

Does *Chevron* Matter?

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ABSTRACT

In this article we evaluate whether the Supreme Court's much-discussed decision in *Chevron v. Natural Resources Defense Council* (1984) signaled a lasting difference in how the justices decide administrative law cases by comparing and testing the predictions of three distinct theories of Supreme Court behavior. The legal model predicts an increase in deference to administrative agencies. This prediction is shared by the jurisprudential regime model, which also predicts that the justices evaluate key case factors differently before and after *Chevron*. The attitudinal model predicts no change in the justices' behavior as a result of *Chevron*. Although we find that attitudes matter, the fact that we also find support for the legal and jurisprudential regime models undermines the assertion of the attitudinal model that law cannot explain Supreme Court votes on the merits.

"The hegemony of the *Chevron* case over the field of judicial review of administrative action . . . is now complete. It is the most extensively cited case in the Courts of Appeals and persistently if inconsistently relied upon by the Supreme Court," declare prominent legal scholars Pierce, Shapiro and Verkuil in the introduction to their administrative law casebook in 1999 (p. vi). Our primary goal in this article is to assess the claim of Pierce, Shapiro and Verkuil. We examine what, if any, effect *Chevron v. Natural Resources Defense Council* (1984) has had on Supreme Court decision making in administrative law. In contrast to the legal explanation offered by Pierce, Shapiro and Verkuil, the attitudinal model (Segal and Spaeth 1993) suggests that *Chevron* should have had no effect because the political attitudes of the justices, combined with key facts, constitute a singular explanation of Supreme Court decision making. Jurisprudential regime theory (Richards and Kritzer 2002) predicts that while the attitudes of the justices do matter, *Chevron* may have nonetheless changed the structure of influences on justices' decisions in administrative law cases.

In this article, we offer three main hypotheses. Our *attitudinal hypothesis* is that the interaction of the justices' attitudes with the policy direction of the agency decision is a significant predictor of how the justices vote. Our *legal hypothesis*, and part of the jurisprudential regime hypothesis, is that the justices will be more likely to defer to agency decisions after *Chevron*. Our *jurisprudential regime hypothesis* also predicts that the justices evaluate key case factors differently before and after *Chevron*, such as whether the case involved rulemaking and whether Congress spoke precisely to the issue. We find that attitudes matter, but contrary to the expectation of the attitudinal model, there is also evidence that law does matter: Our results show that there have been important changes in the nature of the influences on the justices' decisions

since *Chevron*, and we argue that these results are substantiation of what Richards and Kritzer (2002) have labeled a "jurisprudential regime."

This study differs from a number of previous studies of the Court's administrative law decisions in that our main focus is not the relative levels success of different types of government agencies (e.g. Canon and Giles 1972; Crowley 1987; Handberg 1979; Sheehan 1990, 1992). In fact, some of the cases in our data set do not include government agencies as parties. Our intention in this study is to examine all the likely influences on the Supreme Court's administrative law decisions, and to focus our analysis broadly on the impact, if any, of *Chevron* on subsequent Supreme Court administrative law decisions.

***CHEVRON* IN THE EYES OF LEGAL SCHOLARS**

In *Chevron*, the Court tackled the question of the appropriate level of deference that courts should give to statutory interpretations made by administrative and regulatory agencies. Prior to this decision, the Court had not given definitive direction to lower courts charged with determining whether agency interpretations were valid. One stream of pre-*Chevron* cases stressed that final responsibility to interpret the law rests with courts, not with administrators, and consequently that courts should show little deference to the interpretations made by agencies (*U.S. v. Swank* 1981; *Morton v. Ruiz* 1974). Another, conflicting, line of pre-*Chevron* cases emphasized the complicated subject areas covered by administrative and regulatory statutes, and the special expertise of agency personnel to interpret those statutes. These cases suggested courts should defer to any agency interpretation not clearly contrary to the expressed intent of Congress (*FEC v. Democratic Senatorial Campaign Commission* 1981; *Train v. NRDC* 1975; *NLRB v.*

Hearst Publications 1944). In 1976, Judge Henry Friendly of the Second Circuit complained that the Supreme Court had endorsed two contradictory lines of decisions on the subject of deference to be accorded to administrative agencies, and the circuit courts were forced to choose between them (*Pittston Stevedoring Corp. v. Dellaventura* 1976, 49).

The Court attempted to clarify these conflicting lines of cases by ruling in *Chevron*, in what has become known as the "*Chevron* two-step," (Starr et. al 1987, 360), that unless Congress has spoken to the precise question at issue, any reasonable interpretation by the agency must be upheld.

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.

If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. (*Chevron* 1984, 842-843)

Step two of the *Chevron* test prohibits lower courts from substituting their own interpretations for any reasonable interpretation by the agency, even if the court's interpretation is objectively *more* reasonable. Although *Chevron* was not entirely new case law, it was distinct

and significant because it chose between the two previous conflicting lines of cases (Scalia 1989, 512-513).

The Supreme Court's 1984 decision in *Chevron* is widely considered to be a watershed in administrative law. Although scholars continue to debate the meaning of *Chevron* (Garrett 2003), *Chevron* is viewed by the interpretative community of political scientists and administrative law professors as an effort to clarify the Court's administrative law jurisprudence. Merrill and Hickman (2001) refer to the "*Chevron* revolution" and describe the ruling as having "effected a fundamental transformation in the relationship between courts and agencies under administrative law." As suggested by the quotation at the beginning of this article (from Pierce, Shapiro and Verkuil 1999), well-known administrative law casebooks also treat *Chevron* as an important decision in which the Supreme Court provided a relatively clear rule about the circumstances under which courts should defer to agency interpretations of the statutes they administer. Breyer and Stewart (1992, 283) note the conflicting lines of Supreme Court decisions on judicial deference to agency interpretations, and view *Chevron* as an attempt to resolve this conflict and provide a rule for the future. Likewise, Carter and Harrington (2000, 141) note that *Chevron* is "widely hailed as one of the most important developments in administrative law in the last part of the twentieth century" and that it signaled a retreat from aggressive judicial scrutiny of agency interpretations of the statutes they administer. Chae (2000) found that *Chevron* had just such an effect on the Court's environmental law decisions. Based on the views of the legal scholars, we expect to see an increase in deference to administrative agency decisions after *Chevron*.

THE ATTITUDINAL MODEL AND *CHEVRON*

"Simply put, Rehnquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he is extremely liberal" (Segal and Spaeth 1993, 65). According to the attitudinal model of Supreme Court decision making, each justice considers the facts of the case and then decides based on his or her liberal or conservative policy goals, also known as ideologies or attitudes. The justices are free to act on the basis of their policy goals because they "lack electoral or political accountability, ambition for higher offices, and comprise a court of last resort that controls its own jurisdiction" (Segal and Spaeth 1993, 69). In their most extreme statement of their position, Segal and Spaeth (1994, 11) contend that the "the attitudinal model is a complete and adequate *model of the Supreme Court's* decisions on the *merits*" and "attitudinal factors are all that systematically explain the votes of the justices" (emphasis in original). In a somewhat later analysis, Spaeth and Segal concede that justices might defer to law over their policy preferences on some occasions, but that "the overall levels of precedential behavior are so low that only ... preferential models ... appear to be in the right ballpark " (Spaeth and Segal 1999, 288).

The Supreme Court's high level of deference toward government agencies has been noted by many scholars. A legal explanation for this deference is that it is the result of legal values promoting deference toward administrative agencies because of the agencies' greater responsibility for and expertise in their subject areas. In response, attitudinalists suggest deference is the result of political agreement between the justices and the agencies they are supervising. First, some scholars attribute this deference to general policy agreement between the Congresses that write the regulatory statutes and the courts and agencies that implement them (Shapiro 1968, 266). This explanation fits with Dahl's (1957) study arguing that the Court is

generally politically aligned with the other elements of the national government. A different type of political explanation for deference focuses on the relationship between the ideological preferences of the justices and the policy impact of the agency decision being appealed (Handberg 1979; Sheehan 1990; Spaeth and Teger 1982). The decisions of administrative and regulatory agencies implicate both tangible political interests and abstract political values. It is reasonable to expect that the justices' political attitudes, which have been repeatedly shown to influence their decisions in other policy areas such as search and seizure (Segal and Spaeth 1993), capital punishment (George and Epstein 1992), establishment clause (Ignagni 1994), and freedom of expression (Richards and Kritzer 2002), will also influence their decisions in cases involving administrative and regulatory decisions. In this stream of scholarship, Sheehan (1992) demonstrates that the Warren Court was significantly more likely to uphold liberal agency decisions than conservative ones, while the Burger and Rehnquist Courts were significantly more likely to uphold conservative decisions.

Sheehan's 1990 study provides an illustration of both the strengths and limits of this explanation. He arrays the justices from most liberal to most conservative, and shows that support for agency decisions is strongly related to how their ideologies align with the policy direction of the agency decision. However, policy agreement cannot explain why Justice Rehnquist voted to uphold 47 percent of the liberal agency decisions that came before him, nor why Justice Douglas voted to uphold 33 percent of the conservative agency decisions that came before him. There is a significant amount of deference that is not explained by the justices' political attitudes. Regardless, we expect that the attitudes of the justices at least partially explain their administrative law decisions. The question which must be answered is whether the

attitudinal model is the only empirical explanation or whether *Chevron* matters either in terms of a simple increase in deference or as a jurisprudential regime.

JURISPRUDENTIAL REGIME THEORY AND *CHEVRON*

In looking for the influence of law on Supreme Court decision making, advocates of jurisprudential regime theory do not argue that law is some mechanical construct that dictates the outcomes of cases. Rather, they take a neoinstitutional perspective (see Richards and Kritzer 2002, Clayton and Gillman 1999; Epstein and Knight 1998): Law, like other institutions, is created by actors (justices) with political goals (attitudes) whose subsequent decisions are in turn influenced but not determined by the institutional structure they have created. Some neoinstitutional scholars of Supreme Court decision making utilize a strategic approach (Maltzman, Spriggs and Wahlbeck 1999) while others advance an interpretive and/or historical approach (Gillman 1999). The jurisprudential regime model uses parts of the strategic, interpretive and historical approaches (Richards and Kritzer 2002). Jurisprudential regimes establish case factors which matter to the justices' decision making, and/or change the way the justices evaluate key case factors. For example, a regime may highlight certain case factors as being particularly important to the outcome of the relevant class of disputes. Justices then apply the regime in the relevant area of law, creating a change in the way that case factors matter to the justices (Richards and Kritzer 2002, 305; Kritzer and Richards 2003 and 2005).

Some previous efforts to understand the role of law in Supreme Court decision making have attempted to distinguish between the influence of legal and extralegal factors (George and Epstein 1992; Segal 1984, but see Segal and Spaeth 1993 for a different interpretation of Segal's 1984 results). The main shortcoming of these approaches is that the "legal" case factors may be

relevant to the justices for attitudinal reasons, as Segal noted in 1984. Jurisprudential regime theory attempts to overcome this shortcoming by looking for significant changes in the magnitude and/or direction of the influence of both legal and extra-legal factors as a result of important Supreme Court precedents. Jurisprudential regimes filter or change the weighting of a variety of factors that may be relevant to the justices' decision making. The factors which are structured by a jurisprudential regime need not be limited to legal or jurisprudential factors, but can include policy considerations as well.

In evaluating whether *Chevron* established an influential jurisprudential regime, the most direct way to check for the influence of *Chevron* would be to categorize cases according to whether Congress has directly spoken to the issue being litigated and whether the agency interpretation is reasonable. However, it would be difficult to reliably code whether an agency interpretation is reasonable. Instead, we proceed by assessing whether the justices treat two "jurisprudential regime factors" in systematically different ways before and after *Chevron*: the length of the statute (as a proxy for whether Congress spoke directly to the issue), and whether the dispute involves rulemaking (with the expectation that the expected increase in deference generated by *Chevron* will occur in nonrulemaking cases, where the stakes are lower). We explicate and justify this methodology below.

AMICI AND PARTIES, ADJUDICATIONS AND RULEMAKINGS

Administrative law, the body of law governing the actions of regulatory and administrative agencies, is a rich mixture of legal and political ingredients.

In litigation involving administrative actions of the federal government, the federal government is of course a frequent participant. Government participation as a direct litigant can

come when agencies appeal unfavorable circuit court decisions to the Supreme Court or respond to appeals made by unsuccessful circuit court challenges to agency policy. As a litigant before the Supreme Court, the federal government is amazingly successful (Sheehan and Songer 1992; Kritzer 2003).

While federal agencies enjoy substantial success in the courts, it may be that all agencies are not created equally. Thus, another focus of research has been the relative success of different federal agencies, particularly before the Supreme Court. The theory here is that different agencies may represent different political programs, and that the justices may be more sympathetic to some agencies than others. However, Sheehan (1992) emphasizes that whether the agency was inside the executive branch or independent did not seem to influence the Court as much as the political direction of the agency decision (liberal or conservative). There is little evidence that different types of agencies such as economic or social are treated systematically differently by the Court (Crowley 1987).

Among the other important influences on Supreme Court decisions are the parties participating in each case. Litigants differ in their ability to assemble legal arguments, and the presence of particular litigants or *amici* can provide information to the justices about the consequences of their decision (Barker 1967; Vose 1957). In particular, litigants who are in court often are likely to plan ahead for litigation, are greatly concerned about precedent (“play for rules”), maintain constant relationships with their attorneys, develop expertise in assembling and presenting legal arguments, and attain reputations for competence (Galanter 1974). Galanter’s argument suggests that frequent and well-funded litigants such as corporations, interest groups and units of government should be more likely to prevail than infrequent litigants and individuals. However, research on interest group success in the courts has not completely borne

out these suggestions (Sheehan and Songer 1992). Epstein (1991) finds that cases involving units of government and/or economic interests constituted more than 60 percent of the Supreme Court's 1987 docket, and that group-sponsored litigants were significantly more likely to be successful before the Court. Thus, there are compelling theoretical reasons to believe that group-sponsored litigants should be more successful in court, but the empirical results have been mixed.

Groups and individuals can participate indirectly in Supreme Court cases by filing *amicus curiae* briefs. These briefs can serve two purposes: They can provide legal arguments in addition to those made by the litigants in the case, and they can provide information about the political support for and political consequences of a Court decision favoring one side or the other (Collins 2004; Epstein and Knight 1999). Spriggs and Wahlbeck (1997) find that *amicus* briefs frequently present arguments not made by the litigants, but that the Court rarely adopts these arguments in its opinions.

There is considerable evidence that among groups, units of government are particularly successful. Kritzer (2003) observes that units of government enjoy advantages that other well-funded groups do not: Governments write the laws under which the lawsuits are filed and decided, and the judges who decide the cases are themselves government officials.

Legal scholars typically expect that legal considerations matter to the justices. A key legal consideration is the type of agency decision-making process that led to the decision being challenged. Administrative agencies make decisions through two primary types of legal processes: adjudications and rulemakings. These legal processes differ in both the steps the agency must carry out and in the size of their policy impact. Adjudications are typically used to apply policy decisions to a single entity or a small number of entities, such as the distribution of

government benefits or imposition of penalties. The rulemaking process, on the other hand, is aimed at producing regulatory rules, which are broad statements of policy to be applied in the future to a general class of people or situations. As such, rules are more politically important than adjudications; they have broader and longer-term effects on policy, are better suited to signal new directions in policy, and offer greater policy-making flexibility.

CENTRAL HYPOTHESES

Our review of the legal scholarship, the attitudinal model, and jurisprudential regime theory suggests three types of hypotheses.

First, the *attitudinal hypothesis* is that the interaction of the justices' attitudes with the policy direction of the agency decision will shape how the justices vote.

Although we expect that attitudes will matter, our second and third sets of hypotheses suggest that *Chevron* influenced the justices' decisions. This is contrary to the prediction of the most extreme form of the attitudinal model which posits that law has no such influence.

Second, given the substance of *Chevron*, and the discussion of it by legal scholars, one might simply expect the Supreme Court to be more likely to defer to the decisions of administrative agencies in the years since *Chevron* compared to the years prior to *Chevron*. This does not mean that the justices would ignore their own policy preferences, but rather that the impact of *Chevron* would be to shift the pattern. Specifically, a dummy variable representing whether a case was decided after *Chevron* should be positively related to deference. While liberal justices would still prefer liberal policies, they would be more willing to accede to conservative agency decisions after *Chevron*; similarly, while conservative justices would still prefer conservative policies, they would be more willing to accede to liberal agency decisions

after *Chevron*. However, this prediction of deference is somewhat simplistic considering that *Chevron* only asks for deference to the agency if Congress has not directly spoken on the issue and the agency's interpretation is reasonable. With this caveat in mind, our second hypothesis is that the data will show a simple increase in deference post-*Chevron*. We call this the *legal hypothesis*. In addition, a simple increase in deference post-*Chevron* (similar to the simple increase in liberal votes that Richards and Kritzer found after the Court instituted the content-neutrality regime in free expression jurisprudence) is regarded as partial but not complete evidence of a jurisprudential regime. As we detail immediately below, the jurisprudential regime hypothesis requires more detailed statistical tests and more robust results than the legal hypothesis, so it is possible that the legal hypothesis could be supported but the jurisprudential regime hypothesis would not.

Our third hypothesis, the *jurisprudential regime hypothesis*, is that *Chevron* conditions the influence of the jurisprudential regime variables. That is, following Richards and Kritzer (2002), if *Chevron* demarcated a jurisprudential regime change, the jurisprudential factors influencing justices' decisions should differ before and after *Chevron*. Richards and Kritzer theorized that jurisprudential regimes establish case factors which matter to the justices' decision making, and/or change the way the justices evaluate key case factors; a change of regime may institute a new standard of review or balancing test. Justices then apply the regime in the relevant area of law, which changes how case factors matter to the justices (*ibid.*, 305). Unlike the examples of freedom of expression used by Richards and Kritzer (2002) and establishment clause tested by Kritzer and Richards (2003), it is more difficult to find jurisprudential regime variables for *Chevron* that can be reliably coded. The parallel to the jurisprudential variables in the free expression article (e.g. whether the regulation was content-based or content-neutral)

would be the factors judges are required to examine by the *Chevron* two-step. However, there is a problem with step two: How does one reliably code a variable such as whether an agency interpretation is "reasonable"?

In our search for the most plausible indicators of the *Chevron* jurisprudential regime, we chose two variables. One is the length of the statute, measured in column centimeters in the U.S. Code, which we use as a proxy for "whether Congress has directly spoken to the precise question at issue" (*Chevron* 1984, 842), based on the operational assumption that a longer statute increases the likelihood that Congress spoke directly to the issue. The advantage of this measure is obviously its reliability. Although we have some questions about whether the measure is a consistently valid measure of whether Congress spoke precisely to the issue, it is the most obtainable indicator of whether the statute is likely to cover the issue being litigated, and other scholars have used similar measures. Huber, Shipan and Pfahler (2001, 330) used the number of new words added to regulatory statutes as a proxy for statutory control, which is a measure of the amount of discretion afforded to agencies. The related hypothesis is that post-*Chevron*, the Court should be less likely to defer to the agency when the statute is longer (and by assumption, speaks more specifically to the issue at hand), with the opposite occurring pre-*Chevron*.

The second jurisprudential variable we use is whether the case involves rulemaking. Our discussion of the differences between rulemaking and nonrulemaking cases suggests that justices may treat these two subcategories of cases differently. These differences may extend to *Chevron* producing different changes; that is, jurisprudential regime theory as applied to administrative law may imply that justices have treated rulemaking and nonrulemaking differently *in different ways* before and after *Chevron*. Although most of the cases in which the Supreme Court has applied *Chevron* as a controlling precedent have involved rulemakings, it does extend to

nonrulemaking cases as well (Merrill and Hickman 2001). As Schuck and Elliot (1990) have observed, there is more at stake in rulemakings because they apply to broad policy questions and affect large numbers of potential litigants, so courts are less likely to defer in rulemakings than in nonrulemaking cases. Therefore, we expect to see, post-*Chevron*, a greater likelihood that the justices defer in nonrulemaking cases compared to rulemakings. In other words, given the emphasis on deference post-*Chevron*, but keeping in mind that more is at stake in rulemaking cases, we expect the increase in deference to show up primarily in nonrulemaking cases.

Although it is questionable whether this is a jurisprudential factor that comes directly from *Chevron*, we consider that this is at least an indirect means of measuring at the influence of *Chevron*. Given the lack of suitable alternatives, and considering that this is one of four hypotheses we have that make up the regime hypothesis, we think it merits assessment. In summary, the jurisprudential regime hypothesis that *Chevron* matters involves four specific hypotheses:

1. We should see a simple increase in deference post-*Chevron*, as measured by the dummy variable indicating whether a case was decided before or after *Chevron*. Recall that this is also the legal hypothesis, but is only one of the tests we use to assess the jurisprudential regime hypothesis.
2. Post-*Chevron*, the justices should be less likely defer to the agency as the statute length increases (based on the operational assumption this is a measure of when Congress spoke directly to the issue). This effect should differ as compared to the pre-*Chevron* period.
3. Post-*Chevron*, the justices should be less likely to defer to the agency in a rulemaking case than in a non-rulemaking case. Pre-*Chevron*, we do not expect any significant difference.

4. The "sensitivity analysis" should confirm that *Chevron's* influence on the justices' evaluation of jurisprudential factors is uniquely strong, compared to other annual breakpoints. The sensitivity analysis first requires a Chow test, which assesses whether the differences in the jurisprudential variables before/after *Chevron* produce a significant chi square statistic (Richards and Kritzer 2002, 319). The sensitivity analysis next requires the Chow test to be performed with series of annual breakpoints instead of the *Chevron* breakpoint. The size of the chi square statistic associated with *Chevron* should be among the largest, if not the largest, compared to the chi square statistics associated with the other annual breakpoints. If there are other larger chi square statistics, they should be clustered around the time of *Chevron*.

CASE AND VARIABLE SELECTION

Case Selection Method

We coded all cases from 1969 to 2000 that presented an administrative law issue, according to Lexis, using the following procedure: We first ran a search using the phrase "Administrative Law". Next, we examined the Lexis headnotes of all the cases that came up. We then retained those cases where at least one of the headnotes was on the topic "Administrative Law." We selected all orally argued cases for which the Court issued written opinions, including *per curiam* opinions, and we excluded cases with tie votes. We did not code tax cases and prisoner cases because they seemed to us to represent quite distinct areas of jurisprudence even if technically they can be labeled administrative law. Also, we excluded a small number of cases for which we not able to code key variables or which overlap key categories (e.g., cases that presented both a rulemaking and an administrative adjudication issue). Finally, legal scholars

recognize that *Chevron* does not apply to all administrative law decisions so we were forced to limit the analysis to the types of legal questions for which *Chevron* could possibly be relevant. (See the Appendix for a discussion of the cases selected for our analysis.)

We double-coded a random subset of 13 cases to allow us to assess reliability. This was done in a double-blind manner. Neither coder knew which cases had been selected for the reliability analysis. The retest method (double-coding) is appropriate for reliability assessment if there are no concerns about reactivity or changes over time in the phenomena being observed (Carmines and Zeller 1979). Looking at the variables used in this analysis, the rate of agreement between the two coders is 80.3% for all variables, with rates of 79.4% for the dependent variables and 81.3% for the independent variables.

Variable Selection

We used logistic regression as our primary method of analysis. The dependent variable is *deference*: whether a justice defers to the agency's decision or overturns it (and is coded 1 for defer to agency and 0 for not defer). We chose deference rather than ideological direction as the dependent variable based on our review of the relevant literature about *Chevron*, which maintains a similar focus.

To estimate the influence of the *attitudes* of the justices, we use the standard measures based on content analysis of newspaper editorials about nominees at the time of nomination (Segal and Cover 1989; Segal et al. 1995). (See the Appendix for a discussion of the merits of these measures and results obtained using the alternative Martin-Quinn measures.) These scores range from -1 at the extreme conservative end to 1 at the extreme liberal end. *Agency policy direction* represents the ideological direction of the agency's policy decision (-1 is conservative;

1 is liberal; 0 is unclear). To determine whether a policy direction was liberal or conservative, we used the Spaeth (2002) coding convention, with liberal policy direction including anti-business, pro-environment, pro-consumer, pro-liability and pro-competition policy decisions. Conservative policy direction refers to the opposites. *Attitude*Agency Policy Direction*, which we also refer to as "alignment," is an interaction term calculated as the product of attitudes multiplied by agency direction. Positive values for this independent variable mean that there is an alignment of attitude and the policy direction of the agency's decision (Smith and Tiller 2002). We hypothesize that justices will be more likely to defer when there is an alignment of attitude and agency policy direction.

In order to capture some element of the degree of political control of the agency whose action is involved in the case, we include a set of dummy variables for the type of agency that was based on whether the President could hire and fire the agency head (1) or not (0). (We also performed analyses based on the social and economic dimensions developed by Sheehan (1992, 498). Similar to Sheehan, we found that the results were not robust, so we report this alternate approach instead.) Based on our review of the literature, we do not have directional hypotheses for this set of variables or the next sets, which relate to parties. In the tables, we use two-tailed p-values for the variables for which we did not have directional hypotheses, denoted by the pound sign (e.g. #) if significant. If we had a directional hypothesis for a variable, we tested significance using a one-tailed p-value, denoted by the standard asterisk notation (e.g. *) if significant.

Parties opposing deference are treated as a categorical set, with separate dummy variables for the base category of government (primarily state government), corporation or business interest group, non-corporate interest group, and individual. Likewise, parties seeking deference

are handled as a categorical set, with separate dummy variables for non-agency parties (base category), agency alone, and agency with co-party.

To ascertain the role of *amici* other than the federal government, we include a set of variables relating to amount of support or opposition to the agency's decision: the number of *amici* supporting the agency's decision, the number of *amici* opposing the agency's decision, and the number of *amici* taking positions that are unclear vis-à-vis the agency's decision. These measures are the most effective way to control for whether the cases were salient to the justices because they are case-specific and pre-hoc. About three percent of these counts had values exceeding 10 and ranging as high as 31; to avoid problems created by large values, all of the counts were truncated at 10. We did not have directional hypotheses for these variables.

Finally, we include three variables that relate specifically to questions of law. The first is a dummy variable to indicate before (0) and after (1) *Chevron*, with *Chevron* itself omitted from the analysis. This tests the legal hypothesis and is a part of the test for the jurisprudential regime hypothesis. The second is a dummy variable indicating the nature of the administrative procedure involved; this was coded 1 for cases involving rulemaking on the part of the agency and 0 otherwise (this nonrulemaking category includes adjudication, ratemaking, and licensing cases). We also coded this variable, like the issue and standard of review variables, according to what the appellate court wrote to obtain a measure that is prior to and independent of the Supreme Court's decision. The third is the length of the statute, which we use as a proxy for "whether Congress has directly spoken to the precise question at issue" (*Chevron* 1984, 842). However, as we note above, following Segal and Spaeth (1993), these variables may also matter for attitudinal reasons. To demonstrate that these factors matter for legal reasons we need to show that the

Chevron regime conditions their influence (Richards and Kritzer 2002), which requires a Chow test and accompanying sensitivity analysis, detailed below.

ANALYSIS

The first question we address is whether *Chevron* mattered in the simple sense of shifting the likelihood of deference to the agency's decision. To do this, we estimated logistic regressions including a dummy variable to represent whether a decision was made after *Chevron*. The results are shown in the first panels of Table 1 (all justices) and Table 2 (only those on the Court at the time *Chevron* was decided). Tables 1 and 2 include both regular standard errors (S.E.) and robust standard errors (R.S.E.). The robust standard errors account for clustering. For a few variables, the significance level varied depending on S.E. or R.S.E., so two sets of asterisks were used. As the tables show, *Chevron* led to a simple increase in deference to the agency by the justices, supporting the legal hypothesis and part of the jurisprudential regime hypothesis. Even after controlling for change in personnel (shown in Table 2), the coefficient remains significant (Baum 1992).

[TABLES 1 AND 2 ABOUT HERE.]

We now turn to the jurisprudential variables. A very interesting finding from Tables 1 and 2 is that the coefficient for the rulemaking variable in the model involving all cases is negative and significant. The justices are less likely to defer in a rulemaking case than a nonrulemaking case. However, one of the most important findings of this article is that the influence of this variable shifts before and after *Chevron*. Before *Chevron*, the effect of the

variable fails to even approach statistical significance; after *Chevron*, the coefficient for the rulemaking variable is -1.035, with a one-tailed p-value of less than .001. The results are very similar when we limit the analysis to the justices on the Court when *Chevron* was decided. This fits with the jurisprudential regime hypothesis based on Schuck and Elliot's (1990) observation that there is less deference to the agency in a rulemaking case because there is more at stake, broader policies are implicated, and more potential litigants are affected. Even though the *Chevron* opinion calls for courts to show greater deference in certain circumstances, in the post-*Chevron* period, this deference is more likely to be shown in nonrulemaking cases, where the stakes are lower.

The results for the statute-length jurisprudential regime variable in both Table 1 and 2 are also consistent with our hypothesis that in the after period, the longer (and by operational assumption, more specific) the statute, the greater the likelihood that the Court would not defer to the agency, with the opposite effect in the period before the regime was established.

To further test the jurisprudential regime hypotheses, we computed Chow tests to isolate whether the before/after differences in the influence of the jurisprudential variables (rulemaking and statute length) are significant. To perform the Chow test, we first estimate the -2 log likelihood of a model involving all cases (the first column of Table 1, for example), then estimate the -2 log likelihood generated by the interaction of the *Chevron* dummy and the non-jurisprudential variables. Next we estimate the -2 log likelihood based on the interaction of the *Chevron* dummy and the jurisprudential variables (rulemaking and statute length). This produces a chi square statistic that can be used to assess the significance of the interactions (Richards and Kritzer 2002, 312, 319; Hanushek and Jackson 1977). We are particularly interested whether the chi square statistic for the interaction with the jurisprudential variables is significant.

At the bottom of Tables 1 and 2 we show the chi square statistics generated by the Chow tests of the jurisprudential variables. They are strongly significant in both models, thus providing support for the hypothesis that *Chevron* constituted a regime change. However, the sensitivity analysis requires us to assess the size of these chi square statistics based on the *Chevron* breakpoint relative to other annual breakpoints. These results are reported in Figure 1, which shows that the *Chevron* chi square statistics are larger than those associated with any other breakpoint; this is robust support for the jurisprudential regime hypothesis. Critics may question whether the rulemaking variable is truly a jurisprudential variable, so we also performed the sensitivity analysis based on solely the statute-length variable; we found a pattern parallel to the reported sensitivity analysis, with the *Chevron* breakpoint again the largest.

We move next to the question of whether the combination of justices' attitudes and the policy direction of the agency decision influenced the justices' votes on the administrative law disputes in our data. Given that our dependent variable is deference, truly understanding the effect of these variables requires us to look at the interaction of the justices' attitudes and the policy direction of the agency decision. The results in Tables 1 and 2 make it clear that the interaction of these variables is significant for all the models shown. Sorting out the impact of these variables is slightly complicated. To do so, we estimated expected probabilities of deferential votes for different combinations of attitude and agency policy direction; we set values of attitude at +1.0 (very liberal), +0.5 (moderately liberal), 0.0 (moderate), -0.5 (moderately conservative), and -1.0 (very conservative), and used the logistic regression coefficients to estimate the likelihood of a deferential vote for liberal and conservative agency decisions. We presumed that for cases in which the justice was a moderate and for which we could not classify the agency decision (recall that we coded the agency decisions as -1 for conservative and +1 for

liberal, leaving 0 for the small number of cases where we were unable to classify the policy direction of the agency decision) the probability of a deferential vote was .5. The results of these estimates are shown in Figure 2, including estimates based on the regressions for all justices and the justices on the Court when *Chevron* was decided.

[FIGURE 2 ABOUT HERE.]

Liberals are more likely to defer to liberal agency decisions and conservatives are more likely to defer to conservative agency decisions, as shown by the opposite directions of the slopes for liberal and conservative agency decisions. Interestingly, we find that after *Chevron*, the likelihood of deference increases for liberal agency decisions regardless of judicial ideology (shown by the entire line moving up), but decreases for conservative agency decisions (shown by the entire line shifting down). These patterns largely hold when we control for change in personnel. However, in the after period, for liberal agency decisions, the impact of judicial attitudes is less than for conservative agency decisions, as shown by the slight slope for liberal agency decisions, but a steeper slope for conservative agency decisions. Relating these findings to the larger question of which of the three models is best supported, we observe that these findings lend some support to the attitudinal model, or at least suggest that the above findings of support for the jurisprudential regime model should be tempered with a good measure of attitudinalism. This leads us to an interesting theoretical question: Which model is best suited to incorporate both law and attitudes? We shall return to this question in the conclusion.

Finally, what about the remaining variables that are not linked to the attitudinal, legal or jurisprudential regime model, but included for the purposes of control? Looking at the parties seeking deference, the only result that remains consistent when we control for change in personnel is that before *Chevron*, agencies with co-parties are more successful than nonagency

parties, but after *Chevron*, agencies with co-parties are less successful than nonagency parties. Among the parties seeking reversal of the agency, the baseline category is comprised of government parties, primarily state governments. We generally see, regardless of whether the case was decided before or after *Chevron*, that compared to government parties, other types of parties seeking reversal are not as successful. Consistent with this pattern, before *Chevron* corporations are rather unsuccessful compared to the base category of government. However, the difference is not nearly as pronounced after *Chevron*. The number of *amici* urging reversal predicted the failure of these groups before *Chevron*, but after *Chevron*, *amici* seeking reversal showed no significant effects. A higher number of *amici* seeking deference to the agency had a significant likelihood of success post-*Chevron*, but not before. The number of *amici* coded as unclear had no effect before, but a higher number after predicted lack of deference. We also note that when the President can hire and fire the head of the agency, the justices tend to defer, but only before *Chevron*.

CONCLUSION

This article has evaluated three competing theories of the influence of the Supreme Court's *Chevron* decision on the justices' votes. We certainly did find that the interaction of attitudes and the policy direction of the agency decision influenced the justices' votes, which supports the attitudinal hypothesis. At a simple level, we observed increased deference after *Chevron*, which confirms the legal hypothesis, and lends partial support to jurisprudential regime hypothesis. Contrary to the attitudinal model, which asserts that law does not matter, the hypothesis that *Chevron* demarcated two jurisprudential regimes is supported in three additional ways. For our first jurisprudential regime variable, we use the length of the statute as a proxy for

whether Congress spoke directly to the issue. We find that before *Chevron*, the justices were more likely to defer when there was a longer statute, but after *Chevron*, the justices were less likely to defer when there was a longer statute. Our second jurisprudential regime variable is whether the case involved rulemaking. We find that the increase in deference post-*Chevron* was located primarily in nonrulemaking cases, rather than the rulemaking cases that have higher stakes, affect a broader range of policies, and affect more potential litigants (Schuck and Elliot 1990). Finally, we used the sensitivity analysis method to test whether *Chevron* systematically conditioned the influence of these two jurisprudential regime factors, as compared to other annual breakpoints, and found that the statistical differences associated with *Chevron* were stronger than differences associated with any other year. Moreover, all of our models include replications limited to the justices on the Court at the time of *Chevron*. The patterns we found for all justices in our analysis hold up when we limit our focus to the *Chevron* justices, so we are fairly confident that these changes do not simply reflect personnel shifts on the Court.

This brings us back to the theoretical question of which model is best suited to incorporate both law and attitudes? The attitudinal model as described by its most prominent advocates, Spaeth and Segal, contends there is no systematic evidence that law matters, as we explain above. The jurisprudential regime model leaves room for both law and the preferences of the justices. "We do not in any way reject the idea that justices are influenced significantly, perhaps even primarily, by attitudes" (Richards and Kritzer 2002, 309). Although we recommend that any conclusions we draw regarding jurisprudential regime theory should be tempered with a healthy dose of attitudinalism, the various statistical tests that support the jurisprudential regime (and legal) hypotheses are simply not able to be explained by the attitudinal model alone. Rather, *law does matter* in Supreme Court decision making.

This study also illustrates the difficulty of isolating the effects of changes in the justices' behavior. The system of administrative law consists of several sets of participants who vary their behavior in response to the actions of other participants: agencies, whose decisions are influenced by the Supreme Court and who choose which decisions to defend in court; potential litigants who choose which agency decisions to challenge; and circuit courts who influence the nature of the cases that get to the Supreme Court. Isolating changes in justices' behavior is difficult because all these participants adjust their decisions at least partially with the goal of pursuing their policy goals while not wasting resources on actions likely to be overturned by the Court. These adjustments have the effect of responding to Supreme Court actions, and therefore dampening the observable consequences of those actions. Some evidence indicates that lower courts take *Chevron* seriously (Schuck and Elliott 1990, 1030-31) and that, post-*Chevron*, lower courts were less likely to justify their reversals of agency decisions on the legal bases covered by *Chevron* (Smith and Tiller 2002). Either of these two phenomena would have altered the set of administrative law decisions appealed to the Supreme Court on legal grounds covered by *Chevron* in the post-*Chevron* era. Consequently, the Supreme Court would be less likely to take cases in which there is a high probability of the justices simply deferring. In addition, the *Chevron* decision states that if Congress has directly and clearly spoken and the agency overlooks that statement, or if the agency's interpretation is unreasonable, we should not expect the Court to defer. The fact that we do find significant empirical consequences of the *Chevron* decision suggests that it did have a lasting, substantial impact on the justices' behavior.

APPENDIX

Sample Selection

For this analysis we included only those cases in which either the appellate court's majority or dissenting opinion raised the issue of whether the agency had applied the standard of review that Congress had intended or whether the agency had misinterpreted substantive law; we excluded those cases described by the appellate majority and dissenting opinions as involving only issues of constitutional due process, adequacy of factual justification for the agency's decision and/or some procedural error by the agency (other than issues relating to whether the agency had applied the standard of review Congress intended) because *Chevron* does not apply to these types of cases. We included only those cases in which the standard of review employed by the appellate court addressed whether the agency made an error of law; we excluded cases in which the standard of review was *de novo*, substantial evidence, or where the appellate court asked whether the agency's decision was capricious and arbitrary or involved the abuse of discretion. (The issue and standard of review variables were coded based on the opinion of the appellate court in order to obtain measures that are prior to the Supreme Court's decision.) None of the excluded standards of review are likely to apply in the types of cases for which the principles addressed in *Chevron* would be relevant, because these standards of review are used to evaluate the way the agency gathered and analyzed the information it used to make its decision, while *Chevron* focuses on the consistency between the agency's decision and the statute which authorized the decision (Gellhorn and Levin 1990, 9276-96). The result of these various steps was to eliminate 1575 out of 2704 votes, leaving 1129 votes.

Measuring Ideology

Regarding the measures of the justices' ideologies, two sets of questions have been raised about the Segal-Cover scores. One pertains to their suitability in cases not involving civil

liberties (Epstein and Mershon 1996). Although this is a legitimate concern, our use of Segal-Cover scores in this context is justified for three reasons. First, a suitable alternative has not been developed. Using lagged votes, as Epstein and Mershon recognize, is circular, not independent. Secondly, we deliberately left out taxation cases, one of the issue areas for which the Segal-Cover scores are particularly unsuitable. Finally, following Epstein and Mershon's suggestion of evaluating the suitability of the scores for different subsets of cases, we find that the Segal-Cover scores actually do predict the justices' administrative law votes, particularly in interaction with the policy direction of the agency decision.

The second set of questions pertains to the assumption of attitudinal stability over time made by users of the Segal-Cover scores (Martin and Quinn 2002a). Martin and Quinn have developed measures of the justices' preferences that allow the justices' ideal points to vary over time. Using Martin-Quinn scores, we replicated all of our analyses reported in this manuscript. The replications supported the results reported here. Most importantly, the chi-square statistics associated with the *Chevron* decision continued to stand out in the sensitivity analyses. Occasionally, a variable that was of marginal statistical significance according to the analysis performed with Segal-Cover scores failed to achieve significance at the $p=.05$ level when the analysis was performed with the Martin-Quinn scores, or a variable that was not quite significant at the .05 level according the analysis with Segal-Cover scores achieved that level with the alternate Martin-Quinn measures of the justices' attitudes. We chose to report the results we obtained using the Segal-Cover scores because these scores are more commonly used and because Martin and Quinn (2002b, 18) caution about the use of their measures that "ultimately these are vote-based measures and cannot be used *per se* as explanatory variables for studies of voting on the Supreme Court."

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TABLE 1: DEFERENCE IN ADMINISTRATIVE LAW CASES - ALL JUSTICES

	All Cases			Before Chevron			After Chevron		
	B	S.E.	R.S.E.	B	S.E.	R.S.E.	B	S.E.	R.S.E.
After Chevron	0.410	0.144	0.140 **						
Attitude	-0.111	0.098	0.964	-0.067	0.143	0.049	-0.205	0.161	0.165
Agency Policy Direction	0.066	0.082	0.810	-0.261	0.145	0.128 , #	0.506	0.138	0.149 ###, ##
Agency Policy Direction*Attitude	0.600	0.100	0.100 ***	0.686	0.147	0.130 ***	0.763	0.169	0.178 ***
# Amici to Reverse Agency	-0.025	0.029	0.026	0.186	0.056	0.049 ###	-0.053	0.040	0.040
# Amici to Defer to Agency	0.162	0.053	0.049 ##	0.082	0.078	0.062	0.230	0.084	0.088 ##
# Amici, unclear	-0.174	0.060	0.045 ##, ###	-0.276	0.273	0.257	-0.197	0.083	0.075 #, ##
Type of Party Opposing Deference (Base is government)			###			###			###
Corporation Opposing Deference	0.909	0.191	0.188 ###	2.545	0.428	0.416 ###	0.676	0.254	0.277 #, #
Non-Corporate Interest Group Opposing Deference	0.873	0.263	0.263 ##	1.159	0.477	0.450 #	1.360	0.374	0.382 ###
Individual Opposing Deference	0.960	0.220	0.207 ###	1.330	0.399	0.348 ###	1.521	0.353	0.350 ###
Type of Party Advocating Deference (Base is non-agency)						##			##
Agency Alone Advocating Deference	0.282	0.188	0.188	-0.396	0.330	0.313	0.137	0.279	0.287
Agency with Co-party Advocating Deference	0.205	0.206	0.200	0.790	0.348	0.300 #, ##	-0.720	0.314	0.320 #
President Can Fire Agency Head	0.914	0.158	0.158 ###	1.971	0.324	0.349 ###	0.349	0.225	0.220
Rulemaking	-0.512	0.142	0.137 ***	-0.090	0.227	0.218	-1.035	0.232	0.224 ***
Statute Length	-0.003	0.001	0.001 ***	0.008	0.002	0.002 ***	-0.005	0.001	0.001 ***
Constant	-0.598	0.249	0.236 #	-2.511	0.453	0.409 ###	0.947	0.360	0.349 ##
Model chi square		161.490			144.582			142.039	
df		15			14			14	
Proportional Reduction in Error		15.6			33.7			28.9	
Pseudo-R ² (Cox and Snell)		0.129			0.236			0.200	
N		1174			536			638	
Chow test		38.111*** (1 d.f.)							

Notes:

Coefficients are logistic regression maximum likelihood estimates. R.S.E. column contains robust standard errors, which take into account clustering. *p<.05, **p<.01, ***p<.001, one-tailed (used where we had directional hypotheses about variables). Otherwise, #p<.05, ##p<.01, ###p<.001, two-tailed. Two sets of asterisks, corresponding to S.E. and R.S.E., respectively, were used when the significance levels based on S.E. and R.S.E. differed. See text for information on how Chow test was conducted.

TABLE 2: DEFERENCE IN ADMINISTRATIVE LAW CASES - CHEVRON JUSTICES

	All Cases			Before Chevron			After Chevron		
	B	S.E	R.S.E.	B	S.E.	R.S.E.	B	S.E.	R.S.E.
After Chevron	0.305	0.167	0.160 *						
Attitude	-0.127	0.107	0.104	0.024	0.154	0.141	-0.427	0.196	0.195 #
Agency Policy Direction	0.083	0.094	0.090	-0.337	0.166	0.145 #	0.818	0.183	0.207 ###
Agency Policy Direction*Attitude	0.578	0.110	0.108 ***	0.702	0.160	0.142 ***	0.646	0.206	0.215 **
# Amici to Reverse Agency	-0.024	0.032	0.029	0.200	0.063	0.056 ##, ##	-0.013	0.049	0.049
# Amici to Defer to Agency	0.141	0.058	0.056 #	0.033	0.083	0.068	0.278	0.103	0.109 ##
# Amici, unclear	-0.256	0.091	0.091 ##	-0.286	0.298	0.293	-0.289	0.114	0.096 #, ##
Type of Party Opposing									
Deference (Base is government)			###			###			###
Corporation Opposing									
Deference	1.199	0.237	0.237 ###	3.114	0.502	0.505 ###	1.257	0.371	0.444 ###, ##
Non-Corporate Interest Group									
Opposing Deference	0.830	0.298	0.308 ##	1.406	0.528	0.501 ##	1.514	0.462	0.482 ##
Individual Opposing									
Deference	0.984	0.252	0.234 ###	1.540	0.454	0.394 ###	1.782	0.438	0.449 ###
Type of Party Advocating									
Deference (Base is non-agency)						##			###
Agency Alone Advocating									
Deference	0.350	0.225	0.222	-0.477	0.365	0.348	0.084	0.396	0.413
Agency with Co-party									
Advocating Deference	0.333	0.245	0.237	0.879	0.395	0.337 #, ##	-1.383	0.450	0.464 ##
President Can Fire Agency Head	1.183	0.192	0.201 ###	2.361	0.371	0.422 ###	0.437	0.303	0.288
Rulemaking	-0.483	0.167	0.161 **	-0.006	0.253	0.238	-1.459	0.331	0.345 ***
Statute Length	-0.004	0.001	0.001 ***	0.008	0.002	0.002 **	-0.009	0.001	0.002 ***
Constant	-0.756	0.288	0.270 ##	-2.849	0.518	0.480 ###	1.294	0.481	0.482 ##
Model chi square		139.890			148.034			134.028	
df		15			14			13	
Proportional Reduction in Error		20.4			40.0			45.1	
Pseudo-R ² (Cox and Snell)		0.148			0.271			0.280	
N		876			468			408	
Chow test		42.255***, 1 d.f.							
Notes:	Coefficients are logistic regression maximum likelihood estimates. R.S.E. column contains robust standard errors, which take into account clustering. *p<.05, **p<.01, ***p<.001, one-tailed (used where we had directional hypotheses about variables). Otherwise, #p<.05, ##p<.01, ###p<.001, two-tailed. Two sets of asterisks, corresponding to S.E. and R.S.E., respectively, were used when the significance levels based on S.E. and R.S.E. differed. See text for information on how Chow test was conducted.								

FIGURE 1: Influence of *Chevron* Regime on Justices' Evaluations of Decision Factors, Versus Influence of Other Breakpoints

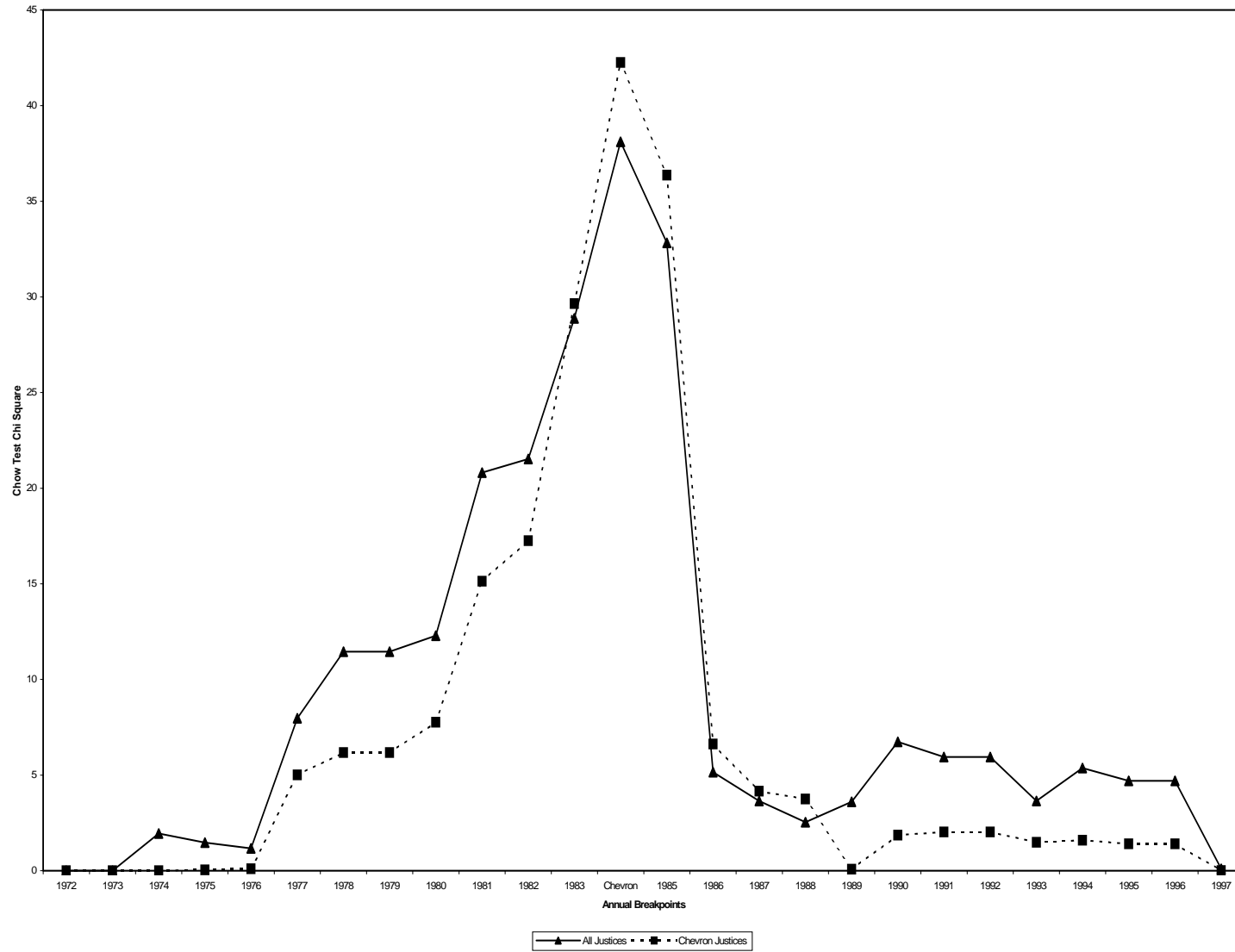
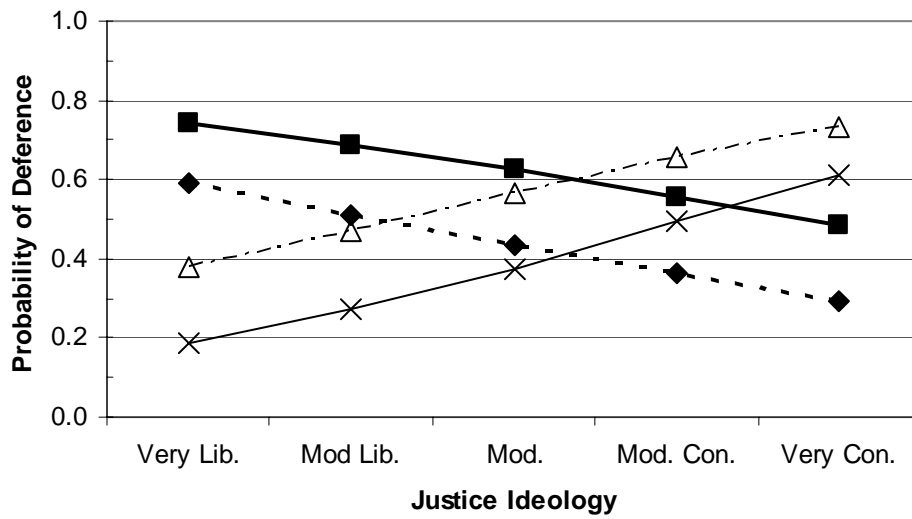
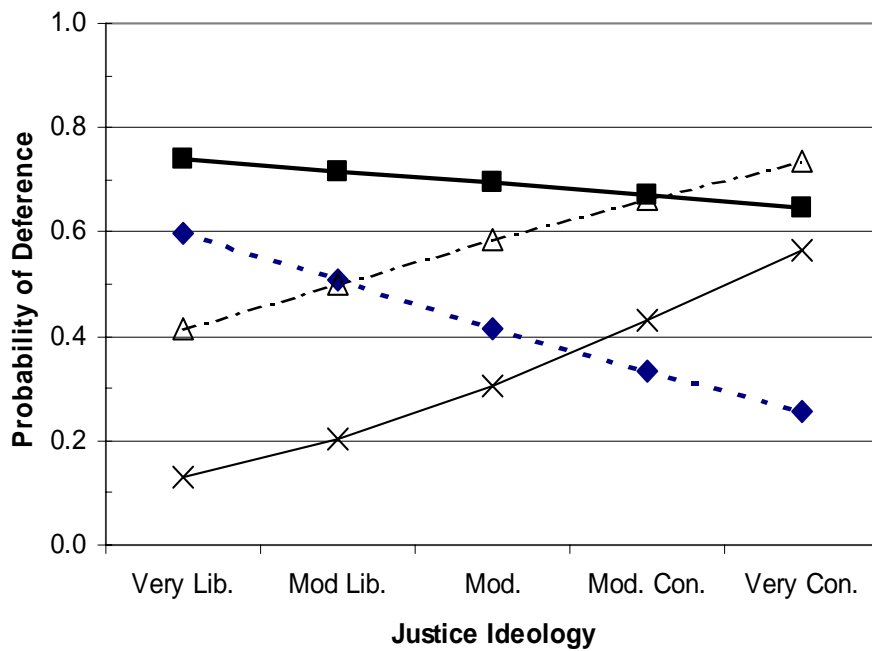


FIGURE 2: INTERACTION OF IDEOLOGY AND AGENCY POLICY DIRECTION

(a) All Justices



(b) Chevron Justices



-◆- Lib. ag. decision before -■- Lib. ag. decision after
 -△- Cons. ag. decision before -×- Cons. ag. decision after