

Statutory Interpretation and *Chevron* Deference in the Appellate Courts in NLRB Cases

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What statutory methods does an appellate court use in reviewing decisions of an administrative agency? In doing this review, are appellate judges more likely to cite to the text or legislative history when they expressly cite the *Chevron* two-step process versus if they apply a different deference regime? And what role does the opinion author's race, age, gender, and prior employment at a federal agency or Congress, among other demographic attributes, play in both choice of statutory method and deference regime? This Article explores the answers to these questions using an original dataset of all 199 statutory interpretation cases culled from more than 2,500 cases decided in appellate courts reviewing National Labor Relations Board ("NLRB") decisions from 1994 through 2018.

The analysis concludes that although there are clear partisan trends, courts regardless of majority party on the court, commonly use text, language canons, substantive canons, legislative history, precedent, policy, and practical considerations to achieve certain aims. Precedent is used most often when overruling a statute while courts use practical considerations when ruling on a Board decision that is dissimilar ideologically from the ideology of the court majority. While Democrat-majority and Republican-panels differ in their propensity to rule in a pro-employee direction, they use whatever statutory method is best suited to achieve the end goal, whether it be textual or purposive in nature.

The data also reveals that courts specifically citing and using the *Chevron* two-step process are more cognizant of citing and using the text and language canons in the writing of the opinion than when they do not specifically cite *Chevron*, thus suggesting that the choice of the *Chevron* framework itself may play a role in influencing how judges choose statutory methods. By contrast, those who decline to apply *Chevron* deference or a similar "reasonableness" standard are more likely to cite legislative history and precedent, perhaps viewing these tools as a substitute to give the opinion greater legitimacy when courts decline to apply *Chevron*.

Further, some interesting bivariate relationships exist between choice of

statutory method or deference regime and opinion-author demographic features. White authors sitting with at least one minority colleague are less likely to apply *Chevron* in overruling liberal Board decisions while judge-authors with congressional experience use substantive canons more overall. Other insights based on party, race, gender, and prior educational and employment background are discussed in the Article. Although the study is limited to one area of law and to the workings of a single agency—and one of the most politically charged ones at that—it offers fresh insight into how empirical analysis can be used to look beyond the black box of statutory interpretation by federal courts to see what shapes judicial opinions.

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INTRODUCTION

Traditionally, scholars have focused their attention to studying statutory interpretation only at the Supreme Court.¹ In the last few years, however, scholars increasingly have expanded the analysis to examine statutory methods in the federal appellate and district courts as well as state supreme courts—judicial bodies who hear far more cases than the Supreme Court.² These studies detail differences between how statutory interpretation is done at the nation’s highest court and lower court tribunals, underscoring the importance of going beyond studying the Supreme Court exclusively. Yet, little empirical research addresses the issue of agency statutory interpretation. While scholars have begun in the last few years to analyze in a comparative fashion how statutory methods differ between levels of the judicial hierarchy, these analyses have focused exclusively on the hierarchical difference between the Supreme Court and the appellate or district courts.³ Further, while there is a large and robust literature on *Chevron* and agency deference,⁴

¹ See, e.g., William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L. J. 1083 (2008) (analyzing Supreme Court cases).

² See, e.g., Frank C. Cross, *THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION* 180–200 (2009) (federal courts of appeals); James J. Brudney & Lawrence Baum, *Protean Statutory Interpretation in the Courts of Appeals*, 58 WM. & MARY L. REV. 681 (2017) (analyzing federal courts of appeals); Aaron-Andrew P. Bruhl, *Communicating the Canons: How Lower Courts React When the Supreme Court Changes the Rules of Statutory Interpretation*, 100 MINN L. REV. 481 (2015) (federal courts of appeals); Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L. J. 1750 (2010) (analyzing several state supreme courts); Jonathan Choi, *An Empirical Study of Statutory Interpretation in Tax Law*, 95 N.Y.U. L. REV. (forthcoming 2020) (comparing Internal Revenue Service decisions and federal courts).

³ Aaron-Andrew Bruhl, *Statutory Interpretation and the Rest of the Iceberg: Diverges Between the Lower Federal Courts and the Supreme Court*, 68 DUKE L. J. 1 (2018) (studying difference between Supreme Court and appellate/district courts).

⁴ See, e.g., Connor R. Raso & William N. Eskridge, *Chevron as a Canon, Not a Precedent*, 110 COLUM. L. REV. 1727 (2010); Thomas J. Miles & Cass Sunstein, *Do Judges Make Regulatory Policy?*, 73 U. CHI. L. REV. 623 (2006); Thomas Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969 (1992). For studies at the court of appeals, see Kent Barnett & Christopher Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1 (2017); Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235 (2007); Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443 (2005); Orin S. Kerr, *Shedding Light on Chevron: An Empirical Study of the Chevron Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REG. 1 (1998); Peter H. Schuck & E. Donald Elliot, *To the*

debates about deference have largely taken place divorced from empirical discussion about statutory method and how deference regimes could potentially affect what statutory methods a court ends up applying.

No study has yet undertaken a comparative analysis of what statutory methods appellate courts use to review agency decisions. Most disputes concerning everyday matters occur in our nation's state and federal administrative tribunals yet we still know surprisingly little about 1) how administrative agencies interpret statutes and how those methods compare to that used by the administrative agency; 2) whether courts use different statutory methods depending on the deference regime employed; or 3) whether judge-author demographic characteristics color either choice of statutory method or application of a particular deference regime.

This study not only details the statutory methods used by the appellate courts, but it is the only study to compare at a more systematic level statutory differences between the layers of the court-agency hierarchy as well as how methods may differ vertically, that is, between appellate courts ruling on the same statutory issue. Moreover, it is the only empirical study to examine statutory methods exploring judge-level characteristics (beyond including political party), including age, gender, race, and prior career path in governmental service, in an attempt to detail whether choice of statutory method and deference regimes varies along any of these characteristics.⁵

The study attempts to answer these questions in the context of reviewing the decisions of a single agency: the National Labor Relations Board ("NLRB"). The NLRB is an ideal agency to study in this regard because it does almost all of its decision making through adjudications. The NLRB also largely interprets only one statute, the National Labor Relations Act ("NLRA"), though on occasion, it rules on another labor statute or on how an interpretation of the NLRA intersects with that of another statute.⁶ Further, plentiful appellate court decisions abound and oftentimes the same exact statutory interpretation is litigated in multiple appellate courts, offering insight into how appellate courts use different methodologies to interpret the very same statutory provision.⁷ As such, over the period under study, I isolated the 199 appellate court opinions concerning the NLRB where the court engages in review of the agency's statutory interpretation in order to decipher the methodologies used by the courts as well as the deference regime

Chevron Station: An Empirical Study of Federal Administrative Law, 1990 DUKE L. J. 984 (1990).

⁵ Bruhl, *supra* note 3, at 9 n.26 (noting that demographic factors off judges such as age, party of appointing president, and pre-appointment career could "influence interpretive results" and thus merits further research).

⁶ See Part II.A, *infra* for examples.

⁷ Amy Semet, *An Empirical Examination of Agency Statutory Interpretation*, 103 MINN. L. REV. 2255, 2257 (2019).

applied.

The study is a follow-up to a previous study of statutory interpretation at the NLRB itself. A prior empirical analysis of the statutory methods employed by the NLRB in its decisions from 1993 through 2016 was published in 2019 in *Minnesota Law Review*.⁸ That study concluded that there was no ideological coherence to statutory method, with Democrat-majority Boards being as likely as Republican-majority Boards to employ textual or purposive methods.⁹ The study also found that the Board varied its methods of statutory interpretation over time. The Obama Board, for instance, relied more on policy pronouncements than prior Boards.¹⁰ Further, the type of dueling between majority and dissenting Board opinions changed over time; while Board members quarreled about precedent during the Clinton years, the Obama Board most frequently bickered over whether text or policy should resolve the interpretive dilemma at hand.¹¹ Although limited to analysis of only one agency—and one of the most politically-charged agencies at that—both the *Minnesota* analysis and this one represents a first-step to extending the study of empirical statutory interpretation beyond that of study merely of important cases decided by federal courts to see how the agencies themselves interpret statutes and how appellate courts in turn review them.

There is every reason to expect that what we learn about statutory interpretation done by agencies and reviewed by appellate courts both is similar and differs from what we know about statutory interpretation in the Supreme Court or federal courts more generally. Scholars studying the hierarchical interplay between different levels of the judicial hierarchy have concluded that “courts at different levels of the system are both *doing different things* and *doing things differently*.”¹² For instance, scholars have found that Supreme Court justices engage in a more detailed analysis of competing canons, and rely less on precedent or plain language than federal district or appellate court judges.¹³ Lower court judges in turn rely on more accessible forms of legislative history than the Supreme Court and rely less on canons.¹⁴

In addition to offering insight to statutory method, this study aims to advance the conversation concerning *Chevron* deference. *Chevron* was intended as a neutral framework divorced from a judge’s ideological

⁸ *Id.*

⁹ *Id.* at 2259.

¹⁰ *Id.*

¹¹ *Id.*

¹² Bruhl, *supra* note 3, at 5 (emphasis in original).

¹³ *Id.* at 4.

¹⁴ *Id.* at 7.

leaning.¹⁵ For the past thirty years, the choice of whether or not to apply *Chevron* deference to an agency’s reasonable interpretation of an ambiguous statute has dominated academic debate.¹⁶ Yet, we still do not know much about whether courts actually use *Chevron*, and when they do, how use of the *Chevron* framework affects choices made later in the case, including choice of statutory method.

This study finds that anecdotally, the appellate court uses many of the same tools as the Board, and that like statutory interpretation at the Board, although there are ideological trends, there is little consistency to the use of particular statutory methods to any great extent. Citation to the plain text and general references to the text are largely used when reviewing conservative Board decisions, regardless of whether or not they are upheld, while actual reliance on text and language canons are used more when the court aims to achieve a liberal result by overturning a conservative Board decision. Substantive canons and legislative history are used more often by Republican-majority courts in reviewing conservative Board decisions. Other methods like practical considerations are used in a more ideological way; courts generally cite practical considerations to advance a ruling consistent with the ideology of a majority of the panel.

In addition, the data reveals that choice of deference regime may influence what statutory methods a court actually uses. Courts use plain text, general references to text, and reliance on text and language canons more when the court is literally citing the *Chevron* two-step (as opposed to using a reasonableness analysis or another deference regime). The differences in citation do not persist if the court does not actually cite *Chevron* or if the court uses another deference regime such as *de novo* or substantial evidence. This provides some evidence that *Chevron* as used as a formal test may impact how courts view what statutory methods to apply.

Likewise, other statutory methods are used more when courts use non-*Chevron* related deference regimes as compared to when the court is citing or applying *Chevron*. Legislative history and precedent for instance are less

¹⁵ Barnett & Walker, *supra* note 4, at 2 (“the *Chevron* framework limits interpretive primary and seeks to separate judges from their policy preferences”).

¹⁶ *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). Courts proceed under a two-step framework following *Chevron*. First, the court must question whether the statutory provision is ambiguous, and if the judges answers that question in the negative, the court ends the analysis by abiding by the unambiguous statutory meaning. *Id.* at 865 However, if the court deems the provision ambiguous, the Court goes on to what is known as “*Chevron* step two” where they question whether the agency’s interpretation of the ambiguous statute is indeed reasonable. *Id.* at 867. A court finding the interpretation reasonable will then enforce the agency’s statutory interpretation. If the court finds instead however that the agency’s interpretation is not reasonable, they will not enforce the statute. *Id.* at 863.

likely to be employed when the court is neither citing nor applying *Chevron*. This suggests that courts may feel the greater need to cite to legislative history or precedent to justify decisions when the court thinks *Chevron* inapplicable or when they choose affirmatively not to apply *Chevron* when they should.

Finally, this study is the first to analyze how demographic characteristics of the author of the opinion could influence what statutory methods are used as well as which deference regimes apply. The analysis focuses on bivariate relationships and given the size of the dataset they can only serve as a preliminary indication of trends in the data worthy of further exploration. Nonetheless, the study finds that white authors use plain text more, while non-white authors focus on policy more than white authors. Judges who previously worked at federal agencies use less legislative history, while those who were employed by Congress before becoming a judge are more likely to use substantive canons than fellow judges with other employment backgrounds. The younger generation of judges who are below age 65 are more likely to cite to the text as well as to policy than older judges are. Not surprisingly, D.C. Circuit judges differ from non-D.C. Circuit judges, but in an unexpected way; they are no more likely to cite or apply *Chevron* than non D.C. courts, but they do use substantive canons more than judges from circuits outside the District. Also, interestingly, judges who attended schools ranked in the top 14 of *U.S. News & World Report* are more likely to apply plain text as well as to cite and apply *Chevron* deference. The study also reveals some interesting bivariate panel effects. In particular, a Republican author sitting with fellow Republicans is far less likely to use legislative history. Further, white authors sitting with two other white authors are less likely to rely on precedent than those sitting with minority colleagues.

Bivariate analysis of demographics also shows some patterns regarding beliefs about deference. Citation of the *Chevron* two-step framework is done more by Democratic authors than Republican authors (32.6% v. 21.1%), but political party does not differentiate opinion writers in actually using either *Chevron* or a reasonableness analysis versus applying a non-reasonableness/non-*Chevron* regime. All-Democrat panels differ from all-Republican ones in the citation and application of *Chevron*, but mixed panels do not differ in their choice of deference regime. Although not related to party, there are two intriguing panel effects with respect to deference. Female authors sitting with two male colleagues cite *Chevron* far more often than when sitting with only one female colleague. In addition, there is a strong bivariate relationship between race of the author and application of a *Chevron*/reasonableness test. When a white author sits with white colleagues, he or she applies *Chevron* 83.2%, compared to just two-thirds of the time when there is at least one minority colleague on the panel. Looking at the data further indicates that this discrepancy is limited to cases in which the court

overrules a liberal Board opinion. Nonetheless, the fact that there is still a discrepancy even when controlling for Board outcome and whether or not the interpretation is upheld makes it all the more intriguing to engage further the extent to which race and gender may impact application of deference. So much of the literature focuses on the narrow choice of how party affects *Chevron* deference, such that analysis of how race and gender may affect citation and application is long neglected and much needed for further study.

The Article also contributes to normative debates in the academy concerning how agencies should interpret statutes and how appellate courts in turn should review them. In recent years, pressure has been building to limit the extent to which appellate courts defer to agencies, with some arguing that the federal judiciary needs to play a more active role in constraining a burgeoning administrative state. Talks of *Chevron*'s imminent demise have been boiling for years. While the perspective offered in this Article may be unique to the NLRA, the majority of appellate courts do not apply the *Chevron* two-step process when engaging in review of statutory interpretation of the NLRB. Rather, they most often apply a "reasonableness" analysis to review, and most make no reference whatsoever to *Chevron* or ensuring that the text is ambiguous before going on to *Chevron* step two. Even when courts cite the *Chevron* two-step they rarely engage in a detailed analysis of the steps.

Indeed, it may be that the courts themselves have already decided the future of *Chevron* by *de facto* ignoring it and changing the analysis to either an analysis based on "reasonableness" or one more similar to the Administrative Procedure Act ("APA")'s arbitrary and capricious standard. As such, perhaps debate on *Chevron* should move on to define criteria on how to ensure the "reasonableness" of an agency's statutory interpretation.¹⁷ The answer may largely depend on one's political view of the role of the administrative state and the broader debate about what role unelected bureaucrats should play in making policy when statutory dictates do not spell out details. Indeed, my review of over 2,500 cases indicates that very rarely is text a definitive source. As with most things in this political era, text of most statutes is seen through a political lens. Example after example abound in which majority and dissent bicker over the text being plain.¹⁸ In practice, it is clear that judges adopt more a practice of "intentional eclecticism" with using both textual and purposive sources to achieve desired outcome and that judges really have no clear standards on how to define reasonableness, leading to inconsistency and lack of uniformity in the way statutes are

¹⁷ Mark Seidenfeld, *A Syncopated Chevron: Emphasizing Reasoned Decision-Making in Reviewing Agency Interpretations of Statutes* 73 TEX. L. REV. 83 (1994)

¹⁸ See Part II.B, *infra*.

interpreted.¹⁹

The question now becomes: how should appellate courts review agency's interpretations of its own purpose and mission? Should there be a "*Chevron* space" where courts can do whatever is permissible within that space?²⁰ But where the text does not limit the space, and/or where text is viewed in most circumstances through a political lens, how does one determine reasonableness within that space? As presently applied, many if not most doctrinal issues heard concerning the NLRB result in circuit splits, with courts reaching dramatically different opinion on reasonableness based on the very same Board opinion.²¹ This result is the opposite of what *Chevron* was designed for as it interjects judicial ideology into the process and results in the judiciary having absolutely no role in policing the agency since the NLRB widely ignores circuit mandates, often to the chagrin of the circuits themselves. Moreover, if *Chevron* were an adequate guide, we should see more consistency between circuits (and even within circuits) than what the empirics bears out. Although the Article is descriptive and it is beyond the scope to propose an updated version of *Chevron*, clearly, appellate courts need more express advice on what factors they should look for in assessing reasonableness. Otherwise, the judiciary risks being completely ignored by the agency, a troubling development that subverts constitutional limitations of separation of powers and checks and balances.

The Article proceeds as follows. Part I details the emerging literature on empirical statutory interpretation, focusing on several recent studies of the statutory methods applied by appellate courts. This Part also details the rich literature concerning the empirical study of *Chevron* deference as well as deference regimes generally. After briefly explaining to the reader the history and institutional structure of the NLRB in Part II.A, Part II.B proceeds to describing the construction of the dataset. Then, Part III sets forth the two-fold nature of the analysis. Part III.A descriptively sets forth the methodology choices made by the appellate courts. Part III.B then turns to discussing *Chevron* deference and how statutory methods vary by deference regimes. Part III.C describes the bivariate relationship between various demographic characteristics of the judge-author and the choice of statutory method as well as deference regime. Finally, the Conclusion discusses the normative implications of the findings, concluding with some thoughts on how the study can be improved.

¹⁹ Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARVARD L. REV. 1298, 1301 (2018).

²⁰ Peter L. Strauss, *Deference is Too Confusing: Let's Call Them 'Chevron Space' and 'Skidmore Weight'*, 121 COLUM. L. REV. 222, 222 (2011).

²¹ See Part II.B, *infra*.

PART 1: LITERATURE REVIEW

A. *Review of Literature on Statutory Interpretation and Chevron Deference*

The aim of this Article is to explore what statutory methods the appellate courts reviewing decisions of a particular agency—here the NLRB—uses in its analysis of statutory interpretation decisions. The analysis is two-fold. First, the aim is to detail empirically what statutory methods the appellate courts uses in its decisions. Second, in the course of analyzing the statutory methods employed, the study aims to also explore the use of deference in the appellate court’s analysis of the NLRB’s statutory interpretations and to analyze the relationship between statutory method and deference regime. Even analyzing the very same statutory issue, some courts expressly apply the *Chevron* analysis, while other courts either detail no deference regime or simply subject the inquiry to a “reasonableness” analysis or in some cases even “arbitrary and capricious” review.²²

1. Theoretical Accounts

What are the reasons why there may be differences in statutory interpretation when an appellate court reviews an agency’s decision as opposed to that of a non-agency decision of a federal court? Scholars argue that agencies may not necessarily construe statutes the same way courts do.²³ Agencies may want to “energize” a statutory program and thus engage in a more activist policymaking interpretation.²⁴ Unlike courts, agencies are not constrained by norms like *stare decisis* or a desire to impose a greater coherence to the larger legal order.²⁵ They may be more cognizant of political realities and of devising a statutory interpretation that appeases political superiors.²⁶

Agencies may also differ in the way they approach statutory interpretation.²⁷ Courts hear many different cases across a broad spectrum of

²² See Part II.B, *infra*.

²³ Jerry Mashaw, *Between Facts and Norms: Agency Statutory Interpretation as an Autonomous Enterprise*, 55 U OF TORONTO L. REV. 497, 519; Peter L. Strauss, *When the Judge Is Not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History*, 66. CHI-KENT. L. REV. 321, 328-329 (1990).

²⁴ Mashaw, *supra* note 23, at 507.

²⁵ *Id.* at 503-505.

²⁶ *Id.*

²⁷ Although this study focuses on the appellate courts, the divergence between the agency and the Supreme Court may be even greater, as cases before the Supreme Court often

subject matters while agencies hear similar cases and interpret a much smaller number of statutes.²⁸ The resources available may differ as well.²⁹ The specialized nature of agency decision making will result in courts having less opportunity to meaningfully engage with the statutory materials and legislative history.³⁰ As such, agencies as opposed to courts will be more intimately familiar with the statute's text, purpose, and legislative history. The close relationship between the agency and Congress may allow the agency to more reliably access "those considerations that served to shape the legislation, the legislative history wheat, from the manipulative chaff."³¹ This institutional memory may allow them to more readily interpret congressional intent.³² Moreover, because agencies are supposed to be guided by an underlying "intelligible principle," they may be better able to develop a reading of the statute that adopts and effectuates the statute's underlying purpose.³³

There are other reasons to expect some divergence between judicial decision makers. There is no consensus on the single right way to interpret a statute.³⁴ Interpretive canons can be "fuzzy" and different decision makers may differ on what they consider "ambiguous."³⁵ As two scholars put it, interpretive methodology is similar to "a web of considerations and varying weights rather than a set of hierarchical rules."³⁶ Moreover, while the agency

have amicus briefs from various organizations advancing a statutory construction. Bruhl, *supra* note 3, at 12; *see also* Allison Orr Larsen & Neal Devins, *The Amicus Machine*, 102 VA. L. REV. 1901, 1902-04 (2016) (noting amicus briefing at Supreme Court). There were too few NLRB cases heard at the Supreme Court during the period under study to do a reliable comparison of statutory method. Moreover, while there were some cases at both the Board and the appellate courts where amicus briefs were filed, the number of cases was too small to interpret in this analysis. *See* Linda Sandstrom Simard, *An Empirical Study of Amici Curiae in Federal Court: A Fine Balance of Access, Efficiency, and Adversarialism*, 27 REV. LITIG. 669, 686-87 (2008).

²⁸ Bruhl, *supra* note 3, at 13-14 (discussing court caselaw and case mix).

²⁹ *See* Frank H. Easterbrook, *The Absence of Method in Statutory Interpretation*, 84 U. CHI. L. REV. 81, 96 (2017) (observing that "[r]ules of interpretation must reflect the resources available to the task")

³⁰ Bruhl, *supra* note 3, at 16.

³¹ Strauss, *supra* note 20, at 347.

³² Mashaw, *supra* note 23, at 508.

³³ Kevin Stack, *Purposivism in the Executive Branch: How Agencies Interpret Statutes*, 109 N.W. U. L. REV. 871, 876 (2015); *see also* Evan Criddle, *The Constitution of Agency Statutory Interpretation*, 69 VAND. L. REV. EN BANC 325, 325 (2016) (responding to Saiger piece)

³⁴ Bruhl, *supra* note 3, at 10; James L. Brudney & Lawrence Baum, *Two Roads Diverged: Statutory Interpretation by the Circuit Courts and the Supreme Court in the Same Cases*, FORDHAM L. REV. (2019), at *13 (forthcoming)

³⁵ Bruhl, *supra* note 3, at 11.

³⁶ Connor N. Raso & William N. Eskridge Jr., *Chevron as a Canon, Not a Precedent*:

itself has an incentive to impose methodological consistency in how it interprets a statute, the appellate courts—widely scattered across the country—have no such incentive. This only encourages appellate court to follow their own circuit precedent instead of trying to give the statute a consistent meaning.³⁷ Few NLRB decisions are ultimately reviewed by the Supreme Court, thus resulting in no judicial body having an incentive to “police” that the statute is consistently interpreted.³⁸

Moreover, certain statutory methods differ between the bodies. For example, the nature of precedent and deference is different between the two bodies.³⁹ There is no deference regime for the Board to apply unlike the courts who are guided by *Chevron* deference or another deference regimes in interpreting agency decisions. The role of precedent in guiding decisions also differs. The NLRB widely engages in a policy of nonacquiescence on the subject, preferring instead to interpret a statute uniformly within the Board rather than interpreting a statute inconsistently to abide by circuit precedent.⁴⁰ Within the Board itself, it is only bound by precedent to five-member Board decisions.⁴¹ Since most statutory interpretation cases are made by the five-member Board, the Board is free to devise its own precedent, though in many cases it is still guided by other Board and circuit court decisions.⁴² By contrast, appellate courts are guided and feel more bound by both Supreme Court and circuit court precedent. Thus, there are many cases in which the appellate court overrules the Board, arguing that its own precedent or that of another circuit, rather than Board precedent, should guide the decision.

Further, we might expect the role of ideology to play a different role across courts.⁴³ The familiar left-right divide assumes that textualism is more favored by conservative judges while resort to legislative history or discussion of the purpose of the statute is seen as more relevant by liberal-leaning judges.⁴⁴ More importantly, judges may have different ideological opinions in how they approach agency deference.⁴⁵

At the same time, however, any divergence in method between the agency

An Empirical Study of What Motivates Justices in Agency Deference Cases, 110 COLUM. L. REV. 1727, 1811 (2010).

³⁷ *Id.* at 11.

³⁸ *Id.*

³⁹ Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073, 1093 (1992).

⁴⁰ See Part II.A, *infra*.

⁴¹ *Id.*

⁴² *Id.*

⁴³ See, e.g., CASS R. SUNSTEIN, DAVID SCHKADE, LISA ELLMAN & ANDRES SAWICKI, ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY 24–40 (2006) (explaining the impact of ideology).

⁴⁴ Bruhl, *supra* note 3, at 20.

⁴⁵ Barnett & Walker, *supra* note 2.

and courts should stay “within certain bounds.”⁴⁶ It may not matter so much if the judge uses a different interpretive method than the agency to arrive at the same substantive result (a decision both for the employee, for example), but too much divergence calls into question how well the appellate courts are overseeing the decisions of the agency. Moreover, because courts should be applying deference to an agency’s reasonable interpretation of a statute that is within the agency’s expertise, too much divergence might suggest that the court is usurping the role of the agency in interpreting the statute. In addition, we might expect less divergence in method between agencies and courts than between the Supreme Court and appellate courts; unlike the Supreme Court, both agencies and court have busy, non-discretionary dockets,⁴⁷ and receive few amicus briefs, thus creating little “pressure” for the decision maker to pay attention to methodological approach.⁴⁸ In addition, certain rules, like *Chevron* deference, are meant to cabin in ideology. Rules may also serve as a “reminder” to the judges, thus making “ideology less salient” with the rules having a “performative function.”⁴⁹

2. Empirical Studies of Statutory Methods

In the early years, qualitative and empirical study focused on examining trends in statutory interpretation at the Supreme Court. Articles were devoted to study the Supreme Court’s trends in using text,⁵⁰ canons,⁵¹ dictionaries,⁵² and legislative history,⁵³ among others. The empirical-oriented scholarship

⁴⁶ Bruhl, *supra* note 3, at 23 (noting that all federal courts are part of the same system).

⁴⁷ Both the NLRB and the federal court of appeals hear an approximately even number of cases. For 2005-2015, the courts of appeals participated in 253-430 merits decision, with the most in the 9th Circuit. Brudney & Baum, *supra* note 2, at 695 & n.37.

⁴⁸ Brudney & Baum, *supra* note 34, at *4.

⁴⁹ Gluck, *supra* note 2, at 1855.

⁵⁰ See, e.g., Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1 (2006); John F. Manning, *Second-Generation Textualism*, 98 CALIF. L. REV. 1287 (2010); Richard M. Re, *The New Holy Trinity*, 18 GREEN BAG 2d 407 (2015).

⁵¹ See, e.g., James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1 (2005); Edward L. Rubin, *Modern Statutes, Loose Canons, and the Limits of Practical Reason: A Response to Farber and Ross*, 45 VAND. L. REV. 579 (1992).

⁵² See, e.g., James J. Brudney & Lawrence Baum, *Oasis or Mirage: The Supreme Court’s Thirst for Dictionaries in the Rehnquist and Roberts Eras*, 55 W. & M. L. REV., 483 (2013); Ellen P. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 ARIZ. ST. L. J. 275 (1998); James J. Brudney & Lawrence Baum, *Dictionaries 2.0: Exploring the Gap Between the Supreme Court and the Courts of Appeals*, 125 YALE L. J. FORUM 104, 104-05, 119 (2015); Bruhl, *supra* note 3, at 46-47.

⁵³ See, e.g., James J. Brudney & Corey Ditslear, *Liberal Justices’ Reliance on Legislative History: Principle, Strategy, and the Scalia Effect*, 29 BERKELEY J. EMP. & LAB. L. 117 (2008); Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of*

analyzing statutory methods falls into two camps.⁵⁴ Traditionally, scholars focused their empirical study on how the Supreme Court interprets statutes.⁵⁵ Recently, scholars shifted the focus beyond the Supreme Court to assess in a quantitative fashion how federal courts and even administrative agencies interpret statutes.⁵⁶ Some investigate how administrative agencies interpret statutes through the use of surveys of congressional staff and administrators,⁵⁷ while others embark on a more qualitative analysis of agency-specific statutory interpretations, picking out a few examples of actual cases to illustrate given points.⁵⁸

a. Statutory Interpretation and the Supreme Court

One strain of the literature looks at how federal judges, particularly those at the Supreme Court, use tools of statutory construction, such as textual and substantive canons and legislative history. In one of the first studies, Frank Cross in a book-length treatment conducted a study measuring judges' use of tools of statutory construction at the Supreme Court to assess how those statutory methods constrain judges from reaching outcomes inapposite to what one would predict from looking at political background alone.⁵⁹ Cross concluded that most methods had far less constraining effect than textualists

Legislative History: New Perspectives on the 1964 Civil Rights Act and its Interpretation, 151 U. PA. L. REV. 1417 (2003).

⁵⁴ See, e.g., Brudney & Ditslear, *supra* note 51, at 4; David S. Law & David Zaring, *Law Versus Ideology: The Supreme Court and the Use of Legislative History*, 51 WM. & MARY L. REV. 1653, 1654 (2010); Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073, 1074-75 (1992).

⁵⁵ Anita S. Krishnakumar, *Dueling Canons*, 65 DUKE L. J. 909, 934 (2016) (examining the use of dueling canons of construction in Supreme Court majority and dissenting opinions).

⁵⁶ See Abbe R. Gluck and Lisa Schulz Bressman, *Statutory Methodologies from the Inside- An Empirical Study of Congressional Drafting, Delegation and the Canons: Part I*, 65 STAN. L. REV. 901 (2013) [hereinafter, *Part I*]; Abbe R. Gluck and Lisa Schulz Bressman, *Statutory Methodologies from the Inside- An Empirical Study of Congressional Drafting, Delegation and the Canons: Part 2*, 66 STAN. L. REV. 725 (2013) [hereinafter, *Part II*]; Christopher Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999 (2015) [hereinafter, *Inside Agency*]; Christopher J. Walker, *Legislating in the Shadows*, 165 U. OF PENN L. REV. 1377 (2017); see also *Adoption of Recommendations*, 80 FED. REG. 76, 161 (Dec. 16, 2015) (summarizing ACUS's findings).

⁵⁷ Gluck & Bressman, *Part I & Part II*, *supra* note 56 (conducting survey among congressional staffers); Walker, *Inside Agency*, *supra* note 56 (conducting survey among agency staffers).

⁵⁸ See, e.g., Daniel P. O'Gorman, *Construing the National Labor Relations Act: The NLRB and Methods of Statutory Construction*, 81 TEMPLE L. REV. 178, 178 (2009) (providing examples of how the NLRB interprets statutes and offering theories for how the Board should interpret statutes).

⁵⁹ Cross, *supra* note 2.

would have one believe and that judges were largely “interpretive pluralists.”⁶⁰ Cross also believed that the judge’s ultimate decisions were motivated by partisan considerations, so they choose the method that best reaches the result they want.⁶¹ Use of textualism, however, he found, did not always result in conservative outcomes.⁶² Cross concluded that legislative history was more constraining than plain meaning,⁶³ and that legislative history was used most often to advance liberal outcomes.⁶⁴ He also found that use of practical considerations is not “ideologically manipulable.”⁶⁵

A study of workplace cases by James Brudney and Corey Ditslear, looked at interpretive canons in every Supreme Court decision in workplace matters from 1969-2003.⁶⁶ In the limited subject matter studied, they found that there was an increase in reliance on canons in the Rehnquist court as opposed to the Burger court and that canon usage was greatest in closely divided cases, with liberal justices using them to advance liberal decisions and conservative judges doing the opposite.⁶⁷ In follow-up work, they narrowed their claim, finding that liberal justices were more likely to vote in favor of the employer when using legislative history but that the use of canons and legislative history by conservatives was more mixed.⁶⁸

Another study by David Law and David Zaring analyzed the use of legislative history in Supreme Court cases from 1953 to 2006.⁶⁹ Law and Zaring found that dissenting judges were more likely to cite legislative history when a majority opinion also cited legislative history, suggesting that judges were sensitive to their colleagues’ arguments.⁷⁰

⁶⁰ *Id.* at 178 (“Reliance on textualism shows no constraining effect...”).

⁶¹ *Id.*

⁶² *Id.* at 169.

⁶³ *Id.* at 160-77.

⁶⁴ *Id.* at 172.

⁶⁵ *Id.* at 174.

⁶⁶ Brudney & Ditslear, *supra* note 53, at 103. It is notable that scholars have different views on what constituted a canon. For example, Cross points out that Brudney and Ditslear see the whole act as canonical, while Cross sees it as textual; likewise, among other differences, Brudney and Ditslear treat plain text as a canon while Cross does not. Cross, *supra* note 2, at 162. Brudney & Ditslear, *supra* note 51, at 1 (little constraint by linguistic and substantive canons); *see also* James J. Brudney & Corey Ditslear, *Liberal Justices’ Reliance on Legislative History: Principle, Strategy and the Scalia Effect*, 29 BERKELEY J. EMP. & LAB. L. 117, 117 (2008) (looking at constraining effects of legislative history on workplace cases); James J. Brudney & Corey Ditslear, *The Warp and Woof of Statutory Interpretation: Comparing Supreme Court Approaches on Tax and Workplace Law*, 58 DUKE L. J. 1231, 1231 (2009) (showing use of legislative history).

⁶⁷ Brudney & Ditslear, *supra* note 34, at 1.

⁶⁸ *Id.*

⁶⁹ David S. Law & David Zaring, *Law Versus Ideology: The Supreme Court and the Use of Legislative History*, 51 WM. & MARY L. REV. 1653, 1738 (2010).

⁷⁰ *Id.*

Nina Mendolson undertook an empirical study of statutory canons used by the Supreme Court from 2005 through 2014 to study how textual and substantive canons were used in Supreme Court majority, dissenting, plurality, and concurring opinions.⁷¹ She found that except for recently appointed Justice Neil Gorsuch, all the Justices applied at least one canon in their authored statutory interpretation cases.⁷² Her data suggested that new canons continue to develop while others disappear from use over time.⁷³ On a substantive front, her data indicated that the Supreme Court commonly relied on canons that other analysis indicates are of dubious utility to congressional drafters, and likewise that the canons congressional drafters say are the most useful were actually ones that were least applied.⁷⁴ She concluded that “canon use is of dubious value to interpretive predictability and in turn to judicial constraint or a stable interpretive background for Congress.”⁷⁵

Anita Krishnakumar did two empirical analyses of Supreme Court statutory interpretation. In one article, she analyzed the role that “dueling canons” play in Supreme Court decisions in the Roberts Court from 2005 through 2010.⁷⁶ She found that conservative justices use the canons to reach conservative outcomes in about 60% of cases, with liberal justices use those same canons to reach liberal outcomes.⁷⁷ She also found that the canons do not constrain the judges to vote against their ideology and that practical reasoning led to greater rates of dueling between the majority and the dissent than traditional methods of construction.⁷⁸ Krishnakumar also looked more thoroughly at the Roberts Court’s use of substantive canons, finding that they are infrequently invoked as a justification in statutory construction.⁷⁹ Rather, she uncovers that Supreme Court precedent as well as reliance on practical considerations served as the “real gap-filling interpretive tools” that the Court relies on.⁸⁰

More recently, Lawrence Solan explored the use of precedent in

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

⁷²*Id.*

⁷³*Id.* at 78.

⁷⁴*Id.* at 79

⁷⁵*Id.* at 78 (noting that “[c]onsiderable reform would be required to positively contribute to interpretive predictability”).

⁷⁶ Krishnakumar, *supra* note 55, at 909.

⁷⁷*Id.*

⁷⁸*Id.*

⁷⁹ Anita Krishnakumar, *Reconsidering Substantive Canons*, 84 U. CHI. L. REV. 825, 825 (2017)

⁸⁰*Id.* at 887.

guiding statutory decisions.⁸¹ Examining the use of precedent in split 5-3 or 5-4 decisions before the Supreme Court, Solan paints a “chaotic picture” of the use of precedent in statutory interpretation.⁸² He concluded that judges on opposing sides cite contrasting precedent, or strategically cite precedent to advance their preferred outcome.⁸³

b. Statutory Interpretation in the Lower Federal Courts

Scholars have also analyzed statutory method at the lower federal courts. Cross, in his book, devoted a chapter to analysis of the lower federal courts where he compared methods to use by the Supreme Court.⁸⁴ Like at the Supreme Court, he found that judges use all interpretive methods.⁸⁵ Legislative history references have generally declined since the 1970s, with references to conference reports in particular evidencing a steady decline.⁸⁶ Cross hypothesized that this decline was not due to an increase in conservative judges (who may see legislative history as less reliable), but by changes in the courts themselves or by litigants having the view that history was less valuable as a method.⁸⁷ Cross also found a “profound” increase in the use of textualism and pragmatism since the 1990s.⁸⁸ In addition, he found that usage of the formal Latin-named language canons increased until 1990, then steadily declined since 2000.⁸⁹ Overall, Cross concluded that the conventional wisdom—that textualism was “ascendant” over legislative history and that the language canons were most associated with textualism—was more true of study of the circuit courts than the Supreme Court.⁹⁰

More recently, scholars have begun to compare statutory interpretation at the Supreme Court with that in the lower federal courts. In one of the latest studies, Aaron-Andrew Bruhl undertook an empirical analysis of statutory methodologies at three distinct layers of the judicial hierarchy: Supreme Court, appellate court, and district court over a forty year time span.⁹¹ He analyzed the use of key interpretive tools such as legislative history, linguistic canons, textual canons, and dictionaries and found that

⁸¹ Lawrence M. Solan, *Precedent in Statutory Interpretation*, 94 N.C. L. REV. 1165, 1172 (2016).

⁸² *Id.* at 1173.

⁸³ *Id.*

⁸⁴ Cross, *supra* note 2, at 180.

⁸⁵ *Id.* at 199.

⁸⁶ *Id.* at 185.

⁸⁷ *Id.* at 186-87.

⁸⁸ *Id.* at 188-89.

⁸⁹ *Id.* at 190.

⁹⁰ *Id.* at 191.

⁹¹ Bruhl, *supra* note 3, at 1.

federal courts in general have become more textualist over time, with this tendency being less pronounced at lower district courts than the Supreme Court.⁹² Bruhl also found that except for precedent, almost every interpretive canon was used less at the lower federal courts and that while all courts commonly use legislative history, lower courts relied on the “most accessible and authoritative kinds” such as congressional committee reports rather than the *Congressional Record*.⁹³ Bruhl also looked at over twenty common canons to identify the ones that were over and under-represented at the Supreme Court compared to the lower federal courts.⁹⁴ He applied a “matched corpus” method studying the same case at three levels, and discovered that courts at different levels of hierarchy applied different methods to analyze the same statutory interpretation issues in a single case.⁹⁵ Overall, he concluded that compared to the Supreme Court, lower courts applied fewer and simpler interpretive tools and that matches across the hierarchy are rare, with *Chevron* deference being the doctrine that matched most across courts.⁹⁶ Indeed, Bruhl found no matches in the lower courts for some cases in which the Supreme Court employed a linguistic canon, a legislative hearing, or the avoidance canon.⁹⁷ Overall, Bruhl was surprised by the degree of “methodological discontinuity” within cases.⁹⁸ Bruhl also looked at trends over time and found that legislative history, although used more often at the Supreme Court, has generally declined, while the use of dictionaries, textual tools, and linguistic tools increased over time.⁹⁹

James Brudney and Lawrence Baum also compared statutory methods of both the Supreme Court and the circuit courts.¹⁰⁰ In their latest 2019 article, they concluded that the Rehnquist and Roberts’ Court focused on ordinary meaning, language canons, and dictionary usage, and its declining reliance on legislative history, are trends that the appeals court adhere to with a lag of a few years.¹⁰¹ Like Bruhl, however, Brudney and Baum also found divergent practices with circuit courts adopting simpler interpretive frameworks.¹⁰² They found that the court of appeals was more

⁹² *Id.* at 7. Bruhl also finds that lower courts tend to follow shifts in trends at the Supreme Court. *Id.* at 27.

⁹³ *Id.* at 7, 26.

⁹⁴ *Id.* at 26.

⁹⁵ *Id.* Brudney and Baum used a similar technique to compare the use of dictionaries and legislative history in several selected areas of statutory law. *See* Brudney & Baum, *supra* note 2, at 701-02; Brudney & Baum, *supra* note 52, at 104-05.

⁹⁶ Bruhl, *supra* note 3, at 23, 51.

⁹⁷ *Id.* at 53.

⁹⁸ *Id.* at 54.

⁹⁹ *Id.* at 57-60.

¹⁰⁰ Brudney & Baum, *supra* note 34, at *1.

¹⁰¹ *Id.* at *1.

¹⁰² *Id.*

likely to rely on ordinary meaning (78.2% v. 61.1%) and agency deference than the Supreme Court and less likely to rely on legislative purpose (48% v. 74.1%).¹⁰³ They also found a pro-employee tendency in the appeals courts when invoking agency deference, a finding consistent with the general tendency of the NLRB as a whole to be more pro-employee given the nature of its “congressional mission.”¹⁰⁴ Co-reliance between the Supreme Court and appellate courts was highest for legislative history and language canons, with legislative purpose and dictionaries having the least amount of co-reliance.¹⁰⁵ Overall, Brudney and Baum concluded that achieving uniformity between the two layers of courts often is secondary to institutional needs at the appellate level, the circuit court’s reluctance to adopt certain textual methods, and the “inevitability and value of methodological contestation” between the levels.¹⁰⁶

Brudney and Baum did a prior analysis of interpretive divergence and convergence between the Supreme Court and three courts of appeals in criminal law, business and commercial law, and labor and employment law from 2005 through 2015.¹⁰⁷ Finding that courts of appeals used statutory methods in “protean” ways, they concluded that appeals judges relied on dictionaries more than the Supreme Court, particularly depending on the subject area and whether the dictionary was a general or legal one.¹⁰⁸ Brudney and Baum concluded too that appeals judges used legislative history in a different way than Supreme Court justices. Supreme Court judges tended to stress how changes in text occur over a statute’s history with less emphasis placed on committee reports.¹⁰⁹ By contrast, appeals judges used legislative history to a different aim: “to resolve ambiguities, confirm apparent meaning,

¹⁰³ *Id.* at *24. The spread for dictionaries was 7.2% v. 9%, language canons 24% v. 23.1%, legislative history 35.2% v. 35.8%, and agency deference 23.4% v. 17.1%. *Id.* They found similar patterns for their analysis of the NLRA and Railway Labor Act: 65.3% v. 41.6% for ordinary meaning; 2.8% v. 1.4% for dictionary, 15.3% v. 12.5% for language canons, 29.2% v. 30.6% for legislative history, 44.4% v. 81.9% for legislative purpose, and 34.7% v. 25% for agency deference. *Id.* at *27. In all, they found higher reliance on agency deference for the NLRA and its related statute, most likely due to the fact that there is no private right of action under the NLRA, ensuring that courts are “effectively required” to address agency deference issues, though by both this studies and Brudney and Baum’s numbers, they do only a third of the time. *Id.*

¹⁰⁴ *Id.* at *85-86.

¹⁰⁵ *Id.* at *44. Brudney and Baum also find some evidence to suggest that agreement about reliance on sources depends on the ultimate outcome in the case. *Id.* at *48. They also found co-reliance to increase over time, perhaps because the Supreme Court is more transparent about interpretive sources. *Id.*

¹⁰⁶ *Id.* at *9.

¹⁰⁷ Brudney & Baum, *supra* note 2, at 678.

¹⁰⁸ *Id.* at 682.

¹⁰⁹ *Id.*

or simply explicate legislative intent...”¹¹⁰ Brudney and Baum made the suggestion that the “eclecticism” of the appeals courts ‘limit[s] judicial discretion’ more successfully than the Supreme Court’s approach which focuses more on articulating a “self-consciously articulated methodological path.”¹¹¹

Other studies focus on particular courts. One early study looked at interpretive methods at the Seventh Circuit, finding that judges with similar interpretive methods were no more likely to agree on outcomes.¹¹²

c. Comparing Statutory Interpretation at Agencies and Federal Courts

More recently, Jonathan Choi has applied natural language processing to explore statutory interpretation trends in tax law cases, comparing trends at the agency versus those used at the federal courts.¹¹³ His analysis of Internal Revenue Service (“IRS”) records indicated that the agency has grown more purposive over time, with decisions being rooted more in achieving goals like efficiency and uniformity, while the Tax Court, the federal court charged to review the IRS’s decisions, has grown more textualist, and puts a greater emphasis on *Chevron* deference and text-based tools of interpretation.¹¹⁴ Choi also found that different courts favor different kinds of sources; compared to the district court, the Tax Court, for example, preferred “congressional reports like those from Congressional Budget Office and the Joint Committee on Taxation) over congressional hearings, holistic-textual canons (those emphasizing a cohesive reading of the tax code) over language canons, and *Chevron* deference over constitutional canons.”¹¹⁵ Choi also discovered that Democratic-appointed Tax Court judges were more likely to employ purposive terminology and were less likely to use textualist terms than Republican appointees.¹¹⁶ By contrast, he found that the end result of the case (whether the court ruled for or against the taxpayer) bore no relationship to purposive or textual methodology.¹¹⁷

d. Surveys of Statutory Method

Abbe Gluck and Judge Richard Posner undertook a survey of forty-two

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² Jason J. Czarnezki & William K. Ford, *The Phantom Philosophy? An Empirical Investigation of Legal Interpretation*, 65 MARYLAND L. REV. 841,841 (2006).

¹¹³ Choi, *supra* note 2, at 4.

¹¹⁴ *Id.* at 4.

¹¹⁵ *Id.* at 5.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

appellate court judges to discover their opinions on statutory methods, focusing on questions that asked judges how they regarded statutory text, dictionaries, the canons of construction, legislative history, and purpose as well as questions concerning pragmatism, the role of agencies, and the value of judges to understanding congressional innerworkings.¹¹⁸ They found that the judge's "generation" as well as whether the judge previously worked on Capital Hill to be important considerations in statutory interpretation, more so than even political ideology.¹¹⁹ The study loosely divided judges into a few types. One group of judges were older, went to law school prior to the period in which courses in legislation and regulation were commonly taught, and therefore they viewed the task of statutory interpretation as a delegation from Congress to the courts.¹²⁰ This older cohort of judges tried to make sense of the law by looking at the statute's text, using whatever source they thought will help them.¹²¹ Gluck and Posner also discovered that judges who previously held positions in the legislative or executive branch of the federal government, particularly those who worked in Congress, focused more on how statutes were actually drafted by Congress, looking at how the canons of construction may differ from how statutory drafting occurs in practice.¹²² This later group of judges were often textualists who used canons together with legislative history to discern statutory meaning of what Congress intended consistent with the realities of congressional drafting.¹²³ Other judges educated in the canons in law school often used them as "tie-breakers" but also considered the role of pragmatism.¹²⁴

3. Empirical Studies of Deference

A similarly rich literature exists on the empirical application of *Chevron* deference. William Eskridge and Lauren Bauer compiled a comprehensive dataset of Supreme Court decisions involving a statutory interpretation issue between the time *Chevron* was decided in 1984 and the end of 2005.¹²⁵ They found no evidence to indicate when the Court will invoke particular deference regimes in whether to defer to the agency.¹²⁶ In

¹¹⁸ Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARVARD L. REV. 1298, 1301 (2018).

¹¹⁹ *Id.* at 1303.

¹²⁰ *Id.* at 1303.

¹²¹ *Id.* at 1303-04.

¹²² *Id.* at 1304-05.

¹²³ *Id.* at 1302-04.

¹²⁴ *Id.* at 1305.

¹²⁵ See sources cited note 2, *supra*.

¹²⁶ Eskridge & Bauer, *supra* note 1, at 1091.

the wake of the Eskridge and Bauer analysis, there have been many follow-up studies studying how federal courts apply *Chevron*.¹²⁷ In one recent analysis, Natalie Salmanowitz and Holger Spamann revisited Eskridge and Bauer's conclusion that the Supreme Court does not apply *Chevron* in 75% of the cases where it is deemed applicable.¹²⁸ After a thorough review of submitted briefs, they found that this figure was far lower, and indeed, closer to zero.¹²⁹

a. Choice of *Chevron* Deference

Kent Barnett and Christopher Walker engaged in the most comprehensive recent empirical study to date studying the application of *Chevron* in the federal courts of appeals.¹³⁰ Studying 1,558 agency interpretations reviewed by the appellate courts over a ten year horizon from 2003 through 2013 where the court expressly cited *Chevron*, Barnett and Walker found that courts deferred to the agency 77% and upheld 71% of agency interpretations overall.¹³¹ They also uncovered a great deal of discrepancy across circuits, agencies, agency types and subject matters concerning application of *Chevron* deference.¹³²

More recently, Kent Barnett, Christina Boyd, and Christopher Walker expanded beyond looking at the outcome to statistically examine whether the choice of whether or not to apply *Chevron* deference was based on partisan leanings.¹³³ They found the choice of *Chevron* framework to be motivated by political preference. Analyzing circuit court decisions over a ten year period from 2003 through 2013, Barnett, Boyd, and Walker found that when courts—irrespective of ideological makeup of the panel—reviewed liberal agency interpretations, they were equally likely to apply *Chevron*, but that when they reviewed conservative agency rulings, liberal panels were less

¹²⁷ See, e.g., Kerr, *supra* note 4, at 32 (finding that courts upheld regulations at rate of 58% after *Chevron* to 82% 2-4 years after *Chevron* then back to 72%); Miles & Sunstein, *supra* note 4, at 849 (noting validation rates); Schuck & Elliot, *supra* note 4, at 1039 (noting affirmance rate of 71% in 1984, then 81% in 1986, then 75% in 1988); see also Reull E. Schiller, *The End of Deference: Courts, Expertise, and the Emergency of New Deal Administrative Law*, 106 MICH. L. REV. 399, 436-37 (2007) (noting circuit court deference to NLRB decisions regarding statements made by employees during union elections).

¹²⁸ Natalie Salmanowitz & Holger Spamann, *Does the Supreme Court Really Not Apply Chevron When It Should?*, 57 INT'L REV. OF L & ECON. 81, 81 (2018).

¹²⁹ *Id.*

¹³⁰ Barnett & Walker, *supra* note 4.

¹³¹ *Id.*

¹³² *Id.*

¹³³ Kent H. Barnett, Christina H. Boyd & Christopher J. Walker, *The Politics of Selecting Chevron Deference*, 15 J. Empirical Legal Studies, 595, 601(2018).

likely than conservative panels to pick the *Chevron* framework.¹³⁴ They found no evidence of judicial whistleblower or disciplining effects when panels were composed of cross-partisans.¹³⁵ They also discovered that liberal judges were less likely to apply *Chevron* when the agency interpretation was conservative.¹³⁶

PART 2: EMPIRICAL STUDY

In this section, I first provide providing some background on the NLRB. Then I discuss how the dataset was constructed, noting the limitations inherent in the case selection process. I then detail general observations about the dataset before moving on in the next section to discussion of the results.

1. Background on the National Labor Relations Board

In 1935, Congress enacted the National Labor Relations Act (“NLRA”), also known as the Wagner Act, to protect employees’ rights to organize and bargain collectively.¹³⁷ Congress created the NLRB in an attempt to (1) reduce strikes and industrial strife which had burdened commerce, and (2) increase employee bargaining power, which could have the effect of raising wages at the height of the Great Depression.¹³⁸ In the pre-New Deal era, courts were often seen as hostile to labor rights so it was viewed that a more neutral body was needed to adjudicate disputes.¹³⁹ The NLRB can both prosecute unfair labor practice cases in addition to supervising union elections.¹⁴⁰ The NLRB’s legislative architect, Senator Robert Wagner, intended the Board to be a non-partisan tribunal that would make decisions detached from the whims of changing administrations.¹⁴¹ Appointments to

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ See National Labor Relations (Wagner) Act, Pub. L. No. 74-198, 49 Stat. 449 § 3 (1935) (codified as amended at 29 U.S.C. §§ 151-69 (2012)).

¹³⁸ 49 Stat. 449 § 3 (codified as amended at 29 U.S.C. § 151); see also Irving Bernstein, THE NEW DEAL COLLECTIVE BARGAINING POLICY 90 (1950) (noting the two-fold purpose “to voice an economic philosophy and to lay a constitutional foundation for the Act”).

¹³⁹ Michael J. Hayes, *After ‘Hiding the Ball’ Is Over: How the NLRB Must Change Its Approach to Decision-Making*, 33 RUTGERS L.J. 523, 554 (2002) (“[I]n passing the [NLRA], Congress continued the process of diminishing the role of courts in the labor area by creating an *alternative* to the courts...”).

¹⁴⁰ 29 U.S.C. § 153.

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

the Board in the first half century were generally of a non-partisan nature.¹⁴² The Board was also designed as an independent agency in order to make it less partisan and distinct from the political branches.¹⁴³

The NLRB's founding Act, the Wagner Act, was amended in 1947 by the Taft-Hartley Act to stretch the Act's provisions to include disputes against unions.¹⁴⁴ In addition to making unions liable for unfair labor practices, the Taft-Hartley Act expanded the size of the Board.¹⁴⁵ Taft-Hartley also created an Office of General Counsel to create a unique institutional feature of the NLRB: an express separation of the adjudicative from prosecutorial functions.¹⁴⁶ The NLRB of the 1950s also became more partisan, with appointees hailing directly from labor and management backgrounds, giving it a more pro-employer tilt.¹⁴⁷

In contrast to other agencies who commonly employ rulemaking, the NLRB operates mainly through adjudication.¹⁴⁸ The General Counsel brings charge, where they are heard before an Administrative Law Judge ("ALJ") in distinct regions.¹⁴⁹ The Board, sitting in three-member panels randomly assigned, hears appeals of ALJ decisions if the losing party or the General Counsel files "exceptions" to the ALJ's decision to point out errors.¹⁵⁰ Board

¹⁴² JAMES A. GROSS, *THE MAKING OF THE NATIONAL LABOR RELATIONS BOARD: A STUDY IN ECONOMICS, POLICY, AND THE LAW* 150 (1974); JAMES A. GROSS, *THE RESHAPING OF THE NATIONAL LABOR RELATIONS BOARD: NATIONAL LABOR POLICY IN TRANSITION 1937-1947* 226 (1981).

¹⁴³ *Id.*

¹⁴⁴ Actions against employers were already included under the 1935 Act. LABOR MANAGEMENT RELATIONS (TAFT-HARTLEY) ACT, Pub. L. No. 80-101, 61 Stat. 136 (1947) (codified at 29 U.S.C. §§ 141-44).

¹⁴⁵ LABOR MANAGEMENT RELATIONS ACT OF 1947, ch. 120, 61 Stat. 136 (1947) (codified at 29 U.S.C. §§ 141-187). Unlike other agencies, the Board has an independent General Counsel, who is appointed by the President, and who is separate from the Board, with adjudicatory and prosecutor functions being divided. *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ Judy Flynn, *A Quiet Revolution at the Labor Board: The Transformation of the NLRB, 1935-2000*, 61 OHIO ST. L. J. 1361, 1364-65 (2000).

¹⁴⁸ Samuel Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking*, 37 ADMIN. L. REV. 163, 175 (1985) (noting that the Board uses adjudication to make policy as opposed to rulemaking); Judy Flynn, *Costs and Benefits of 'Hiding the Ball': NLRB Policymaking and the Failure of Judicial Review*, 75 B.U. L. REV. 387, 470 n.21 (1995). The NLRB has engaged in rulemaking only once in its 75 year history. NLRB has faced criticism of its failure to use rulemaking, with critics contending that an adjudicatory approach results in the Board frequently changing policies. *Id.*

¹⁴⁹ Claire Tuck, *Policy Formulation at the NLRB: A Viable Alternative to Notice and Comment Rulemaking*, 27 CARDOZO L. REV. 1117, 1137-38 n.162 (2005) (noting role of General Counsel); Robert A. Gorman & Matthew W. Finkin, *BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING* 11-12 (2nd ed. 2004) (noting procedures).

¹⁵⁰ Less than 1% of decisions ever reach the Board as most cases are resolved by a regional hearing officer on or before they are heard by ALJs, who are bound by Board

decisions are not constrained by *stare decisis* from non-five member Board decisions; only cases heard by the full five-member Board are binding.¹⁵¹

Appeals of Board decisions arise from two mechanisms. First, a party losing an unfair labor practice case before the Board can appeal to the federal appellate courts.¹⁵² However, the Board does not see itself as bound by circuit precedent; rather, it follows a policy of nonacquiescence to circuit court precedent under the reasoning that it is more important to fashion nationally-uniform labor rules than be bound by contrasting circuit precedent from different regions of the country.¹⁵³ Appeals also can come from the NLRB itself. Unlike a regular court decision or even administrative law decision, the Board's orders are not self-enforcing so unless the parties voluntarily agree, the General Counsel can seek an order of enforcement in the federal courts.¹⁵⁴ Most cases involve both types of appeals, with the losing party appealing the merits of the case, and in the cases where the General Counsel (and NLRB prevail), the NLRB also sues in federal courts for enforcement of the Board order. Only one percent of cases are appealed.¹⁵⁵ Parties have a choice of forum for appeal; they can file "wherein such person resides or conducts business" (which is usually the district where the original NLRB ALJ decision was heard) or in the D.C. Circuit.¹⁵⁶

Unlike other agencies who must enforce dozens of statutory mandates, most of the NLRB's cases come under the umbrella of one statute: the National Labor Relations Act ("NLRA") as well as its last major revision the Landrum-Griffin Act. Congress has not amended the Act in any way since 1974 when it added several health-care related provisions to the Act; no major changes were made since 1959.¹⁵⁷ Since the NLRB's statutory mandate from Congress rarely changes—and indeed, has stated relatively static for the past

precedent in issuing their decisions. Flynn, *supra* note 147, at 426 & n.165.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L. J. 679, 681 (1989); Flynn, *supra* note 147, at 421 (1995) (noting that the General Counsel does not look to circuit precedent in deciding whether or not to issue a complaint); Rebecca Hanner White, *Time for a New Approach: Why the Judiciary Should Disregard the 'Law of the Circuit' When Confronting Nonacquiescence by the National Labor Relations Board*, 69 N.C. L. REV. 639, 639 (1991) (same).

¹⁵⁴ Losing parties can seek judicial review of an adverse Board decision in the federal court where they petition for relief or seek enforcement of a Board order. 29 U.S.C. §§160(e)-(f) (2012). The General Counsel can also seek enforcement of a Board order. *Id.* § 160(f).

¹⁵⁵ Flynn, *supra* note 147, at 426 & n.165.

¹⁵⁶ 29 U.S.C. §160(f) (2012).

¹⁵⁷ Cynthia Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1530 (2002). The last major change was in 1959. See LABOR-MANAGEMENT REPORTING & DISCLOSURE (LANDRUM-GRIFFIN) ACT, Pub. L. No. 86-257, 73 Stat. 519 (1959) (codified at 29 U.S.C. §§ 401-503).

75 years—new statutory interpretation is rare. As such, compared to other agencies, the NLRB hears more routine matters where they apply existing statute.

The NLRB hears two main types of cases: (1) unfair labor practice allegations against employers or unions,¹⁵⁸ and (2) election representation cases or bargaining unit determinations, the latter of which do not enjoy rights of appeal in the federal courts.¹⁵⁹ In unfair labor cases, a party alleges that either the union or employer engaged in “unfair labor” acts such as discharging an employee for engaging in union activity, unilaterally altering the terms and conditions of a union contract, or refusing to bargain with the union in “good faith.”¹⁶⁰ The majority of unfair practice cases are against employers (“CA” cases). Cases can also be brought alleging unfair labor practices of unions (“CB,” “CC,” “CD,” or “CE” cases).¹⁶¹ In the second group of election cases, the Board reviews cases related to elections; many of these cases include certifying whether the bargaining unit is appropriate.¹⁶² Since this second group of cases cannot be appealed, in many cases, two types of cases are brought—an unfair election case alleging the failure of the union to bargain in “good faith” as well as an election-related case concerning the appropriateness of the bargaining unit.¹⁶³ Board voting is highly partisan, with Republican members routinely voting in favor of management and Democratic members voting in favor of labor in the majority of adjudications.¹⁶⁴ In some cases, the Board reverses many of the decisions of the prior administration when a new partisan majority takes gains control of the Board.¹⁶⁵ Board appointments have become more ideological over time.¹⁶⁶ Indeed, the Obama Administration was operating with a two-member

¹⁵⁸ 29 U.S.C. § 160.

¹⁵⁹ 29 U.S.C. § 159.

¹⁶⁰ 29 U.S.C §§ 158(a)(1)-(5).

¹⁶¹ 29 U.S.C § 158.

¹⁶² 29 U.S.C. § 159.

¹⁶³ *Id.*

¹⁶⁴ See, e.g., Catherine L. Fisk & Deborah C. Malamud, *The NLRB in Administrative Law Exile: Problems with the Structure and Function and Suggestions for Reform*, 58 DUKE L. J. 2013, 2020 (2009) (noting that “[a]cross a range of doctrinal areas, it is apparent that Bush II labor policy made a decisive shift in favor of protecting managerial prerogatives and augmenting the ability of employers and employees to oppose unionization”); Ronald Turner, *Ideological Voting on the National Labor Relations Board*, 8 U. PA. LAB. & EMP. L. 707, 712 (2006) (noting the predictive value of ideology in votes at the Board); Flynn, *supra* note_, at 1411 (noting the partisan-based voting patterns); William N. Cooke & Frederick H. Gautschi III, *Political Bias in NLRB Unfair Labor Practice Decisions*, 35 INDUS. & LAB. REL. REV. 539, 549 (1982).

¹⁶⁵ Tuck, *supra* note 149, at 1153.

¹⁶⁶ Flynn, *supra* note 147, at 1366. The rise of “package” appointments where groups of nominees for different governmental posts are “packaged” together for a Senate vote exacerbated the trend of a more partisan nomination process. *Id.* at 1366.

Board because of the difficulty of getting its nominees passed.¹⁶⁷

2. Construction of the Dataset

a. Choice of Cases

Searches on Westlaw indicated that the NLRB made 2,584 decisions from January 1993 through December 2018 concerning review and/or enforcement of decisions at the NLRB.¹⁶⁸ Analysis was restricted to review of cases that were first heard by the Board during the Clinton, George W. Bush (“Bush 2”), and Obama presidencies so as to have a complete record of Board decision making across three different presidencies.¹⁶⁹ Each of the approximately 2,500 decisions was read and coded for standard variables, such as the date of the decision, the judge panel, the author, the statutory section under which unfair labor practice challenges was brought, whether the case concerned appeal of an unfair labor practice of either an employer or a union,¹⁷⁰ whether the decision of the court, the Board, and the ALJ was in favor or the employer or employee, and other case-specific variables.¹⁷¹

Analysis was then further restricted to only cases in which the appellate court engaged in statutory interpretation. Specifically, the dataset was limited to decisions in which the courts was tasked to review challenges concerning substantive and procedural issues relating to unfair labor practice decisions under the NLRA or the Landrum-Griffin Act or the Railway Labor Act (“RLA”); the few cases involving statutory challenge to other statutes

¹⁶⁷ Flynn, *supra* note 147, at 1366.

¹⁶⁸ The study excluded cases in which a party sought an injunction under the NLRA since those decisions concern review of a district court decision.

¹⁶⁹ To be specific, analysis was restricted to review of Board decisions dated from January 1, 1993 through December 31, 2016 so as to capture Board decision making across three complete presidencies. Court cases dated after January 20, 2016 arose from Board cases heard during the Obama presidency but heard at the appellate courts during the Trump era.

¹⁷⁰ Taft-Hartley expanded the NLRA so that parties could bring unfair labor practice charges against unions. Most cases concern unfair labor practice charges directed against employers (so-called “CA” cases). Cases involving unfair labor practices directed at union come under section 8(b) of the NLRA (“CB,” “CC,” “CD,” or “CE” cases, collectively, “CB cases”).

¹⁷¹ These variables include: the union (and whether the union was a part of the American Federation of Labor), the procedural posture of the union (i.e., if the union intervened in the case or was a petitioner or respondent), the procedural posture of the case (i.e., whether the case concerned review of the NLRB decision or whether the NLRB was simply moving to enforce the decision, or whether the case was a combination of both), the state in which the facts occurred, the main industry (i.e., agriculture, health, etc.) of the case, and the number of cases that were part of the appeal. In addition, it was also noted if the case exclusively concerned appeal of the remedy (rather than the merits of the unfair labor practice decision).

were excluded since the NLRB has no special expertise to review those decisions.¹⁷² The dataset did, however, include cases where the courts opine on how the NLRA interplays with another statute. For example, in several cases, courts were tasked to explore whether a statute on Native American rights impacts how the Board interprets whether or not someone is an “employee” under the NLRA.¹⁷³ In another series of cases, courts analyzed the interplay between the Federal Arbitration Act or the Immigration and Naturalization Act and the NLRA in order to assess how a statutory term in the NLRA should be construed.¹⁷⁴

It is a judgement call on whether or not a case even concerns statutory interpretation; another researcher could make an equally valid judgment call using another method. Many scholars who undertake empirical analysis of statutory interpretation and *Chevron* deference create their universe of cases by relying on whether the court actually cites the *Chevron* decision.¹⁷⁵ This method is consistent and straight-forward. However, relying exclusively on whether or not *Chevron* is cited results in both underinclusive and overinclusive of statutory interpretation cases. This is particularly the case concerning NLRB decisions, since appellate courts analyzing the NLRB rarely cite *Chevron* even when it is clear they are interpreting a statute. Of the approximately 2,500 cases, not all of which involved statutory interpretation, courts cited and applied *Chevron* about a quarter of the time.¹⁷⁶ In some cases, the court applies the *Chevron* standard yet cites another Supreme Court case that cites or references *Chevron*; as such, any coding decision relying on whether the court cites *Chevron* would not have found those cases.

In addition, scholars have used other methods to discern whether *Chevron* applies. Salmanowitz and Spamann use the methodological innovation of using the litigant’s briefs rather than an examination of case facts.¹⁷⁷ Instead of relying on the researcher to decide applicability based on case facts as Eskridge and Baer did, they reviewed the briefs to minimize coding errors since brief writers would have the “incentive, expertise, and resources to get

¹⁷² In addition, the few decisions concerning review of NLRB regulations were excluded.

¹⁷³ See, e.g., *San Miguel Indian Bingo v. N.L.R.B.*, 475 F.3d 1305 (12th Cir. 2007); *Pauma v. N.L.R.B.*, 888 F.3d 1066 (9th Cir. 2018).

¹⁷⁴ See, e.g., *Agri Processing v. N.L.R.B.*, 514 F.3d 1 (12th Cir. 2008) (alien); *N.L.R.B. v. Kolkka*, 170 F.3d 937 (9th Cir. 1999) (alien).

¹⁷⁵ Barnett & Walker, *supra* note 2.

¹⁷⁶ There were six statutory interpretation cases where *Chevron* was cited but not applied.

¹⁷⁷ Salmanowitz & Spamann, *supra* note 128, at 81.

it right.”¹⁷⁸ Their study concerned analysis of 191 Supreme Court briefs.¹⁷⁹ The current study, however, concerns analysis of over 2,000 appellate court opinions whose briefs are often not as well-done as Supreme Court briefs (with some even being written *pro se*).¹⁸⁰ In addition, appellate court briefs are not as readily available to those without access to advanced versions of Westlaw or Lexis. In addition, a text analysis program would best be able to analyze the briefs in a manner akin to Salmanowitz and Spamann, since there are so many briefs to analyze. As such, these data accessibility issues as well as the nature and breadth of the present study precluded use of this method to check the robustness of whether the case concerns statutory interpretation or *Chevron* applicability.¹⁸¹ The current study and the Salmanowitz and Spamann study underscore the importance of engaging more thoroughly with context to discern whether a case concerns statutory interpretation or whether *Chevron* is applicable, rather than to use of methods that simply look to whether *Chevron* is cited to discern that the case concerns statutory interpretation.¹⁸²

To discern whether the case involved statutory interpretation, several methods were employed. Although time-consuming, reading the cases is the only reliable way of adequately capturing most if not all of the cases in which the courts are reviewing a statutory interpretation. In order to ensure that no obvious cases were missed from reading only, I limited the search on Westlaw to separately analyze a subset of the 2,500 cases that were most likely to concern statutory interpretation.¹⁸³ In addition to using the search

¹⁷⁸ *Id.* at 83.

¹⁷⁹ *Id.* at 81.

¹⁸⁰ However, like the Solicitor General in Supreme Courts briefs, one would expect that the General Counsel at the NLRB would have a similar incentive to “argue for deference when deference is actually due.” *Id.* at 84 (making argument about Solicitor General).

¹⁸¹ For instance, looking at the briefs would allow the researcher to discern whether cases in which the appellate court issued a summary opinion involved a statutory interpretation issue.

¹⁸² Over the course of five years, the author has personally read over 7,000 Board decisions and 2,500 appellate court decisions. Although others may have a different judgment call on whether the case concerns statutory interpretation or *Chevron*, the author’s familiarity with this particular agency’s decisions plus the fact that the NLRB largely only interprets one statute that has rarely been updated over a limited range of issues results in the analysis being more straightforward than it might be if reviewing the decisions of an agency who interprets many statutes or an agency whose governing statute is constantly changing.

¹⁸³ Specifically, I searched for all cases between January 1, 1994 and January 31, 2018 that contained the following words: “canons,” “legislative history,” “Senate,” “Congress,” “congressional committees,” “legislative history,” “statutory interpretation,” “statutory construction,” “Chevron,” “permissible construction,” “reasonable construction,” “permissible interpretation,” “reasonable interpretation,” as well as the names of the Latin-named canons and substantive canons like “constitutional avoidance,” “extraterritoriality,” “Indian canon” and canons that call for consultation of the common law. Unlike Bruhl, I

string used by Bruhl in his analysis of statutory interpretation of all issues,¹⁸⁴ I separately undertook a search for all cases in which *Chevron*, deference, or statutory interpretation or construction was mentioned. In addition, I looked particularly at all cases mentioning legislative history, the *Congressional Record*, or congressional committees as well as any specific mention to linguistic or substantive canons.¹⁸⁵ Certain tools such as discovering the use of precedent or the common law as an interpretive required “human intervention” and were discovered through the careful reading of all cases that were identified as involving statutory interpretation.¹⁸⁶

To create the universe of cases, I first coded all cases in which *Chevron* or the *Chevron* two-step process was expressly mentioned and employed in the analysis. This resulted in only 52 cases over the time frame under study that expressly applied the *Chevron* two-step framework. I then read the remaining cases, focusing specifically on the several hundred cases in which courts applied a reasonableness analysis without actually citing the *Chevron* decision. In many cases, the courts contend that they will uphold the NLRB decision if it is “permissible,” “rational and consistent” with the Act, “reasonably defensible,” or generally “reasonable.”¹⁸⁷ Other cases use an “arbitrary and capricious test.”¹⁸⁸ For most of my analysis, I counted this group of cases (which consisted of approximately 157 cases—more than the cases that actually cited *Chevron* and a majority of the cases involving statutory interpretation) as both statutory interpretation cases as well as cases in which the court applied the *Chevron* deference regime. In alternative specifications, I coded these cases as applying a non-*Chevron* deference regime as one could argue that a general “reasonableness” inquiry is a

searched for these terms both in the opinions as well as in the West-created Key numbers and headnotes.

¹⁸⁴ Bruhl ran two separate searches for linguistic canons as well as one for the *Congressional Record*. Bruhl, *supra* note 3, at 30-31. For the linguistic canons, he ran the following search in Westlaw: “adv: OP(((expressio or expresio or inclusio or “last antecedent” or “noscitur a sociis” or “ejusdem generis”) /50 (statut! or act or legislat! or congress! or U.S.C.)) or ((expressio or expresio or inclusio or “last antecedent” or “noscitur a sociis” or “ejusdem generis”) /p (statut! or act or legislat! or congress! or U.S.C.))) and DA([year]).” *Id.* at 30-31 For the *Congressional Record*, he ran the following search: “adv: OP(“Cong.Rec.” or “Cong. Rec.” or “Congressional Record”) and OP((statut! or legislat! or congress! or U.S.C.) /s (interpret! or constr! or meaning or reading)) and DA([year]).” *Id.* at 30.

¹⁸⁵ Some of these searches yielded irrelevant results. For example, the textual canon of *ejusdem* often comes up in cases in which the courts engages in contract, not statutory, interpretation.

¹⁸⁶ Bruhl, *supra* note 3, at 31.

¹⁸⁷ See, e.g., *N.L.R.B. v. General Teamsters*, 175 F.3d 1173 (9th Cir. 1999); *Mississippi Power v. N.L.R.B.*, 284 F.3d 605 (5th Cir. 2002); *Media General v. N.L.R.B.*, 560 F.3d 181 (4th Cir. 1999); *Cellular Sales of Missouri v. N.L.R.B.*, 824 F.3d 772 (8th Cir. 2016).

¹⁸⁸ See, e.g., *Raymond Kravits Center v. N.L.R.B.*, 550 F.3d 1183 (D.C. Cir. 2008).

somewhat different and less stringent standard than the mandatory two-step *Chevron* analysis. Moreover, I also wanted to test whether there was a relationship between choice of statutory method and the choice to actually cite *Chevron* rather than just a general reasonableness test.

In addition, there were a series of cases in which the court either did not note the standard of review or where the court inserted standard language about the great deal of deference it gives to the Board given the Board's expertise in the field but without expressly mentioning a reasonableness or permissiveness analysis. For some of these cases, it was clear that the issue concerned a matter of statutory interpretation, yet the court chose to rely on the "substantial evidence" analysis to disguise their decision to effectively overturn the Board's statutory interpretation.¹⁸⁹ In another group of cases where the court failed to note a standard of review, it was clear from the nature of the opinion that the court chose to ignore application of *Chevron* since the court went on to overturn the decision on policymaking grounds, often to the chagrin of the dissent who argued that *Chevron* should apply. In still other cases, the court made clear that it was applying "traditional" deference rather than *Chevron* deference, or that it was reviewing the case *de novo*.¹⁹⁰ In still other cases, the court made clear that it would be applying less deference due to the Board's history of biased decision making in favor of labor or due to the inconsistent nature of the Board's decisions.¹⁹¹ In all, there were approximately 42 cases coded with a non-*Chevron* or non-reasonableness standard of review.

To make sure I did not mistake any cases that should properly be included as statutory interpretation cases, I also conducted other Westlaw searches. After having read over 7,000 NLRB cases previously for my other study on agency adjudication, it was clear to me that there are under a dozen issues for which it is common to engage in statutory interpretation. For example, I looked up cases in which the courts were asked to rule on whether or not someone was a "supervisor," an "employee, or whether a particular entity constituted a "labor organizations," all terms which are listed in the statute.¹⁹² Debates about whether or not something should be considered a "term or condition" of employment were also common. I did not include in the corpus for review decisions in which the court merely applied established court or Board precedent and simply reviewed whether "substantial evidence"

¹⁸⁹ See, e.g., *Dorsey Trailers v. N.L.R.B.*, 233 F.3d 931 (4th Cir. 2000).

¹⁹⁰ See, e.g., *Bob Evans Farm v. N.L.R.B.*, 163 F.3d 1012 (7th Cir. 1998).

¹⁹¹ See, e.g., *Spentonbush Red Star v. N.L.R.B.*, 106 F.3d 484 (2nd Cir. 1997).

¹⁹² See, e.g., *Pikeville United Methodist v. N.L.R.B.*, 109 F.3d 1146 (6th Cir. 1997) ("political subdivision"); *Providence AK Medical Center v. N.L.R.B.*, 121 F.3d 548 (9th Cir. 1997) ("supervisor"); *Glenmark Associates v. N.L.R.B.*, 147 F.3d 333 (4th Cir. 1998) ("supervisor"); *Entergy MS, Inc. v. N.L.R.B.*, 810 F.3d 287 (5th Cir. 2015) ("employee").

supported the agency's decision. For instance, the Board has an established test to determine whether or not someone (often a nurse) was an "supervisor" under the Act. I included appellate court cases in which the employer or other entity challenged the Board's statutory construction of the term "supervisor." I did not include cases in which the parties either conceded or did not contest the statutory construction and simply asked the court to rule whether, based on established Board and circuit precedents, "substantial evidence" supported the Board's decision on whether they met the requirements of being a supervisor.

The search was overinclusive to some extent. I picked up a fair share of contract interpretation cases in which the courts cited linguistic canons (such as *ejusdem*) in assisting in how a particular collective bargaining agreement should be reviewed so those cases were eliminated.¹⁹³ Since I wanted to restrict the analysis to only those cases heard by the NLRB, I eliminated cases in which a party or the NLRB sought an injunction at the district court that was later heard on appeal. I also generally excluded unpublished cases, though I included a handful of unpublished cases in which the court engaged in new statutory interpretation analysis.

The study is by necessity limited to only cases with an opinion available on Westlaw. There are many cases in which the court either summarily affirms the Board or in which the court issues only a short opinion, where it may cite *Chevron* but not discuss the statutory interpretation issue. Thus, the study may be underinclusive of the extent to which the courts apply *Chevron* or engage in statutory interpretation. As part of another project, I created a separate database of all cases in which the Board engaged in statutory interpretation.¹⁹⁴ I went back and looked at the appellate follow-up to those cases to see if after the creation of the dataset using Westlaw searches any cases remained outstanding. I did not find any additional cases.

The dataset differs from datasets analyzing hierarchically Supreme Court/appellate/district court interactions in some significant ways. First, it is not possible to have a unique "matched pair" for each Board/court decision.¹⁹⁵ Unlike other statutory analyses which focuses exclusively on the hierarchical nature of decision making, this dataset also allows the researcher to analyze statutory interpretation vertically. While this may be a unique issue for the NLRB, the same statutory interpretation issue appears again and again in different circuits. Courts are commonly asked to review whether someone is an "employee," a "supervisor," or whether the entity in question meets the statutory definition of a "labor organization," among other issues. There may only be one or two NLRB decisions on the given topic, which yield dozens

¹⁹³ Appellate courts review contract interpretation *de novo*.

¹⁹⁴ Semet, *supra* note 7.

¹⁹⁵ Cf Bruhl, *supra* note 3, at 26 (applying matched pair method).

of applicable circuit court decisions in different circuits, many with contrasting outcomes, statutory methods, and even applying different deference regimes. As one example, the Board is commonly asked to rule on whether nurses are “supervisors.” The Board applied one test in the 1990s, which was overruled in part by the Supreme Court. It then applied a different test devised by the five-member Board. Many of the cases reviewed by the appellate court refer to the five-member Board decision and are then simply decided by summary judgment so there is no clear statutory interpretation to reveal. In this circumstance, the same underlying Board decision is reviewed multiple times by different appellate courts. As discussed further, it is astonishing the degree to which different appellate panels apply different statutory methods and deference regimes to analysis of the same exact statutory issue.

Other complications arise in the case selection process. Some cases concern a statutory interpretation issue which does not involve the merits of the unfair labor practice dispute and thus the statutory interpretation was not even discussed in the Board decision (an issue not uncommon since many statutory interpretation cases at the appellate court are heard on summary judgment at the Board). These cases primarily concern section 3 of the NLRA and whether or the two-member Board consists of a “quorum.”¹⁹⁶ There are nearly a dozen appellate court cases concerning this issue, with courts resolving the issue by the plain text and other courts arguing that the legislative history indicates the opposite conclusion. All of the “quorum” cases were included in the analysis since this subset of cases reflects the diversity of decisionmaking styles of the courts.¹⁹⁷ Cases concerning jurisdiction or remedies were also included.

In addition, the analysis included only unique interpretations and if the court decided multiple statutory issues, each were coded as separate observations.¹⁹⁸ In some cases, the appellate court resolves the statutory issue in question by claiming that the Board’s interpretation is barred by circuit precedent. Although the Board should abide by circuit precedent, it has a longstanding practice of nonacquiescence to appellate court decision making, and thus often ignores what should be controlling circuit precedent.¹⁹⁹ In one

¹⁹⁶ See, e.g., *UC Health v. N.L.R.B.*, 803 F.3d 669 (D.C. Cir. 2015); *SSC Mystic Operating v. N.L.R.B.*, 801 F.3d 302 (D.C. Cir. 2015).

¹⁹⁷ By contrast, cases in which courts were tasked to analyze constitutional question of the Recess Clause were not analyzed. See, e.g., *D.R. Horton v. N.L.R.B.*, 737 F.3d 344 (5th Cir. 2013) (not analyzing Recess clause argument).

¹⁹⁸ In all, five cases had two statutory interpretations, and were included twice in the dataset.

¹⁹⁹ In particular, the Fifth Circuit is particularly irked by the Board’s refusal to abide by its decision in *D.R. Horton v. N.L.R.B.*, 737 F.3d 344 (5 Cir. 2013). Cases where the Fifth Circuit complains about the Board disobedience by not holding to *Horton* are excluded. See,

case, one court member stated that they would be open to affirming the Board's decision but they were bound by circuit precedent.²⁰⁰ I included the first applicable circuit precedent in which the court reviewed the statute, but did not include subsequent cases that merely referred to circuit precedent as controlling the outcome of the case since they did not involve new statutory interpretations.²⁰¹

There are other limitations to the analysis. By necessity, the analysis is descriptive; the small sample size plus the inability to properly assess the causal direction prevents one from making any kind of definitive causal statements. A judge may invoke a particular tool resulting in a given decision, but it may be the case that judges are in fact selecting what their decision will be before selecting what statutory methods or canons they will use to justify said decision.²⁰² Furthermore, the "triggering condition" for the invocation of many statutory canons is whether the given text is "ambiguous."²⁰³ For instance, to invoke *Chevron* deference formally, the judge must first decide that the text is "ambiguous," a nebulous standard that judges may interpret in different ways.²⁰⁴

b. Coding of Statutory Methods

Majority and dissenting opinions were analyzed as separate opinions, with the majority of the study devoted to only using the interpretive tools cited in the majority opinion unless otherwise noted.²⁰⁵ While some of the study details the frequency of the invocation of a particular canon or method, in some parts of the study, I made a judgment call on what the court employs as a method. A source can be a "passing mention," a "substantive deflection of no probative value," or be cited as being "determinative" in the case.²⁰⁶ For this study of majority opinions, I included it if the source "contributed in a meaningful way to other majority justification for the holding."²⁰⁷ This

e.g., *Murphy Oil v. N.L.R.B.*, 808 F.3d 1013 (5th Cir. 2015).

²⁰⁰ *See, e.g.*, *Edgewood Nursing v. N.L.R.B.*, 142 F.3d 433 (6th Cir. 1998) (Moore, concurrence noting that should defer under *Chevron* but bound by circuit precedent).

²⁰¹ This often happened in cases concerning use of the term "supervisor."

²⁰² Bruhl, *supra* note 3, at 28.

²⁰³ Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARVARD L. REV. 2118, 2135-36 (2016) (book review) (noting that legislative history, the avoidance canon, and *Chevron* deference are triggered by an ambiguity finding).

²⁰⁴ Bruhl, *supra* note 3, at 28. Indeed, there are many cases in this very dataset where one panel of judge finds the very same words of the same statute "ambiguous" while another panel or judge finds the words "plain."

²⁰⁵ *Cf* Bruhl, *supra* note 3, at 32 (analyzing both dissenting and majority opinions in counts).

²⁰⁶ Brudney & Baum, *supra* note 34, at *23.

²⁰⁷ *Id.* at *21.

obviously injected some subjectivity into the analysis. I also included “negative” use of a canon in the totals, such as if the judge discounts the use of legislative history.²⁰⁸ As Bruhl notes, inclusion of negative use indicates that the given tool “is a recognized part of the court’s interpretive vocabulary.”²⁰⁹ The denominator was simply the universe of the 2,500 cases that involve a statutory interpretation issue, having read the decisions and used various Westlaw search strings to confirm my reading.²¹⁰

To come up with the list of statutory tools, I relied on what other scholars in the field have used as well as what I used in my prior study of NLRB agency interpretation.²¹¹ Since use of the Latin-canons was so rare, I collapsed the use of them into one category, “language canons” to include linguistic canons such as *ejusdem generis*, *noscitur a sociis*, *expressio unius*, and the rule of the last antecedent. These so-called linguistic or textual canons are meant to impose some sort of consistency in congressional drafting.²¹² Another group focuses less on grammatical structure and more on assumptions about how Congress drafts legislation, that it does so “deliberately, coherently, consistently, and without redundancy.”²¹³ Language canons beyond sentence-based canons include reliance on structural canons like the whole act rule, the whole code rule,²¹⁴ the whole text rule, or *in pari materia*. The rule against surplusage or redundancy was also assessed and separately coded since it occurred more often than other textual canons. In NLRB cases, courts commonly rely on the rule against redundancy by assuming all language in text is meaningful and the Congress deliberately pays attention to how words are structured, even if the same

²⁰⁸ See, e.g., Bruhl, *supra* note 3, at 32 (including negative use of canons); see also Mendelson, *supra* note 71, at *24–25 (noting that “questions of a canon’s applicability are often difficult ones,” so discussion of a canon, even if not applied, still “clarifies” what the canon is).

²⁰⁹ Bruhl, *supra* note 3, at 32.

²¹⁰ Bruhl uses a similar denominator, having derived it from a Westlaw search string, to capture all cases that “meaningfully engage with statutory interpretation.” Bruhl, *supra* note 3, at 32 & n.120.

²¹¹ *Id.* at 36–37; Semet, *supra* note 7, at 2255 (analyzing NLRB statutory interpretation). For more on interpretive canons and sources see William N. Eskridge Jr., et al., *CASES AND MATERIALS ON LEGISLATION AND REGULATION* app. B (5th ed. 2014)

²¹² Mendelson, *supra* note 71, at 80.

²¹³ *Id.* at 81.

²¹⁴ The use of the “whole act rule” includes any reference to the presumption of consistent usage, meaningful variation of similar statutory terms, as well as the *in pari materia*. Bruhl, *supra* note 3, at 36. The whole act calls for the same statutory term to be used consistently through the whole statute at issue, while the whole code makes the same set of assumptions using the entire U.S. Code. ANTONIN SCALIA & BRYAN GARDNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 168, 172 (2012). For instance, the court may contend that the same term used in Title VII should mean the same when interpreting the NLRB.

words are used somewhere else in the statute.²¹⁵ In essence, it makes the assumption that excesses are never meant for clarity but they have a meaning that needs to be discerned.²¹⁶ Whether or not the court cited a legal or lay dictionary was also noted. Citation goes beyond merely citing a particular canon. For example, a case may be coded as invoking *expressio unius* not only if the canon is expressly named but if the court makes a contrast between different sections of a law or between different laws.²¹⁷ Cases in which the court refers to the “structure” of the Act as influencing construction or where the court compares one section with other sections of the same Act are coded as referring to the “whole text rule.”²¹⁸ While collectively, about a quarter to a third of cases used one or more of these methods, overall, each method was used only a handful of times over the course of the dataset.²¹⁹

In addition, although not used frequently, I coded for the use of substantive canons, such as the presumption against implied repeal, construing a statute in favor of Native Americans, the constitutional avoidance canon, and the like. I separately code for the clear statement rule, as well as Congressional awareness of past practices. Cases in which the issue rested entirely on constitutional grounds were excluded while cases having both constitutional and statutory issues were included, with only the statutory issue being coded.

Source and purpose of legislative history was also documented. The source of the legislative history was coded as referring to either the *Congressional Record*, House or Senate Conference Report, House or Senate committee reports or hearings, as well as general references to legislative history as a source (so-called “indirect” references to legislative history as either not limiting the court’s interpretation of a term or providing no guidance on how to interpret the term). I also coded for the bill’s drafting history (so-called “vertical history”), such as if the court discusses the proposed version of the statute or compares versions of the statute as proposed by the House or Senate, as well as the bill’s drafting and amendment history. However, in my analysis of legislative history, I eliminated analysis of the “indirect” methods when the court fails to cite a specific congressional source. In some instances, the court incorporates legislative history in the analysis by stating that legislative history does not indicate any limitation to a given statutory term, or that legislative history was consulted and offers no

²¹⁵ Scalia & Gardner, *supra* note 214, at 107.

²¹⁶ Mendelson, *supra* note 71, at 82.

²¹⁷ Bruhl, *supra* note 3, at 36 (noting use of *expressio unius* if cited) with Mendelson, *supra* note 71, at 42 (including broader use of canon).

²¹⁸ Mendelson, *supra* note 71, at 42.

²¹⁹ For example, rule of the last antecedent or no elephants in mouseholes was only used once. Because so few canons were used multiple times, it was not a worthwhile exercise to separate them out.

guidance.

I also coded for precedent, which was relied on to some extent in almost every single case. In order to ensure that my coding of precedent would be useful, I separately coded for whether Supreme Court, circuit court, or Board precedent was instrumental or the most important part of the court's statutory decisionmaking process. I also coded for mentions of policy implications (such as if the reform would impact "industrial peace, an aim of the Act) as well as practical implications of the court's ruling, including references to absurdity.

c. Coding for Judge-Demographics

In addition to coding for case-specific factors, the analysis goes further than any other prior analysis of statutory method and deference and codes for judge-specific demographic factors. The Federal Judicial Center has a database with demographic information on each appointed federal judge.²²⁰ Information such as the party of the judge's appointing president and the judge's gender and race, and whether the judge attended a top 14 law school were merged into the caselaw dataset. In addition, I reviewed the professional backgrounds of each of the judges to see whether they had prior employment either working in the federal government, or whether they previously worked in Congress or for a congressional committee. I also coded for the judge's age, based on the difference between the date of the decision and the judge's birth date in order to test the claim that older judges view statutory interpretation different than younger judges. To better analyze the data, I created age as a dichotomous variable coded "1" for judges older than 65.²²¹

I also created variables based on the partisan composition of the panel hearing the case. Based on the party of the president who appointed the judge, each decision was coded with a party panel composition type: DDD (all Democratic), DDR (two Democrats and one Republican), RRD (two Republicans and one Democrat), and RRR (all Republican). Although most of the resulting analysis is by case, I also undertook some analysis by judge. For one part of the analysis, I analyzed the decisions made by the decision's author. I then coded the party of the author's copanelists; DD if they author was a Democratic and they sat on a DDD panel or if the author was a Republican sitting on a DDR panel; DR if they author was a Democrat on a DDR panel or a Republican sitting on a RRD panel; or RR if the author was a Republican sitting with fellow Republicans or a Democrat on a mixed RRD

²²⁰ <https://www.fjc.gov/history/judges>

²²¹ Since the choice of what to code as a dichotomous variable is arbitrary, I alternatively coded this variable at other ages, such as 45, 50, 60 and 70, and came to similar results.

panel. I similarly looked at racial and gender panel effects as well, creating variations of the panel based on the number of women and minorities on each panel based off the author of the opinion.

PART 3: ANALYSIS OF STATUTORY METHODS AND DEFERENCE

A. Statutory Methods

The analysis starts with painting a picture of how often the court of appeals relies on each interpretive method in the 199 cases under study. Table 1 show both the frequency in the majority opinion for each of the ten main type of interpretive sources.²²² Looking at the bare numbers, several patterns become apparent. First, use of plain text on first blush seems to have increased over time compared to the Clinton years (3.9%), reaching its height in usage of 16.7% during the Obama presidency. Plain text is also used most frequently when reviewing Board decisions against the employee (7.1% v. 16.1%). Second, use of legislative history has changed over the near 25-year time period under study, with usage being more common in cases heard during the Obama presidency (20.8%). In particular when the President is a Democrat (Clinton or Obama), legislative history is used 16% of the time compared to 5.4% for a Republican President, a result statistically significant at 95% confidence. Third, use of substantive canons is used most often in overturning decisions (15.9% v. 6.6% when upholding), and in reviewing conservative Board decisions (19.4% v. 7.4% for liberal decisions). Fourth, the first cut at the data indicates that the use of precedent as a defining source has changed over time to a statistically significant degree at 99% confidence, but with no clear time trend, though usage of precedent is low under the Obama era (27.1%) compared to Trump years (61.5%). The court clearly relies on precedent most often, however, when the court's statutory interpretation is anti-employee in tone (62.1% v. 36.0%), a result statistically significant at 99% confidence. Further, courts use precedent more to strike down opinions rather than uphold them to 99% statistical confidence (66.7% v. 36.0%). Finally, although not statistically significant, there is a clear uptrend trend in the use of both policy and practical reasoning as time marches on; practical considerations are mentioned in just 64.9% of Clinton-era decisions compared to 84.6% of Trump-era cases.

²²² Alternative tabulations were also done by judge, and considered the different methodologies used by dissents. The results did not differ substantially.

Table 1: Frequency (%) of Statutory Method

	Plain	Text Cite	Text Rely	Lan	Subst.	LH	Prec	Policy	Prac
All ²²³	8.5	77.9	26.8	28.6	9.6	12.1	45.7	77.9	67.8
Dem Maj	6.3	82.5	30.2	30.2	6.4	12.7	46.0	81.0	61.9
Rep Maj	9.0	75.4	24.8	28.4	11.2	11.2	45.5	76.8	70.9
DDD	0	76.5	29.4	35.3	5.9	0	29.4	88.2	76.5
DDR	13.7	86.3	33.3	29.4	5.9	19.6	47.1	78.4	56.9
RRD	10.0	75.6	24.4	26.7	13.3	11.1	46.7	75.6	71.1
RRR	2.4	73.2	22.5	29.3	7.3	9.8	48.8	78.1	70.7
Clinton	3.9*	70.1*	19.7	27.3	10.4	13.0*	52.0***	74.6	64.9
Bush	8.2*	77.1*	29.5	29.5	13.1	6.6*	49.2***	83.6	65.7
Obama	16.7*	89.6*	35.4	27.1	2.1	20.8*	27.1***	79.2	70.8
Trump	7.9*	84.6*	23.1	38.5	15.9	0	61.5***	69.2	84.6
Pro-E:B.	7.1*	75.6*	26.2	28.6	7.4**	10.7	44.6	76.2	68.5
Anti-E:B.	16.1*	90.3*	30.0	29.0	19.4**	19.3	51.6	87.1	64.5
Pro-E:Ct.	6.8	75.2	29.0	28.8	7.2	12.0	36.0**	80.0	70.4
Anti-E:Ct	9.6	82.4	23.0	28.4	13.5	12.2	62.2**	74.3	63.5
Uphold	9.7	76.5	25.7	25.7	6.6*	12.5	36.0***	76.7	67.7
Not Uph.	6.4	81.0	29.0	34.9	15.9*	11.1	66.7***	76.2	68.2

Figure 1

Statutory Methods (%) by Presidential Era
By Court Decision

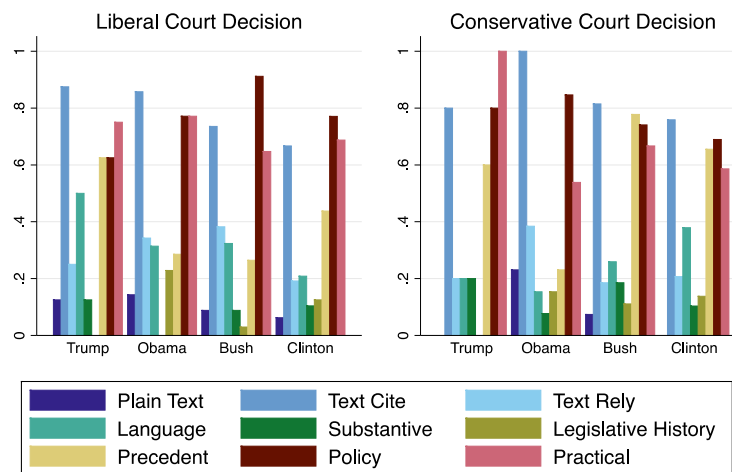


Table 1 (and Figure 1) details, however, just the bivariate statistics and it is unlikely the same patterns would hold once one controls for other case-specific factors such as both the majority panel of the panel as well as the direction and type of decision. Since the database is small, it is difficult to get any results to reach statistical significance at standard 95% confidence or even 90% confidence given the smaller sample size necessitating larger standard errors. Nonetheless, despite these limitations in the sample size, Table 2 (as well as Figures 2 and 3) breaks down the data in a more fine-

²²³ Pro-E-Bd. Refers to the Board decision being pro-employee while Pro-E-Ct refers to appellate court's decision being pro-employee.

grained way to show some of the unique patterns driving choice of method, with the goal being not to make causative claims but to make note of patterns in the dataset concerning the use of some of these methods. Secondly, another goal is to make comparative statements across court ideology, time period, ideology of the Board decision, whether or not the court's majority was in ideological agreement with the Board, and whether or not the court upheld the Board decision.

Table 2: Frequency (%) of Statutory Method, Detailed

	Plain Text	Text Cite	Text Rely	Language	Substantive	LH	Prec.	Policy	Prac
Dem/Cons/Lib ²²⁴	5.4	80.4	28.6	28.6	7.4	12.5	48.2	78.6	58.9*
Dem/Incons/Cons	14.2	100	42.9	42.9	0	14.3	28.6	100	85.7*
Rep/Cons/Cons	17.4*	87.0	27.7	26.1	26.1***	21.7*	56.5	87.0	56.5*
Rep/Incons/Lib	7.2*	72.9	24.3	28.8	8.1***	9.0*	43.2	74.8	73.8*
Consistent/Uphold	10.2	81.4	28.1	28.8	8.5**	13.6	37.3***	81.4	65.0
Consistent/No Uphold	5.0	85.0	26.3	25.0	25.0**	20.0	90.0***	80.0	55.9
Inconsistent/Uphold	8.0	72.0	22.7	24.0*	5.3	10.7	34.7***	77.3	77.3
Inconsistent/No Uph	7.0	79.1	30.2	39.5*	11.6	7.0	55.8***	74.4	69.8
Dem/Uphold	6.4	80.9	27.7	27.7	4.7	8.5*	36.2***	83.0	59.6
Dem/No Uphold	6.3	87.5	37.5	37.5	12.5	25.0*	75.0***	75.0	68.8
Rep/Uphold	10.3	73.6	24.1	25.4	8.1	13.9	35.6***	77.0	72.4
Rep/No Uphold	6.4	78.7	26.1	37.5	17.1	6.4	63.8***	76.6	68.1
Dem/Court Liberal ²²⁵	8.7	80.4	34.8	34.8	4.4	10.9	32.6***	82.6	60.9
Dem/Court Conser	0	88.2	17.7	17.7	11.8	17.6	82.4***	76.5	64.7
Rep/Court Liberal	9.0	71.8	24.7	25.6	9.0	11.5	38.5**	78.2	76.9*
Rep/Court Conser	8.9	80.4	25.0	32.1	14.3	10.7	55.4**	75.0	62.5*
Court Liberal/Uphold	8.7	73.4*	27.0	27.0	5.2	11.3	33.9	78.3	69.6
Court Conser/Uphold	14.3	90.5*	19.1	19.1	14.3	19.1	47.6	81.0	57.1
Court Liberal/No Uph	20.0**	90.0	55.6*	50.0	30.0	20.0	60.0	100**	80.0
Court Conser/No Uph	3.8**	79.3	24.5*	32.1	13.2	9.4	67.9	71.7*	66.0

²²⁴ Dem/Rep refers to majority party of the panel. Consistent/inconsistent references whether the court's majority is in line ideologically with the Board opinion. For example, a Democrat-majority court aligns ideologically with a liberal (pro-employee) Board opinion. A decision is coded "inconsistent" where they do not align (i.e., Democrat-majority Board and an anti-employee Board opinion).

²²⁵ "Court Conser" or "Court Liberal" refers to the liberalness of the court opinion as opposed to the Board. So a conservative court opinion is one anti-employee in tone while a "Court Liberal" is one pro-employee.

Figure 2
Statutory Methods (%)
By Ideological Consistency of Court Majority and Board Opinion

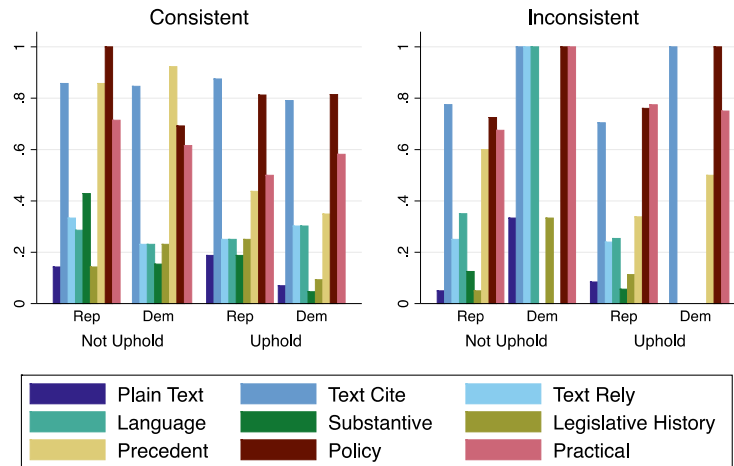
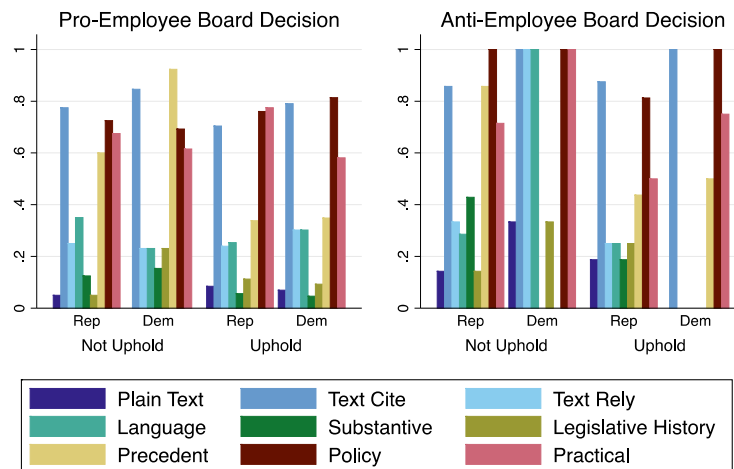


Figure 3
Statutory Methods (%)
By Board Decision



Looking at the data in this comparative way in Table 2, column 2 indicates that plain text is used often in reviewing conservative Board decisions. Plain text is used both to uphold them (14.3% when uphold v. 3.8% when conservative and not uphold), or to overrule anti-employee Board opinions. Plain text is used in 20.0% of decisions overruling conservative

Board opinions compared to 3.8% of liberal Board decisions not upheld, a difference statistically significant at 95% confidence. Although in general Republican-majority Boards cite plain text in a greater percentage of cases, particularly when the Board result is conservative, Democrat-majority panels are only slightly less likely to use plain text in similar circumstances (17.4% v. 14.2%). When Democrat-majorities rely on plain text as an interpretive method, they, like Republican-majority courts, use it more in ruling on anti-employee Board opinions as opposed to pro-employee ones (14.2% v. 5.2%). Use of plain text is the least likely when the court declines to enforce a Board decision that is liberal (3.8%), particularly for Democrat-majority panels. In all, use of plain text is most common in reviewing conservative Board outcomes, regardless of whether or not the court upholds the Board. Further, while there are small differences based on party of the panel, Democrat- and Republican-majority panels do not differ statistically in their use of plain text. The use of plain text has increased over time, at least through the Obama era, experiencing a decline in the Trump era due to the small sample size.²²⁶

Moving on, analysis of the text in Tables 1 and 2 focuses on two questions: 1) any *citation* or reference to text (columns 3); and 2) actual *reliance* on text to justify the statutory interpretation (column 4). This latter category more narrowly captures cases in which the court dissects the text as part of its statutory interpretation whereas the first category counts if the court at a minimum, sets forth the language of the text in the opinion. Focusing on column 3, text citation, there has been an increase over time in text at least being cited in majority opinions. Text was cited in 70.1% of Clinton-era decisions compared to 84.6% of Trump-era ones, a trend that continues for both liberal and conservative Board decisions. Moreover, text is more likely to be cited in cases where the Board rules against the employee (90.3% v. 75.6% if Board result was pro-employee) as well as cases in which the court upholds an anti-employee Board decision (88.9% v. 72.0% if upholding a liberal decision), a result statistically significant at 95% confidence; the same disparity between ideology of the Board decision does not exist for cases in which the court does not uphold the case since the court cites text more when overruling conservative Board decisions than liberal ones (90.0% v. 79.3%), suggesting that like plain text, the citation of text is more related to the anti-employee nature of the Board decision.²²⁷ Democrat-majority panels cite text almost always when reviewing a conservative Board decision (100%); text is also almost always cited when the court reaches a conservative ruling

²²⁶ For example, during the Bush 2 years, plain text was used in just 16.7% of cases of Republican-courts upholding conservative Board decisions. This figure jumps to 40% for the Obama years.

²²⁷ Indeed, although not statistically significant, courts overruling conservative Board decisions use text 90.9% compared to 78.9% when overruling a liberal Board decision.

(90.5%), or when the court overrules a conservative Board decision (90.0%). Democrat-majority panels use text as a method more than Republican-majority panels, but the differences are negligible and like plain text not statistically significant. Most particularly, the largest gulf exists when the court upholds a liberal decision (where text is cited only 73.5%) as compared to a conservative one (90.5%), a pattern statistically significant at 90% confidence and one that exists regardless of party.

Similar patterns exist when limiting the analysis to cases in which the court *relies* more overtly on the text (column 4). Rates of reliance are highest when overruling conservative Board opinions to achieve a liberal outcome rather than just review of conservative Board decisions. As shown in column 4 of Tables 1 and 2, although not statistically significant, Democrat-majority panels rely more on text in cases where they are asked to rule on conservative Board decisions and reliance on text is most during the Obama years (35.4% compared to just 19.7% in the Clinton years). Similar disparities do not exist for Republican-majority panels; Republican-majority panels rely on text in a more consistent manner regardless of whether they agree or not agree with the Board decision. As a point of comparison, Democrat-majority panels rely on text 42.9% of the time when reviewing Board decisions contrary to the panel's majority ideology (that is anti-employee) compared to 28.6% when reviewing pro-employee decisions; the comparable figures for Republican-majority panels are 24.3% and 27.7%, respectively. But the differences based on majority party of the panel are not statistically significant. Similarly, when overruling Board decisions, Democrat-majority panels rely on text more than Republican-majority panels, for instance, in overruling a statute (37.5% v. 26.1%), or in issuing a liberal opinion (34.8% v. 24.7%), but the differences again are not statistically significant. Courts rely on text the most when overruling conservative Board decisions (55.6%) compared to when they overrule liberal ones (just 24.5%). Likewise, text is rarely relied on when issuing a conservative opinion (19.1% if upholding, 24.5% if not upholding). This suggests that the patterns for reliance on text are slightly different than the patterns for either use of plain text or citation of text. For plain text and citation of text, the conservative nature of the Board decision drives citation whereas for reliance on text, use is the highest when the court is not only hearing a conservative Board decision but also overruling it; text is relied on in only 19.1% of cases when upholding a conservative Board opinion compared to 55.6% when overruling it. Temporal increases in reliance on text appear to be most notable in review of liberal Board decisions. Democrat-majority panels for example always rely on text in reviewing conservative Board decisions in all time periods.

Language canons are used most often to overrule conservative Board opinions, a pattern similar to reliance on text generally. While true that

Democrat-majority panels use language canons more (42.0% v. 28.6% when reviewing a liberal Board decision), differences based on party of the panel are not statistically significant at 95% confidence. Courts are more likely to use language canons to explain why they are overruling a conservative Board decision rather than upholding it (39.5% v. 24.0%). Likewise, in writing the opinions, courts do not often use language canons when upholding conservative outcomes (19.1% v. 27.0% for liberal outcomes). Use of language canons has also increased over time (27.3% under Obama to 38.5% under Trump).

Substantive canons likewise are used most often to overrule conservative Board opinions, especially by Republican-majority courts, suggesting a more ideological bent to their use. Unlike language canons which are used more by Democrat-majority panels, Republican-majority panels are most likely to use substantive canons when ruling on conservative Board decisions than liberal ones (26.1% v. 8.1%), a result statistically significant at 99% confidence. Democrat-majority panels by contrast never use substantive canons when reviewing conservative opinions. Further, substantive canons are used often when overturning a statutory interpretation where the court majority is in alignment ideologically with the Board (25.0% v. 8.5%), as well as when the court overturns a conservative Board opinion (30.0% v. 13.2% when overturning a liberal Board opinion). There is no predictable temporal pattern; use varies from 10.4% during the Clinton years to 15.9% under Trump. Thus, overall, it appears substantive canons are most favored by Republican-majority panels overruling conservative Board decisions to achieve a liberal result.

As with plain text and citation of text, use of legislative history is used most often when reviewing conservative Board decisions, especially by Republican-majority Boards, regardless of whether the case is overturned, as shown in Tables 1 and 2, column 7. When hearing a liberal Board opinion, Republican-majority panels use legislative history just 9.0% of the time compared to 21.7% when the Board's decision is conservative. Democrat-majorities, by contrast, use legislative history about equal (12.5% and 14.3%, respectively) regardless of the ideological tone of the Board decision. Nonetheless, none of the differences between parties was statistically significant. Democrat-majorities use legislative history less to uphold a case than to overturn it (8.0% v. 25.0%), a difference statistically significant at 90% confidence. By contrast, Republican-majority panels show the opposite pattern, using legislative history 13.9% when upholding a statute and just 6.4% when overturning it. Further, except for the Trump years, where there was an abrupt departure, the use of legislative history has generally increased over time, though differences are small, and in particular, legislative history is most commonly cited when courts are reviewing liberal Board decisions

during Democratic administrations as opposed to Republican administrations (14.4% v. 4.7%), a difference statistically significant at 95% confidence; the same difference does not persist for conservative Board decisions. While generally use of legislative history in Supreme Court opinions has been on the decline, the possibly pro-employee nature and vague statutory directive of the NLRA may be some things unique to the NLRA that prompt greater use of legislative history to justify overturning conservative Board opinions.

Of all the statutory tools, the trends concerning the use of precedent are the most different, with the largest gaps and results with the greatest level of statistical certainty. Tables 1 and 2, column 8 indicates that the use of precedent varies between the different presidential eras, but the trend is not clear. Looking at the data, two factors stand out as being important: first, whether or not the court upheld the Board's statutory interpretation; and second, whether the Board decision was pro-employee or not. Courts overwhelmingly use precedent more when overturning a decision than upholding it (66.9% v. 36%), particularly when ruling in an anti-employee direction (53.4% v. 39.6%), both results being statistically significant at 99% confidence. Democratic and Republican-majority panels exhibit similar patterns, though Democrat-majority courts tend to cite precedent more than Republican-majority courts when overturning a statute (75.0% v. 63.8%), and some of the highest rate of precedent use are by Democrat-majority panels writing conservative opinions, where they use precedent 82.4% compared to Republican-majorities writing either liberal (38.5%) or conservative opinions (55.4%). As shown in Table 1, the use of precedent has generally increased over time, particularly for Democrat-majority panels ruling on liberal Board decisions, while Republican-majority panels upholding conservative Board decisions have increasingly stopped using precedent to 99% statistical confidence; whereas approximately two-thirds of Clinton and Bush 2 era decisions with Republican majorities upholding conservative cases used precedent, precedent was never used for similar decisions during the Obama administration.

Tables 1 through 3, column 9 show trends in the use of policy. In general, Democrat-majority panels always cite policy when trying to justify overruling a conservative Board opinion but cite policy only 78.6% when writing an opinion to explain a liberal result. Although differences between the parties are not statistically significant, Republican-majority panels seem to cite policy in an opposing way as they cite policy more when the Board decision is conservative (87% v. 74.8%). In all policy is used more when reviewing anti-employee Board outcomes regardless of panel majority. On the flip side, policy is used the least to explain overruling liberal decisions; there, it is used just 71.7% compared to 100% when overruling a conservative Board decision, a result statistically significant at 95% confidence. However,

the trend toward increased use of policy is limited to pro-employee Board decisions; reviewing courts have increased the use of policy from 71% during the Clinton years when upholding cases to 100% today. But Republican majorities upholding liberal Board decisions have declined in their use of policy to a statistically significant degree, from 75% during Clinton to 40% today. Overall, about two-thirds to 75% of cases refer to the policy implications of the court's ruling.

Practical considerations are referenced in approximately two-thirds of all cases. Court panels, both Democrat-majority and Republican-majority, cite practical considerations more when the Board's opinion is ideologically dissimilar to the makeup of the court panel. That is, both Democratic and Republican panels cite practical considerations 57-58% of the time when in ideological agreement with the Board (that is, when the Board is liberal and panel is Democrat or Board is conservative, panel Republican). But this number jumps to 85.7% for Democrats and 73.8% for Republicans when the court majority is a different party than the tone of the Board decision (conservative Board, Democrat or liberal Board, Republican). This trend is particularly stark for Republican-majority panels; when the court decision is anti-employee, the court cites practical considerations 62.5% of the time, jumping to 76.9% when court rules in a pro-employee direction. Some of the lowest rates of practical citation occurs for courts writing conservative opinions upholding the Board, where practical considerations are used just 57.1%. As such, consistency between the ideological tone of the Board's decision and the partisan makeup of the majority of the court panel appears to be the primary driver explaining the use of practical considerations in court rulings. Use is particularly frequent when overruling the Board to achieve a liberal outcome (80.0% v. 66.0% when overruling a conservative outcome).

B. Deference Regimes and Statutory Methods

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

Each of the 199 cases was coded with what "deference" regime the court applied. As noted previously, the NLRB is a unique agency, and courts often will not actually cite to the famous *Chevron* decision nor use the two-step process when they are in fact applying *Chevron* deference. The cases

were first analyzed to see if *Chevron* deference would be appropriate given the context of the case. *Chevron* deference, for example, is not appropriate if the court is reviewing the Board's or the court's articulation of precedent. In all, the analysis concluded that a total of 82.9% of the cases where the court interpreted statutes should have applied *Chevron* deference to the agency's interpretation. In actuality, however, not all courts applied *Chevron* deference when they were supposed to. Only 26.1% of cases expressly applied the *Chevron* two-step framework, and another 78.9% of cases applied a "reasonableness" framework to analyze the statutory issue in question. In all, 94.6% of cases that should have applied *Chevron* or a similar reasonableness analysis did. Of those that declined to apply *Chevron* when they should have, 77.8% consisted of decisions from Republican-majority panels.²²⁸

While scholars have oft analogized the "reasonableness" inquiry to be equivalent to *Chevron* deference, other scholars, specifically those studying the NLRB, have argued that in adopting a reasonableness analysis, the court adopts a lessened form of deference.²²⁹ As such given the large number of cases in the dataset in which the courts do not expressly adopt the *Chevron* two-step framework, the analysis below is done on two levels: 1) expressly invoking *Chevron* v. not invoking *Chevron* ("*Chevron Citation*" or "*Chevron Cite*" cases) and 2) expressly invoking *Chevron* or using a reasonableness standard versus not using either *Chevron* or reasonableness ("*Chevron Application*" or "*Chevron Apply*"). Since the vast majority of cases invoking *Chevron* were resolved at step two, no separate analysis was done for cases specifically invoking *Chevron* step one deference.

²²⁸ In most of these cases, the court made general statements about deference, but did not adopt a reasonableness inquiry or make special note that more deference would be required in the present case than in another case.

²²⁹ See Part II.B, *supra*.

Figure 4

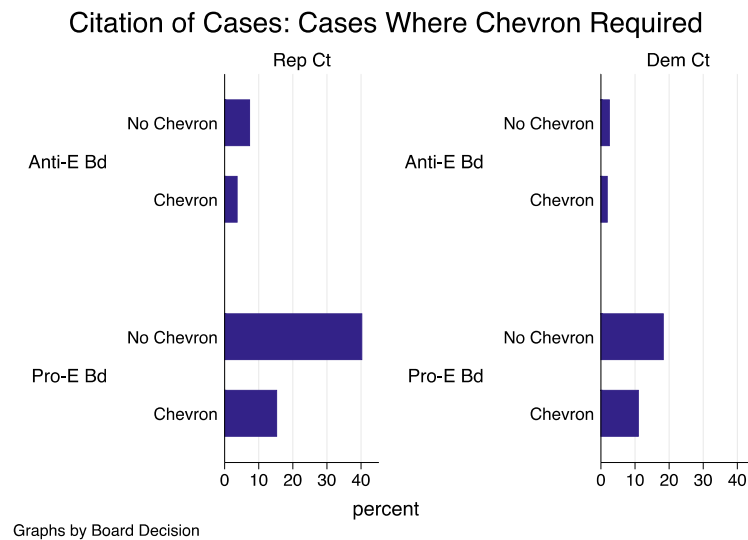


Figure 5

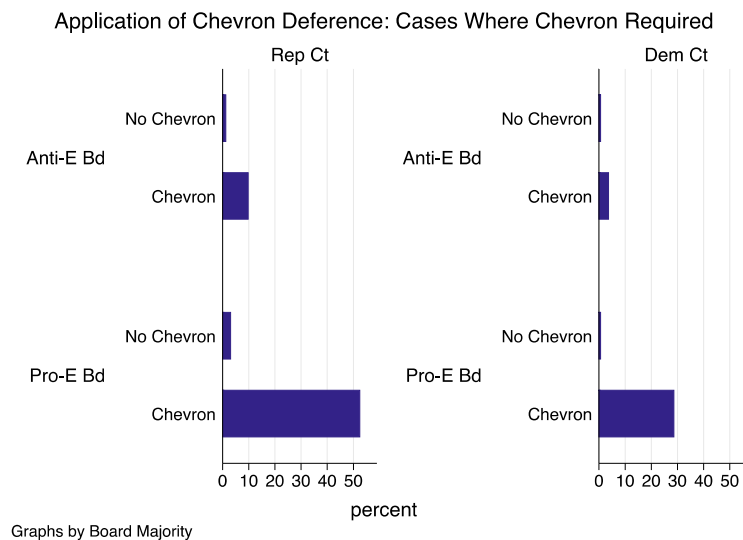


Figure 4 and 5 cite separate graphs for *Chevron Cite* and *Chevron Apply* with analysis limited to the universe of cases that should have applied *Chevron*. Republican-majority panels in particular do not *Cite Chevron* or *Apply Chevron* when they should. By contrast, as shown in Figure 5, Democrat-majority panels almost always apply *Chevron* when they should.

Table 3 sets forth the summary information concerning use of

Chevron in the dataset. Column 2 details *Chevron Citation* statistics while column 3 refers to the broader category of *Chevron Application* when the court is either using *Chevron* or a reasonableness analysis. While Democrat-majority panels cite and apply both types of *Chevron* more, the difference is not statistically significant nor does the citation or application of *Chevron* depend on the liberalness of the Board's decision. Given others' research this may be a surprising result, but it is important to note that the present analysis is limited to a single politically-charged agency and the method used to count *Chevron* use and application is different than what other scholars have used.²³⁰ However, *Chevron* is both cited more and applied more in practice when upholding a statute than when not upholding it. The court specifically invokes the *Chevron* two-step framework 32.5% when upholding the statute, compared to just 12.7% when ruling contrary to it, a difference statistically significant at 99% confidence. This same result persists widening the definition of *Chevron* in column 3 to include cases in which the courts applies *Chevron* expressly as well as when it applies a general "reasonableness analysis." In those cases, *Chevron* is applied far more often when the statute is upheld than when it is struck down (89.0% v. 57.1%). *Chevron* is also applied more often in pro-employee appellate decisions than in cases ruling against the employee. When *Citing Chevron* expressly in column 2, courts invoke the *Chevron* two-step in 31.5% of pro-employee cases compared to just 17.6% of conservative ones, a difference statistically significant at 95% confidence. This difference persists adopting the wider view of *Chevron Application* in column 3 (86.4% v. 66.2%) and remains statistically significant.

While there is no difference in either *Chevron Citation* or *Chevron Application* over the time frame of the study, both Democrat and Republican-majority panels cite and apply *Chevron* to different ends. As detailed in Table 3, panels from both parties cite and apply *Chevron* more when upholding a statute than in overturning it. For example, Democrat-majority panels upholding a liberal Board decision *Applying Chevron* 89.2% when upholding the statute compared to just 50.0% when not upholding it. These wide differences persist for conservative decisions, with an even bigger gulf between upholding and overruling the statute (40% v. 8.3% for *Chevron Citation* and 100% v. 66.7% for *Chevron Application*). Republican-majority panels behave similarly; when upholding a liberal interpretation, they use *Chevron Application* 90.5% compared to 28.6% if not upholding it. By contrast, the band between upholding and overturning of conservative versus

²³⁰ Some studies measure propensity to apply *Chevron* by looking for all citations to *Chevron*. However, there are many cases in which courts apply *Chevron* or should apply *Chevron* yet do not cite *Chevron*. Using *Chevron* to measure the cases in which courts engage in statutory interpretation is underinclusive.

liberal decisions is much narrower when Republican majorities review conservative Board decisions; *Chevron Citation* is 29.2% v. 12.5%, while *Chevron Application* is 79.2% v 60%, a much narrower band.

Further, courts cite and apply *Chevron* less when the Board's decision is opposite ideologically from the party of the court majority. Courts *Cite Chevron* 37.3% when upholding a consistent statute (ideology of Board decision matches ideology of court majority) compared to just 10% when there is ideological disharmony, a result statistically significant at 95% confidence. The same discrepancy occurs with *Chevron Apply* (88.1% v. 55.0%). If not upholding the statute courts are less likely to *Cite Chevron* (29.3% v. 14.0% if not consistent), findings which are similar for *Chevron Apply* (89.3% v. 58.1%).

In all, and as shown in Figures 4 and 5, courts, particularly Republican-majority courts, are reluctant to cite or apply *Chevron*, when they disagree with the Board's decision.

Table 3: *Chevron Citation v. Chevron Application*: Key Statistics

	<i>Chevron Citation</i>	<i>Chevron Application</i>
Dem	33.3	84.1
Rep	23.1	76.1
Uphold	32.5***	89.0***
Not Uphold	12.7***	57.1***
DDD	47.1	88.2
DDR	26.5	79.6
RRD	26.4	75.8
RRR	17.1	80.5
Board Pro-Employee	25.6	79.8
Board Anti-Employee	29.1	74.2
Court: Liberal	31.2**	86.4***
Court: Conservative	17.6**	66.2**
Consistent	30.4	79.8
Inconsistent	23.7	78.0
Clinton Era	24.7	79.2
Bush Era	25.6	80.3
Obama Era	29.2	79.2
Trump Era	30.8	69.2
Uphold/Consistent	37.3**	88.1***
Uphold/Inconsistent	10.0**	55.0***
Not Uphold/Consistent	29.3*	89.3***
Not Uphold/Inconsistent	14.0*	58.1***

Table 4 and Figure 6 details how the use of statutory method varies by deference regime. Cases in which courts go through the express *Chevron* two step framework (*Chevron Citation*) differ in their use of methods from cases in which the courts either do not apply any *Chevron*-deference based

framework (relying on standard evidence or *de novo* review for example), or cases in which the courts apply *Chevron* without citing it directly. Likewise, cases in which the courts expressly apply *Chevron* or use a reasonableness test (*Chevron Application*) differ from ones applying a non-*Chevron* based standard like *de novo* or standard evidence. Table 5 and Figure 6 sets out the results for both *Chevron Citation* and *Chevron Application*.²³¹

²³¹ For *Chevron Citation*, non-*Chevron Citation* case are ones where the court applies either a reasonableness analysis or some other deference regime. For *Chevron Application* cases, non-*Chevron* cases are ones in which the court is neither applying *Chevron* expressly or in spirit through a reasonableness test.

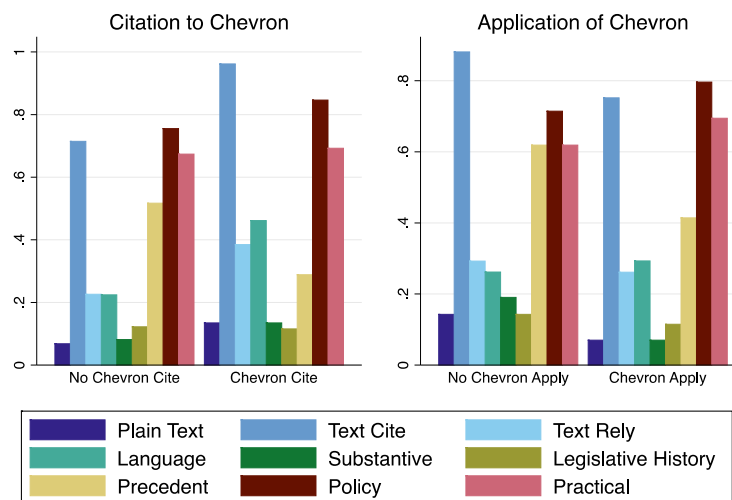
Table 4: Statutory Methods and *Chevron v. No Chevron* Deference

	Plain	Text Cite	Text Rely	Lang.	Subst.	LH	Prec	Policy	Prac
Overall									
Uphold									
Chv1 ²³²	13.5	96.1***	38.5**	46.2***	13.5	11.5	28.9***	84.6	
No Chv1	6.8	71.4***	22.6**	22.5***	8.2	12.2	51.7***	75.5	67.4
Chv1/Up	11.4	95.5***	38.6**	36.4**	13.7**	11.4	29.6	88.6**	70.5
No Chv1/Uph	8.7	67.4***	19.6**	20.7**	3.4**	13.0	39.1	73.9**	66.3
Chv1/No U	25.0**	100	37.5	100***	12.5	12.5	25.0***	62.5	62.5
No Chv1/No U	3.6**	78.2	27.8	25.5***	16.4	10.9	72.7***	78.2	69.1
Chv2	7.0	75.2*	26.1	29.3	7.0***	11.5	41.4**	79.6	69.4
No Chv2	14.3	88.1*	29.3	26.2	19.1***	14.3	61.9**	71.4	61.2
Chv2/Up	7.4**	76.0	24.0	26.5	6.6	9.9***	36.4	79.3	68.6
No Chv2/Up	26.7**	80	40.0	20.0	6.7	33.3***	33.3	73.3	60.0
Chv2/No Up	5.6	72.2**	33.3	38.9	8.3**	16.7*	58.3*	80.6	72.2
No Chv2/No Up	7.4	92.6**	23.1	29.6	25.9**	3.7*	77.8*	70.4	63.0
Party									
Chv1/Dem	9.5	100***	47.6**	47.6***	4.8	16.7	28.6**	81.0	66.7
No Chv1/Dem	4.8	73.8***	21.4**	21.4***	7.1	4.8	54.7**	81.0	59.2
Chv1/Rep	16.1*	93.6***	32.3	45.2**	19.4*	16.1	29.0**	87.1	71.0
No Chv1/Rep	6.8*	69.9***	22.6	23.3**	8.7*	9.7	50.5**	73.8	71.9
Chv2/Dem	5.7	79.3*	32.1	28.3	3.8**	11.3	41.5*	84.9*	64.2
No Chv2/Dem	10.0	100*	20.0	40.0	20.0**	20.0	70.0*	60.0*	50.0
Chv2/Rep	6.9	72.6	22.6	30.4	8.9	10.8	41.2*	77.5	72.6
No Chv2/Rep	15.6	84.3	32.3	21.9	18.9	12.5	59.4*	75.0	65.6
Consistency									
Chv1/Consis	16.7*	100***	50.0***	50.0***	16.7	12.5	29.2***	83.3	70.8
NChv1/Consis	5.5*	74.5***	18.5***	18.2***	10.9	16.4	60.0***	80.0	52.7
Chv1/Incons.	10.7	92.9***	28.6	42.9*	10.7	10.7	28.6*	85.7	67.9
NChv1/Incons.	6.7	68.9***	24.4	25.6*	7.7	8.9	46.7*	73.3	76.7
Chv2/Consis	7.9	81.0	30.2	30.2	7.9*	11.1**	44.4**	84.1	61.9
NChv2/Consis	12.5	87.5	20.0	12.5	31.3*	31.3**	75.0**	68.8	43.8
Chv2/Incons.	5.4*	70.7*	22.8	29.4	6.5	10.9	39.1	77.2	75.0
NChv2/Incons.	15.4*	88.5*	34.6	30.8	11.5	3.9	53.9	73.1	73.1
Board Opinion									
Chv1/Pro-E:Bd	11.6	95.4***	37.2**	46.5***	9.3	9.3	27.9***	81.4	67.4
NChv1/Pro-E:Bd	5.6	68.8***	22.4**	22.4***	7.2	11.2	50.5***	74.4	68.8
Chv1/Anti-E:Bd	22.2	100	44.4	44.4	33.3	22.2	33.3	100	77.8
NChv1/Anti-E:Bd	13.6	86.4	23.8	22.7	13.6	18.2	59.1	81.8	59.1
Chv2/Pro-E:Bd	6.7	71.6**	26.1	28.4	6.0*	11.2	40.3**	78.4	69.4
NChv2/Pro-E:Bd	8.8	91.2**	26.5	29.4	14.7*	8.8	61.6**	67.6	64.7
Chv2/Anti-E:Bd	8.7**	95.6*	26.1	34.8	13.0	13.0	47.8	87.0	69.6
NChv2/Anti-E:Bd	37.5**	75.0**	42.9	12.5	37.5	37.5	62.5	87.5	50.0
Court Opinion									
Chv1/Pro-E:Ct	12.8	94.9***	43.6**	41.0**	7.7	7.7	25.6*	87.2	71.8
NChv1/Pro-E:Ct	8.1	66.3***	22.4**	23.3**	7.0	14.0	40.7	76.7	69.8
Chv1/Anti-E:Ct	15.4	100*	23.1	61.5***	30.8**	23.1	38.5**	76.9	61.5
NChv1/Anti-E:Ct	4.9	78.7*	23.0	21.3***	9.8**	9.8	67.2**	73.7	63.9
Chv2/Pro-E:Ct	8.3	74.1	28.7	29.6	4.6***	10.2	34.3	79.6	69.4
NChv2/Pro-E:Ct	17.7	82.4	31.3	23.5	23.5***	23.5	47.1	83.4	76.5
Chv2/Anti-E:Ct	4.1	77.6	20.4	28.6	12.2	14.3	57.1	79.6	69.4
NChv2/Anti-E:Ct	12.0	92.0	28.0	28.0	16.0	8.0	72.0	64.0	52.0
Uphold/Cons.									
C1/Up/Cons	13.6	100***	50.0***	45.5**	18.2**	13.6	27.3	86.4	72.7**

²³² C1 refers to *Chevron Cite* while C2 refers to *Chevron Application*. NC1 refers to non-*Chevron Cite* and NC2 means non-*Chevron Application*.

NC1/Up/Cons	8.1	70.3***	16.2***	18.9**	2.7**	13.5	43.2	78.4	45.0**
C1/NU/Cons	50***	100	50.0	100***	0	0	50.0**	50.0	50.0
NC1/NU/Cons	0***	83.3	23.5	16.7***	27.8	22.2	94.4**	83.3	66.7
C1/Up/Incons	9.1	90.9**	27.3	27.3	9.1	9.1	31.8	90.9*	68.2
NC1/Up/Incons	7.5	64.5**	20.8	22.6	3.7	11.3	35.9	71.7*	81.1
C1/NU/Incons	16.7	100	33.3	100***	16.7	16.7	16.7**	66.7	66.7
NC1/NU/Incons.	5.4	75.7	29.7	21.6***	10.8	5.4	62.2**	75.7	70.3
C2/Up/Cons	7.7**	80.8	26.9	30.8	7.7	7.8***	36.5	82.7	59.6
NC2/Up/Cons	28.6**	85.7	42.9	14.3	14.3	57.1***	42.9	71.4	28.6
C2/NU/Cons	9.1	81.8	45.5**	27.3	9.1*	27.3	81.8	90.9	72.7
NC2/NU/Cons	0	88.9	0**	22.2	44.4*	11.1	100	66.7	55.6
C2/Up/Incons	6.0*	71.6	20.	23.4	6.0	10.5	35.8	77.6	76.1
NC2/Up/Incons	25.0*	75.0	37.5	25.0	0	12.5	25.0	75.0	87.5
C2/NU/Incons	4.0	68.0**	28.0	44.0	8.0	12.0	48.0	76.0	72.0
NC2/NU/Incons.	11.1	94.4**	33.3	33.3	16.7	0	66.7	72.2	66.7

Figure 6
Statutory Methods (%) by Chevron Cite/Apply



The second column details the results for the use of plain text. Courts that expressly use the *Chevron* two-step framework employ plain text 25.0% of the time when overruling a statute whereas they use plain text just 3.6% applying a non-*Chevron Citation* deference regime, a result statistically significantly at 95% confidence. The use of plain text does not differ by deference regime when the statute is upheld. By contrast the opposite pattern in the use of plain text exists for *Chevron Application*, seen further down column 2. There, courts rely on plain text just 7.4% of the time to uphold a statute when relying on a *Chevron* analysis compared to 26.7% when not applying *Chevron* to uphold a statute. Thus, when actually citing the *Chevron* two-step, plain text is used more but when the definition of *Chevron* is broadened to include either use of the two-step or a reasonableness test plain text is used less. This suggests that the formal two-step *Chevron* process in itself might inspire the court to use plain text more in the analysis than if the

method is not formally applied.

Table 4, column 2 shows other patterns with respect to the relationship between deference regime and the plain text. For *Chevron Citation*—comparing actual use of the two-step test versus non-usage of the test, irrespective of whether the court applied a reasonableness test—plain text is clearly used more often in some circumstances when the *Chevron* test is cited and not used in comparable circumstances where it is not cited. For example, Republican-majority panels cite plain text more when *Citing Chevron* than when they do not *Cite Chevron* (16.1% v. 6.7%). Democrat-majority panels, however, evidence no statistical difference. As another example, in cases in which the court majority and Board decision are in ideological agreement, cases in which courts *Cite Chevron* use plain text in 16.7% of opinions whereas only 5.5% of cases that do not *Cite Chevron* use plain text. The opposite pattern holds for court majorities out of ideological harmony with the Board; there, those who *Cite Chevron* use plain text *less*, just 5.4% of the time, whereas those who do not cite *Chevron* use plain text *more* in 15.4% of opinions.

Table 4 indicates some statistically significant relationships when the expanded category of *Chevron Application* is used, that is, cases invoking the two-step or using a reasonableness analysis. Reliance on plain text is particularly stark for *Chevron Application* in reviewing conservative Board outcomes; to 95% confidence, courts relying on *Chevron Application* use plain text 8.3% compared to non-*Chevron Applying* courts who employ plain text 37.5%, a result statistically significant at 95% confidence. In all, courts, especially Republican-majority panels, are more enthusiastic in using plain text as a method choice when *Citing Chevron*.

There are some notable differences between *Chevron Citation* and *Chevron Application* in both the citation and reliance on text in columns 3 and 4. Regarding citation of text (regardless of whether or not the court relies on it), *Citing Chevron* courts cite text 96.1% compared to just 71.4% of cases in which the courts do not *Cite Chevron*, with the difference being particularly stark and statistically significant at 95% confidence when the court votes to uphold the Board's statutory interpretation. But when courts are *Applying Chevron* (either the two-step or a reasonableness analysis), *Chevron Applying* courts actually cite text *less* 75.2% to 88.1%. Moreover, while Democratic or Republican-majority courts are similarly likely to cite text, courts are most likely to cite texts when just *Citing Chevron* in reviewing liberal Board decisions (95.4% v. 68.8%) than when not *Citing Chevron*. An opposite pattern occurs for instances in which courts *Apply Chevron*; there, courts that *Apply Chevron* are *less* likely to cite text reviewing pro-employee Board cases than courts that do not *Apply Chevron* (71.6% v. 91.2%), whereas in anti-employee case, the opposite pattern occurs, with text being

cited more in the *Apply Chevron* cases (95.8% v. 75.0%). *Cite Chevron* cases differ from *Apply Chevron* cases in another significant way. For *Chevron Apply*, courts are equally likely to cite text when in ideological harmony with the Board and less likely to cite text when in disharmony if the court is also *Applying Chevron*. However, for cases that *Cite Chevron*, citing to the text is much more likely in cases of both harmony and disharmony if *Chevron* is also cited. When the court and Board both issue liberal opinions, courts that *Cite Chevron* always cite the text whereas where there is a disharmony, courts that *Cite Chevron* are still more likely to cite the text (92.9% v. 68.9%), a difference statistically significant to 99% confidence. Thus, as with plain text, courts that merely *Cite Chevron* differ from courts that more broadly *Apply Chevron* in their propensity to cite text.

This same pattern persists in Table 4, column 4, examining actual reliance on the text. For actual reliance on text rather than just citation, cases in which the courts *Cite Chevron* rely on text 38.5% compared to 22.6% when not *Citing Chevron* specifically, a difference statistically significant at 95% confidence. Similarly, as with citation of text discussed above, courts *Citing Chevron* are more likely to rely on the text on their opinions than non-*Citing Chevron* cases when upholding the Board's statutory interpretation (38.6% v. 19.65%), when the panel is Democrat-majority (47.6% v. 21.4%), and when the panel is upholding a statutory interpretation that is consistent with that of the majority of the court (50% v. 18.5%). In addition, liberal court decisions rely on text 43.6% in *Cite Chevron* cases but just 22.4% of cases not *Citing Chevron*. Republican-majority panels for the most part as well as panels overruling the Board's statutory interpretation and conservative court decisions do not appear to differ significantly in whether they rely on text based on the deference regime. As with plain text and citation of text, these differences do not carry over to *Apply Chevron*. That is, while there are clear differences in whether or not text is relied on depending on if the court *Cites Chevron* versus if it does not, cases that *Apply Chevron* do not differ from cases that do not *Apply Chevron* in this use of text. This seems to indicate that when courts actually do the *Chevron* two-step analysis, they are more cognizant of doing a textual analysis, and perhaps are more likely to rely on and cite text in their analysis.

The use of language canons also underscores the stark difference between *Cite Chevron* and *Apply Chevron*. The use of language canons differs statistically based on deference regime only when the court is *Citing Chevron* not when *Applying Chevron*. Where the case cites the *Chevron* two-step, language canons are used 46.2% compared to just 22.5% when *Chevron* is not cited; these findings hold regardless of whether or not the Board is upheld or overruled but the gulf between the two is much stronger for opinions in which the court overrules the Board (36.4% v. 20.7% for uphold and 100%

v. 25.5% for overrule). Both Democratic and Republican-majority panels use language canons more when *Citing Chevron* than not (for Democrats 47.6% *Citing Chevron* v. 21.4% not *Citing Chevron*, with the comparable figure for Republicans being 45.2% v. 23.3%, both differences statistically significant at 99% confidence). Use of language canons is particularly stark for liberal cases; when the deference regime is *Citing Chevron* and the court result pro-employee, the courts uses language canons 46.5% compared to just 22.4% when not *Citing Chevron*. Whether or not the court decision is liberal or conservative as well as the deference regime applied affects whether language canons are used; when the opinion is liberal, language canons are used in 41.0% of *Citing Chevron* cases but just 23.3% of non-*Citing Chevron* ones, a difference statistically significant at 95% confidence. The gulf is even wider for conservative opinions, where the deference regime has even more of an effect; there, *Citing Chevron* cases use language canons 61.5% compared to 21.3% when *Chevron* is not cited, a result that is statistically significant at 99% confidence. As with other tools, there are no statistically significant difference between *Chevron Application* and non-*Chevron Application*, suggesting that the framework of employing the two step seems to have some impact on choice of language method to justify the statutory interpretation.

Substantives canons are used for different purposes depending on the deference regime as well. When courts *Cite Chevron*, they use substantive canons 13.7% of the time when upholding the statute versus 3.4% when they do not apply the two-step, a difference statistically significant at 95% confidence. Further, Republican-majority panels *Citing Chevron* are more likely to invoke substantive canons (19.4% v. 8.7% when not *Citing Chevron*), and there is also a statistically significant difference in the use of substantive canons to justify conservative outcomes; when *Citing Chevron*, substantive canons are used 30.8% in conservative cases, but just 9.8% when adopting a different non-*Chevron Citing* deference regime.

However, unlike the other results, there are more differences when courts *Apply Chevron*. When courts *Apply Chevron*, they use substantive canons less, 7.0% versus 19.1% when using a non-*Chevron* deference regime, a 99% confidence statistical decision. That is, when the courts adopt a deference regime different from either *Chevron* or a reasonableness analysis, the courts are more likely to use substantive canons to justify their decision. Use is particularly strong when invoking a non-*Chevron* deference regime and overturning the statute; there, substantive canons are used 25.9% compared to 8.3% when *Chevron Apply* is used. As opposed to *Citing Chevron*, for *Chevron Apply*, Democrat-majority panels use substantive canons substantially less when *Applying Chevron* than when not (3.8% v. 20.0%). Overall, when courts *Apply Chevron*, courts that do not use a *Chevron*

deference regime use substantive canons more. This is especially the case for liberal court opinions; when courts *Apply Chevron* to write liberal opinions, they use substantive canons 4.6% compared to 23.3% when not *Applying Chevron*. Overall, substantive canons overall are used more when there is no *Chevron* or *Chevron*-equivalent analysis except if the decision is by a Republican-majority panel justifying a conservative result.

Like the substantive canons which are invoked more in non-*Chevron* deference regimes, legislative history is another statutory method that courts using a deference regime other than *Chevron* or reasonableness seem to apply more often. Further, unlike the text, language canons, and substantive canons discussed above, there is no statistically significant difference in the employment of legislative history between *Citing Chevron* cases or Not *Citing Chevron* cases. Rather, limited to the cases in which courts are *Applying Chevron*, in upholding a statute, legislative history is most often used in non-*Chevron Applying* cases than *Chevron Applying* cases (33.3% v. 9.9%), particularly when the court agrees ideologically with the Board. This is a different pattern than what we have seen above. In cases rejecting the Board's statutory interpretation, the pattern is the opposite; there, legislative history is relied on more in the *Chevron Applying* cases than non-*Chevron Applying* ones (16.7% v. 3.7%). Whereas Republican-majority courts voting to overturn contrary Board decisions who *Apply Chevron* use legislative history often (20.0%) and differ statistically from non-*Chevron Apply* (2.9%), the results indicate no partisan division on the uses of legislative history once the deference regime is considered. Overall, it seems that cases that do not use or invoke *Chevron* whatsoever are more drawn to using legislative history as a substitute, except when overturning a statute.

Similarly, it is not unexpected that precedent as a primary interpretive source is more common in non-*Chevron* deference cases. For *Chevron Cite*, the discrepancy in usage is 28.9% versus 51.7%, whereas for *Chevron Apply*, the difference is narrower at 41.4% versus 61.9%, with both differences statistically significant at 95% confidence. The use of precedent by non-*Chevron Citing* or *Applying* courts is also not surprisingly more frequent when the court votes to overturn a statutory interpretation (72.7% if no *Chevron Citing* versus 25.0% if *Citing Chevron*). The discrepancies are particularly stark when looking at the data broken down by whether or not the court's ruling is consistent ideologically with the Board; where the court *Cites Chevron*, it relies on precedent just 29.2% compared to 60% when not *Citing Chevron*; similarly when it makes a judgment inconsistent with the Board, there is an even greater discrepancy based on deference regime, 16.5% v. 62.2%. In some ways, the absence of *Chevron* as a precedent forces the court to find another precedent in which to latch its statutory interpretation on to, and so many times, especially when not upholding the Board, courts

seem to be turning to precedent as a substitute for *Chevron* as justification for the decision. The discrepancy is particularly stark when the court has a conservative outcome; there, precedent is cited in 38.5% of *Citing Chevron* cases but 67.2% of non-*Citing Chevron* ones.

Policy is used most frequently by courts that *Cite Chevron* to uphold a statutory interpretation whereas it is invoked less frequently when upholding cases that do not *Cite Chevron* (88.6% v. 73.9%). Policy also is used more by Democrat-majority panels that *Apply Chevron* than ones that do not (84.9% v. 60.0%), a difference not seen for Republican-majority panels. Otherwise, there are few differences in citation of policy based on deference regime. Similarly, practical considerations appear to bear little relationship to the deference regime. For *Chevron Apply*, practical considerations are used most often to uphold a consistent interpretation. For cases *Applying Chevron*, courts upholding judgements where the ideology of the Board and court match use practical considerations 72.3% versus 45% than when not, a difference statistically significant at 95% confidence.

C. Statutory Method/Deference Regime and Author Characteristics

This last section explores the impact of demographic factors. Table 5 details in bivariate fashion how characteristics of the authors' of the opinion correspond to choice of statutory method.

Table 5: Statutory Methods and Judge-Author Demographic Characteristics

	All Cases ²³³	Author	Plain	Text Cite	Text Rely	Lang.	Subst.	LH	Prec	Policy	Prac
No DC	67.8	68.2	10.3	80.7	27.6	30.4	6.7**	14.9*	43.7	76.3	68.2
DC	32.3	31.8	4.7	71.9	25.0	25.0	15.7**	6.3*	50.0	81.3	67.2
Dem	41.0	44.1	10.5	74.4	25.6	30.3	11.0	8.1	43.0	79.1	67.5
Rep	59.0	55.9	7.3	79.8	27.8	29.1	8.1	14.7	46.8	76.2	67.0
Dem/DD		8.7	0	76.5	29.4	35.3	5.9	0	29.4	88.2	76.5
Dem/DR		17.1	11.8	76.5	23.5	23.5	5.9	11.8	41.2	82.4	55.9
Dem/RR		17.6	14.3	71.4	25.7	31.4	11.4	8.6	51.4	71.4	74.3
Rep/DD		7.0	14.3	100	50.0	42.9	7.1	35.7**	57.1	71.4	50.0
Rep/DR		27.6	9.1	78.2	25.5	27.3	14.6	12.7**	41.8	76.4	69.1
Rep/RR		20.1	2.5	75.0	23.1	30.0	7.5	10.0**	50.0	77.5	70.0
Female	23.3	26.7	11.5	75.0	29.4	30.8	9.6	5.7	40.4	71.2	61.5
Male	76.7	73.3	7.8	78.3	25.9	29.4	9.8	14.0	46.9	79.7	69.2
Male/MM		41.7	19.8	75.9	27.7	32.5	8.4	16.9	44.6	78.3	68.7
Male/MF		26.6	3.7	79.3	22.6	24.5	11.3	9.4	47.2	81.1	73.6
Male/FF		3.5	0	100	28.6	28.6	14.3	14.3	71.4	85.7	42.9
Female/MM		34.3	3.8	73.5	30.6	32.6	11.8	0**	38.2	70.6	64.7
Female/FM		7.5	0	73.3	20.0	26.7	6.7	13.3**	53.3	73.3	53.3
Female Col.		33.9	7.1	78.6	26.1	27.7	10.7	8.0	45.5	76.8	66.1
No Female		66.2	10.8	75.9	27.7	32.5	8.4	16.9	44.6	78.3	68.7
White	80.7	81.5	10.7**	78.0	27.9	32.5	9.9	12.6	44.7	74.2**	69.2
Non-White	19.3	18.5	0**	75.0	22.2	28.1	11.6	8.3	47.2	91.7**	58.3
White/WW		50.7	78.2	30.0	34.6	34.7	8.9	11.8	38.6*	78.2	70.3
White/WM		27.6	78.2	23.6	27.3	27.3	12.7	12.7	54.5*	67.3	67.3
White/MM		1.5	66.7	33.3	0	0	0	33.3	66.7*	66.7	66.7
Min/WW		12.1	66.7	25.0	20.8	20.8	12.5	8.3	45.8	87.5	58.3
Min/WM		5.0	90.0	20.0	30.0	30.0	0	10.0	50.0	100	70.0
MMM		1.0	100	0	0	0	0	0	50.0	100	0
Min. Col		35.9	1.4***	76.9	29.1	33.7*	8.7	12.6	39.4*	77.9	70.2
No. Min.		64.1	12.8***	79.0	24.2	23.2*	10.5	11.5	52.6*	77.9	65.3
Before 65	62.3	63.1	7.3	82.1**	26.2	29.5	6.4	9.8	45.4	82.1**	67.5
After 65	37.7	36.9	11.1	69.4**	27.8	26.4	1.4	15.3	44.4	69.4**	66.7
Cong	7.3	4.1	0	62.5	0*	36.7	27.8**	12.5	37.5	100*	87.5
No Cong	92.7	95.9	9.1	78.1	27.8*	28.2	8.5**	11.8	45.5	76.5*	66.3
Leg	9.9	6.2	20.0*	80.0	33.3	40.0	20.0	13.3	46.7	86.7	73.3
No Leg	90.1	93.9	7.6*	77.7	26.2	27.7	8.7	12.0	45.7	77.2	67.4
Fed Govt	47.8	50.3	9.3	77.3	25.7	26.5	10.2	8.3	40.8	81.4	72.2
No Fed G	49.8	47.7	8.2	77.5	27.8	30.7	8.9	15.3	49.5	73.5	62.2
Agency	50.3	52.3	9.7	77.4	26.9	27.4	10.5	7.5*	50.5	80.6	71.0
No Agency	62.6	62.6	7.8	77.5	26.7	29.8	8.7	15.7*	40.2	74.5	63.7
Top 14	37.4**	37.4**	5.7*	75.4	25.6	71.6*	10.5	13.1	47.5	79.5	71.2
No Top 14	16.4**	69.9**	13.7*	80.8	28.7	59.6*	8.7	9.6	41.1	74.0	64.8

Plain text, for instance, is never used by non-white authors to a statistically significant degree at 95% confidence (10.7% v. 0%), while those who attended a law firm in the top 14 of the *U.S. News and World Report* standings also appear to use plain text less (5.7% v. 13.7%). Further, non-whites are significantly more likely at 95% confidence to cite and rely on policy (91.6% v. 74.2%). Those who attended elite law schools use language

²³³ All Cases is the percent in all cases while Author is limited to cases in which the judge is an author.

canons more (71.6% v. 59.6%). By contrast, female authors use substantive canons more than male authors (19.6% v. 6.5%). Age seems at least somewhat related to how a judge views the use of text and policy. Whereas there is no difference between ages on the use of text as a primary source, younger judges (before age 65) rely on it to a statistically significant degree more than older judges (82.1% v. 69.4%). Younger judges also seem to have a different attitude toward the use of policy when framing their opinion (82.1% v. 69.4%).

The location of the judge's court as well as their prior career choices also impact choice of statutory method. Not surprisingly, certain canons and methods are more in favor with non-D.C. Circuit judges. D.C. Circuit judges use substantive canons more than non-D.C. Circuit judges (15.7% v. 6.7%), while non-D.C. Circuit judges favor legislative history, 14.9% v. 6.3%. Most interestingly, those who worked at a federal agency appear to have a less optimistic outlook on legislative history, relying on it 7.5% to 15.7% of those who did not work at an agency. This result persists even limiting the cases to ones in which authors are not prompted to cite legislative history through the Board decision or the dissent. Similarly, judges who have experience working in Congress have a less optimistic view of the text; none relied on it as authors in their opinions on it, while 27.8% of those who did not serve in Congress did, a statistically significant difference at 90% confidence. However, among those who worked in either state or federal legislatures or served as a Congressman, use of plain text was more frequent. Those with past congressional experience also have a greater affinity for using and citing policy (100% v. 76%), and for using substantive canons more (27.8% v. 8.5%). Authors who worked in Congress use language canons like the whole act, whole code, or whole text rules more to assist in statutory interpretation, but the results are not statistically significant, perhaps for no other reason than they possibly were unfamiliar with the rules or outright rejected them. If anything, if canons resembled actual drafting practices in Congress, at a minimum we would expect to see a statistically increase in the use of the tools among those who have worked in Congress; here there is only differences for the substantive canons.

Panel effects influence choice of method too. In particular, a Republican author sitting with fellow Republicans is far less likely to use legislative history; Republican authors sitting with two Democrats use legislative history 35.7% compared to 12.7% and 10.0%, respectively, when sitting with each additional Republican judge. Panel effects are not limited to those based on party. White authors sitting with two other white authors are less likely to rely on precedent than sitting with minority colleagues (38.6% for all white panel to 54.5% with one minority on the panel and 66.7% with two minority colleagues, a result statistically significant at 90% confidence).

In all, the results on demographic characteristics though far from definitive, represent a first attempt to look more broadly at what factors impact choice of statutory method. Each opinion writer comes to writing the opinion with their own backgrounds and while scholars no doubt have found that race, gender, and prior career path have impacted votes, there has been systematic study of how those methods may also impact the statutory methods the authors choose to use in their opinions. Of course, judges are shaped by what statutory methods the Board used, or what may appear in the attorney's briefs, factors which are not accounted for here.

This nonetheless represents an attempt to raise the conversation among those studying statutory methodology to go beyond vote counting and deference regime to assess how these factors impact decision making and statutory interpretation. For too long, studies of court decision making have ignored the impact that race, gender, and prior employment and educational opportunities can play in how judges not only make decisions but in how they frame the decision for public consumption in the form of a written opinion. Especially when the statute is vague and open-ended like the NLRA is, judges may differ in the role that they see text, canons, policy and practical considerations to play in the decision making. However, given the small size of the dataset, many of the results no longer hold once more factors are considered (race and gender and party and circuit, etc.). Advances in machine learning using millions of cases will enable researchers to be able to analyze this issue in a more rigorous fashion.

Table 6: Deference Regime and Judge-Author Characteristics

	Cite Chev	Upheld	Not U	Apply Chev	Uphold	Not U
No D.C. Cir.	25.6	29.5	9.1	79.0	91.6	47.5
D.C. Cir.	27.4	37.5	15.8	75.8	82.5	47.4
Dem	33.9*	35.1	16.7	82.6	89.2	41.7
Rep	22.9*	27.9	12.5	74.3	88.5	56.4
DDD	47.1	46.7	50.0	88.2	86.7	100
DDR	27.1	33.3	8.33	79.2	91.7	41.7
RRD	25.6	31.8	11.1	74.4	87.3	44.4
RRR	17.5	19.1	15.8	80.0	90.5	68.4
Dem/ DD	47.1	46.7	50.0	88.2	87.7	100
Dem/DR	29.4	33.3	0	85.3	93.3	25.0
Dem/RR	28.6	31.0	16.7	77.1	86.2	33.3
Rep/DD	25.0	50.0	12.5	66.7	100	50.0
Rep/DR	22.8	30.6	9.5	71.9	86.1	47.6
Rep/RR	17.5	19.1	15.8	80.0	90.5	68.4
Female	30.8	34.2	21.4	78.9	90.7	64.3
Male	25.5	30.9	10.9	77.6	84.2	50.0
Male/MM	24.1	28.8	12.5	77.1	91.5	41.7
Male/MF	26.4	35.3	10.5	79.3	88.2	63.2
Male/FF	14.2	25.0	0	71.4	100	33.3
Female/MM	37.8*	44.0**	20.0	75.4	85.2	60.0
Female/FM	13.3*	9.1**	25.0	80.0	81.2	75.0
Female Col.	22.7	31.7	8.0	78.8	90.2	60.0
No Female	27.9	31.9	17.1	77.5	88.3	48.7
White	23.9	29.8	12.7	86.1	87.5	54.6
Non-White	36.1	38.7	20.0	76.1	93.6	40.0
White/WW	24.8	26.5	21.2	83.2***	88.2	72.7***
White/WM	23.6	37.1	0	63.6***	85.7	25.0***
White/MM	0	0	0	66.7***	100	50.0***
Min/WW	33.3	36.8	20	83.3	94.7**	40.0
Min/WM	50.0	50.0	0	100	100**	0
MMM	0	0	0	50	50.0**	50
Min. Col	22.4	36.1	0**	68.6** ²³⁴	86.1	27.3***
No. Min.	24.8	26.5	21.0**	83.2**	88.2	72.7***
Before 65	29.3	86.7	85.2	78.9	87.8	61.0*
After 65	20.8	82.6	86.7	76.4	90.6	36.8*
Cong	37.5	37.5	NA	100	100	NA
No Cong	25.7	31.5	13.3	77.0	88.2	53.3
Leg	41.7	50.0	0	83.3	100	0
No Leg	25.1	30.4	13.8	77.6	88.0	55.2
Fed Govt	24.7	29.4	13.8	76.3	83.8	58.6
No Fed G	27.6	34.3	12.9	79.6	94.1	48.4
Agency	23.7	27.1	13.8	74.3	82.8	58.6
No Agency	28.4	35.1	12.9	80.4	94.4	48.4
Top 14	32.0**	37.9**	15.1	82.8**	92.6**	48.2
No Top 14	16.4**	17.5**	11.1	69.9**	80.0**	57.6

Table 6 also details how judges with varying demographic features feel about deference regimes. The results make clear that these demographic factors do not have much effect in coloring how different authors views *Chevron* deference and the relationship of the agency to that of the court more

²³⁴ Limited to liberal Board decisions, having a minority colleague is statistically significant at 99% confidence, with *Chevron* deference being applied less when the Board's decision is liberal (67.7% v. 85.6%). It is not statistically significant if the court is reviewing a conservative Board decision.

generally. As detailed in Table 6, this study finds little evidence to support that a judge's support for particular deference regime is impacted by demographic factors like race, gender, circuit or prior employment in Congress or in the federal government. Not unexpectedly, Democratic authors cite and apply *Chevron* more than Republicans, but the differences are only statistically significant at 90% confidence for the former (33.9% v. 22.9% for *Citing Chevron*). The only other demographic statistically significant is whether the author attended a top 14 law school. If the author did, they are more likely to both *Cite Chevron* and *Apply Chevron* than those who did not attend top 14 law schools (32.0% v. 16.4% for *Cite Chevron* and 82.3% v. 69.9% for *Apply Chevron*), perhaps reflecting an emphasis on what students are taught in law school. Courts with no minorities on the panel differ from those with minorities in their proclivity to apply *Chevron* to overrule the statute when the two-step process is applied.

The results also show panel effects. For example, white judges sitting with at least one minority colleague overturning liberal Board decisions are less likely to *Apply Chevron*. Female authors with two male colleagues are more likely to *Cite Chevron* than if they have a female colleague.

Notably, however, the study was limited and small and it was only done of a single agency. Its findings may be unique to labor law or interpretation of the NLRA. Although the time horizon of the study spanned near a quarter of a century, there could be some temporal aspects to deference regimes that were not adequately accounted for. Further, this particular part of the study focused only on the opinion's authors. Broader study of more agencies using machine learning techniques will help scholars add to the conversation to see if the NLRB is an anomaly in this regard.

CONCLUSIONS

The analysis in this Article tells us more about how appellate courts review statutes as an empirical matter. The results indicate that at least at the NLRB, courts are political in their decisions, but they do not necessarily apply statutory methods in a consistently political way. Some tools, like plain text and text, are used most often to review conservative Board decisions while other tools like reliance on text or language canons are used in a more targeted way to overrule conservative Board decisions. While Democrat-majority and Republican-majority courts favor certain methods more than others, differences for the most part are not statistically significant. Other tools are used in a more ideological way. For instance, practical considerations are used in a different way when the ideology of the judge panel matches the ideology of the Board decision versus when it does not.

The Article's findings on *Chevron* deference are worthy of further study.

The results suggest that citation of *Chevron* influences choice of statutory method; those who cite the *Chevron* two step have more frequent references to text and language canons. Likewise, references to substantive canons, legislative history or precedent are often more common when not applying *Chevron* suggesting that courts may feel the greater need to use these tools to give the opinion greater legitimacy when not using the *Chevron* framework.

Finally, although they were only bivariate relationships, the study indicates that choice of statutory method and deference regime may be affected by the judge's demographic characteristics and work experiences as well as that of their colleagues.

The results also bear on the future of *Chevron*. As proposed in a prior article, agency statutory interpretation should change, and appellate review should change along with it.²³⁵ The Board should use its expertise to craft legal doctrine that advances the NLRA's purpose, collecting evidence on policy and pragmatic consequences of a given decision.²³⁶ As Mashaw argues, "[a]gency control of . . . its interpretive agenda argues for an interpretive approach that engages in a wider-ranging set of policy considerations and a more straightforward approach to political context than would be constitutionally appropriate for the judiciary."²³⁷ At present, the NLRB chooses between "competing constructions . . . within the range of meanings that the statutory language can support" when interpreting statutes.²³⁸ In essence, the conflict boils down to one side advocating that a term be construed broadly with the other arguing for a narrow construction. Traditional methods of statutory interpretation relying on the text or legislative history are of little consequence in answering that question, because the answer boils down to a political calculation of whether the decisionmaker believes the NLRA should be interpreted broadly to cover a wider array of workers in disadvantaged positions. This is more a debate about policy than about textualism.

If the NLRB is truly going to serve its foundational mission, it needs to start acting more like a policymaking court rather than a court who does policymaking on the side.²³⁹ Board decisions often predict dire consequences

²³⁵ Semet, *supra* note 7.

²³⁶ O'Gorman, *supra* note 58, at 215-216; Mashaw, *supra* note 23, at 510.

²³⁷ Mashaw, *supra* note 23, at 510.

²³⁸ Richard J. Pierce, *How Agencies Should Give Meaning to the Statutes They Administer: A Response to Mashaw and Strauss*, 59 ADMIN. L. REV. 197, 200 (2007).

²³⁹ Fisk & Malamud, *supra* note 164, at 2057 ("The Board continues to operate like a court, limiting itself to the specific issues brought to it by its general counsel, failing to bring multiple areas of Board doctrine together to enrich its understanding and amplify its remedial capacities, and most of all, using rights rhetoric as a way to mask what would otherwise be its obligation to seek out (let alone generate) empirical assessments of the effects of its policies.")

of a given decision, yet never lay out the empirical evidence to back it up. The NLRB can be reformed to give it more power to engage in policymaking in a more explicit and fairer way. For instance, if the NLRB were to truly embrace its policymaking role, it would ask parties that appear before it to brief the economic effects that would flow from its decision. Rather than vague assertions of “policy” or pontifications about a given case’s possible ramifications, the Board should consider expert opinions so as to have a solid foundation to inform policymaking to serve the aims of (1) avoiding strikes; and (2) increasing wages, the twin aims that Congress states as the underlying purpose of the NLRA.

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