, at 26, 46 (applying matched pair method).

because the NLRB case that did the interpretation decision was not necessarily the same case that was appealed, it did not make sense to do such matches because one could be matching a Board decision where the Board did not do a statutory interpretation with an appellate court case that did. Rather, any comparison would have to be made between the Board decision that actually did the statutory interpretation (often by the five-member Board on a case under a different factual situation) and the appellate court decision. This method would exclude many appellate court cases that actually analyzed a statutory interpretation. In essence, to match a case, statutory interpretations by the Board itself, rather than individual cases, would have to be connected. In addition, it was simply not possible to discern the statutory interpretation of some NLRB decisions that were appealed. Sometimes the Board would summarily affirm the ALJ decision, so it was impossible to know the grounds that they relied on. In others, cases reviewed by the appellate court referred to the five-member Board decision decided by summary judgment, so there is no clear statutory interpretation to code. As such, it would be difficult to create an accurate matched-corpus set to compare interpretations between the agency and the Board.

However, unlike other statutory analyses, which focus exclusively on the hierarchical nature of decision making, this database allows the researcher to analyze the statutory interpretations in a vertical fashion. While this may be a unique issue for the NLRB, the same statutory interpretation issue appeared again and again in different circuits. As noted above, oftentimes, it was the five-member Board that interpreted the statute, which was often applied by three-member panels. Those three-member panel decisions were then appealed by the losing party on the merits and/or by the General Counsel for enforcement. Courts were commonly asked to review whether someone was an "employee" or a "supervisor," or whether the entity in question met the statutory definition of a "labor organization," among other issues. There may only be one or two NLRB decisions detailing the statutory interpretation, which then yielded dozens of applicable circuit court decisions in different circuits, many with contrasting outcomes, statutory methods, and even applications of different deference regimes. The issue on who qualifies as an "employee" could then be "matched" with a case in the Fifth Circuit, the First Circuit, and the Ninth Circuit, for example. The more liberal Ninth Circuit often clashed with the more conservative Fifth Circuit in this regard. As discussed further, it is surprising the degree to which different appellate panels applied different statutory methods and deference regimes to analyze the same statutory issue.

Other complications arise in the case selection process. Some cases concern a statutory interpretation issue that did not involve the merits of the unfair labor practice dispute, and thus the statutory interpretation was not even discussed in the NLRB decision (an issue not uncommon because many statutory interpretation cases at the appellate court are heard on summary judgment at the Board). These cases primarily concerned section 3 of the NLRA and whether a two-member Board

consisted of a "quorum,"[273] an issue that came up frequently during the Obama administration when it became increasingly difficult for President Obama to appoint Board members.[274] There were nearly a half-dozen appellate court cases concerning this issue, with some courts resolving the issue by reference to the plain text and other courts arguing that the legislative history indicated the opposite conclusion. All of the "quorum" cases that actually considered a statutory interpretation were included in the analysis because this subset of cases reflects the diversity of courts' decision-making styles.[275] The few cases concerning statutory interpretation issues involving jurisdiction or remedies for an unfair labor practice violation under the NLRA were also included.

In addition, the analysis included only unique interpretations, and if the court decided multiple statutory issues, each was coded as a separate observation.[276] In some cases, the appellate court resolved the statutory issue in question by claiming that the Board's interpretation was barred by existing circuit precedent.[277] Although the Board should abide by circuit precedent, it has a long-standing practice of nonacquiescence to appellate court decision making, and thus it often ignores what should be controlling circuit precedent.[278] As an example, one judge stated that she would be open to affirming the Board's decision but she was bound by circuit precedent.[279] I included the first applicable circuit precedent in which the court reviewed the statute but did not include subsequent cases that merely referred to the first circuit precedent as controlling the outcome of the case because the case

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273. *See, e.g.*, UC Health v. NLRB, 803 F.3d 669 (D.C. Cir. 2015); SSC Mystic Operating Co. v. NLRB, 801 F.3d 302 (D.C. Cir. 2015).

274. *See, e.g.*, Daniel Fisher, *Obama Loses on NLRB Recess Appointments, But Employers Unlikely to Win*, FORBES (Jan. 26, 2014, 12:08 PM), https://www.forbes.com/sites/danielfisher/2014/06/26/obama-loses-on-nlrb-recess-appointments-but-employers-unlikely-to-win/?sh=301d7ea11941 [https://perma.cc/4LAE-PAQF]. The Supreme Court addressed this issue in *NLRB v. Noel Canning*, 573 U.S. 513 (2014).

275. By contrast, the parts of cases in which courts were tasked to analyze constitutional questions of the Recess Clause were not included. *See, e.g.*, D.R. Horton v. NLRB, 737 F.3d 344 (5th Cir. 2013) (failing to analyze the Recess Clause argument).

276. In all, eight cases had two statutory interpretations and were included twice in the dataset.

277. *See, e.g.*, Caremore, Inc. v. NLRB, 129 F.3d 365, 371 (6th Cir. 1997) ("Because the NLRB continues to misapprehend both the law and its own place in the legal system, today we state for the fifth time that individuals who possess authority in any area listed in Section 2(11) of the NLRA . . . , and use independent judgment in the exercise of that authority, are supervisors within the meaning of the NLRA.").

278. The Fifth Circuit is particularly irked by the Board's refusal to abide by its decision in *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013). Cases where the Fifth Circuit complained that the Board disregarded precedent by not applying *Horton* are excluded because the statutory interpretation at issue in *Horton* was already included in the analysis. *See, e.g.*, Murphy Oil USA, Inc. v. NLRB, 808 F.3d 1013 (5th Cir. 2015), *aff'd sub nom.* Epic Systems Corp. v. Lewis, 138 S. Ct. 1612 (2018).

279. *See, e.g.*, Edgewood Nursing Ctr., Inc. v. NLRB, 142 F.3d 433 (6th Cir. 1998) (Moore, J., concurring) (noting that the court should defer under *Chevron* but was bound by circuit precedent).

did not involve new statutory interpretations from that particular circuit.[280] But if it was a new statutory interpretation done by another circuit, I included it.

There are other limitations to the analysis. By necessity, the analysis is descriptive: the relatively small sample size plus the inability to properly assess the causal direction prevent one from making any kind of causal statement. A judge may invoke a particular tool resulting in a given decision, but it may be the case that judges are in fact selecting what their decision will be before selecting what statutory methods they will use to justify said decision.[281] Furthermore, the "triggering" condition for the invocation of *Chevron* is supposed to be whether the given text is "ambiguous."[282] Thus, to invoke *Chevron* deference formally, the judge must first decide that the text is "ambiguous," a nebulous standard that judges may interpret in different ways, with judges differing on how they interpreted the plain meaning of the text.[283]

2. Coding of Statutory Methods

I also coded each case for the statutory methods used in the majority opinion.[284] Choice of statutory method required some judgment calls. A method can be a "passing mention" or a "substantive deflection . . . of no probative value," or be cited as being "determinative" in the case.[285] For the study of majority opinions, I included the source if it "contributed in a meaningful way to the majority's justification for its holding."[286] This obviously injected some subjectivity into the analysis. I also included "negative" use of a canon in the totals, such as if the judge discounted the use of legislative history.[287] As Bruhl noted, inclusion of negative use indicates that the given tool "is a recognized part of the court's interpretive vocabulary."[288] Having read the decisions and used variousWestlaw or Lexis Advance search strings to confirm my reading, I found that the denominator was simply the universe of all statutory interpretation issues.[289]

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280.   This often happened in cases concerning use of the term "supervisor." *See, e.g.*, *Caremore*, 129 F.3d at 369 (applying circuit precedent for interpreting "supervisor"). The number of such cases was about a dozen.

281.   Bruhl, *Statutory Interpretation*, *supra* note 17, at 28.

282.   Kavanaugh, *supra* note 9, at 2135–36 (noting that legislative history, the avoidance canon, and *Chevron* deference are triggered by an ambiguity finding).

283.   Bruhl, *Statutory Interpretation*, *supra* note 17, at 28. Indeed, there were many cases in this very dataset where one panel of judges found the words of a statute "ambiguous" while another panel of judges interpreted the same words in the same statute "plain."

284.   *Cf. id.* at 32 (analyzing both dissenting and majority opinions in counts).

285.   Brudney & Baum, *Two Roads*, *supra* note 48, at 839.

286.   *Id.*

287.   *See, e.g.*, Bruhl, *Statutory Interpretation*, *supra* note 17, at 32 (including negative use of canons); *see also* Mendelson, *supra* note 101, at 98 (noting that "questions of a canon's applicability are often difficult ones," as discussion of a canon, even if not applied, still clarifies what the canon is).

288.   Bruhl, *Statutory Interpretation*, *supra* note 17, at 32.

289.   Bruhl uses a similar denominator, having derived it from a Westlaw search string, to capture all cases that "meaningfully engage with statutory interpretation." *Id.* at 32 n.120.

To come up with the list of statutory tools, I relied on what other scholars in the field have used as well as what I used in my prior study of NLRB agency interpretation.[290] Meant to be "policy-neutral," textual canons refer to "grammatical and punctuation rules, as well as rules that assume internal consistency and nonredundancy in textual drafting."[291] Because use of Latin canons by the exact name was so rare, I collapsed their use into one category, "language canons," to include linguistic canons such as *ejusdem generis*, *noscitur a sociis*, *expressio unius*, and the rule of the last antecedent.[292] These so-called linguistic or language canons are meant to impose some sort of consistency in congressional drafting.[293] In addition, language canons beyond sentence-based canons included reliance on structural canons, such as the whole act rule, the whole code rule,[294] the whole text rule, or *in pari materia*. I also included as language canons assumptions about how Congress drafts legislation, that it does so "deliberately, coherently, consistently, and without redundancy."[295] The rule against surplusage or redundancy was separately coded since it occurred often. In NLRB cases, courts commonly relied on the rule against redundancy by assuming all language in the text was meaningful and that Congress deliberately paid attention to how words were structured, even if the same words were used somewhere else in the statute.[296] In essence, courts often made the assumption that excess word choices were never meant for clarity but that they had a meaning that needed to be discerned.[297] Whether or not the court cited a legal or lay dictionary was also noted, though use of dictionaries was rare.

Analysis also included whether a particular Latin canon was used in spirit. Hardly any of the Latin canons were invoked by their Latin name. Instead, a case may be coded as invoking *expressio unius* not only if the canon was expressly named but also if the court made a contrast between different sections of a law or between different laws.[298] Cases in which the court referred to the "structure" of the Act as

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290. *Id.* at 36–37; Semet, *supra* note 24, at 2259 (analyzing NLRB statutory interpretation); Brudney & Ditslear, *Warp and Woof*, *supra* note 85, at 1249 (discussing "ten distinct interpretive resources on which the Court relies with some frequency").

291. Mendelson, *supra* note 101, at 80.

292. Brudney & Ditslear, *Warp and Woof*, *supra* note 85, at 1254 n.85.

293. Mendelson, *supra* note 101, at 80–82.

294. The use of the "whole act rule" includes any reference to the presumption of consistent usage, meaningful variation of similar statutory terms, as well as *in pari materia*. Bruhl, *Statutory Interpretation*, *supra* note 17, at 36. The whole act rule calls for the same statutory term to be used consistently throughout the whole statute at issue, while the whole code rule makes the same set of assumptions using the entire U.S. Code. ANTONIN SCALIA & BRYAN GARDNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 168, 172 (2012). For instance, the court may contend that the same term used in another statute such as Title VII should mean the same when interpreting the NLRA. For more on the whole code rule see Anita S. Krishnakumar, *Cracking the Whole Code Rule*, 96 N.Y.U. L. REV. 76 (2021) (providing the first empirical analysis of how the Supreme Court uses whole code comparisons based on statutory cases decided during the Roberts Court era).

295. Mendelson, *supra* note 101, at 81.

296. *See* SCALIA & GARDNER, *supra* note 294, at 107–09; Mendelson, *supra* note 101, at 80.

297. *See* Mendelson, *supra* note 101, at 81.

298. Bruhl, *Statutory Interpretation*, *supra* note 17, at 37 n.136 (noting use of *expressio unius* if cited); Mendelson, *supra* note 101, at 110 (including broader use of canons).

influencing interpretation or where the court compared one section with other sections of the same Act were coded as referring to the "whole text rule."[299] While collectively, slightly less than one-third of cases used one or more of these methods, overall, each particular language method was used only a handful of times over the course of the database.[300]

In addition, I also coded for substantive canons, which were not used frequently. Unlike language canons, substantive canons do not reference semantic or linguistic trends but are tools to explain how a court may try to "harmonize statutory text with judicially identified constitutional principles, judicially perceived statutory objectives, or preenactment common law practices."[301] I coded for the use of substantive canons, such as the presumption against implied repeal, the construction of a statute in favor of Native Americans, the constitutional avoidance canon, and the like. I separately coded for the clear statement rule (the most common substantive canon employed in the database that instructs courts not to interpret a statute in a particular way unless the statute makes clear its intent for a given result) as well as congressional awareness of past practices.[302] The few cases in which the issue rested entirely on constitutional grounds were excluded while cases having both constitutional and statutory issues were included, with only the statutory issue being coded.

Source and purpose of legislative history were also documented. The source of the legislative history was coded as referring to either the *Congressional Record*, the House or Senate conference reports, or the House or Senate committee reports or hearings, as well as when general references were made to legislative history as a source (so-called "indirect" references to legislative history where the court contends that legislative history does not "limit" the court's interpretation of a term or that it provides no guidance on how to interpret the term). I also coded for a statute's drafting history (its "vertical history"), such as if the court discussed the proposed version of the statute or compared versions of the statute as proposed by the House or Senate, as well as the bill's drafting and amendment history.[303] However, in my analysis of legislative history, I eliminated analysis of the "indirect" methods when the court failed to cite a specific congressional source. In some

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299.   SCALIA & GARDNER, *supra* note 294, at 168; Mendelson, *supra* note 101, at 91 n.94.

300.   For example, rule of the last antecedent or "no elephants in mouseholes" was only used once. Because so few canons were used multiple times, it was not a worthwhile exercise to separate them out. Moreover, as Bruhl points out, some canons are new and are used much more at the Supreme Court, so it would be unlikely to find much use in this sample. For example, "no elephants in mouseholes" only started being used in 2001 and had been primarily used by the Supreme Court. Bruhl, *Statutory Interpretation*, *supra* note 17, at 65.

301.   Brudney & Ditslear, *Warp and Woof*, *supra* note 85, at 1240.

302.   Gluck & Bressman, *Part I*, *supra* note 75, at 942–43.

303.   As Brudney and Baum point out, as compared to the Supreme Court, which uses "vertical history" that focuses on modifications in the text or changes in the bill, legislative history used by appellate courts focuses more on traditional forms of legislative history, such as conference or committee reports, and is primarily used "to resolve ambiguities, confirm apparent meaning, or simply explicate legislative intent." Brudney & Baum, *Protean*, *supra* note 16, at 682.

instances, as noted above, the court incorporated legislative history in the analysis by stating that legislative history did not indicate any limitation to a given statutory term or that legislative history was consulted and offered no guidance.

I also coded for precedent, which was invoked to some extent in almost every single case, but which was determinative in far fewer cases. Precedent can take multiple forms; it can be "binding authority, persuasive authority, a source of analogies, a source for authoritative statements of statutory purposes, a source for interpretive principles, and more."[304] I also coded for mentions of policy implications (such as if the reform would further "industrial peace,"[305] an aim of the NLRA) as well as practical implications of the court's ruling, including references to absurdity.[306] Practical consequences also referred to the ruling's workability, the effect a ruling would have on the workplace, and the overall impact the ruling could have on the labor force.[307]

3. Coding for Judge Demographics

I created variables based on the partisan composition of the appellate panel hearing the case. Based on the party of the president who appointed the judge, each decision was coded with a party panel composition type: DDD (all Democratic), DDR (two Democratic and one Republican), RRD (two Republican and one Democratic), and RRR (all Republican).[308] Given the time frame under study, 66.5% of panels were Republican-majority, and 70.0% were ideologically mixed (DDR or RRD panels).

III. ANALYSIS OF STATUTORY METHODS AND DEFERENCE

A. Statutory Methods

The analysis starts with painting a picture of how often appellate courts used each interpretive method in the 201 cases under study involving 209 instances of statutory interpretation.[309] Table 1 and Figure 1 show the frequency in the majority

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304. Bruhl, *Statutory Interpretation*, *supra* note 17, at 71.

305. 29 U.S.C. § 151.

306. Krishnakumar, *supra* note 74, at 922 (coding "practical consequences" as an interpretive tool).

307. Semet, *supra* note 24, at 2286–87.

308. The Federal Judicial Center maintains a database of biographical directory of federal judges. *Biographical Directory of Article III Federal Judges, 1789–Present*, FED. JUD. CTR., https://www.fjc.gov/history/judges/biographical-directory-article-iii-federal-judges-about-directory [https://perma.cc/YF3D-QBTH] (last visited Feb. 4, 2022).

309. Unless otherwise noted, all results are not statistically significant. The conventional level of significance is at 95% confidence or higher. Since this is solely a descriptive piece and I am not seeking to make definitive claims about differences in use, I also note where results reach 90% confidence. Results here are denoted with one asterisk for 90% confidence, two asterisks for 95% confidence, and three asterisks for 99% confidence. In the tables, statistical significance is read by looking down at pairs of rows in multi-column tables (such as comparing Democrat-majority versus Republican-majority courts) (Tables 1, and Tables 8 through 10), or by looking across columns in the

opinion of each of the main types of interpretive sources.[310] Notably, the data does not tell a clear story; all interpretive methods were used, with the data indicating that such factors as the presidential era of the appellate court decision, the pro-employee direction of the Board or the appellate court interpretation, or the partisanship of the appeals court majority, generally bore little relationship to use of most of the statutory methods. But there were some patterns of note. As noted in Table 1, column 2, appellate panels split ideologically (DDR or RRD panels) used plain text (11.0%) at a higher rate than politically homogenous panels (DDD or RRR panels) who used plain text less (1.6%), a difference statistically significant at 95% confidence. Plain text reached its height in usage of 17.0% for cases decided during the Obama presidency, which was higher than usage during other presidencies to a statistically significant degree (though only at 90% confidence). The citation of text, column 3, also increased over time, as text was cited 85.7% during the Trump presidency, and 89.6% during the Obama presidency, compared to just 71.8% during the Clinton presidency, and 76.2% during the Bush II presidency, a result statistically significant but again only at 90% confidence. Substantive canons, column 6, were used most often to review anti-employee Board interpretations (17.2%) than pro-employee ones (6.7%), a result statistically significant at 95% confidence. Similarly, courts used substantive canons more when the court's outcome slanted anti-employee (12.4%) compared to pro-employee (5.5%), though the difference was only statistically significant at 90% confidence.

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three-or five column tables (Tables 2 through 4, and Table 6) (comparing columns 2 with 3, and then comparing columns 4 and 5 if applicable), or both down and across (Tables 5 and 7).

310.   Data was gathered on the entire relevant population, so significance tests were not necessary; simply showing the descriptive pattern is useful in itself. However, to illuminate the data further, analysis was done using chi-squared tests which measure the likelihood the frequency is due simply to chance. The conventional level of significance at 95% confidence means that one can be 95% certain that the results are not due to randomness. It also means there is a 5% chance the results are wrong. In other words, if we say that the computed chi-square value is significant at the 95% confidence level, we would expect that in a maximum of five times in every one hundred samples drawn from the population we might find there is a relationship between two variables when in fact there is no relationship between those variables in the actual population. In addition, because one would expect that at least 5% would be false positives, one necessarily might find some false relationships when doing dozens of chi-square tests consecutively, resulting in false inferences based on doing multiple comparisons. As such, further robustness tests were conducted to correct for the multiple comparisons issue. Because the database is small, it is difficult to get any results to reach statistical significance at the 95% confidence standard, or even 90% confidence, as smaller sample size necessitates larger standard errors to get statistical significance.

Table 1: Frequency (%) of Statutory Methods[311]

	Plain Text	Text Cite	Text Rely	Lang.	Subst.	L.H.	Prec.	Policy	Prac.
All	8.1	78.5	29.2	29.2	8.1	12.9	72.7	82.3	66.5
Dem.-Maj.	8.6	85.7*	32.9	30.0	4.3	12.9	71.4	84.3	62.9
Rep.-Maj.	7.9	74.8*	27.3	28.8	10.1	13.0	73.4	81.3	68.4
DDD	0.0	83.3	33.3	38.9	5.6	5.6	66.7	94.4	77.8
DDR	11.5	86.5	32.7	26.9	3.9	15.4	73.1	80.8	57.7
RRD	10.6	74.5	30.9	28.7	11.7	13.8	74.5	81.9	67.0
RRR	2.2	75.6	20.0	28.9	6.7	11.1	71.1	80.0	71.1
Split Panel	11.0**	78.8	31.5	28.1	8.9	14.4	74.0	81.5	63.7
Non-Split Panel	1.6**	77.8	23.8	31.8	6.4	9.5	69.8	84.1	73.0
Clinton Era	3.9*	71.8*	20.5	26.9	9.0	14.1	80.8**	83.3	66.7
Bush II Era	7.9*	76.2*	31.8	31.8	12.7	6.4	66.7**	82.5	63.5
Obama Era	17.0*	89.6*	36.2	23.4	2.1	21.3	61.7**	85.1	70.2
Trump Era	4.8*	85.7*	38.1	42.9	4.8	9.5	85.7**	71.4	66.7
Pro-Empl. Bd.	7.2	77.2	28.3	29.0	6.7**	12.2	71.7	81.7	67.2
Anti-Empl. Bd.	13.8	86.2	34.5	31.0	17.2**	17.2	79.3	86.2	62.1
Pro-Empl. Ct.	8.6	75.0	28.1	27.3	5.5*	13.3	61.7***	88.3***	68.0
Anti-Empl. Ct.	7.4	84.0	30.9	32.1	12.4*	12.4	90.1***	72.8***	64.2
Uphold	9.9	75.6	29.0	26.0	6.1	13.8	61.1***	88.6***	69.5
Reverse	5.1	83.3	29.5	34.6	11.5	11.5	92.3***	71.8***	61.5

* 90% confidence, ** 95% confidence, *** 99% confidence.

Figure 1: Frequency (%) of Statutory Methods

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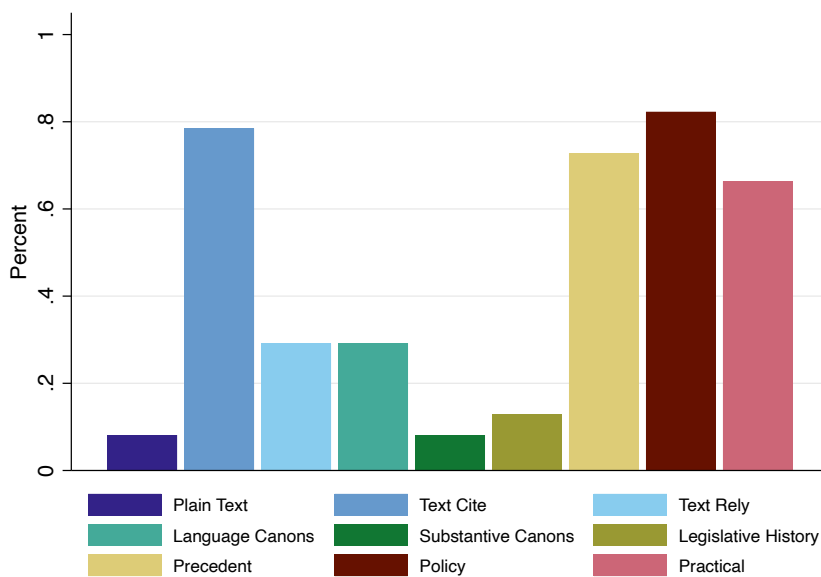
311. "Pro-Empl. Bd." refers to the Board's statutory interpretation being pro-employee in direction while "Pro-Empl. Ct." refers to the appeals court's decision being pro-employee. Similar abbreviations were used when the Board's or the appeals court's decision was anti-employee in direction.

Most notable is how appeals courts used precedent and policy displayed in Table 1, columns 8 and 9. The use of precedent as an interpretive source changed over time to a statistically significant degree at 95% confidence, with much lower usage during the Bush II (66.7%) and Obama (61.7%) years compared to the Clinton (80.8%) and Trump (85.7%) years. Courts clearly relied on precedent most often, however, when their statutory interpretation ruled against the employee (90.1%) compared to interpretations in favor of the employee (61.7%), a difference statistically significant at 99% confidence. In particular, courts used precedent at a statistically significant higher rate (99% confidence) to reverse Board decisions (92.3%) rather than to uphold them (61.1%). Courts used policy in a contrasting way to the use of precedent. Statistically significant at 99% confidence, policy was used more when courts ruled in favor of the employee (88.3%) than against them (72.8%). Further, whereas precedent was used more to reverse cases, courts used policy more to uphold Board interpretations (88.6%) than to reverse them (71.8%), a result statistically significant at 99% confidence.

Tables 2 through 4 set forth the data in a more fine-grained way. Table 2 breaks down the data by the ideological direction of the Board's interpretation (whether pro-employee or anti-employee in tone) and the partisanship of the majority of the appeals court majority (Democrat-majority or Republican-majority). Table 3 further breaks down the data in Table 2 by whether the court upheld or reversed the Board's statutory interpretation. This table allows one to analyze the consistency between the Board's interpretation and the partisanship of the majority of the appellate court panel hearing the case. A Board interpretation would be ideologically consistent if a pro-employee Board interpretation was reviewed by a Democrat-majority court, or if an anti-employee Board interpretation was reviewed by a Republican-majority court. By contrast, a pro-employee interpretation reviewed by a Republican-majority court or an anti-employee interpretation reviewed by a Democrat-majority court would be ideologically inconsistent. Table 4 goes on to look at how statutory methods differ depending upon whether the appeals court upholds or reverses the Board, broken down by the ideological direction of the Board's interpretations (pro-employee or anti-employee) and by the partisanship of the appellate court majority.

Table 2: Frequency (%) of Statutory Method, by Ideological Direction of Board Statutory Interpretation and Partisanship of Appellate Court Majority

	Pro-Employee Board	Anti-Employee Board
Democrat-majority Court		
Plain Text	6.6	22.2
Text Citation	83.6	100.0
Text Reliance	26.2***	77.8***
Language Canons	27.9	44.4
Substantive Canons	4.9	0.0
Legislative History	11.5	22.2
Precedent	73.8	55.6
Policy	83.6	88.9
Practical	65.6	44.4
Republican-majority Court		
Plain Text	7.8	10.0
Text Citation	74.0	80.0
Text Reliance	29.4	15.0
Language Canons	29.4	25.0
Substantive Canons	7.6**	25.0**
Legislative History	12.6	15.0
Precedent	70.6*	90.0*
Policy	80.7	85.0
Practical	68.8	53.9

* 90% confidence, ** 95% confidence, *** 99% confidence.

Table 3: Frequency (%) of Statutory Method, by Ideological Direction of Board Interpretation, Partisanship of Appellate Court Majority, and Whether Uphold Board Interpretation

	Pro-Employee Board	Anti-Employee Board
Democrat-majority Court		
Uphold		
Plain Text	8.7***	40.0***
Text Citation	82.6	100.0
Text Reliance	28.3***	80.0***
Language Canons	28.3	20.0
Substantive Canons	4.4	0.0
Legislative History	8.7	20.0
Precedent	65.2	60.0
Policy	84.8	100.0
Practical	69.6	40.0
Reverse		
Plain Text	0.0	0.0
Text Citation	86.7	100.0
Text Reliance	20.0**	75.0**
Language Canons	26.7*	75.0*
Substantive Canons	6.7	0.0
Legislative History	12.6	15.0
Precedent	100.0***	50.0***
Policy	80.0	75.0
Practical	53.3	50.0
Republican-majority Court		
Uphold		
Plain Text	8.7	9.1
Text Citation	68.1	81.8
Text Reliance	27.5	18.2
Language Canons	24.6	27.3
Substantive Canons	4.4***	27.3***
Legislative History	16.0	18.2
Precedent	55.1*	81.8*
Policy	91.3	81.8
Practical	69.6	81.8
Reverse		
Plain Text	6.0	11.1
Text Citation	82.0	77.8
Text Reliance	32.0	11.1
Language Canons	36.0	22.2
Substantive Canons	12.0	22.2
Legislative History	8.0	11.1
Precedent	92.0	100.0
Policy	66.0	88.9
Practical	66.0	55.6

* 90% confidence, ** 95% confidence, *** 99% confidence.

Table 4: Frequency (%) of Statutory Method, by Whether Uphold Board Interpretation, Ideological Direction of Board Statutory Interpretation, and Partisanship of Appellate Court Majority

	Uphold	Reverse
Ideological Direction of Board		
Pro-Employee Board Decision		
Plain Text	8.7	4.6
Text Citation	73.9	83.1
Text Reliance	27.8	29.2
Language Canons	26.1	33.9
Substantive Canons	4.4*	10.8*
Legislative History	13.0	10.8
Precedent	59.1***	94.0***
Policy	88.7***	69.2***
Practical	69.6	63.1
Anti-Employee Board Decision		
Plain Text	18.8	7.7
Text Citation	87.5	84.6
Text Reliance	37.5	30.8
Language Canons	25.0	38.5
Substantive Canons	18.8	15.4
Legislative History	18.8	15.4
Precedent	75.0	84.6
Policy	87.5	84.6
Practical	68.8	53.9
Partisanship of Court Majority		
Democrat-majority Court		
Plain Text	11.8	0.0
Text Citation	84.3	89.5
Text Reliance	33.3	31.6
Language Canons	27.5	36.8
Substantive Canons	3.9	5.3
Legislative History	9.8	21.1
Precedent	64.7**	89.5**
Policy	86.3	79.0
Practical	66.7	52.6
Republican-majority Court		
Plain Text	8.8	6.8
Text Citation	70.0	81.4
Text Reliance	26.3	28.8
Language Canons	25.0	33.9
Substantive Canons	7.5	13.6
Legislative History	16.3	8.5
Precedent	58.8***	93.2***
Policy	90.0***	69.5***
Practical	71.3	64.4

* 90% confidence, ** 95% confidence, *** 99% confidence.

Looking at the data in this purely descriptive way indicates that appellate courts used plain text most often either when upholding interpretations (Table 1, column 2), or when reviewing anti-employee Board interpretations. A case was coded as plain text if the court indicated that text alone dictated the outcome. As a general matter, as noted in Table 1 and Figure 2, plain text was used more to uphold decisions (9.9%) than to reverse them (5.0%), particularly for anti-employee Board interpretations. Specifically, plain text was used often by Democrat-majority courts when ruling on ideologically inconsistent anti-employee Board interpretations. As detailed in Table 2 and Figure 3, Democrat-majority courts used a plain text method in 22.2% of anti-employee appeals compared to just 6.6% of pro-employee appeals, though the differences just escaped being statistically significant. This discrepancy, seen in Table 3 and Figure 4, was especially acute when Democrat-majority courts upheld anti-employee Board decisions (40.0%) compared to pro-employee rulings (8.7%), a difference statistically significant at 99% confidence. Democrat-majority courts never used plain text when reversing the Board. By contrast, Republican-majority courts did not use plain text differently based on the pro- or anti-employee direction of the Board's ruling.

Figure 2: Frequency (%) of Statutory Method, by Whether Uphold Board Interpretation and Ideological Direction of Board Interpretation
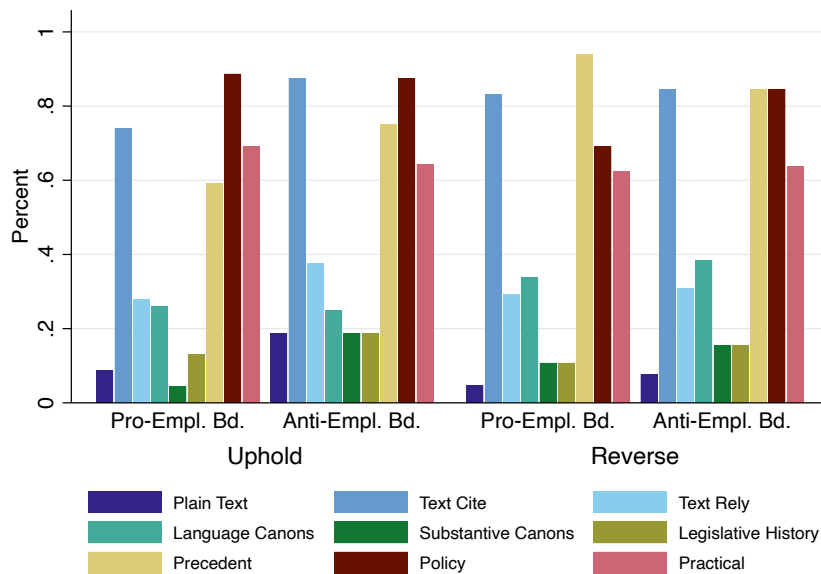
**Figure 3: Frequency (%) of Statutory Method, by Partisanship of
Appellate Court Majority and Ideological Direction of
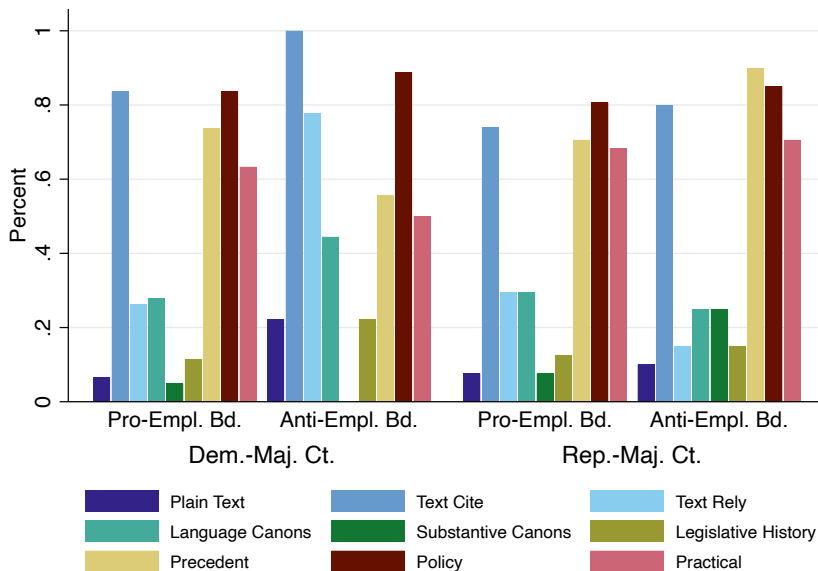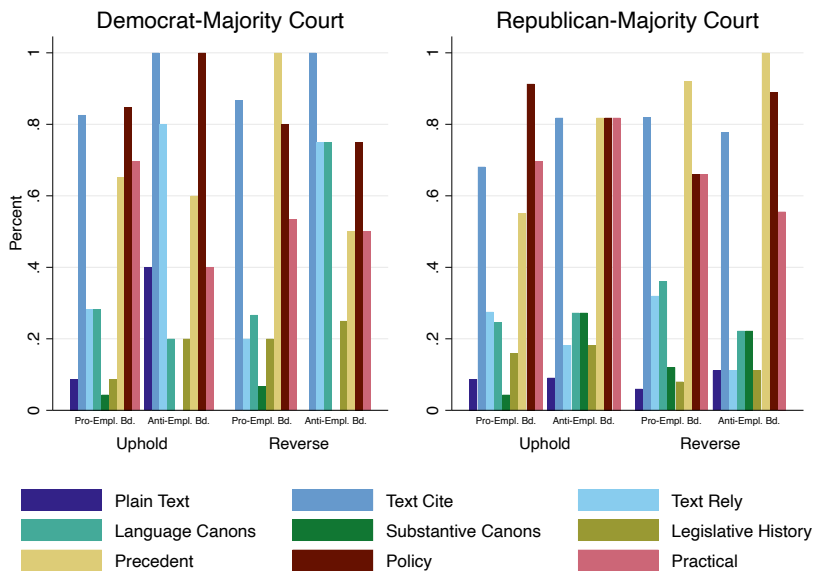Board Interpretation**

**Figure 4: Frequency (%) of Statutory Method, by Partisanship of
Appellate Court Majority, Whether Uphold Board Interpretation, and
Ideological Direction of Board Interpretation**

Moving on, analysis focuses on patterns related to (1) any *citation* or reference to text (Table 1, column 3) and (2) actual *reliance* on text to justify the statutory interpretation (Table 1, column 4). The first category (Text Cite) applied if the court, at a minimum, expressly set forth the language of the text in the opinion. This latter category (Text Rely) more narrowly captured cases where the court dissected the text as part of its statutory interpretation instead of just referring to the text in a cursory fashion. As noted in Table 1, Democrat-majority courts cited text more (85.7%) than Republican-majority courts (74.8%), though the difference was only statistically significant at 90% confidence. Citation of text did not vary between cases where the court upheld the Board's interpretation (75.6%) versus cases in which the court reversed it (83.3%). Text was more likely to be cited where the Board ruled against the employee (86.2%) than when the interpretation was in favor of the employee (77.2%), though the difference was not statistically significant.

There were some noticeable patterns limited to the narrower group of cases where the court *relied* more overtly on the text. As displayed in Table 2 and Figure 3, Democrat-majority courts relied more on text where they ruled on ideologically inconsistent anti-employee Board interpretations (77.8%) versus cases where the Board decided ideologically consistent pro-employee interpretations (26.2%), a difference statistically significant at 99% confidence. These differences persisted regardless of whether the Democrat-majority court upheld or reversed the Board, as shown in Table 3 and Figure 4. Republican-majority courts were less likely to rely on text at all; they were less likely to rely on text for ideologically consistent anti-employee interpretations (15.0%) versus ideologically inconsistent pro-employee rulings (29.4%), though the difference was not statistically significant, as displayed in Table 2 and Figure 3. In all, Democrat-majority courts were more likely to rely on text when deciding ideologically inconsistent anti-employee Board interpretations.

Language canons were used most often to reverse Board opinions. As noted in Table 1, column 5, language canons were used in 34.6% of cases where courts reversed the Board's statutory interpretation compared to just 26.0% of cases where courts upheld it, though the difference was not statistically significant. This same pattern persisted regardless of whether the Board decision was pro-employee in orientation or not, as noted in Tables 3 and 4 and Figure 2. Democrat-majority and Republican-majority courts used language canons mostly in a statistically indistinguishable fashion (as displayed in Figures 3 and 4), though as noted in Table 3 and Figure 4, Democrat-majority courts used language canons more to reverse ideologically inconsistent anti-employee Board interpretations (75.0%) than ideologically consistent pro-employee rulings (26.7%), a difference statistically significant but only at 90% confidence.

As a general matter, substantive canons, noted in Table 1, column 6, likewise were used most often to reverse the Board's statutory interpretation (11.5% versus 6.1% when upheld), especially by Republican-majority courts (13.6%, noted in

Table 4). Like language canons, these differences were not statistically significant. Notably, as shown in Table 4 and Figure 3, however, substantive canons were used more to reverse pro-employee Board interpretations (10.8%) compared to anti-employee ones (4.4%), a difference statistically significant only at 90% confidence. Substantive canons were also used in a partisan fashion. Republican-majority courts used them more than Democrat-majority courts. As noted in Table 3 and Figure 4, Republican-majority courts were more likely to use substantive canons when upholding ideologically consistent anti-employee Board interpretations (27.3%) than ideologically inconsistent pro-employee ones (4.4%), a statistically significant difference at 99% confidence. Democrat-majority courts, by contrast, never used substantive canons when reviewing ideologically inconsistent anti-employee Board interpretations and only used them in analyzing ideologically consistent pro-employee outcomes 4.9% of the time (Table 2 and Figures 3 and 4).

Although overall Democrat- and Republican-majority courts used legislative history in almost exactly the same percentage of cases (about 13% as noted in Table 1, column 7), they used legislative history in different ways. As shown in Table 4 and Figure 3, Democrat-majority courts used legislative history more to reverse Board interpretations (21.1%) than to uphold them (9.8%), but the difference was not statistically significant. By contrast, Republican-majority courts used legislative history in an opposite way more to uphold interpretations (16.3%) than reverse them (8.5%), a difference also statistically irrelevant. As with the other statutory interpretation methods, use of legislative history was used most often when reviewing anti-employee Board decisions (17.2%) compared to pro-employee interpretations (12.2%), as shown in Table 1, column 7, though the difference was not statistically significant.

Of all the statutory tools, the trends concerning the use of precedent were some of the most different. Not surprisingly, as shown in Table 1, column 8, Table 4, and Figure 2, courts overwhelmingly used precedent more when reversing a statutory interpretation (92.3%) than when upholding it (61.1%), particularly when ruling to reverse a pro-employee Board outcome (94.0%) rather than uphold it (59.1%), with both results statistically significant at 99% confidence. By contrast, precedent was used at a statistically similar rate (84.6% when reversing versus 75.0% when upholding) when courts reviewed anti-employee Board decisions. Democrat- and Republican-majority courts exhibited similar patterns with using precedent more to reverse interpretations, with Democrat-majority courts using precedent 89.5% of the time when reversing a statutory interpretation and Republican-majority courts using it slightly more at 93.2%, as noted in Table 4. As demonstrated in Table 3 and Figures 3 and 4, Democrat-majority and Republican-majority courts used precedent often when the ideological orientation of the Board's interpretation (pro-employee or anti-employee in tone) was ideologically similar to the ideology of the majority of the appeals court. As noted in Table 3 and Figure 4, Democrat-majority courts universally used precedent (100.0%) when reversing ideologically consistent pro-employee Board

interpretations, but they only used precedent half the time (50.0%) when reversing ideologically inconsistent anti-employee interpretations, a difference statistically significant at 99% confidence. By contrast, although only statistically significant at 90% confidence, Republican-majority courts employed precedent more in upholding ideologically consistent anti-employee interpretations (81.8%) than ideologically inconsistent pro-employee ones (55.1%).

In contrast to precedent, which was generally used to reverse Board interpretations, as shown in Table 1, column 9, policy was used most often to uphold Board interpretations (88.6%) rather than to reverse them (71.8%), a difference statistically significant at 99% confidence. This pattern held for both Democrat-majority and Republican-majority courts, as shown in Table 4 and Figure 4. The difference was particularly wide for Republican-majority courts which employed policy just 69.5% of the time when reversing interpretations compared to 90.0% when upholding them, a difference statistically significant at 99% confidence. As shown in Table 4 and Figure 2, in particular, courts used policy in particular to uphold pro-employee interpretations (88.7%) rather than to reverse them (69.2%), a difference statistically significant at 99% confidence.

Finally, practical considerations were referenced in approximately two-thirds of all cases, as noted in Table 1, column 10. Although courts used practical considerations more to uphold cases and to advance pro-employee outcomes as shown in Figure 2, the differences were not statistically significant. Nor were there statistical differences in the rate by which Democrat- and Republican-majority courts used practical considerations, as noted in Tables 3 and 4 and Figures 3 and 4. Both Democrat-majority and Republican-majority courts employed practical considerations more when upholding ideologically consistent interpretations, but the difference was not statistically significant.

B. *Deference Regimes and Statutory Methods*

The analysis in Part III.A set forth the empirics of statutory methods, but it did so without discussing the important issue of deference. Unlike analyzing statutory interpretation at the agency level, an important ingredient in analyzing statutory interpretation for courts is to analyze the degree of deference granted by the court to the agency decision. This Section turns to the issue of agency deference, focusing on *Chevron* deference and analyzing how the statutory methods used by the courts may differ according to what deference regime the court applied.

1. Chevron *Citation and* Chevron *Application: Patterns*

Each of the 201 cases was coded with what "deference" regime the court applied. As noted previously, the NLRB is a unique agency. Courts often will not cite to the famous *Chevron* decision nor expressly invoke the two-step framework when they are in fact applying *Chevron* or *Chevron*-like deference. The database was restricted to only the cases involving a statutory interpretation worthy of *Chevron* deference. While some scholars have analogized the "reasonableness" inquiry as

equivalent to *Chevron* deference, other scholars, specifically those studying the NLRB, have argued that in adopting a reasonableness analysis, the court adopts a lessened form of deference.[312] As such, given the large number of cases in the database in which courts did not expressly adopt the *Chevron* two-step framework, the analysis below is done on two levels: (1) expressly invoking *Chevron* versus not invoking *Chevron* (*Chevron* Citation) and (2) expressly invoking *Chevron* <u>or</u> using a reasonableness standard versus not using <u>either</u> *Chevron* <u>or</u> reasonableness (*Chevron* Application). Since the vast majority of cases invoking *Chevron* were resolved at step two,[313] no separate analysis was done for cases specifically invoking *Chevron* step one deference.

Table 5 sets forth the summary information concerning use of *Chevron* in the database. Columns 2 and 3 detail appeals court cases explicitly citing and using *Chevron* versus not citing and using *Chevron*. Column 4 refers to the broader category when the court <u>either</u> used *Chevron* <u>or</u> a reasonableness/rationality analysis while column 5 references cases in which *Chevron* was neither cited nor used in spirit through a reasonableness/rationality analysis.

In actuality, not all courts applied *Chevron* deference when they should have. Only 26.8% of cases expressly applied the *Chevron* two-step framework, and 57.4% of cases further applied a "reasonableness" framework to analyze the statutory issue in question. In all, 84.2% of cases that should have applied *Chevron* or a similar reasonableness analysis did. Failure to cite or apply *Chevron* had a partisan bent. For example, 69.9% of instances where courts failed to expressly cite *Chevron* involved Republican-majority courts. Moreover, of the few instances where courts declined to apply *Chevron* whatsoever, 75.8% of those rulings were decided by Republican-majority courts.[314] By contrast, as shown in Table 5 and Figure 5, Democrat-majority courts invoked *Chevron* expressly or a similar reasonableness analysis at higher rates than Republican-majority courts. Indeed, homogenous all-Democrat courts had the highest rate of citing *Chevron* (44.4%), while all-Republican courts had the lowest rate (15.6%), a difference statistically significant at 90% confidence.

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312. *See supra* Section II.B.

313. Indeed, arguably no case was expressly decided at *Chevron* step one. While there was a handful of cases where the court ruled that the plain text controlled, they did not set forth the analysis within the *Chevron* framework by noting that the term was unambiguous. Moreover, even when a case was decided by plain text, courts used other interpretive tools to supplement the analysis.

314. In most of these cases, the court made general statements about deference but did not adopt a reasonableness inquiry or make special note that more deference would be required in the present case than in another case.

Table 5: Frequency (%) of *Chevron* Citation Versus *Chevron* Application: Key Statistics

	Cite	**Not Cite**	**Apply**	**Not Apply**
Democratic-Majority	34.3*	65.7*	88.6	11.4
Republican-Majority	23.0*	77.0*	82.0	18.0
DDD Court Panel	44.4*	55.6*	89.0	11.1
DDR Court Panel	30.8*	69.2*	88.5	11.5
RRD Court Panel	26.6*	73.4*	83.0	17.0
RRR Court Panel	15.6*	84.4*	80.0	20.0
Split Panel	28.1	71.9	84.9	15.1
Non-Split Panel	23.8	76.2	82.5	17.5
Clinton Era	24.4	75.6	82.1	18.0
Bush II Era	25.4	74.6	82.5	17.5
Obama Era	34.0	66.0	93.6	6.4
Trump Era	23.8	76.2	76.2	23.8
Pro-Employee Board	25.0	75.0	85.6	14.4
Anti-Employee Board	37.9	62.1	75.9	24.1
Pro-Employee Court	31.3*	68.8*	86.7	13.3
Anti-Employee Court	19.8*	80.3*	80.3	19.8
Uphold	35.9***	64.1***	90.8***	9.2***
Reverse	11.5***	88.5***	73.1***	26.9***

* 90% confidence, ** 95% confidence, *** 99% confidence.

Figure 5: Frequency (%) of Deference Regime, by Partisanship of Appellate Court Majority and Whether Uphold Board Interpretation
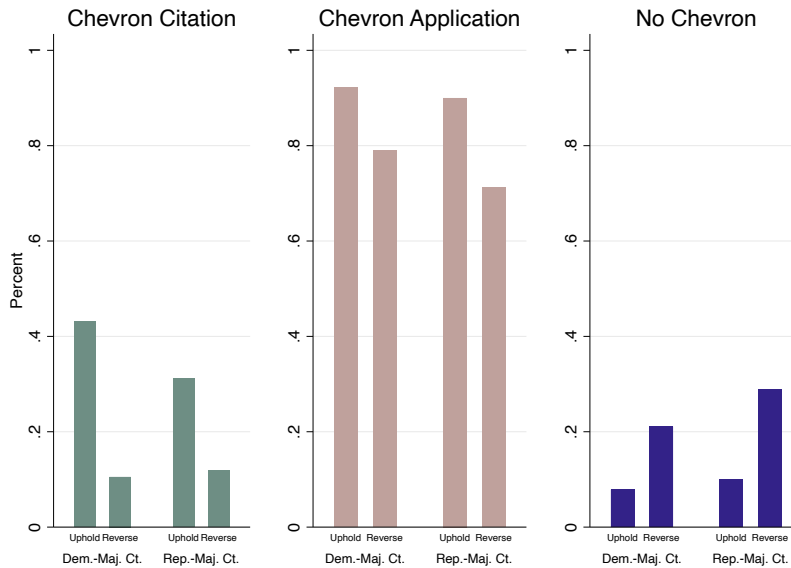
Democrat-majority courts citing *Chevron* more than Republican-majority courts (34.3% versus 23.0%), the difference was only statistically significant at 90% confidence. Further, there were no statistically significant differences based on partisanship of the majority of the appeals court when applying the broader category of *Chevron* or a *Chevron*-like reasonableness analysis (where both Democrat- and Republican-majority courts applied *Chevron* over 80% of the time). Not surprisingly, *Chevron* was cited more, and a *Chevron*-like reasonableness analysis was applied more in practice when upholding a statute than when reversing it. As displayed in Table 5, the courts explicitly invoked the *Chevron* two-step framework 35.9% of the time when upholding the statute, compared to just 11.5% when reversing it, a statistically significant difference at 99% confidence. This same result persisted when widening the definition of *Chevron* in column 4 to include cases in which the courts both cited *Chevron* expressly as well as when they applied a general "reasonableness" or "rationality" analysis. In those cases, as with cases where *Chevron* was expressly cited, *Chevron* was applied far more often when the statute was upheld (90.8%) than when reversed (73.1%), a difference again statistically significant at 99% confidence. Courts expressly invoked *Chevron* in 31.3% of their own pro-employee interpretations compared to just 19.8% of their anti-employee interpretations, a statistically significant difference but only at 90% confidence. This same trend persisted in cases where courts adopted the broader category of either *Chevron* or a *Chevron*-like reasonableness analysis in column 4 (86.7% for pro-employee court rulings versus 80.3% for anti-employee appeals), though the difference was not statistically significant.

Table 5, column 5 and Figure 5 also shows when courts declined to cite or apply *Chevron* altogether. In nearly all cases when courts voted to uphold the agency's interpretation, they cited or applied *Chevron*; when upholding the Board, they declined to apply *Chevron* or a *Chevron*-like reasonableness analysis just 9.2% of the time. Not surprisingly, courts were much more eager to decline to apply *Chevron* when reversing the Board's interpretation. All told, when reversing the Board's interpretation, courts declined to apply *Chevron* at all 26.9% of the time compared to 73.1% of the time when they did apply it, a difference statistically significant at 99% confidence.

Moreover, as shown in Table 6 and Figure 6, when courts expressly cited *Chevron*, the agency won more (83.9%) than when the courts did not cite *Chevron* (54.9%), a difference statistically significant at 99% confidence.[315] There was a

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315.   Democrat-majority courts upheld the agency more (72.9%) than Republican-majority courts (57.6%), a difference statistically significant at 95% confidence. Democrat-majority courts were especially eager to uphold ideologically consistent pro-employee Board interpretations (75.4%) compared to ideologically inconsistent anti-employee ones (55.6%), a difference again statistically significant. Republican-majority courts upheld Board interpretations at near equal rate irrespective of the direction of the Board interpretation (55.0% for ideologically consistent anti-employee interpretations compared to 58.0% for ideologically inconsistent pro-employee interpretations). Given the nature of the NLRB's mission, most of the Board's cases are decided in favor of the employee, with 86.1% of appeals involving a Board interpretation pro-employee in direction.

similarly wide discrepancy when applying *Chevron* or a *Chevron*-like reasonableness analysis. The agency won at a rate of 67.6% when courts applied *Chevron* while the win-rate was only 36.4% when courts did not apply *Chevron* at all in any form. These differences persisted for both Democrat-majority and Republican-majority courts; when heard by Democrat-majority courts that cited *Chevron*, the NLRB prevailed at a rate of 91.7% versus an agency-win rate of just 63.0% when courts did not cite *Chevron*. Further, Democrat-majority courts agreed with ideologically inconsistent anti-employee interpretations just 40.0% of the time when not citing *Chevron* but 75.0% when they did. Republican-majority courts were even more likely to uphold the agency when reviewing ideologically inconsistent pro-employee interpretations; there, they upheld the agency 76.0% of the time when citing *Chevron* but just 53.2% when they did not, a difference statistically significant at 99% confidence. A similar difference for Republican-majority courts was observed when comparing the broader definition of *Chevron* application (62.0% when applying *Chevron* versus 36.8% when not applying *Chevron*).

Ideologically split courts (DDR or RRD courts) that cited *Chevron* also had a higher agency-win rate (87.8%) than when not citing *Chevron* (56.2%), a difference statistically significant at 99% confidence. There was a similar discrepancy when either citing *Chevron* or using a reasonableness analysis (70.2%) versus not applying *Chevron* at all (36.4%). Ideologically homogenous panels did not have a statistically higher win-rate if citing *Chevron*, suggesting that there potentially could be a whistleblower effect, with mixed panels being more likely than homogenous panels to cite and apply *Chevron*.

Table 6: *Chevron* Citation and *Chevron* Application:

Agency-Win Rates

	Cite	Not Cite	Apply	Not Apply
Overview	83.9***	54.9***	67.6***	36.4***
Dem. Maj.	91.7***	63.0***	75.8	50.0
Rep. Maj.	78.1***	51.4***	63.2***	32.0***
Dem. Maj/Consistent	95.0***	65.8***	77.8	57.1
Dem. Maj./Inconsistent	75.0	40.0	62.5	0.0
Rep. Maj./Consistent	85.7***	38.5***	71.4***	16.7***
Rep. Maj./Inconsistent	76.0***	53.2***	62.0***	36.8***
Split Panel	87.8***	56.2***	70.2***	36.4***
Non-Split Panel	73.3	52.1	61.5	36.4

* 90% confidence, ** 95% confidence, *** 99% confidence.

**Figure 6: Agency-Win Rates, by *Chevron* Citation and *Chevron*
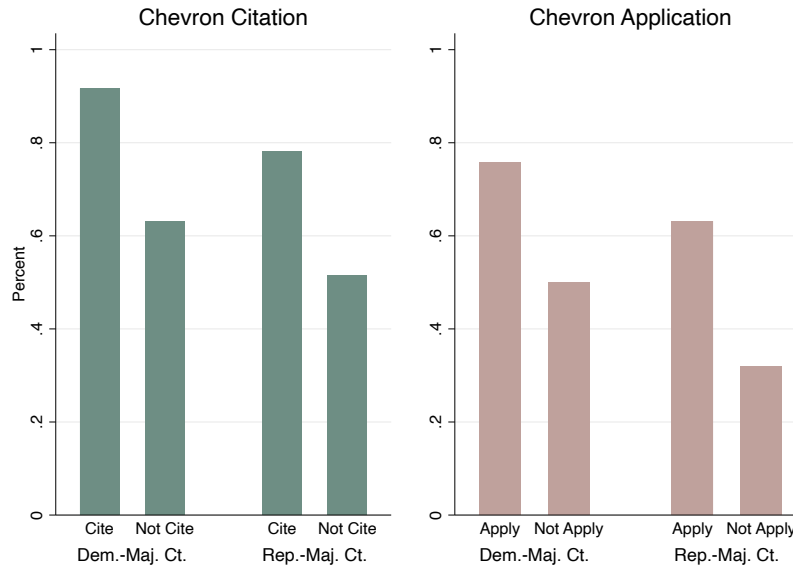Application and Partisanship of Appellate Court Majority**

Table 7 breaks down the data concerning use of *Chevron* by analyzing whether the ideological tone of the Board decision mirrored the partisanship of the court majority. In particular, courts cited *Chevron* more when they upheld (43.9%) an ideologically consistent Board interpretation than when they reversed it (8.3%), a difference statistically significant at 99% confidence. The same was true in the broader category of cases where courts applied either *Chevron* or a reasonableness analysis. There, courts applied *Chevron* (either by citing it or using a reasonableness analysis) 91.2% of the time when upholding the statute where the Board's ruling was consistent ideologically with the partisanship of the appeals court majority versus just 66.7% of the time when reversing an ideologically harmonious interpretation, a difference again statistically significant at 99% confidence. The same trend was also evident when the court ruled on ideologically *disharmonious* Board interpretations, but the rate by which courts cited *Chevron* was much less. When the court majority voted to uphold a Board ruling that differed ideologically from the court majority, they cited *Chevron* just 29.7% of the time, much less than the 43.9% of time they cited *Chevron* when ruling on ideologically consistent interpretations, a difference statistically significant at 90% confidence.[316] Employment of *Chevron* was higher when courts either cited *Chevron* or used a reasonableness analysis. As shown in Table 5, column 4, similar to when *Chevron*

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316.   For ease of presentation, in some of the tables, statistical significance was measured by pairs of rows, with each of the rows being compared to each other. The finding in this sentence comparing consistent and inconsistent cases compared non-consecutive rows, so its statistical significance is not mentioned in Table 7.

was expressly cited, courts cited or applied *Chevron* 90.8% of the time when upholding Board decisions, while citing or applying *Chevron* only 73.1% when reversing such decisions, a result statistically significant at 99% confidence. This trend persisted regardless of whether or not there was ideological consistency between the Board interpretation and the partisanship of the appellate court majority, as noted in Table 7.

Table 7: *Chevron* Citation Versus *Chevron* Application: More Statistics

	Cite	**Not Cite**	**Apply**	**Not Apply**
Consistent	33.3*	66.7*	84.0	16.1
Inconsistent	22.7*	77.3*	84.4	15.6
Uphold/Consistent	43.9***	56.1***	91.2***	8.8***
Reverse/Consistent	8.3***	91.7***	66.7***	33.3***
Uphold/Inconsistent	29.7**	70.3**	90.5**	9.5**
Reverse/Inconsistent	13.0**	87.0**	75.9**	24.1**
Uphold/Dem.-Maj.	43.1***	56.9***	96.1	7.8
Reverse/Dem.-Maj.	10.5***	89.5***	79.0	21.1
Uphold/Rep.-Maj.	31.3***	68.8***	90.0***	10.0***
Reverse/Rep.-Maj.	11.9***	88.1***	71.2***	28.8***
Pro-Empl. Bd./Dem.-Maj.	32.8*	67.2*	88.5	11.5
Pro-Empl. Bd./Rep.-Maj.	21.0*	79.0*	84.0	16.0
Anti-Empl. Bd./Dem.-Maj.	44.4	55.6	89.0	11.1
Anti-Empl. Bd./Rep.-Maj.	35.0	65.0	70.0	30.0
Uphold/Consistent/Dem.-Maj.	41.3***	58.7***	91.3	8.7
Reverse/Consistent/Dem.-Maj.	6.7***	93.3***	80.0	20.0
Uphold/Inconsistent/Dem.-Maj.	60.0	40.0	100.0	0.0
Reverse/Inconsistent/Dem.-Maj.	25.0	75.0	75.0	25.0
Uphold/Consistent/Rep.-Maj.	54.5**	45.5**	90.9**	9.1**
Reverse/Consistent/Rep.-Maj.	11.1**	88.9**	44.4**	55.6**
Uphold/Inconsistent/Rep.-Maj.	27.5**	72.5**	90.0**	10.1**
Reverse/Inconsistent/Rep.-Maj.	12.0**	88.0**	76.0**	24.0**

* 90% confidence, ** 95% confidence, *** 99% confidence.

As detailed in Table 7 and Figure 5, the trend of both citing and applying *Chevron* more when upholding the Board's interpretation than when reversing it persisted for both Democrat-majority and Republican-majority courts alike. For example, Democrat-majority courts upholding an ideologically consistent pro-employee Board interpretation cited *Chevron* 41.3% of the time compared to just 6.7% when reversing it, a difference statistically significant at 99% confidence. The same trend persisted when courts applied either *Chevron* or a reasonableness analysis; there, Democrat-majority courts applied *Chevron* 91.3% of the time when upholding the Board's harmonious interpretation and 80.0% of the time when reversing it, results too close to be statistically significant. A similar trend persisted for Republican-majority courts ruling on ideologically consistent anti-employee rulings; when upholding an ideologically consistent anti-employee interpretation, Republican-majority courts cited *Chevron* 54.5% of the time versus 11.1% of the time when reversing it, a statistically significant difference at 95% confidence. For the broader category where Republican-majority courts applied *Chevron* expressly or

in spirit, they did so 90.9% of the time compared to 44.4% when reversing an ideologically consistent interpretation from the agency, a difference statistically significant at 95% confidence. Moreover, while Democrat-majority courts often cited *Chevron* as an anchor to uphold ideologically inconsistent anti-employee rulings (60.0%), Republican-majority courts rarely cited *Chevron* in a similar fashion to uphold ideologically inconsistent pro-employee rulings (27.5%), though the difference was not statistically significant.

2. Chevron *Deference and Statutory Methods*

Cases in which courts went through the express *Chevron* two-step framework differed in the methods they employed compared to when they did not apply any *Chevron*-deference-based framework. Likewise, cases in which the courts *expressly* applied *Chevron* <u>or</u> used a reasonableness test used different methods than ones applying a non-*Chevron*-based standard like de novo or standard evidence. Tables 8 through 10 and Figures 7 through 9 break down the data.

Table 8: Frequency (%) of Statutory Method, by *Chevron* Citation and *Chevron* Application

	Plain Text	Text Cite	Text Rely	Lang.	Subst.	L.H.	Prec.	Policy	Prac.
Citation									
Cite	16.1***	94.6***	39.2**	46.3***	12.5	14.3	53.6***	89.3	71.4
Not Cite	5.2***	72.6***	25.5**	22.9***	6.5	12.4	79.7***	79.7	64.7
Application									
Apply	9.1	77.3	29.0	29.0	6.9	13.6	71.6	84.1	67.1
Not Apply	3.0	84.9	30.3	30.3	15.2	9.1	78.8	72.7	63.6

* 90% confidence, ** 95% confidence, *** 99% confidence.

**Figure 7: Frequency (%) of Statutory Method, by *Chevron* Citation
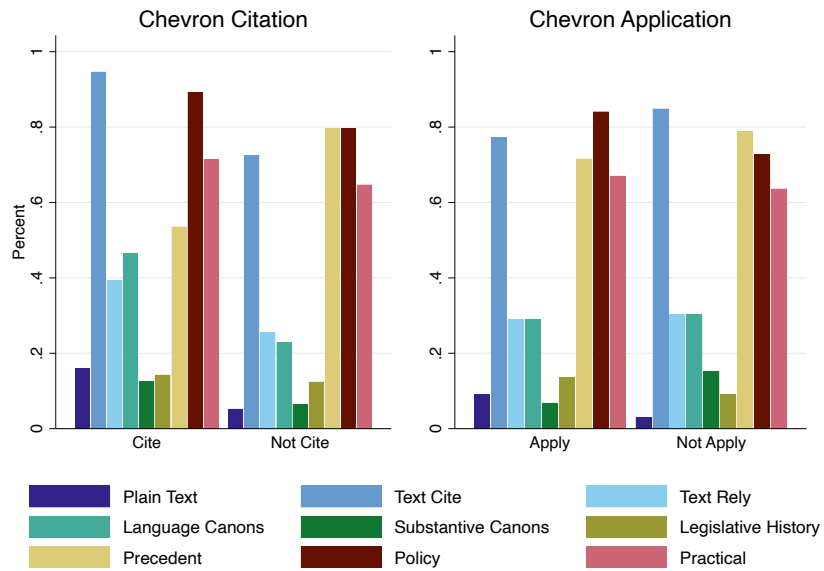and *Chevron* Application**

**Table 9: Frequency (%) of Statutory Method, by *Chevron* Citation and
Chevron Application and Partisanship of Appellate Court Majority**

	Plain Text	Text Cite	Text Rely	Lang.	Subst.	L.H.	Prec.	Policy	Prac.
Citation									
Dem-Maj.									
Cite	16.7*	91.7	45.8*	41.7	4.2	8.3	54.2**	87.5	70.8
Not Cite	4.4*	82.6	26.1*	23.9	4.4	15.2	80.4**	82.6	58.7
Rep.-Maj.									
Cite	15.6*	96.9***	34.4	50.0***	18.8*	18.8	53.1***	90.6	71.9
Not Cite	5.6*	68.2***	25.2	22.4***	7.5*	11.2	79.4***	78.5	67.3
Application									
Dem.-Maj.									
Apply	9.7	83.9	33.9	30.7	4.8	12.9	71.0	88.7***	64.5
Not Apply	0.0	100.0	25.0	25.0	0.0	12.5	75.0	50.0***	50.0
Rep.-Maj.									
Apply	8.8	73.7	26.3	28.1	7.9*	14.0	71.9	81.6	68.4
Not Apply	4.0	80.0	32.0	32.0	20.0*	8.0	80.0	80.0	68.0

* 90% confidence, ** 95% confidence, *** 99% confidence.

Figure 8: Frequency (%) of Statutory Method, by *Chevron* Citation and *Chevron* Application and Partisanship of Appellate Court Majority
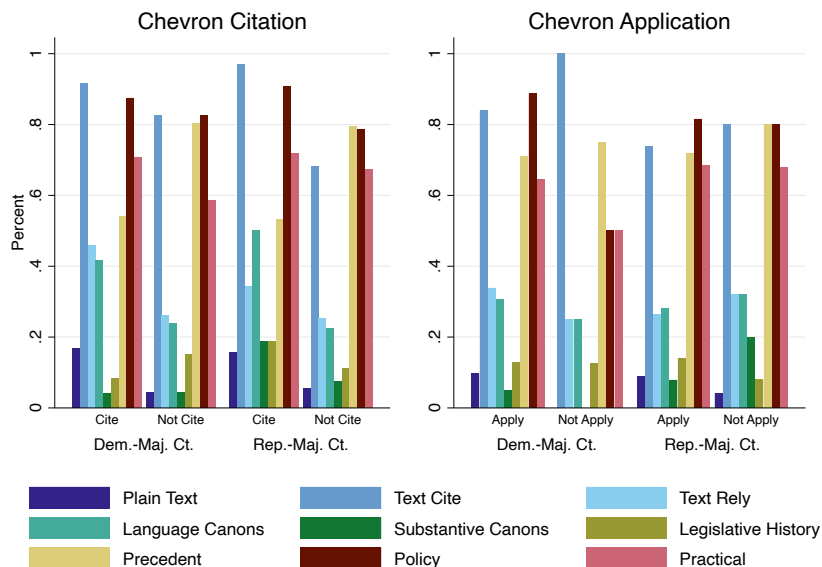

Table 10: Frequency (%) of Statutory Method, by *Chevron* Citation and *Chevron* Application and Whether Uphold Board Interpretation

	Plain Text	Text Cite	Text Rely	Lang.	Subst.	L.H.	Prec.	Policy	Prac.
Citation									
Uphold									
Cite	14.9	93.6***	36.2	36.2**	12.8**	14.9	51.1*	95.7**	74.5
Not Cite	8.1	65.5***	25.0	20.2**	2.4**	13.1	66.7*	84.5**	66.7
Reverse									
Cite	22.2**	100.0	55.6*	100.0***	11.1	11.1	66.7***	55.6	55.6
Not Cite	2.9**	81.2	26.1*	26.1***	11.6	11.6	95.7***	73.9	62.3
Application									
Uphold									
Apply	10.9	76.5	27.7	26.1	6.8	13.5	62.2	89.1	68.9
Not Apply	0.0	66.7	41.7	25.0	0.0	16.7	50.0	83.3	75.0
Reverse									
Apply	5.3	79.0*	31.6	35.1	7.0**	14.8	91.2	73.7	63.0
Not Apply	4.8	95.2*	23.8	33.3	23.8**	4.8	95.2	66.7	57.1

* 90% confidence, ** 95% confidence, *** 99% confidence.

Figure 9: Frequency (%) of Statutory Method, by *Chevron* Citation and *Chevron* Application and Whether Uphold Board Interpretation
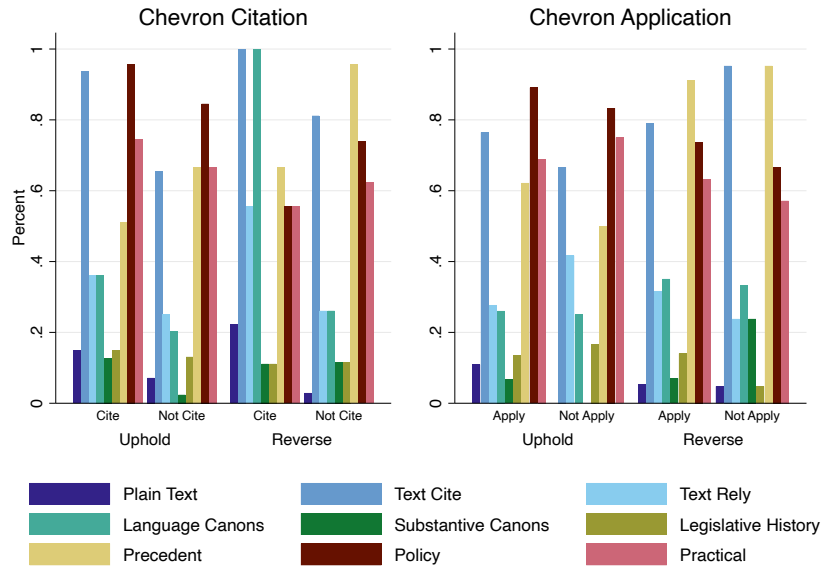
As a general matter, as noted in Table 8, column 2, and Figure 7, cases in which the courts expressly cited *Chevron* (16.1%) used plain text more than cases that did not cite *Chevron* (5.2%), a difference statistically significant at 99% confidence. The gap was especially stark for Democrat-majority courts, seen in Table 9 and Figure 8. Further, courts that expressly cited the *Chevron* two-step framework employed plain text 22.2% of the time when reversing a statutory interpretation whereas they used plain text just 2.9% when applying a non-*Chevron*-citing deference regime, a statistically significantly difference at 95% confidence, as displayed in Table 10 and Figure 9. The use of plain text did not differ statistically by deference regime when the Board's ruling was upheld. Further, when actually citing the *Chevron* two-step framework, plain text was used more, but when the definition of *Chevron* was broadened to include either use of the two-step or a reasonableness test, the use of plain text did not differ significantly between a regime applying *Chevron* versus one that neither cited nor applied *Chevron*. Not surprisingly, this might suggest that the formal recitation of the two-step *Chevron* framework in itself could inspire courts to use plain text more in the analysis than if the method was not formally applied.

There were some notable differences between expressly citing *Chevron* and applying *Chevron* in both the citation and reliance on text. Regarding citation of text (regardless of whether or not the court relied on it), column 3 in the tables, as shown in Table 8 and Figure 7, courts expressly citing *Chevron* did so 94.6% of the time compared to just 72.6% of interpretations in which the courts did not expressly cite *Chevron*, with the difference statistically significant at 99% confidence.

Republican-majority courts especially cited text when expressly citing *Chevron* (96.9%) compared to when they were not citing *Chevron* (68.2%), as noted in Table 9 and Figure 8, a statistically significant difference at 99% confidence. The discrepancy between the deference regimes was also apparent looking at rulings in which courts upheld the statute, shown in Table 10 and Figure 9, where courts expressly citing *Chevron* used text 93.6% of the time whereas a non-*Chevron*-citing deference regime cited text only 65.5%, a difference statistically significant at 99% confidence. When courts were both citing or applying the *Chevron*-like reasonableness analysis (either the two-step framework or a reasonableness analysis), however, the courts actually cited text *less* (77.3% versus 84.9% for a non-*Chevron*-like deference regime, as noted in Table 8 and Figure 7), with the difference being too small to be statistically significant. Limited to the cases in which courts reversed the Board's statutory interpretation, noted in Table 10 and Figure 9, courts applying the broader definition of *Chevron* were less likely to cite text (79.0%) than a non-*Chevron*-applying regime (95.2%), though the difference was only statistically significant at 90% confidence. Thus, as with plain text, courts that merely cited *Chevron* differed from courts that more broadly applied *Chevron* in their propensity to cite text: courts that cited *Chevron* cited text more in their analysis and courts ignoring *Chevron* also tended to cite text when reversing the Board's statutory interpretation.

This same pattern persisted regarding actual reliance on the text, column 4 in the tables. As shown in Table 8 and Figure 7, for actual reliance on text rather than just citation, cases in which courts expressly cited *Chevron* relied on text 39.2% of the time compared to 25.3% when not citing *Chevron*, a difference statistically significant at 95% confidence. Unlike the citation of text, where the gap was wider for Republican-majority courts, as shown in Table 9 and Figure 8, Democrat-majority courts that cited *Chevron* were more likely to rely on text (45.8%) compared to their non-*Chevron*-citing counterparts (26.1%), though the difference was only significant at 90% confidence. Further, shown in Table 10 and Figure 9, in contrast to citation of texts, courts expressly citing *Chevron* were more likely to rely on the text in their opinions than non-*Chevron*-citing cases when reversing the Board's statutory interpretation (55.6% versus 26.1%), a difference large enough to be statistically significant but only at 90% confidence. As with plain text and citation of text, these differences did not carry over to cases using the broader category of both *Chevron*-citing cases as well as those employing a *Chevron*-like reasonableness analysis. That is, while there were clear differences in whether or not text was relied on depending on if the court cited *Chevron* expressly versus if it did not, the expanded category of cases that applied *Chevron* did not differ from cases that did not apply *Chevron* in the usage of text. This may indicate that when courts actually do the *Chevron* two-step analysis, they are more cognizant of doing a textual analysis and perhaps were more likely to rely on text in their analysis.

The use of language canons, column 5 in the tables, also underscores the stark difference between cases that expressly cited *Chevron* and the broader category that

applied *Chevron* or a *Chevron*-like reasonableness analysis. The use of language canons statistically differed based on deference regime only when courts expressly cited *Chevron*. As shown in Table 8 and Figure 7, where courts cited the *Chevron* two-step framework, language canons were used 46.3% of the time compared to just 22.9% of the time when *Chevron* was not cited, a difference statistically significant at 99% confidence. This gap was especially noticeable for Republican-majority courts, as displayed in Table 9 and Figure 8; where language canons were cited in 50.0% of *Chevron*-citing opinions, only 22.4% of non-*Chevron*-citing ones employed language canons, a difference statistically significant at 99% confidence. Further, language canons were always employed (100.0%) when citing *Chevron* and reversing the Board's interpretation, as noted in Table 10 and Figure 9. By contrast, non-*Chevron*-citing courts employed language canons only 26.1% of the time when reversing, a difference statistically significant at 99% confidence. As with other methods, there were no statistically significant differences between cases applying the expanded category of *Chevron*, suggesting that it is the framework of employing the two-step framework that might encourage language canon usage.

Substantive canons, column 6 in the tables, were used for different purposes depending on the deference regime as well. When courts expressly cited *Chevron*, as noted in Table 8 and Figure 7, they used substantive canons 12.5% of the time when upholding the statute versus 6.5% when not expressly applying the two-step framework, a difference too small to be statistically significant. Republican-majority courts especially differed in their patterns. When citing *Chevron*, as noted in Table 9 and Figure 8, Republican-majority courts employed substantive canons more (18.8%) than when not citing *Chevron* (7.5%), a difference statistically significant at only 90% confidence. This was especially the case when Republican-majority courts voted to uphold the Board's interpretation, where the difference was wide enough to be statistically significant at 99% confidence. Democrat-majority panels only used substantive canons about 4% of the time. Moreover, as shown in Table 10 and Figure 9, when courts upheld the Board's interpretation, they were more likely to use substantive canons when citing *Chevron* (12.8%) than when not (2.4%), a difference statistically significant at 95% confidence.

However, unlike many of the other methods, there were more differences with respect to substantive canons when courts used the expanded category of *Chevron* and *Chevron*-like reasonableness. When courts applied *Chevron* or a *Chevron*-like reasonableness inquiry more broadly, as noted in Table 8 and Figure 7, they actually used substantive canons *less* (6.9%) than when using a non-*Chevron* based deference regime (15.2%), though the difference barely escaped being statistically significant. That is, when the courts adopted a deference regime different from either *Chevron* or a reasonableness analysis, the courts were more likely to use substantive canons to justify their decisions. This tendency was especially strong among Republican-majority courts. As noted in Table 9 and Figure 8, Republican-majority courts invoked substantive canons more when not applying *Chevron* (20.0%) than

when applying *Chevron* or a *Chevron*-like reasonableness analysis, a difference statistically significant at 90% confidence. Use of substantive canons was particularly strong when both invoking a non-*Chevron* deference regime and reversing the statutory interpretation of the Board. Shown in Table 10 and Figure 9, for reversals, substantive canons were used 23.8% of the time for a non-*Chevron* deference regime compared to 7.0% when *Chevron* applied, a difference statistically significant at 95% confidence. Overall, when courts applied *Chevron* expressly or in spirit, courts, especially Republican-majority courts, that did not use a *Chevron*-based deference regime whatsoever simply used substantive canons more, particularly to reverse the Board.

Unlike the textual canons, language canons, and substantive canons discussed above, there was no statistically significant difference in the employment of legislative history between cases expressly citing *Chevron* cases versus those that did not, as seen in column 7 in the tables. About 13% of cases overall employed legislative history, regardless of the deference regime used. While there were certainly trends (for example, legislative history was invoked less by Democrat-majority courts (8.3%) in *Chevron*-citing opinions than by Republican-majority courts (18.8%)), overall it was impossible to make any firm conclusions on the relationship between the use of legislative history and a deference regime. Nor were there statistically significant differences in use of legislative history comparing a *Chevron*-based deference regime versus one that did not apply *Chevron* or a reasonableness analysis.

Precedent as a primary interpretive source was more common in non-*Chevron*-citing deference cases, as noted in column 8 in the tables. For cases that expressly cited *Chevron*, as shown in Table 8 and Figure 7, the discrepancy in usage was 53.6% for *Chevron*-citing courts versus 79.7% in non-*Chevron*-citing courts, a result statistically significant at 99% confidence. Democrat-majority and Republican-majority courts evidenced near identical patterns. Not surprisingly, displayed in Table 10 and Figure 9, non-*Chevron*-citing courts invoked precedent more (95.7%) than non-*Chevron*-citing courts (66.7%) when reversing a statutory interpretation, a difference statistically significant at 99% confidence. The gap was narrower (and still statistically significant but only at 90% confidence) in cases where courts upheld the Board (66.7% for non-*Chevron*-citing courts versus 51.1% for *Chevron*-citing courts). Like most of the other methods, there were no statistically significant differences when analyzing the *Chevron* and *Chevron*-like reasonableness regime compared to a completely non-*Chevron*-based deference regime. The differences with respect to the use of precedent was restricted solely to express recitation of the *Chevron* two-step framework.

Use of policy, column 9 in the tables, had a different pattern compared to the use of precedent. As noted in Table 10 and Figure 9, non-*Chevron*-citing courts used precedent nearly all the time (95.7%) when *reversing* a statutory interpretation. With respect to policy, *Chevron*-citing courts nearly always employed it when *upholding* the Board's interpretation (95.7%). By contrast, non-*Chevron*-citing courts upholding

the Board used policy much less (84.5%), a difference statistically significant at 95% confidence. Policy was invoked in an interesting way for the broader category of *Chevron* or *Chevron*-like reasonableness cases. As noted in Table 9 and Figure 8, Democrat-majority courts that applied *Chevron* more broadly were much more likely to use policy to justify their interpretations (88.7%) compared to courts that did not use any *Chevron*-based deference regime (50.0%), a difference statistically significant at 99% confidence). This pattern was not observed for Republican-majority courts (who employed policy about 80% of the time regardless).

Practical considerations, column 10 in the tables, bore little relationship to the deference regime. As noted in Table 8 and Figure 7, courts citing *Chevron* used practical considerations more (71.4%) compared to courts that did not cite *Chevron* (64.7%), but the difference was statistically indistinguishable. Democrat-majority courts often employed practical considerations more than Republican-majority courts when citing *Chevron*, but again any difference was negligible statistically. Further, courts reversing the Board that cited *Chevron* generally referenced practical considerations less (55.6%) than non-*Chevron*-citing courts (62.3%), as noted in Table 10 and Figure 9. As with some of the other statutory tools, use of practical considerations did not vary between the expanded category of cases where *Chevron* was applied versus where it was ignored altogether; in both cases, practical considerations were raised in about two-thirds of cases.

CONCLUSION

Appellate courts used a plethora of statutory methods when ruling on the Board's statutory interpretations. Courts, however, were more likely to use certain statutory methods when ruling against the employee or when reversing the Board. The courts relied on precedent most often when the court reversed the Board's pro-employee interpretation. Courts used policy in a contrasting way to the use of precedent. Whereas courts have employed precedent more when courts ruled in an anti-employee direction to reverse a Board decision favorable to employees, courts used policy more to uphold interpretations in favor of the employee.

Both Democrat-majority and Republican-majority courts exhibited different tendencies in their choice of methods. Democrat-majority courts often cited and relied on text more than Republican-majority courts, especially when ruling on anti-employee interpretations of the Board. Republican-majority courts disproportionately used substantive canons to uphold anti-employee interpretations while Democrat-majority courts favored language canons when reversing such appeals. Moreover, while Democrat-majority courts always used precedent to buttress their reversals of ideologically consistent pro-employee interpretations, Republican-majority courts employed precedent to uphold ideologically consistent anti-employee interpretations. Further, policy was especially invoked to uphold pro-employee Board interpretations for Democrat-majority and Republican-majority courts alike.

Consistent with what other scholars found in empirical analysis of the Supreme Court, appellate courts reviewing interpretations done by the NLRB often do not invoke the *Chevron* two-step framework.[317] Republican-majority courts were less likely than Democrat-majority courts to actually cite and use the *Chevron* two-step. The NLRB also won more before courts citing and applying *Chevron*, supporting the inference that perhaps invocation of *Chevron* cabins the ideological proclivities of judges, as some other scholars have uncovered.[318] The data also reveals a divergence in statutory methods depending on how a court applies *Chevron*. The results suggest that courts that expressly cite the *Chevron* two-step framework more frequently referred to text and language canons. This could be because courts expressly citing and using the *Chevron* two-step framework may be more cognizant of citing legal principles in the writing of the opinion than when they do not specifically cite *Chevron*. In addition, Republican-majority courts upholding Board interpretations often employed substantive canons more when citing *Chevron* than when not. Policy considerations were often invoked more by *Chevron*-citing courts than non-*Chevron*-citing courts to uphold interpretations as well. By contrast, references to precedent occurred most when *not* applying *Chevron* or a *Chevron*-like reasonableness analysis. Substantive canons also were more employed by non-*Chevron*-applying courts than *Chevron*-applying ones when reversing Board interpretations. Perhaps courts use these methods of both precedent and substantive canons when they do not apply *Chevron* because they feel the need to anchor the opinion in some legal principle.

The results also bear on the future of *Chevron*, which has increasingly come under attack by scholars, judges, and legislators.[319] As proposed in a prior article, agency statutory interpretation should change, and appellate review should change along with it.[320] The Board should use its expertise to craft legal doctrine that advances the NLRA's purpose, collecting evidence on policy and pragmatic consequences of a given decision.[321] As Jerry Mashaw argues, "Agency control of . . . its 'interpretive agenda' argues for an interpretive approach that engages a wider-ranging set of policy considerations and a more straightforward attention to political context than would be constitutionally appropriate for the judiciary."[322] At present, the NLRB chooses between "competing constructions . . . within the range of meanings that the statutory language can support" when interpreting statutes.[323]

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317.   Eskridge & Baer, *supra* note 14, at 1090 (finding that the Supreme Court "usually" fails to apply *Chevron* in most *Chevron*-eligible cases).

318.   *See, e.g.*, Barnett, Boyd & Walker, *Politics*, *supra* note 7; Barnett, Boyd & Walker, *Political Dynamics*, *supra* note 7; Barnett & Walker, *Circuit Courts*, *supra* note 7.

319.   *See supra* note 9, and accompanying text.

320.   Semet, *supra* note 24, at 2333–40; *see also* Fisher & Shapiro, *supra* note 9, at 113–17 (describing why commentators want to overturn *Chevron*).

321.   O'Gorman, *supra* note 77, at 215–16; Mashaw, *supra* note 36, at 510.

322.   Mashaw, *supra* note 36, at 510.

323.   Richard J. Pierce, Jr., *How Agencies Should Give Meaning to the Statutes They Administer: A Response to Mashaw and Strauss*, 59 ADMIN L. REV. 197, 200 (2007).

In essence, the conflict boils down to one side advocating that a term be construed broadly with the other arguing for a narrow construction. Traditional methods of statutory interpretation relying on the text or legislative history are of little consequence in answering that question because the answer boils down to a political calculation of whether the decision maker believes the NLRA should be interpreted broadly to cover a wider array of workers in disadvantaged positions. This is more of a debate about policy than about textualism.

If the NLRB is truly going to serve its foundational mission, it needs to start acting more like a policy-making court rather than a court that does policymaking on the side.[324] Board decisions often predict dire consequences of a given decision, yet they never lay out the empirical evidence to back them up. The NLRB can be reformed to give it more power to engage in policymaking in a more explicit and fair way. For instance, if the NLRB were to truly embrace its policy-making role, it would ask parties that appear before it to brief the economic effects that would flow from its decision. Rather than vague assertions of "policy" or pontifications about a given case's possible ramifications, the Board should consider expert opinions so that it has a solid foundation to inform its policymaking that will serve the aims of (1) avoiding strikes and (2) increasing wages, the twin aims that Congress stated as the underlying purpose of the NLRA.

If the Board does this, appellate court review would be better equipped to develop clear criteria to review Board decisions. Although *Chevron* is still the controlling precedent, most courts analyzing NLRB adjudications apply a reasonableness analysis in practice and do not expressly invoke *Chevron*. However, there are no clear guidelines to say what is or is not reasonable, resulting in vast vertical inconsistencies. Although opining on the proper standard of deference is beyond the scope of this Article, if the Board shifts the way it interprets statutes to rely more on clearer evidentiary standards such as reports on practical implications and the like, it will be easier for courts to develop standards to better assess reasonableness.

In turn, deference regimes can affect agency behavior, and further research could examine how appellate court deference regimes affect how the Board reacts. Research on tax law indicates that *Chevron* makes agency rulemaking more detailed and policy-focused, encouraging agencies to put more effort into rule-making procedures.[325] Therefore, one could also make the argument that it is the courts, not the Board, that should adopt more consistent deference regimes so as to give guidance to the Board. However, adjudication is different from rulemaking, and it

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324.   Fisk & Malamud, *supra* note 221, at 2057 ("[T]he Board continues to operate like a court, limiting itself to the specific issues brought to it by its general counsel, failing to bring multiple areas of Board doctrine together to enrich its understanding and amplify its remedial capacities, and most of all, using rights rhetoric as a way to mask what would otherwise be its obligation to seek out (let alone generate) empirical assessments of the effects of its policies.").

325.   Choi, *supra* note 16, at 818. In addition, a survey of agency drafters indicated the factors that agency officials believed impacted whether *Chevron* applied. Walker, *supra* note 75, at 1065 tbl.1.

is precisely because there are so many cases, decided by so many different combinations of decision makers, that make it difficult for either entity—the Board or the courts—to come up with clear standards. In any event, *Chevron*'s long-term applicability to adjudication is an open question. Kristin Hickman and Aaron Nielson argue for "narrowing" *Chevron*'s domain, reducing deference for agency adjudications.[326] Richard Pierce argues that the polarized political climate puts *Chevron* in jeopardy, noting that changing presidential administrations in a polarized climate inhibits the reliance interests of parties before agencies.[327] He, in turn, advocates for replacing *Chevron* with the *Skidmore* test,[328] as policies put into effect by prior administrations would remain in effect unless the agency could justify its decisions based on data.[329] The inference this study yields is that appellate courts apply *Chevron* selectively, making it clear that some change needs to happen, and perhaps express application of a more *Skidmore*-like test could be a solution.[330]

This brings us back to the pending problem: how *do* reviewing courts interpret statutory interpretations made by administrative adjudicators and how *should they*?[331] This Article offers insight into the first question, analyzing the adjudicatory decisions of a partisan administrative agency and offering interesting insights into how appellate courts interpret statutes and apply *Chevron*. Of course, no empirical study can ever account for the many factors that impact court choices.[332] The empirics make clear that the inconsistency in the current system is not optimal and that either the agencies need to change how they react to the courts, or the courts need to devise a better way of properly reviewing administrative adjudications so as to achieve the best way of balancing democratic accountability and agency expertise.

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326.   Hickman & Nielson, *supra* note 30, at 932.

327.   *See generally* Richard J. Pierce, Jr., *The Combination of* Chevron *and Political Polarity Has Awful Effects*, 70 DUKE L.J. 91 (2021).

328.   Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (instructing courts to give "weight" to an agency's statutory interpretation based "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"); *see also* Hickman & Krueger, *supra* note 7, at 1258–59.

329.   *See* Pierce, *supra* note 327, at 93.

330.   Similarly, Shoba Sivaprasad Wadhia & Christopher J. Walker propose that the less deferential *Skidmore* regime should govern immigration adjudications. *See* Shoba Sivaprasad Wadhia & Christopher J. Walker, *The Case Against* Chevron *Deference in Immigration Adjudication*, 70 DUKE L.J. 1197, 1202 (2021).

331.   Several articles discuss how to interpret statutes generally. *See* Aaron Hauptman, *Statutory Diagrams*, 38 YALE J. ON REG. 413 (2021) (advocating use of statutory diagrams); Rebecca M. Kysar, *Interpreting by the Rules*, 99 TEX. L. REV. 1115 (2021) (interpreting statutes by deconstructing the legislative process); Alex Stein, *Probabilism in Legal Interpretation*, 101 IOWA L. REV. (forthcoming 2022) (advocating probabilism).

332.   Hickman & Hahn, *supra* note 10, at 627 (noting that empirical studies "do not capture the nuances of why courts might affirm agencies more often under *Chevron*).