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# ***Chevron* Deference: An Empirical Review of Rigor of Application at the District Court Level**

*Bethany Ring\**

## I. INTRODUCTION

During the trial which culminated in his death sentence, Socrates argued “the unexamined life is not worth living.”<sup>1</sup> Perhaps a parallel wisdom can be derived for judicial realms—perhaps an unexamined legal doctrine is not worth applying. Just as our vast body of law has continually transmogrified over time, it may be that our legal doctrines should be constantly reassessed and adjusted when and where appropriate. *Chevron* deference is one such doctrine worthy of re-evaluation.

The literature is replete with academic examinations of both *Chevron*’s supposed wisdom and folly.<sup>2</sup> But such speculations remain simply that: academic. Without actual, empirical evidence of how the doctrine is being applied by the courts, it is impossible to know if arguments on either side have been persuasive to the judges daily called upon to decide when and how to apply *Chevron* deference in a case at hand. Having reviewed and appreciated the several empirical studies conducted in this area, this Article seeks to expand the investigation and presents similar findings with respect to *Chevron* deference application at the federal district courts—an unexamined judicial level until this study. This Article takes a slightly different approach than previous studies as it attempts

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\* J.D. 2020, Chapman University Dale E. Fowler School of Law. My deepest appreciation goes out to my faculty advisors, Professor Anthony Caso and Professor John Eastman, for their dedication to the Constitutional Jurisprudence Clinic at the Fowler School of Law. This Article is a by-product of the Clinic as the idea for the research germinated while drafting several amicus curiae briefs on *Chevron*-related issues during my work in the Clinic. I am sincerely grateful for their support and encouragement. Additionally, I wish to thank my sons, Austin, Zac, and Darren, for their continued support, as well as my husband Rev. Dr. Robb C. Ring.

<sup>1</sup> Socrates, *Apology*, in ANCIENT PHILOSOPHY 88, 102 (Forrest E. Baird & Walter Kaufman eds., 2003).

<sup>2</sup> Throughout this Article, the doctrine of *Chevron* deference will be repeatedly referred to simply by the moniker “*Chevron*.” The underlying case is at times referred to as “*Chevron USA*.”

to examine the rigor with which the courts apply the deference doctrine—not simply whether the agency prevails under the application.

A brief account of *Chevron's* emergence and rise first serves to ground the reader in particulars of the doctrine under scrutiny, including several Athena-istic deference doctrines that subsequently sprung forth fully-formed from the Zeus-like *Chevron* head. Part II recounts various prior empirical studies of court applications and overlays the accumulated results on current data to underline the need for a district court level examination. Part III describes the current study, both in methodology and result, and finds that at the district court level there is ample room for improvement in the rigor applied to a *Chevron* analysis. Part IV summarizes the research and offers further possible inquiries in this realm that would serve to augment not only this current undertaking, but the body of empirical *Chevron* studies in general.

#### A. *Chevron's* Appearance

*Chevron* deference entered the scene via *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, a decision penned by Justice Stevens in June 1984.<sup>3</sup> The case dealt with interpretations of EPA emissions standards and whether the standards should be construed narrowly, to every individual building within a refinery complex, or broadly, such that the emissions should be measured across the entire complex as a whole.<sup>4</sup> Thomas Merrill summed it up well in his 2014 article, *The Story of Chevron: The Making of an Accidental Landmark*, when he wrote, “Most landmark decisions are born great—they are understood to be of special significance from the moment they are decided. But *Chevron* was little noticed when it was decided, and came to be regarded as a landmark case only some years later.”<sup>5</sup> This Supreme Court decision, introduced without great fanfare or full understanding of its future application, indeed came through the Court quietly without ruffling any feathers or creating much stir, even in academia. In the year following its publication, twenty-six law review articles cited the *Chevron* case.

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<sup>3</sup> 467 U.S. 837.

<sup>4</sup> *Id.* at 840.

<sup>5</sup> Thomas W. Merrill, *The Story of Chevron: The Making of an Accidental Landmark*, 66 ADMIN. L. REV. 253, 257 (2014). See also FedSoc Films, *Chevron: Accidental Landmark*, FEDERALIST SOC'Y (Dec. 19, 2018), <http://fedsoc.org/commentary/videos/chevron-accidental-landmark> [<http://perma.cc/B68U-MNVQ>] (discussing the origins of the *Chevron* doctrine and how it rose to become an “accidental landmark”).

Of these, seventeen referred to the holding only in footnotes,<sup>6</sup> four gave it a passing mention,<sup>7</sup> and one simply compared it to prior court findings.<sup>8</sup> The six remaining articles voiced cautious opinions, hedged with words such as “may,” “perhaps,” “if,” and “suggests.”<sup>9</sup> Nonetheless, the *Chevron* decision has left a deep and lasting impression known as *Chevron* deference—today a well-established and widely relied upon doctrine.<sup>10</sup>

*Chevron* deference, according to the Court, is a two-step process for judicial review of statutory interpretation by a federal agency, where the agency is acting within a specified congressional delegation.<sup>11</sup> In Step One, a court determines if “Congress has directly spoken to the precise question at issue” in its authorization of the agency to promulgate the statute.<sup>12</sup> If Congress has been clear, “that is the end of the matter” as “the court . . . must give effect to the unambiguously expressed intent of Congress.”<sup>13</sup> This investigation of meaning is to be done by “employing traditional tools of statutory construction.”<sup>14</sup> If ambiguity is found, deference is given to an agency’s reasonable interpretation at Step Two.<sup>15</sup> The interpretation need not be the best possible reading, or even one well-thought out in light of the statute’s surrounding wording or legislative purpose, it need only be reasonable. This deference doctrine has come to be called an “icon of administrative law.”<sup>16</sup>

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<sup>6</sup> See, e.g., Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381, 385 n.27 (1985); Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 596 n.250 (1985).

<sup>7</sup> See, e.g., Michael Fix & George C. Eads, *The Prospects for Regulatory Reform: The Legacy of Reagan’s First Term*, 2 YALE J. ON REGUL. 293, 306–07 (1985); Andrew Joseph Siegel, *The U.S.-Japanese Whaling Accord: A Result of the Discretionary Loophole in the Packwood-Magnuson Amendment*, 19 GEO. WASH. J. INT’L L. & ECON. 577, 600 (1985).

<sup>8</sup> Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 549–53 (1985).

<sup>9</sup> See, e.g., Stephen M. Lynch, *A Framework for Judicial Review of an Agency’s Statutory Interpretation: Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 1985 DUKE L.J. 469, 470 (1985) (“In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, the Supreme Court may have forged the analytic framework for assessing the validity of an administrative agency’s construction of the statute that it is charged with administering.”); Eric Redman, *Statutory Construction in the Supreme Court: A Northwest Power Act Example*, 15 ENV’T. L. 353, 354 (1985) (“Thus, *Chevron* is perhaps more likely than *ALCOA* to have a lasting impact . . .”).

<sup>10</sup> See Kristin E. Hickman, *The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537, 1579 (2006).

<sup>11</sup> The requirement that the agency’s actions fall within a scope delineated by Congress is sometimes referred to as *Chevron* Step Zero.

<sup>12</sup> *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

<sup>13</sup> *Id.* at 842–43.

<sup>14</sup> *Id.* at 843 n.9.

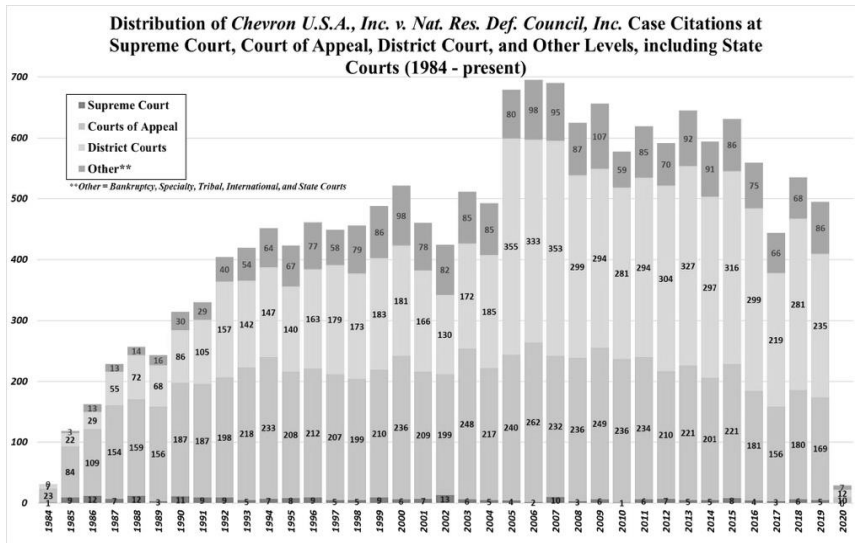
<sup>15</sup> *Id.* at 842–44.

<sup>16</sup> Jonathan R. Siegel, *The Constitutional Case for Chevron Deference*, 71 VAND. L. REV. 937, 938 (2018).

## B. *Chevron*'s Expansion

The distribution of *Chevron* references, as documented in Westlaw, is instructive. Figure 1 below summarizes the number of *Chevron USA* citations, across all jurisdictions, for each year from 1984 through 2019.

Figure 1



It is clear from the trend lines on the graph above that a steep rate of increase in citation occurred between 1984 and 1992.<sup>17</sup> Between 1993 and 2004, the same rise was present, but less pronounced. In 2005, a 38% jump in usage occurred—mostly reflected at the district court level which experienced a 92% increase from 2004 to 2005. The overall usage trend since 2005 has been decreasing. However, the decrease has yet to reach pre-1992 levels.<sup>18</sup>

## C. *Chevron*'s Offspring

The invention of *Chevron* deference opened the door to later forms of deference. The ensuing deference forms, previously thought unimaginable, each stood on *Chevron*—pushing the deference envelope a bit further. For example, if Chief Justice John Marshall had ruled on the meaning of a particular statute, and then was told

<sup>17</sup> It is noted that the graphic in Figure 1 reflects *Chevron USA* citations only, not applications of the *Chevron* deference two-step test itself.

<sup>18</sup> Again, this graphic reflects citations, not deference application. The trends for the data set studied herein are similar. It is hypothesized that the decreasing post-2005 trend is due in part to a corresponding increase in application of *Chevron* deference under varying pseudonyms.

that nonetheless, he must defer to a subsequent contrary interpretation of that statute, chances are he would have been greatly amused, assumed such a claim was a joke, and reminded us all of the emphatic duty of the judiciary “to say what the law is.”<sup>19</sup> But it is this exact situation, among others, that the *Chevron* deference offspring have created. Under *Brand X* deference, an agency’s interpretation of an ambiguous statute prevails over a court’s prior contrary interpretation.<sup>20</sup> In this same vein, agency deference is given when ambiguity exists in the meaning of an agency’s own regulations under *Auer* deference.<sup>21</sup> That is, the agency solely holds the power to both write and interpret regulations, directly contrary to a constitutional system which emphasizes separation of powers. In *City of Arlington v. FCC*, the Court extended *Chevron* deference to questions of agency jurisdiction, holding that, when a statute is ambiguous on whether the relevant agency has authority to interpret it, courts must defer to the agency’s determination that it has such authority.<sup>22</sup>

#### D. Recent Rumbblings in the Court

The discussion surrounding the prudence of *Chevron* deference application has been ongoing for several years, if not decades. And, in a sort of parallel percolation among academia, the discussion appears to have risen to a sufficient level to catch the eye of the Supreme Court. The current conservative makeup of the Court has helped ripen such notice into comment.

In the Court’s 2019 *Kisor v. Wilkie* decision, the Court addressed *Auer* deference—one of the aforementioned kin of *Chevron*.<sup>23</sup> The Court in *Kisor* encouraged a “cabined” approach to judicial acquiescence, warning that “deference is not the answer to every question of interpreting an agency’s rules.”<sup>24</sup> This warning by the Court should trigger careful investigation into all judicial deference.

The Court instructed in *Kisor* that “[f]irst and foremost,” deference should only be granted when “the regulation is genuinely ambiguous.”<sup>25</sup> And before determining genuine ambiguity exists, courts “must exhaust all the ‘traditional tools’ of construction.”<sup>26</sup> Accordingly, under *Kisor*, all tools of statutory

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<sup>19</sup> *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

<sup>20</sup> *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 982–83 (2005).

<sup>21</sup> *Auer v. Robbins*, 519 U.S. 452, 462–63 (1997).

<sup>22</sup> 569 U.S. 290, 296–97 (2013).

<sup>23</sup> 139 S.Ct. 2400, 2408 (2019) (addressing the scope of *Auer* deference).

<sup>24</sup> *Id.* at 2408, 2414.

<sup>25</sup> *Id.* at 2415.

<sup>26</sup> *Id.*

interpretation must be utilized when courts attempt to discern the meaning of an agency's regulation. The Court thus narrowed the scope of *Auer* deference by instructing that courts "must 'carefully consider[]' the text, structure, history, and purpose" of an agency's regulations since "[d]oing so will resolve many seeming ambiguities out of the box . . . ." <sup>27</sup> This "all tools exhausted" standard is not a novel concept. <sup>28</sup> The Court's call for such a standard is appropriately extended to *Chevron* deference as well, <sup>29</sup> especially since it is reflected in the original wording of the *Chevron USA* decision itself. <sup>30</sup>

## II. PREVIOUS STUDIES

*Chevron* deference has been in place for just over thirty-five years and the underlying case has been cited in over 17,000 decisions subsequently, according to the Westlaw database. <sup>31</sup> Figure 2 below depicts the yearly distribution of *Chevron* case citations for the main three federal court levels. A complete evaluation of how and when *Chevron* deference has been applied to these thousands of cases would be daunting, to say the least.

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<sup>27</sup> *Id.*

<sup>28</sup> *See, e.g.,* Aqua Prods., Inc. v. Matal, 872 F.3d 1290, 1303 (Fed. Cir. 2017) ("In considering [the statutory] language, we must assure ourselves that we have employed all 'traditional tools of statutory construction' . . . .") (citation omitted); Delek Refin. v. Occupational Safety & Health Rev. Comm'n, 845 F.3d 170, 175 (5th Cir. 2016) ("We will consider all the 'traditional tools of statutory construction' before concluding that a statute is ambiguous.") (citation omitted); Adams v. Holder, 692 F.3d 91, 95 (2d Cir. 2012) (noting *Chevron* Step Two is only examined if "the statute remains ambiguous despite our use of all relevant tools of statutory construction . . . ."); Krzalic v. Republic Title Co., 314 F.3d 875, 880 (7th Cir. 2002) ("[C]ourts do not consider themselves bound by 'plain meaning,' but have recourse to other interpretive tools in an effort to make sense of the statute.") (citations omitted); Loving v. I.R.S., 742 F.3d 1013, 1016 (D.C. Cir. 2014) ("In determining whether a statute is ambiguous and in ultimately determining whether the agency's interpretation is permissible or instead is foreclosed by the statute, we must employ all the tools of statutory interpretation, including 'text, structure, purpose, and legislative history.'") (citations omitted).

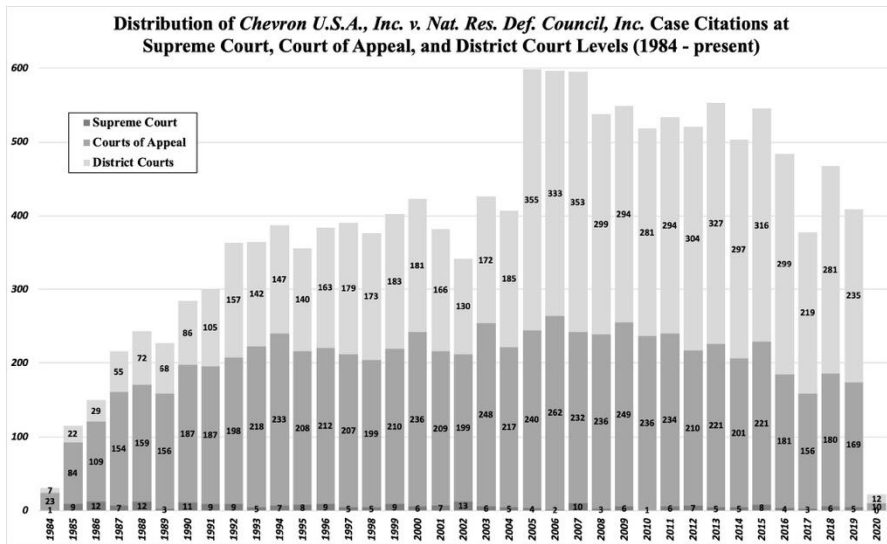
<sup>29</sup> *See also* Matthews v. Barr, 927 F.3d 606, 615 (2d Cir. 2019) ("[T]he Supreme Court's [*Esquivel-Quintana*] decision reminds courts to use all available tools of statutory construction . . . before concluding that a statutory term is ambiguous . . . ."); King v. Burwell, 759 F.3d 358, 367 (4th Cir. 2014) (noting "[c]ourts should employ all the traditional tools of statutory construction" at *Chevron* Step One); Strickland v. Comm'r, Me. Dept. of Hum. Servs., 48 F.3d 12, 17 (1st Cir. 1995) ("[I]t is appropriate to employ all the 'traditional tools of statutory construction' in the first part of the *Chevron* analysis when the statutory language itself is not dispositive.") (citations omitted).

<sup>30</sup> *See, e.g.,* TransAm Trucking, Inc. v. Admin. Rev. Bd., U.S. Dep't of Lab., 833 F.3d 1206, 1216 (10th Cir. 2016) (Gorsuch, J., dissenting) (then-Judge Gorsuch reminding the bench that simple use of a dictionary can resolve ambiguity); Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1, 71–72 (2017) (summarizing case opinions at the court of appeals level from 2003–2013 and finding "circuit-by-circuit disparity in . . . invocation of *Chevron*"); *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984).

<sup>31</sup> As of April 23, 2021, there were exactly 17,348 cases.

Various empirical studies of *Chevron* deference have been conducted in the past, but due to the extremely large data set encountered, each study has chosen a particular focus to produce a manageable subset. Generally, these studies have focused on Supreme Court decisions, federal courts of appeal findings, or subject-specific applications.

Figure 2



### A. Supreme Court Studies

The most noteworthy Supreme Court study was done by Eskridge and Baer in 2008.<sup>32</sup> The study examined Supreme Court decisions between 1984 and 2005 in which an agency interpretation of a statute was at issue.<sup>33</sup> This criterion produced a set of 1014 cases which were coded for 156 variables ranging from basic descriptive information of the key statute to the voting record for each judge.<sup>34</sup> Based on this, Eskridge and Baer developed a “Continuum of Deference” across Supreme Court decisions and showed that when *Chevron* deference was applied, the agency win rate was 76.2%.<sup>35</sup> However, they also concluded that, as of 2005, “there has not been a *Chevron* ‘revolution’ at the Supreme Court level” as *Chevron* deference had only been

<sup>32</sup> 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).

<sup>33</sup> *Id.* at 1094.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 1100.



applied 8.3% of the time in Supreme Court cases involving statutory interpretation.<sup>36</sup>

In an earlier study, Thomas Merrill found it to be “clear that *Chevron* is often ignored by the Supreme Court. . . . [as] the two-step framework has been used . . . only about one-third of the [time].”<sup>37</sup> Merrill’s study compared Supreme Court agency win rates for the three years before *Chevron* to those in the six years after the *Chevron* decision was handed down.<sup>38</sup>

## B. Appellate Courts Studies

An outstanding 2017 empirical study by Barnett and Walker examined circuit court opinions from 2003 to 2013 and found inconsistencies in the circuit courts’ application of *Chevron* in general.<sup>39</sup> Starting with a data set of 2,272 cases, the study culled the decisions pulled down to 1,327 relevant opinions.<sup>40</sup> Reviewing these relevant opinions, they discovered circuits differed significantly in agency-win rates when *Chevron* was applied, from 88.2% in the Sixth Circuit, to 72.3% in the Ninth Circuit.<sup>41</sup> That is, Barnett and Walker observed that some circuits are simply more deferential. The study concluded: “The circuit-by-circuit disparity in the circuit courts’ invocation of *Chevron* and agency-win rates reveals that *Chevron* may not be operating uniformly among the circuits.”<sup>42</sup>

Other studies examining circuit court applications have been done by Kerr<sup>43</sup> as well as Schuck and Elliott.<sup>44</sup> Kerr looked at circuit court opinions in 1995–96,<sup>45</sup> whereas Schuck and Elliott focused on D.C. Circuit application for select periods (“1965, 1975, 1984–85, and 1988”).<sup>46</sup>

## C. Subject-Specific Studies

Some studies only reviewed topic-specific cases. For example, Miles and Sunstein looked at appellate court decisions from 1990

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<sup>36</sup> *Id.* at 1090.

<sup>37</sup> Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 982 (1992).

<sup>38</sup> *Id.* at 980–82.

<sup>39</sup> Barnett & Walker, *supra* note 30, at 1.

<sup>40</sup> *Id.* at 5.

<sup>41</sup> *Id.* at 49.

<sup>42</sup> *Id.* at 71–72.

<sup>43</sup> 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 Regul. 1 (1998).

<sup>44</sup> Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 Duke L.J. 984 (1990).

<sup>45</sup> Kerr, *supra* note 43 at 1.

<sup>46</sup> Schuck & Elliott, *supra* note 44, at 988.

through 2004 that involved EPA and NLRB interpretations.<sup>47</sup> They also included a parallel examination of sixty-nine Supreme Court cases.<sup>48</sup> In a study by Revesz, D.C. Circuit cases from 1970 to 1994 were investigated for cases concerning health-and-safety decisions.<sup>49</sup> Along this same line, a 2008 study by Czarnezki examined environmental law cases in circuit courts over the three-year period from 2003 to 2005.<sup>50</sup>

#### D. Summary of Studies Over Time

In Figure 3 below, the years examined by these past empirical studies have been overlaid on a graphical depiction of yearly *Chevron USA* citations for each judicial level, as originally shown in Figure 2. Red bars denote examined Supreme Court cases, dark pink bars indicate years where all circuit court cases were examined, and light pink bars show time frames during which a subset of all available cases were investigated. The individual studies themselves are reflected on Figure 3 as either solid lines (indicating all cases were examined), or as dashed lines (indicating a subset of cases were looked at). Figure 3 highlights the lack of investigation done at the district court level, as well as the limits of studies done at the circuit court level. The study undertaken herein is depicted as a curved line of large dashes.

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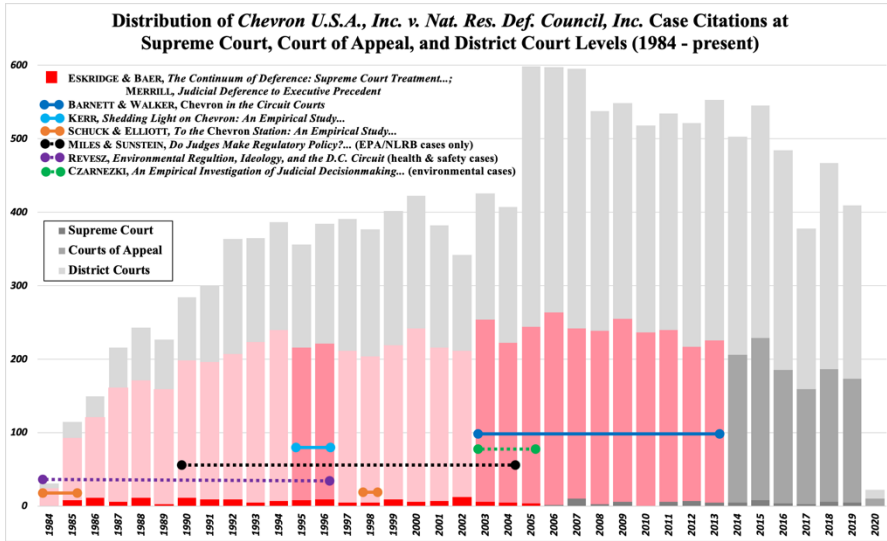
<sup>47</sup> See Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 823 (2006) (examining only EPA and NLRB cases).

<sup>48</sup> *Id.* at 825.

<sup>49</sup> Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717 (1997).

<sup>50</sup> Jason J. Czarnezki, *An Empirical Investigation of Judicial Decisionmaking, Statutory Interpretation, and the Chevron Doctrine in Environmental Law*, 79 U. COLO. L. REV. 767, 767 (2008).

Figure 3



### III. CURRENT STUDY

Upon reviewing the previous empirical studies of *Chevron* done to date, the paucity of insight into application at the initial federal level, i.e., in the district courts, became evident. It is naturally expected that the appellate court level addresses a mere fraction of the number of cases passing across the district court threshold.<sup>51</sup> But for a true understanding of the doctrine's day-in, day-out application, there is a prudence in examining the lowest federal judicial tier as well. The studies described in Part II cover approximately twenty-eight percent of the possible cases to investigate and, in some instances, overlap.<sup>52</sup> Again, further empirical study of *Chevron* application seems timely and useful as the current Court make-up has signaled a willingness to wrestle with the underlying wisdom of the doctrine and its scope.

<sup>51</sup> See, e.g., *Federal Judicial Caseload Statistics 2019*, U.S. CTS., <http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2019> [<http://perma.cc/8EAU-UV6E>].

<sup>52</sup> See Figure 3, *supra* Part II. Twenty-eight percent is derived by assuming the subject-specific studies constituted examination of half the available cases. In reality, this number is likely much lower, possibly rendering the percent of cases study to be as low as nineteen percent.

## A. Methodology

An examination of only federal district courts reduces the size of the data set to 7,123 cases. In this study, a catalogue of basic application of *Chevron* deference over a broad swath of cases is presented, rather than a more detailed study on a smaller case subset.

### 1. *Chevron* Citation as Proxy

It is not necessarily true that an opinion which cited to the underlying *Chevron USA* case applied the doctrine of *Chevron* deference as well. That is, citation is not expected to be an accurate proxy for the two-step *Chevron* application. However, based on the overall findings in the Barnett and Walker study, it was estimated the proxy would be accurate approximately 55% to 60% of the time.<sup>53</sup>

### 2. Quasi-random Case Selection

Knowing that not all cases selected would apply the *Chevron* two-step analysis, this study set out to examine 500 cases, expecting an ultimate yield of about 275 cases of interest. Because many of the previous studies were conducted at the circuit court level, the district courts were first divided into subsets corresponding with their respective circuit. The circuit subsets were then divided according to the Westlaw “Depth of Treatment” designation.<sup>54</sup> This was done to capture a representative number of cases across all levels of discussion.<sup>55</sup> Next, the cases were divided by decade, as reflected in Table 1 below. Using the distribution in Table 1, the 500 cases were spread out proportionally over the circuit-depth-decade subcategories. Because cases must be chosen as whole numbers, numbers were rounded up where appropriate, and 511 total cases were selected. The individual cases within each subcategory were chosen randomly.

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<sup>53</sup> Barnett & Walker, *supra* note 30.

<sup>54</sup> See *Why you need KeyCite on Thomson Reuters*, THOMSON REUTERS, <http://legal.thomsonreuters.com/en/insights/articles/why-you-need-keycite>.

<sup>55</sup> That is, a case which applied *Chevron* deference in a few brief sentences would be captured along with cases where the application occupied the majority of the opinion.

Table 1

Circuit	Depth of Treatment: 4				Depth of Treatment: 3				Depth of Treatment: 2				Depth of Treatment: 1			
	1980-89	1990-99	2000-09	2010-20	1980-89	1990-99	2000-09	2010-20	1980-89	1990-99	2000-09	2010-20	1980-89	1990-99	2000-09	2010-20
1	0	4	9	15	1	22	25	18	8	30	49	53	2	5	13	6
2	2	8	24	38	7	42	65	69	24	126	143	151	4	24	22	11
3	0	3	22	28	6	21	49	72	10	70	156	173	4	17	12	19
4	0	8	24	33	2	18	46	66	8	44	100	121	4	7	11	15
5	0	2	15	31	1	18	62	37	10	49	108	147	1	13	11	19
6	0	5	16	22	3	24	57	35	7	66	92	100	2	9	11	18
7	0	3	7	12	4	19	38	33	15	84	82	84	2	19	10	10
8	0	7	8	8	1	16	46	31	3	70	71	75	9	13	8	13
9	0	12	40	65	6	46	103	128	19	132	303	257	7	15	26	94
10	1	2	12	34	2	23	37	51	10	55	54	79	0	3	9	6
11	0	1	26	23	2	22	28	53	6	44	116	138	1	11	15	15
DC	2	24	86	161	17	74	93	111	36	128	102	85	4	17	6	10

### 3. Coding

The basic identifying information (caption, citation, date, court, circuit, etc.) was entered and tracked in an Excel spreadsheet. Additional variables were entered as each case was examined. These variables included depth of treatment, subsequent treatment by the courts of appeals, document type, case disposition, as well as a count of the number of times the *Chevron USA* citation occurred. Each case was examined to see if a *Chevron* two-step analysis had been applied. If so, the level of rigor the court applied at each step was recorded using the following legend:

- 0 = no discussion
- 1 = passing mention
- 2 = limited discussion
- 3 = full discussion

This numerical coding allowed the entire dataset to be easily examined and the results to be represented graphically for additional clarity.

### B. Results

The convenient coding of results in this study via Excel spreadsheet enabled the creation of simple graphical illustrations of the data, as seen throughout the following sections.<sup>56</sup> The use of this format also allowed data to be easily separated into relevant subsets and corresponding graphs for comparison purposes.

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<sup>56</sup> Complete spreadsheet and corresponding graphs are available from the author upon request.

## 1. Frequency of Application

Out of the 511 cases reviewed, a *Chevron* analysis was found to be applied in 252 rulings. This means that for the cases randomly selected for this study, fifty-one percent contained one or more references to the underlying *Chevron USA* opinion but did not apply the two-step analysis laid out therein. This percentage is higher than that reflected in the Barnett and Walker study, but judicial level may account for the difference.<sup>57</sup> This means citation to the *Chevron USA* case was only an accurate proxy for application of the *Chevron* deference doctrine approximately half of the time—a key factor to be considered in formulating methodology for future studies. It is not surprising that the average number of *Chevron* citations in cases applying the deference doctrine was greater than those in the compliment set.<sup>58</sup> Interestingly, for the cases applying *Chevron*, twenty-seven percent cited to the *Chevron USA* opinion only once.<sup>59</sup>

## 2. Frequency of Deference

This study revealed overall that the district courts grant deference to agency interpretations with high frequency. Specifically, the courts found the underlying statute to be unambiguous twenty-seven percent of the time at Step One of the *Chevron* analysis.<sup>60</sup> In these cases, Step Two was generally not considered.<sup>61</sup> For the remaining cases where the statute was found to be ambiguous at Step One, the court deferred to the agency interpretation at a much higher rate than not. Of all cases where the deference doctrine was applied, the Step Two analysis found the agency interpretation to be unreasonable only nine percent of the time.<sup>62</sup> The level of analytical rigor applied by the courts in coming to these decisions, however, was not constant across the board and is addressed in the following step-specific sections.

It is noted that in a circuit level review of the data in this study, the district courts in the D.C. Circuit are most likely to apply a *Chevron* analysis (68% application), followed by those in the Tenth Circuit (66% application). The Eighth and Ninth

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<sup>57</sup> Barnett & Walker, *supra* note 30, at 27 (finding 1,327 relevant cases among 2,272 cases studied, a 58.4% rate of application).

<sup>58</sup> In cases applying *Chevron*, the average number of citations was 5 (with a maximum of 139). For cases in which the *Chevron USA* case was cited but the doctrine was not applied, the average citation count was 2 (with a maximum value of 39).

<sup>59</sup> See Figure 4.

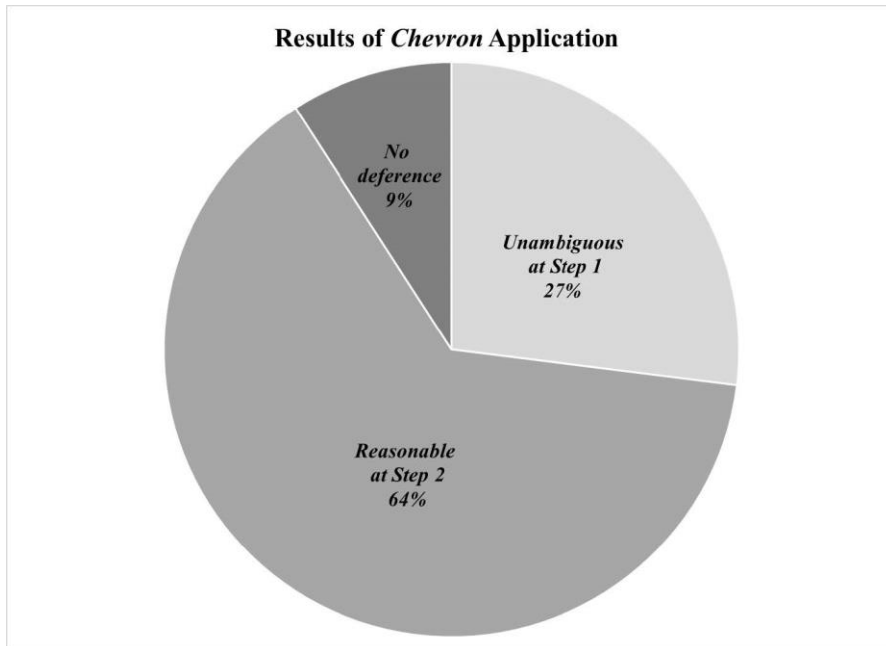
<sup>60</sup> *Id.*

<sup>61</sup> In seven percent of the cases, the court went on to evaluate Step Two as well.

<sup>62</sup> See Figure 4.

Circuits are closely tied behind (55% and 56% application, respectively).

Figure 4



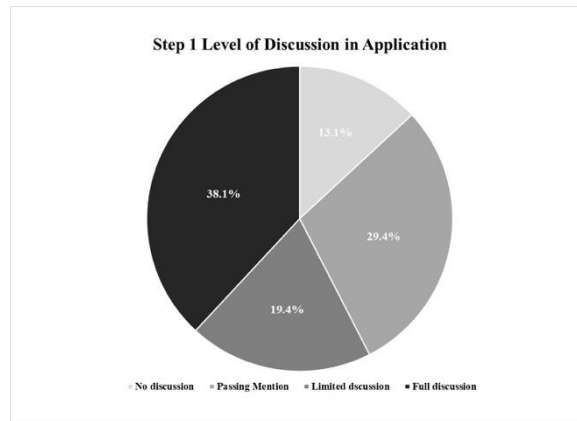
### 3. Step One Analysis

When the two-step *Chevron* deference doctrine is applied, Step One is applied with varying amounts of rigor. Overall, a full examination of the text to determine the existence of ambiguity was performed 38.1% of the time, as depicted in Figure 5 below. However, this number is somewhat misleading as it reflects the data as whole. Breaking down the cases into sub-categories reflecting the outcome of the Step One analysis (i.e., ambiguous or unambiguous), it was found that a full analysis is applied 50% of the time in unambiguous findings, but much less—only 33.7% of the time—when ambiguity is discovered. Figure 6 reflects the complete range of levels of discussion in these two sub-categories. It is noted that, in Figure 6, a “passing mention” level of analysis when a statute was found unambiguous was usually a simple cite to prior or sister court precedent.

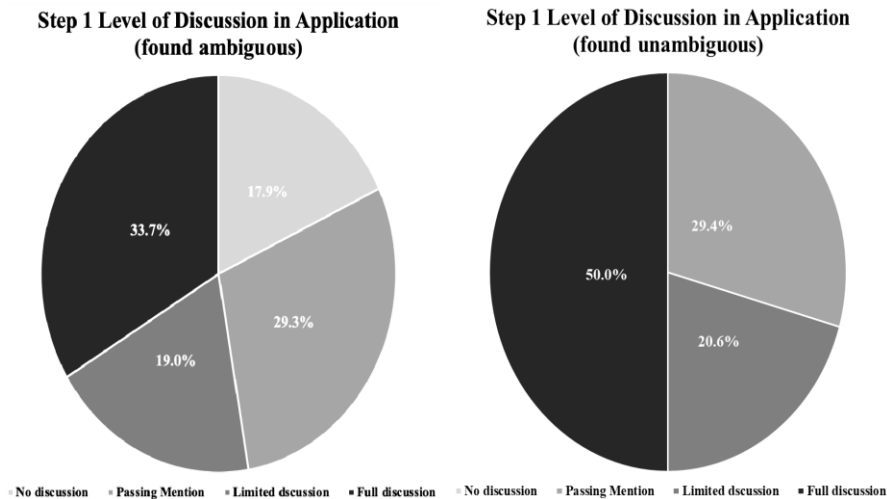
The discrepancy in application of a “full discussion” level of analysis between ambiguous and unambiguous findings, as reflected in Figure 6, begs the question of whether this result is a cause or an effect. That is, do courts include a deeper, more robust discussion when they are seeking to justify a finding of unambiguity? Or does a deeper, more robust discussion more frequently lead to a finding of

unambiguity? Absent insight into the minds of the individual judges behind these opinions, this query cannot be answered from the data gathered in this study, but it posits an interesting question worthy of further examination.

**Figure 5**



**Figure 6**



Overall, the levels of discussion at Step One in Figure 5 across the sampling of district court cases in this study, at first glance, seem heartening. Taken together, a limited or full discussion was applied in 57.5% of the cases.<sup>63</sup> This number would appear to

<sup>63</sup> See Figure 5.



bolster claims that the district courts are dutiful in applying appropriate rigor at Step One. However, it is disturbing to see that 29.4% of the time, the courts give Step One analysis no more than a passing mention.<sup>64</sup> It is even more disturbing that in 13.1% of cases, no discussion of Step One was included in a *Chevron* analysis.<sup>65</sup> These numbers underline the need seen by the Supreme Court in *Kisor* to emphasize the requirement to exhaust all the traditional tools of construction in determining if genuine ambiguity exists—a standard the district courts are failing to faithfully meet.

#### 4. Step Two Analysis

Having determined there is an ambiguity present, the courts next consider at Step Two whether the agency's interpretation was reasonable. As seen in Figure 7, this study found a full discussion of the question was afforded 44.6% of the time across the board. But again, a discrepancy is seen when the data is sub-divided by result, i.e., by whether or not deference is ultimately given to the agency interpretation.<sup>66</sup>

Much like the question posed in the Step One results above, there is a question of cause and effect presented in the Step Two results. Remembering that weighted percentages must be applied to the graphs in Figure 8 in order to produce the graph in Figure 7, it is somewhat striking to see that a full discussion occurs 56.5% of the time when no deference is given, as opposed to only in 42.9% of the cases where deference is granted. Is the higher percent of full discussion given as a justification for finding no deference is warranted? Or is a higher level of discussion more likely to lead to a denial of deference? These cause-and-effect questions were not anticipated at the outset of this study, and therefore, the study did not collect variables sufficient to address such inquiries.

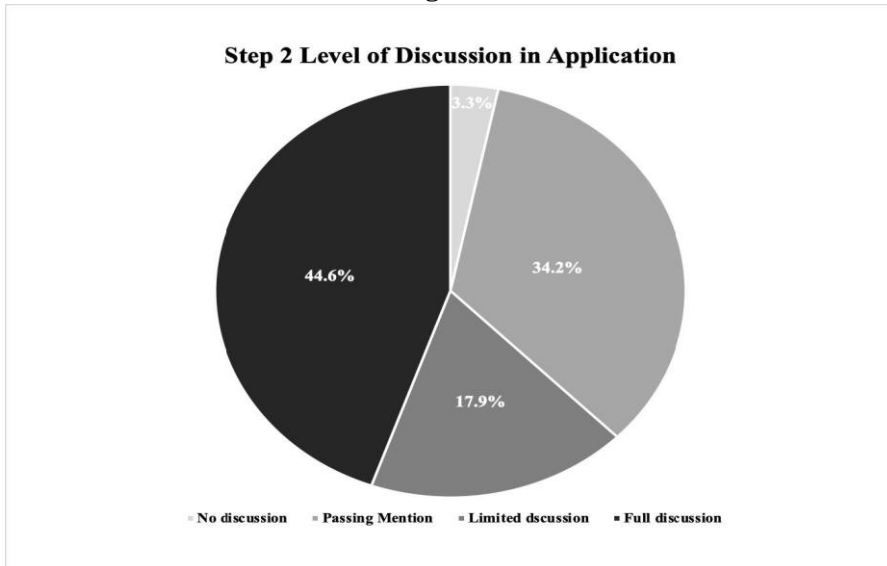
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<sup>64</sup> *Id.*

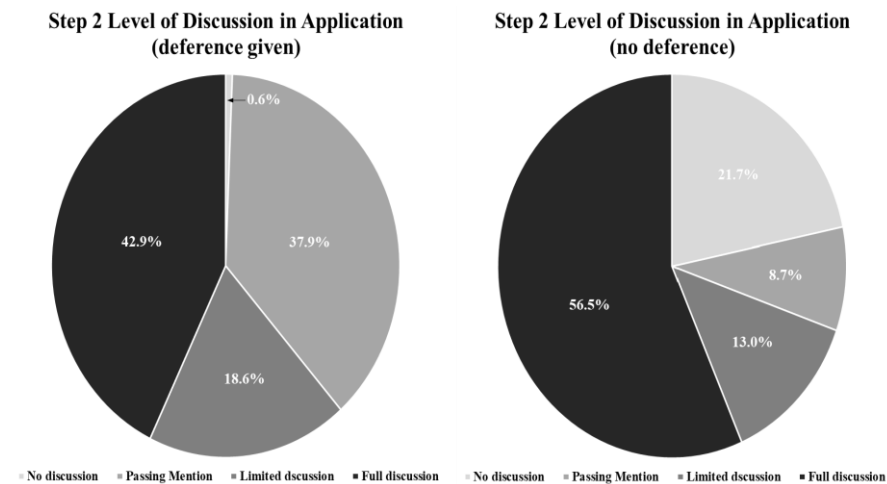
<sup>65</sup> *Id.*

<sup>66</sup> *See* Figure 8.

**Figure 7**



**Figure 8**



Again, it is initially encouraging to see the relatively high frequency of full discussion reflected in Figure 7. Nonetheless, it seems counterintuitive that a Step Two analysis would ever be given no discussion or a simple passing mention, much less that such would occur 37.5% of the time.<sup>67</sup> The district courts clearly have ample room for improvement in this area.

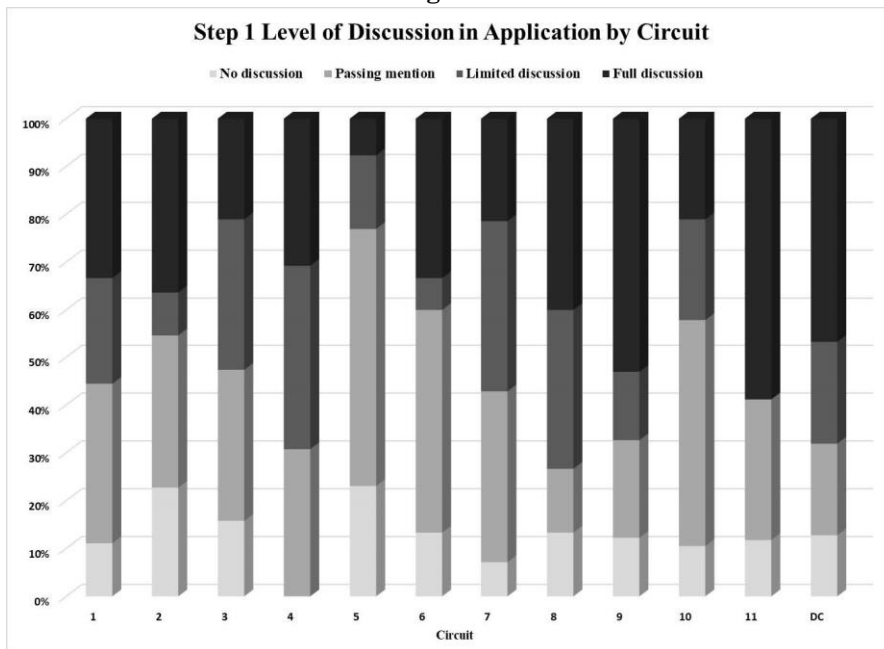
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<sup>67</sup> 3.3% (no discussion) + 34.2% (passing mention) = 37.5%.

## 5. Circuit Comparisons

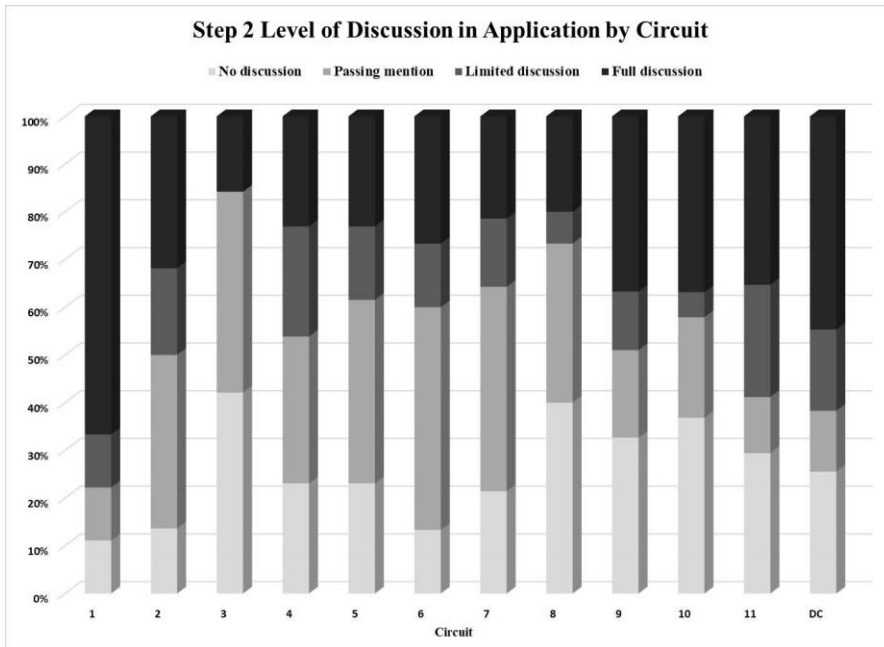
The results presented above can also be viewed on a circuit-by-circuit basis since each district court decision in the study was coded to identify its parent circuit. This introduces a refinement to the levels of discussion given for Steps One and Two above. In Figures 9 and 10 below, each circuit is presented as a bar with the varying levels of discussion reflected in the same colors used in Figures 5 through 8 above. Each bar reflects 100% of the data gathered at the circuit level and therefore, the colors reflect the percentage of application at each level, not actual numbers of cases in each category. According to Figure 9, the Eleventh Circuit applies a full discussion at Step One most often, followed closely by the Ninth Circuit and the D.C. Circuit. The Eleventh Circuit result, however, may be tempered by the fact that the “limited discussion” category is not reflected at all, and may be further exacerbated by the small number of cases studied for the Eleventh Circuit (17 cases total, as compared to 49 cases and 47 cases at the Ninth and D.C. Circuits, respectively). The Fifth Circuit, in contrast, seems to be most willingly to give no discussion or a passing mention in a *Chevron* Step One analysis.

Figure 9



At Step Two, reflected in Figure 10 below, the First Circuit is most likely to apply a full discussion, followed by the D.C. Circuit and a tie between the Ninth and Tenth Circuits. But again, the percentages are impacted by the small sample size at the First Circuit level—only nine cases falling in the First Circuit were studied.

Figure 10



#### IV. CONCLUSION AND FURTHER POSSIBLE INQUIRIES

This research seeks to fill an empirical study void by examining district court applications of the *Chevron* deference doctrine. The study found that for cases which apply the two-step analysis, the levels of rigor with which each step is applied varies significantly within the district courts themselves, from no discussion to full discussion, and equally varies among the respective circuit court groupings. Overall, there exists among the district courts a 38.1% full discussion application of Step One<sup>68</sup> and a 44.6% full discussion application at Step Two.<sup>69</sup> The failure of the courts to be more rigorous in *Chevron* application via full discussion suggests there may be merit to past academic

<sup>68</sup> See Figure 5.

<sup>69</sup> See Figure 7.

claims that the courts have wide room for improvement with respect to this doctrine.

Such claims have not been limited to academia. In his dissent in *TransAm Trucking, Inc. v. Administrative Review Board, United States Department of Labor*, then-Judge Gorsuch pointedly reminded the court that “there are countless cases finding a statute unambiguous after examining the dictionary.”<sup>70</sup> Similarly, Justice Kavanaugh, while he was on the D.C. Circuit bench, observed variation in *Chevron* application among lower courts and noted that “judges’ personal views are infecting these kinds of cases” where judges “have wildly different conceptions of whether a particular statute is clear or ambiguous.”<sup>71</sup> Indeed, this disparity in rigorous application has prompted the Court to warn that “a court cannot wave the ambiguity flag just because it found the regulation impenetrable on first read.”<sup>72</sup> Justice Scalia has noted that sometimes “interpretation requires a taxing inquiry” and “*Chevron* is . . . not a declaration that, when statutory construction becomes difficult, we will throw up our hands and let regulatory agencies do it for us.”<sup>73</sup> Although this “taxing inquiry” may not be omitted on account of its onerous nature, this study, alongside results from prior studies, suggests courts appear to be doing just that.

In the future, the current study would be well served to be expanded to generate a greater sample size. Additionally, several supplementary lines of inquiry have been proposed above in Part III; although as presented, as cause versus effect inquiries, the study methodology would need to be significantly adjusted. Alternatively, updates of some of the prior studies presented in Part II would offer interesting insight, particularly on how the *Chevron* deference doctrine has weathered the last seven years at the circuit court level and the last fifteen years in the Supreme Court. Such expansions of the Barnett and Walker, and Eskridge and Baer studies, respectively, are still feasible at this point—albeit time-consuming—and the author strongly encourages the undertaking of these extensions to further general understanding of *Chevron* deference and how it has been and is currently being applied by the federal courts at all levels.<sup>74</sup>

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<sup>70</sup> 833 F.3d 1206, 1216 (10th Cir. 2016) (Gorsuch, J., dissenting).

<sup>71</sup> Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2142, 2152 (2016).

<sup>72</sup> *Kisor v. Wilkie*, 139 S.Ct. 2400, 2415 (2019).

<sup>73</sup> *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 707 (1991) (Scalia, J., dissenting).

<sup>74</sup> In the author’s opinion, either update would be reasonable to accomplish with a suitable team of assistants.