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JUDICIAL INCENTIVES AND INDETERMINACY IN SUBSTANTIVE REVIEW OF ADMINISTRATIVE DECISIONS

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It was not supposed to be like this. In *Chevron*[1] and *State Farm*,[2] the Supreme Court announced what appeared to be controlling standards for substantive review of administrative decisions. *Chevron* adopted a two-step approach to statutory interpretation under which courts were to overturn agency interpretations that were contrary to the clear intent of Congress, but defer to permissible agency constructions of a statute.[3] *State Farm* indicated that an agency's policy judgments should be analyzed according to a specific set of inquiries that focused on the agency's reasoning process.[4] Administrative law scholars, whether they agreed or disagreed with the Court's standards, assumed that the two cases were landmark decisions that signaled a turning point in the substantive review of agency decisions.[5] Instead, the *Chevron*

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1. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

2. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).

3. *Chevron*, 467 U.S. at 842–43.

4. *See State Farm*, 463 U.S. at 43.

5. *E.g.*, Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the*

framework has broken down, and *State Farm* has been all but ignored by agencies and the courts, including the Supreme Court.

This article accounts for this breakdown by analyzing the impact of judicial incentives on substantive review in administrative law. Part I offers a model of judicial behavior based on the "craft" and "outcome" components of judicial decisionmaking. Judges engage in the well-reasoned application of doctrine as a matter of craft, and they consider the implications of a result for the parties and society in general as a matter of outcome. When these components pull in opposite directions in a given case, our model suggests how judicial incentives influence the resolution of this tension. Part II uses our model of judicial behavior to explain the lack of influence of *Chevron* and *State Farm*. Judges have stronger incentives to control outcome and weaker incentives to develop determinate craft norms that limit pursuit of outcome in administrative law than in other areas of law. Because reliance on indeterminate craft norms enables judges to pursue outcome without sacrificing craft, judges have avoided applications of *Chevron* and *State Farm* that are determinate. Finally, Part III proposes a modified approach to substantive judicial review that accounts for the way that judicial incentives influence substantive review doctrine. We recommend that Congress require courts to respond to a series of specific questions that would apply to substantive agency decisions. These questions would make it more difficult for judges to manipulate scope of review standards and would require more explicit reasons for affirming or reversing an agency decision.

Administrative State, 89 COLUM. L. REV. 452, 455 (1989); Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 513 (1985); Robert Glicksman & Christopher H. Schroeder, *EPA and the Courts: Twenty Years of Law and Politics*, 54 LAW & CONTEMP. PROBS., Autumn 1991, at 249, 295–96; Richard J. Pierce, Jr., *Political Control Versus Impermissible Bias in Agency Decisionmaking: Lessons from* Chevron *and* Mistretta, 57 U. CHI. L. REV. 481, 483 (1990) [hereinafter Pierce, *Political Control*]; Richard J. Pierce, Jr., Chevron *and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301, 302 (1988); Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Administrative Law*, 1990 DUKE L.J. 984, 1023; Sidney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 DUKE L.J. 387, 423; Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1095 (1987); Cass R. Sunstein, *Deregulation and the Hard-Look Doctrine*, 1983 SUP. CT. REV. 177, 178.

I. MODEL OF JUDICIAL BEHAVIOR

This section offers a model of judicial behavior based on judicial incentives to pursue the craft and outcome components of judicial decisions. Our model, which draws on the burgeoning literature on social choice (or institutional theory) and judicial behavior,[6] reveals that a tension exists between the craft and outcome components that can be relieved by the adoption of indeterminate craft norms.

A. *Craft and Outcome*

Our model of judicial behavior begins by identifying two generally accepted components of judicial decisionmaking that we call "craft" and "outcome." By craft, we mean the well-reasoned application of doctrine to the circumstances of a particular case.[7] Craft reflects the values of consistency with constitutional and statutory provisions and continuity with prior caselaw, but permits interstitial evolution and, in exceptional cases, overruling precedent.[8] Outcome, on the other hand, focuses on the result in a given case and its implications for the parties and society as a whole; it reflects the values of justice and social utility as filtered through a judge's worldview. A "pure" craft orientation is outcome-neutral in the sense that the judge does not consider the implications of a given result for the parties or society in general. Under a "pure" outcome orientation, the judge would not consider consistency

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6. *See, e.g.*, SHELDON GOLDMAN & THOMAS P. JAHNIGE, THE FEDERAL COURTS AS A POLITICAL SYSTEM (3d ed. 1985); DAVID W. RHODE & HAROLD J. SPAETH, SUPREME COURT DECISION MAKING (1976); GLENDON SCHUBERT, THE JUDICIAL MIND (1965); GLENDON A. SCHUBERT, QUANTITATIVE ANALYSIS OF JUDICIAL BEHAVIOR (1959); JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993); Mark A. Cohen, *The Motives of Judges: Empirical Evidence from Antitrust Sentencing*, 12 INT'L REV. L. & ECON. 13 (1992) [hereinafter *The Motives of Judges*]; Mark A. Cohen, *Explaining Judicial Behavior or What's "Unconstitutional" About the Sentencing Commission*, 7 J. L. ECON. & ORG. 183 (1991) [hereinafter *Explaining Judicial Behavior*]; Richard A. Epstein, *The Independence of Judges: The Uses and Limitations of Public Choice Theory*, 1990 B.Y.U. L. REV. 827; Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1 (1993); Nicholas S. Zeppos, *Deference to Political Decisionmakers and the Preferred Scope of Judicial Review*, 88 NW. U. L. REV. 296 (1993).

7. *See* KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 214–15 (1960) (describing the appellate judge's job as the application of "craft").

8. ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 222 (1993).

with positive law or continuity with prior cases to be relevant to a decision.

Neither a pure craft nor a pure outcome orientation exists in practice. All judges value both craft and outcome to some degree, and many decisions involve some combination of craft and outcome.[9] The value that a judge accords craft and outcome in a particular decision reflects the utility that the judge gains from a particular orientation. The next section considers why judges value both craft and outcome, and the following section explains the relationship of these components of judicial review.

B. *Judicial Utility*

Social choice theory has had some difficulty accounting for judicial behavior because the judiciary has been structured to sharply reduce the self-interested motivations typically identified with other political actors (e.g., financial rewards, promotion, reelection).[10] Nonetheless, three types of incentives are recognized in the literature and accord with our observations of the real world of judicial behavior: respect, ideological utility, and leisure.[11] Judges typically gain respect by a craft orientation and obtain ideological utility from an outcome orientation. A judge's pursuit of leisure, by comparison, is not strongly correlated with either craft or outcome.

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9. *See id.* at 118 ("The judge's interest in the well-being of the law encompasses a variety of concerns—the concern for doctrinal coherence, for example, and for the responsiveness of doctrine to social and economic circumstances.").

10. *See* Epstein, *supra* note 6, at 827 ("Given the set of institutional constraints under which judges routinely labor, the basic assumption of public choice theory—that self interest rules behavior in public as well as private transactions—*should* yield only weak and instructive generalizations about judicial behavior."); Jeffrey N. Gordon, *Corporations, Markets, and Courts*, 91 COLUM. L. REV. 1931, 1967 (1991) ("Developing a theory that relies upon judges' responsiveness to political pressures . . . presents something of a puzzle."); Jonathan R. Macey, *Competing Economic Views of the Constitution*, 56 GEO. WASH. L. REV. 50, 69 (1987) (suggesting that judges have no rational incentives to enforce interest-group bargains); Posner, *supra* note 6, at 4–5 (explaining that judicial salaries are fixed and do not vary with performance or outcome). *But see* Eugenia F. Toma, *Congressional Influence and the Supreme Court: The Budget as a Signaling Device*, 20 J. LEGAL STUD. 131, 146 (1991) ("As long as the Congress controls the purse strings, members of the Supreme Court will not be totally autonomous agents."); Zeppos, *supra* note 6, at 298 (arguing that powerful interest groups prefer that judges engage in nondeferential review).

11. *See Explaining Judicial Behavior*, *supra* note 6, at 186; Macey, *supra* note 10, at 70; Posner, *supra* note 6, at 13–15.

1. *Incentives.* Both the respect of others and self-respect are important motivating factors for judges. Judges value the prestige and esteem associated with their position and wish to maintain and enhance their reputation within the bench and bar.[12] Likewise, judges understandably take pride in their work and gain satisfaction from a job well done.[13] At one level, respect (particularly self-respect) is valued for its own sake. At another level, a good reputation is valuable because it enhances a judge's influence within the profession and, through that influence, the judge's ability to influence other judges.[14] Finally, reputation affects a judge's limited opportunities to gain financial rewards or promotion.[15]

Judges also gain utility from influencing public events in accordance with their worldview. Implementing one's ideology may reflect a judge's self-interest because decisions favoring groups of which the judge is a member (e.g., property owners) also benefit the judge.[16] Because judges must avoid cases in which they have a financial interest,[17] however, this form of self-interest has at best an indirect influence.[18] A judge might also gain satisfaction from influencing public events because judicial decisionmaking is an exercise in power, which may be valued for its own sake.[19] For many political actors, however, ideological preferences are

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12. Jack M. Beermann, *Interest Group Politics and Judicial Behavior: Macey's Public Choice*, 67 NOTRE DAME L. REV. 183, 221–22 (1991); *Explaining Judicial Behavior*, *supra* note 6, at 186.

13. Posner, *supra* note 6, at 19.

14. *See* Macey, *supra* note 10, at 70; Jonathan R. Macey, *The Internal and External Costs and Benefits of Stare Decisis*, 65 CHI.-KENT L. REV. 93, 94 (1989).

15. *See Explaining Judicial Behavior*, *supra* note 6, at 188; *The Motivcs of Judges*, *supra* note 6, at 16.

16. *See* Richard E. Levy, *Escaping* Lochner*'s Shadow: Toward a Coherent Jurisprudence of Economic Rights*, 73 N.C. L. REV. 329, 420 n.392 (1995) (suggesting that the "class based implications" of recent Supreme Court Contracts and Takings Clause cases "may reflect the conscious or unconscious pursuit of doctrinal positions that furthered the interests of conservative Justices' political constituencies.").

17. 28 U.S.C. § 455(b)(4) (1988); *see* Joan Biskupic & Albert B. Crenshaw, *White House Responds to Ethics Concerns on Breyer's Rulings in Toxic Waste Cascs*, WASHINGTON POST, July 12, 1994, at A6 (describing the controversy concerning the possible conflict of interest of a Supreme Court nominee in cases that he decided as a federal appellate judge).

18. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 19.7, at 534 (4th ed. 1992).

19. Posner, *supra* note 6, at 17.

"other regarding";[20] they reflect a sense of individual or social justice that transcends any identifiable self-interest.[21] This motivation would appear to be even greater for judges, who are not burdened by the necessity of being reelected.[22]

In addition to respect and ideological orientation, social choice scholars posit that judges seek to reduce their work and expand their leisure time.[23] In this sense, judges are no different from other people—they work because the utility gained from working outweighs the opportunity costs in terms of pursuing other activities. The incentive to work hard is reduced because judges lack the financial rewards typically attached to job performance; however, judges will pursue leisure only when the utility they gain from it outweighs the respect-based and ideological utility they may gain through work.

2. *Behavior.* Judicial behavior is affected by the incentives discussed above because the craft and outcome components of judging affect the extent to which judges obtain respect, ideological rewards, and leisure. Judges generally gain respect from a craft orientation and ideological rewards from an outcome orientation, although the opposite associations can occur. Leisure, however, is not directly correlated with either craft or outcome.

Respect as a motivating factor will generally favor a craft orientation because of the legal profession's norms.[24] The legal profession holds craft in high regard because it preserves consistency and predictability in the law.[25] These attributes also serve

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20. Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward A Synthesis*, 6 J. L. ECON. & ORG. 167, (Special Issue 1990).

21. *See* Patricia M. Wald, *The Role of Morality in Judging: A Woman Judge's Perspective*, 4 LAW & INEQ. J. 3, 12 (1986) (discussing the sources to which a judge should turn for guidance when she must answer difficult questions of morality); Steven Kelman, *Why Public Ideas Matter, in* THE POWER OF PUBLIC IDEAS 32, 32 (Robert B. Reich ed., 1988) (explaining that public officials are influenced by public policy concerns).

22. Jonathan R. Macey, *Judicial Preferences, Public Choice, and the Rules of Procedure*, 23 J. LEGAL STUD. 627, 631 (1994) [hereinafter *Judicial Preferences*]; *see* Levine & Forrence, *supra* note 20, at 193 (stating that public officials' responsiveness to voters is a function of the risk that taking a position will cost votes).

23. *E.g., Explaining Judicial Behavior, supra* note 6, at 187.

24. *See* Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518, 527 (1986) (arguing that friends and enemies will see the judge as "having violated a role constraint" if the judge does not offer a "good legal argument" for a decision).

25. STEVEN J. BURTON, AN INTRODUCTION TO LAW AND LEGAL REASONING 18

to establish the accountability of judges and therefore impact significantly on the legitimacy of the judiciary.[26] Although a judge normally gains respect by pursuing a craft orientation, outcome may also be important for a judge's self-respect and reputation in some circumstances and some circles. For example, when a case presents issues critical to a judge's values, the judge's self-respect may compel an outcome consistent with those values. Moreover, if a judge values what persons holding certain ideological views think of him, the outcome in certain cases may also be important.[27]

Ideological utility generally favors an outcome orientation because it is the outcomes of judicial decisions that influence public events. The effect of ideology, however, is complicated by two factors. First, a judge's ability to influence events is to some degree dependent on the judge's allegiance to craft; a decision that substantially departs from craft may not influence other judges because they usually hold conformance with craft in high regard. Second, craft is often an important component of a judge's ideology because that ideology will include beliefs concerning the judiciary's role in a democratic society. These beliefs will affect (and will probably limit) how a judge will act on other ideological values such as fairness, equity, or the role of the government in the economy.

We see no consistent correlation between the pursuit of leisure and either a craft or an outcome orientation.[28] Judges may pursue outcomes that reduce their workloads, but it is not easy to identify what those outcomes might be. On the one hand, the "easiest" path in many cases may be adhering to doctrine, which would tend to support a craft orientation.[29] On the other hand, some outcomes may reduce a judge's caseload by closing off access to the courts in future cases. There is at least some empirical evidence, however, that judges will not seek to reduce their workload when doing so would reduce their power and authority.[30]

(1985).

26. *Id.* at 167–68.

27. *The Motives of Judges*, *supra* note 6, at 16; *see* David A. Strauss & Cass R. Sunstein, *The Senate, the Constitution, and the Confirmation Process*, 101 YALE L.J. 1491, 1507–08 (1992) (describing ideological screening of judges by the executive branch).

28. *See Judicial Preferences*, *supra* note 22, at 629 (noting that the preference for leisure may be consistent or inconsistent with other judicial incentives).

29. *See* Kennedy, *supra* note 24, at 528.

30. *See Explaining Judicial Behavior*, *supra* note 6, at 198 (stating that judges with

Given the attenuated correlation between leisure and craft or outcome orientation, our model focuses on how the respect and ideological incentives influence the relationship between craft and outcome.

C. *Judicial Utility and Doctrinal Determinacy*

In light of the previous discussion, we offer certain basic conclusions about the relationship between craft and outcome and its implications for judicial decisions. Our basic contention is that a judge's outcome orientation is a function of the determinacy of craft norms.

Outcome orientation and craft norms may be clearly consistent or inconsistent. If they are consistent, judges will decide cases in accordance with their preferred outcome. In this context, a judge can maximize ideological utility without sacrificing the respect that comes from following craft. If craft and outcome are clearly inconsistent, judges will tend to follow a craft orientation for two reasons. First, as noted earlier, craft is the dominant component of judicial decisionmaking.[31] As a result, judges who ignore clear craft norms in order to pursue an outcome orientation are likely to suffer a loss of respect among fellow jurists, lawyers, and the public.[32] Second, an outcome orientation may be self-defeating. In the case of lower courts, decisions that clearly conflict with craft norms are likely to be reversed on appeal, thus sacrificing respect based on adherence to craft norms without having any influence on public events. At the appellate level, including the Supreme Court, collegiality operates as a constraint; a judge or Justice's ability to pursue outcome is limited by the necessity of gaining a majority for a given result. More generally, whether

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crowded dockets tended to rule that the U.S. Sentencing Commission was unconstitutional and that those judges with prospects of being appointed to a vacant appeals court position were less likely to do so).

31. *See supra* notes 24–26 and accompanying text.

32. *See* Kennedy, *supra* note 24, at 529 (claiming a direct correlation between the judge's "stock of legitimacy [] at stake" and the degree of inconsistency between preferred outcome and applicable craft norms.) This loss of reputation can have more than psychological effects. Despite the increasing attention to ideology in judicial appointments, for example, a nominee without a sufficient reputation for craft might be rejected. *See, e.g.*, ETHAN BRONNER, BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA 148 (1989) (noting that Judge Bork's opponents successfully characterized him as being outside of the mainstream of constitutional jurisprudence).

decisions have a lasting impact is a function of their consistency with, and a judge or Justice's reputation for, craft.

The extent to which craft will constrain the pursuit of outcome orientation is related to the determinacy of the craft norms.[33] As Figure 1 illustrates, the more determinate the norm is, the more likely it is to constrain a judge's pursuit of an outcome:

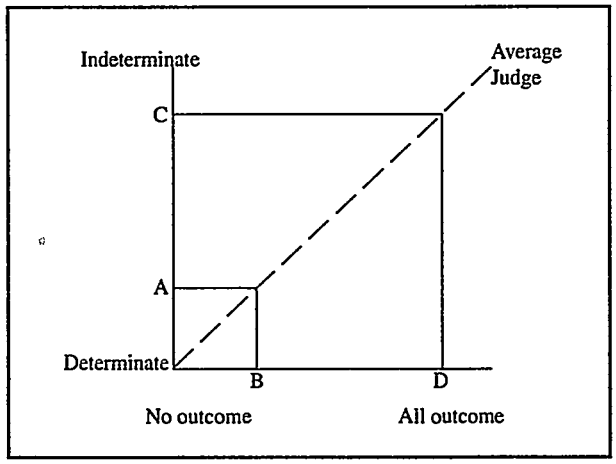

FIGURE 1

In Figure 1, the Y axis reflects the determinacy of applicable craft norms. Norms may be completely determinate (at the bottom of the axis), completely indeterminate (at the top of the axis), or somewhere in between. For purposes of Figure 1, we assume that judges cannot affect the level of determinacy and must accept applicable craft norms.[34] The X axis reflects the pursuit of outcome in which a judge has the choice of pursuing outcome entirely (at the right extreme), not at all (at the left extreme), or to some extent in between these extremes.

We posit that the average judge becomes less outcome-oriented as craft becomes more determinate (upward sloping line

33. *See* Kennedy, *supra* note 24, at 549 (stating that the judge tries to move "the law in the direction of [the preferred outcome], and to the extent the law is resistant, [the judge is] under pressure to move toward the law").

34. How judicial incentives affect preferences for determinate or indeterminate craft norms is discussed *infra* following note 37.

marked "average judge"). When craft is very determinate (A), the judge will feel constrained in pursuing outcome and act accordingly (B). When craft is very indeterminate (C), the judge will feel freer to pursue outcome and will be more outcome-oriented (D). The judge will behave in this manner for several reasons. It is more difficult to reconcile the pursuit of a given outcome with apparently contradictory craft norms when those norms are more determinate. This problem increases the likelihood that a judge's pursuit of outcome would be regarded as sacrificing craft and thus entails a loss of respect. In addition, it is more likely that the institutional constraints of collegiality and appellate review would frustrate the judge's pursuit of outcome. Finally, the effort to reconcile the outcome with more determinate craft norms may interfere with the pursuit of leisure.

Figure 1 indicates how the level of determinacy affects the average judge. The extent to which particular judges are constrained by determinacy depends on two factors. First, if a judge can successfully manipulate craft norms, he will be less constrained in reaching a preferred outcome.[35] When craft is successfully manipulated, the judge has a lower risk of a loss of respect for an outcome-oriented decision. Indeed, great judges are not only brilliant at manipulating craft norms, but also enhance their reputation by doing so.[36] Nevertheless, most judges are constrained by more determinate craft norms because they are more difficult to manipulate.

Second, as Figure 2 indicates, individual judges will have different preferences concerning craft and outcome when the two are in conflict:

35. *Cf.* Kennedy, *supra* note 24, at 530–42 (describing legal techniques to manipulate craft norms towards a preferred outcome).

36. LLEWELLYN, *supra* note 7, at 214–15.

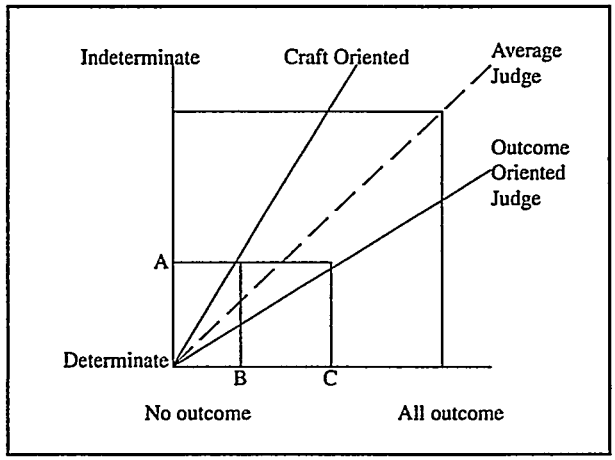

FIGURE 2

In Figure 2, some judges (indicated by the upward sloping line marked "craft-oriented judge") will hew more closely to craft as indeterminacy increases than the average judge. These judges value craft more and outcome less than the average judge, and will therefore struggle to apply even relatively indeterminate craft norms without regard to outcome. Other judges (indicated by the upward sloping line marked "outcome-oriented judge") will be more resistant to following craft even when craft is relatively determinate. These judges value outcome more and craft less than the average judge. For example, a judge might find that outcome is important because a case implicates values that the judge considers important or because the judge covets the respect of a group of persons who care intensely about the outcome.[37] At the same level of determinacy (A), the craft-oriented judge will be less likely to pursue outcome (B) than the outcome-oriented judge (C).

Although the model to this point has assumed that judges take the level of determinacy as a given, judges actually have significant control over the determinacy of craft norms. Because doctrinal indeterminacy permits judges to pursue outcome without sacrificing craft—thus maximizing utility from respect, ideology, and leisure—it is not surprising that much of judicial doctrine is

37. *See supra* note 27 and accompanying text.

indeterminate. Balancing tests, for example, permit judges to reach more outcome-oriented decisions without a sacrifice of craft. Open-ended tests, such as reasonableness, serve the same function.

Judicial incentives to create indeterminate doctrine are self-limiting, however. Indeterminacy can increase a judge's ability to pursue an outcome in a particular case, but it also reduces the judge's ability to influence outcomes in future cases. For example, if judges can overrule past decisions easily, they can reach desired outcomes despite the limits of doctrine; but this also means that their present decisions can easily be overruled by future courts.[38] Thus, the optimal level of doctrinal determinacy in a given field (for given judges) will depend on the relative strengths of the desire to pursue outcomes in present cases and to influence outcomes in future cases.

II. JUDICIAL BEHAVIOR AND ADMINISTRATIVE DECISIONS

Both craft and outcome are important to a judge in general. When there is a conflict, the judge must determine to what extent he or she will sacrifice craft for an outcome-oriented decision. The tension between craft and outcome, however, can be reduced to the extent that craft norms are vague and indeterminate. Courts will create indeterminate craft norms when judges are particularly concerned about outcomes in present cases, especially if their concern for influencing future decisions is limited. Judicial behavior in substantive review of administrative decisions is consistent with this prediction, which helps explain the decline of *Chevron* and *State Farm.*

A. *Judicial Incentives*

Judicial incentives in administrative law are more oriented towards the pursuit of outcome than in other legal areas for two reasons. First, the utility of being outcome-oriented is greater than in private law areas. Second, the disutility of having indeterminate craft norms is not as great as in other legal areas. In light of these influences, judges favor indeterminate craft norms.

38. *Cf.* RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 217 (1985) (arguing that conservative judges should not be bound by judicial restraint to respect liberal decisions).

Judges have stronger incentives to pursue an outcome orientation in administrative law because, as compared to most private litigation, administrative law cases are more likely to involve important issues of public policy.[39] This is especially true if, as is often the case, an agency decision has far-reaching implications for society because of its general applicability. The importance of such cases increases the utility that a judge derives from an outcome-oriented result that favors his or her worldview.[40] In administrative law, indeterminate judicial review norms permit a judge, without a loss of respect, to intervene when the agency decision runs counter to the judge's strongly held values and to defer when the agency decision is consistent with them.[41]

Judicial incentives are different in administrative law in a second way that affects the determinacy of judicial review doctrines. A judge ordinarily prefers an indeterminate craft norm. However, the use of such a norm limits the judge's ability to influence the resolution of future cases because other judges are also less constrained in pursuing their own views of an appropriate outcome.[42] In administrative law, however, the desire to influence future outcomes by the adoption of determinate craft norms is especially weak. For example, a judge might favor a more determine craft norm for a specific agency. The number of agencies

39. This is not to say that all administrative decisions have important public policy implications; indeed, the vast majority probably do not. It is therefore to be expected that the majority of agency decisions will be affirmed notwithstanding the indeterminacy of deferential craft norms. However, a significant portion of high-profile cases, particularly those that make it to the Supreme Court, involve important public policy considerations. *See, e.g.*, Rust v. Sullivan, 500 U.S. 173 (1991) (involving the prohibition on abortion counseling, referral, and advocacy for clinics receiving federal funds); Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983) (involving federal motor vehicle safety standards); Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607 (1980) (involving the federal standard on permissible exposure to certain hazardous substances).

40. Of course, some judges may place great weight on the outcome of a particular case for the parties and have little concern for broader public policy considerations. These judges may have stronger incentives to pursue outcome in private law cases than in public law cases. On the whole, however, we believe that judges in general, and appellate judges in particular, are likely to derive greater ideological utility from deciding cases with broad public policy implications.

41. *Judicial Preferences*, *supra* note 22, at 640–41.

42. As noted previously, judges' pursuit of outcome is often limited by their desire to create a rule that is binding on later courts. If judges adopt a rule that is relatively indeterminate, future judges will be less constrained in pursuing an outcome orientation. *See supra* text accompanying note 38.

and the variety of contexts in which agencies render decisions, however, make it unlikely that the judge will have the same attitude concerning the policy views of all other agencies.[43] A second problem is that the judge cannot be certain which political party will control the executive branch or what regulatory philosophy the administration might adopt. Since judges serve for life, they will typically see a number of administrations come and go. This means that judges will encounter agencies with opposing views on public policy in the future. Thus, judges will be reluctant to establish a determinate craft norm to control future cases. Even if a judge generally favors the regulatory approach of the current administration, there will still be situations in which the judge's strongly held values require intervention or in which the judge would prefer intervention by other judges with similar views of public policy.[44]

B. *Doctrinal Indeterminacy*

Our model predicts that judicial incentives in administrative law favor reliance on indeterminate craft norms for judicial review. As discussed below, the behavior of judges in administrative law is consistent with this prediction. Indeterminacy in judicial review has been achieved primarily through two mechanisms: the use of open-ended "standards" of deference and the proliferation of manipulable categories to which different degrees of deference apply. Judicial reliance on open-ended standards is illustrated by the scope of review applied to agency policy decisions. The use of manipulable categories is illustrated by judicial review of statutory interpretation. While *State Farm* and *Chevron* appeared to introduce more determinate doctrines in each area, respectively, subsequent devel-

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43. Despite the President's ability to influence agency decisions through appointments, direct oversight, and removal, it is unlikely that all agency decisions reflect a uniform public policy perspective; some agencies are independent (and may contain carry-over appointments), and the permanent staff of agencies are often resistant to the policy agenda of political appointments. *See* Sidney A. Shapiro, *Political Oversight and the Deterioration of Regulatory Policy*, 46 ADMIN. L. REV. 1, 4 (1994) (describing the problem of "slack" in regulatory agencies). Even if agencies did reflect the President's policy perspective, it is unlikely that any given Justice—much less the Court as a whole—would agree with every aspect of that policy.

44. This insight may explain why judges apparently follow interest-group preferences against highly deferential review doctrines. *See* Zeppos, *supra* note 6, at 298 (arguing that judicial activism reflects interest group preferences against highly deferential review doctrines).

opinents have returned substantive review doctrine to its indeterminate state.

1. *Scope of Review.* The Administrative Procedure Act (APA) establishes "substantial evidence"[45] and "arbitrary [and] capricious"[46] as the scope of review standards for agency adjudication and rulemaking. These phrases capture the general idea of the appropriate level of deference[47] and are somewhat comprehensible in relation to each other.[48] But as those familiar with administrative law know, the Supreme Court has failed to give these tests precise content.

The substantial evidence standard, which applies to agency fact finding in formal adjudications and some rulemakings,[49] is typically defined as "more than a mere scintilla" or "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[50] Although this standard is understood as being "highly deferential,"[51] it has been applied with varying degrees of deference in different contexts. For example, federal courts were less deferential in social security benefit cases when the Social Security Administration (SSA) tightened eligibility standards in the 1980s.[52]

Similarly, the arbitrary and capricious standard is relatively open-ended, and the Supreme Court has not given it more precise

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45. 5 U.S.C. § 706(2)(E) (1988).

46. 5 U.S.C. § 706(2)(A) (1988).

47. *See infra* notes 50–52, 53–58 and accompanying text.

48. American Paper Inst., Inc. v. American Elec. Power Serv. Corp., 461 U.S. 402, 412 n.7 (1983) (noting that the arbitrary and capricious test is "more lenient"). *But see* Association of Data Processing Serv. Orgs., Inc. v. Board of Governors, 745 F.2d 677, 686 (D.C. Cir. 1984) (explaining that the standards are identical as they apply to findings of fact).

49. 5 U.S.C. § 706 (1988).

50. Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938); *see also* Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951) (explaining that the evidence must be "substantial" after the reviewing court takes into account "whatever in the record [that] fairly detracts from its weight").

51. KENNETH C. DAVIS & RICHARD J. PIERCE, JR., 2 ADMINISTRATIVE LAW TREATISE § 11.2, at 177 (1994).

52. Carolyn A. Kubitschek, *A Re-Evaluation of* Mathews v. Eldridge *in Light of Administrative Shortcomings and Social Security Nonacquiescence*, 31 ARIZ. L. REV. 53, 75–76 (1989); Richard E. Levy, *Social Security Disability Determinations: Recommendations for Reform*, 1990 B.Y.U. L. REV. 461, 506–07. Federal judges "angered" by the SSA's policy decisions increased the agency's rate of reversal from 20% to 57% during this period. Pierce, *Political Control*, *supra* note 5, at 518.

content. According to *Overton Park*, this scope of review is a "narrow one" yet there should be "a thorough, probing in-depth review" that is "searching and careful."[53] After the lower federal courts interpreted the phrase "thorough, probing in-depth review" as sanctioning aggressive (i.e., "hard look")[54] judicial review,[55] the Court signaled its disapproval in *Baltimore Gas & Electric*.[56] *State Farm*, however, again sent conflicting messages concerning the appropriate level of deference. On the one hand, it warned that the "scope of review . . . is narrow and a court is not to substitute its judgment for that of the agency."[57] On the other hand, the majority seemingly engaged in aggressive substantive review of one aspect of the agency decision in question.[58]

Despite the dual personality of *State Farm*, we previously expressed the hope that it might lead to a more determinate approach to substantive review.[59] In *State Farm*, the Court adopted a more exact definition of the arbitrary and capricious standard under which a court would look at four aspects of an agency's decision: whether the agency relied on factors that Congress had not intended it consider; whether the agency failed to consider "entirely" an important aspect of the problem it was solving; whether the agency offered an explanation for its decision that ran counter to the evidence; and whether the agency's decision was so implausible that it could not be explained as a product of agency expertise

53. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415–16 (1971).

54. Greater Boston Television Corp. v. F.C.C., 444 F.2d 841, 851 (1970).

55. *See* Harold Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509, 511 (1974) (endorsing "hard look" review).

56. Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87, 103 (1983).

57. Motor Vehicles Mfrs. Assn. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

58. The Court unanimously concluded that the National Highway Traffic Safety Administration's (NHTSA) failure to consider an "airbags only" rule was arbitrary and capricious in light of the agency's conclusion that manufacturers would opt for seatbelts if given a choice; the Court's decision was uncontroversial. *Id.* at 46–51. But the majority also reversed as arbitrary and capricious NHTSA's finding that passive seat belts would be ineffective because their uniform availability in cars would produce less than a 5% increase in seat belt usage. *Id.* at 53–54. After careful scrutiny of the scientific studies that NHTSA interpreted, the majority was unwilling to accept the agency's interpretation of the evidence. *Id.* at 56. By comparison, the dissent argued that more deference was owed to the agency's conclusions. *Id.* at 58 (Rehnquist, J., concurring in part, dissenting in part).

59. Shapiro & Levy, *supra* note 5, at 439.

or a difference in view.[60] Whether the Court actually intended to adopt a more determinate standard is unclear. The opinion does not stress this aspect of the case, although the definition is described as a synthesis of prior law.[61] In any case, the subsequent actions of the Court show that it had no interest in enforcing a more specific doctrine for scope of review. In the fifty-six cases that we surveyed, the Court cited *State Farm* only fifteen times in applying the arbitrary and capricious standard to an adjudicatory or rulemaking decision, and only four of the fifteen opinions mention the *State Farm* criteria.[62]

Because the Supreme Court has not promoted use of the *State Farm* criteria, the definition of "arbitrary and capricious" remains relatively indeterminate.[63] In the 118 cases that we surveyed, circuit courts cited *State Farm* only forty-five times in applying the arbitrary and capricious standard to an adjudicatory or a rulemaking decision, and only thirteen of the forty-five cases mentioned the *State Farm* criteria.[64] Our model predicts that judges are freer to pursue an outcome orientation in this circumstance. Scope of review decisions that confirm our prediction of

60. *State Farm*, 463 U.S. at 43.

61. *Id.*

62. We conducted a Westlaw search of decisions by the Supreme Court involving judicial review of administrative decisions between June 1983 and June 1993. Our query was "(arbitrary w/3 capricious) ("State Farm" w/7 "463 U.S.") (Satisfactory w/2 explanation w/5 actions) ("rational connection") ("adequate reasons") (5 w/2 U.S.C. w/2 706) % To("Criminal Law")."

63. Moreover, *State Farm* and *Baltimore Gas & Electric* create a categorization problem. In *Baltimore Gas & Electric*, the Court held that when an agency "is making predictions, within its area of special expertise, at the frontiers of science, . . . as opposed to simple findings of fact, a reviewing court must generally be at its most deferential." Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87, 103 (1985). Because *State Farm* appears to authorize less deferential review, a court must decide when *State Farm*, instead of *Baltimore Gas & Electric*, applies. Glicksman & Schroeder, *supra* note 5, at 296–97. Referring to this categorization problem, the Fifth Circuit has noted that the Supreme Court's decisions "seem to embody two different approaches that are, 'analytically in conflict "with the result that a court of appeals must choose the one it deems more appropriate for the case at hand."'" Chemical Mfrs. Ass'n v. EPA, 870 F.2d 177, 200 (5th Cir. 1989), *cert. denied*, 495 U.S. 910 (1990) (quoting HI-Craft Clothing Co. v. NLRB, 660 F.2d 910, 913–14 (3rd Cir. 1981)).

64. We conducted a Westlaw search of decisions by the United States Courts of Appeals involving judicial review of administrative decisions between November 1992 and November 1993. Our query was "(arbitrary w/3 capricious) ("State Farm" w/7 "463 U.S.") (Satisfactory w/2 explanation w/5 actions) ("rational connection") ("adequate reasons") (5 w/2 U.S.C. w/2 706)."

result-oriented behavior are easy to find,[65] although the extent of such behavior is uncertain.[66]

2. *Statutory Interpretation.* Judges are assisted in pursuing an outcome orientation in administrative law not only by the relatively open-ended nature of judicial review doctrines, but also by the existence of manipulable categories to which different degrees of deference apply. The reliance on categories dates back to *Hearst*[67] and *Packard*,[68] which established standards for reviewing interpretations of statutes in formal adjudications. These standards permit *de novo* review of pure questions of law, but require deferential rational basis review of mixed questions of law and fact. The difference between these two categories, however, has not always been clear, as *Hearst* and *Packard* themselves

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65. Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1412 (1992) ("It is not hard to find examples of judicial overreaching."); *see also* THOMAS O. MCGARITY & SIDNEY A. SHAPIRO, WORKERS AT RISK: THE FAILED PROMISE OF THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION 260 (1993) (stating that OSHA's judicial review experience "provides ample evidence of the difficulties that health and safety agencies face in attempting to promulgate rules"); JERRY L. MASHAW & DAVID L. HARFST, THE STRUGGLE FOR AUTO SAFETY 200 (1990) (arguing that NHTSA's "[l]osses in court stymied, embarrassed, and ultimately delegitimated the efforts of principal proponents of aggressive rulemaking"); Richard J. Pierce, Jr., *Two Problems in Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking*, 1988 DUKE L.J. 300, 302 (asserting that D.C. Circuit's review of agency policy decisions in the 1980s can only be explained by the policy predilections of individual judges and whether the majority of judges on a panel was appointed by a Republican or Democratic president); Richard J. Pierce, Jr., *Unruly Judicial Review of Rulemaking*, NAT. RESOURCES & ENV'T, Fall 1990, at 23, 24 (stating that D.C. Circuit's review of Federal Energy Regulatory Commission regulations demonstrates a "remarkable [judicial] instinct for the capillary"). *See generally* Richard E. Levy & Robert L. Glicksman, *Judicial Activism and Restraint in the Supreme Court's Environmental Law Decisions*, 42 VAND. L. REV. 343, 422 (1989) (discussing why Supreme Court environmental law decisions have pursued a consistently pro-development policy).

66. *See* ROSEMARY O'LEARY, ENVIRONMENTAL CHANGE: FEDERAL COURTS AND THE EPA 153 (1993) ("While the findings of this study do not necessarily negate a conclusion that *some* judges have become increasingly deliberate and aggressive in shaping regulatory policy, it is clear that a sweeping conclusion that judges generally have become increasingly deliberate and aggressive is not supported by the totality of the evidence."); Jim Rossi, *Redeeming Judicial Review: The Hard Look Doctrine and Federal Regulatory Efforts to Restructure the Electric Utility Industry*, 1994 WIS. L. REV. 763, 779; Patricia M. Wald, *Regulation at Risk: Are Courts Part of the Solution or Most of the Problem*, 67 S. CAL. L. REV. 621, 645 (1994); Ronald M. Levin, *Administrative Discretion, Judicial Review, and the Gloomy World of Judge Smith*, 1986 DUKE L.J. 258, 267.

67. NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944).

68. Packard Motor Car Co. v. NLRB, 330 U.S. 485 (1947).

demonstrate.[69] Judges have been able therefore to manipulate the "law" and "fact" categories to affect the standard of review.[70] *Chevron* replaced the *Hearst/Packard* distinction with a distinction between clear and ambiguous statutes, but this change has not brought about more determinacy. Under *Chevron*'s now famous two-step test, a court first inquires whether a statute is clear because Congress has "directly spoken to the precise question at issue." And if a statute "is silent or ambiguous with respect to the specific issue," a court is to defer to any "permissible construction of the statute."[71]

After *Chevron* was decided, it appeared for a time that the Court had introduced less manipulable categories than the prior distinction between questions of "law" and "fact." The language in *Chevron* appeared to order courts to go to step two if there was any ambiguity concerning Congress' intent about the meaning of a statutory term.[72] Since few statutes are absolutely clear, this approach appeared to create a presumption of statutory ambiguity that would be difficult to rebut.[73] Whatever the merits of this approach concerning its impact on separation of powers principles,[74] it would have made judicial review more determinate. In most cases, the courts would have moved to step two. At step two, judges would normally affirm an agency's interpretation of its

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69. In *Hearst*, the Court treated the definition of "employee" under the Labor Management Relations Act as a pure question of law for purposes of determining whether the term incorporated common law standards, but as a mixed question for purposes of determining whether newsboys were employees. *See Hearst*, 322 U.S. at 128–32. In *Packard*, however, the Court treated the question whether foremen were employees within the meaning of the Act as a pure question of law. *See Packard*, 330 U.S. at 488–92.

70. In NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974), for example, the Court "did precisely what it reversed the circuit court for doing in *Hearst* in the context of interpretation of the same term in the same statute." RICHARD J. PIERCE, JR. ET AL., ADMINISTRATIVE LAW AND PROCESS § 7.4, at 349 (2d ed. 1992).

71. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842–43 (1984) (citation omitted).

72. *Id.* at 843; Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc., 470 U.S. 116, 125 (1985).

73. Sidney A. Shapiro & Robert L. Glicksman, *Congress, the Supreme Court, and the Quiet Revolution in Administrative Law*, 1988 DUKE L.J. 819, 859.

74. *Compare* Farina, *supra* note 5, at 498 (arguing that highly deferential *Chevron* test is inconsistent with separation of powers principle) *with* Marshall J. Breger, *A Conservative's Comments on Edley and Sunstein*, 1991 DUKE L.J. 671, 677 (arguing that highly deferential *Chevron* test is appropriate in light of political accountability) *and* Richard J. Pierce, Jr., *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469, 505–06 (1985) (same).

mandate, except in the rare cases in which the agency did not have a "permissible" construction of its mandate.[75] The Court, however, has taken a different tack. It will move to step two only if it cannot determine Congress's intent by using tools of statutory construction.[76] Since such tools are inherently imprecise,[77] the Court has returned to a situation in which manipulable categories of different degrees of deference apply.[78]

Statistical evidence confirms that the *Chevron* framework has not led to a more determinate approach to judicial review. As discussed above, most cases would be resolved in favor of the agency at step two under the determinate version of *Chevron*. Yet, the rate of affirmance of agencies in the Supreme Court[79] and the circuit courts[80] is about the same now as (or even lower than)

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75. *Chevron*, 467 U.S. at 843.

76. *See, e.g.*, EEOC v. Arabian American Oil Co., 499 U.S. 244 (1991). In this decision, even Justice Scalia, the most ardent supporter of the more deferential version of *Chevron*, see INS v. Cardoza-Fonseca, 480 U.S. 421, 452–53 (1987) (Scalia, J., concurring), relied on a traditional tool. *Arabian American*, 499 U.S. at 259–60 (finding that presumption against extraterritorial application of statutes rendered agency construction unreasonable at step two of *Chevron*).

77. Eben Moglen & Richard J. Pierce, Jr., *Sunstein's New Canons: Choosing the Fictions of Statutory Interpretation*, 57 U. CHI. L. REV. 1203, 1219 (1990).

78. The Court has created a vagueness issue as well. *Chevron* requires a court to affirm an agency at step two if the agency's construction of the statute is a "permissible construction of the statute." Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984). Although the term "permissible" appears to require substantial deference by the courts to the agency's statutory interpretation, the Court did not define the criteria that a court should use in making this judgment. *See infra* notes 94, 96 and accompanying text (proposing criteria for this judgment).

In addition, there is a second categorization problem. If a court wishes to avoid giving the deference required by step two to an agency's statutory interpretation, it can characterize the agency's interpretation as a policy decision and review it under *State Farm*. Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1548 (1992); *see infra* notes 99–100 and accompanying text (proposing a solution to this categorization problem).

79. William Eskridge and Philip Frickey have calculated that agency positions prevailed in 62% of civil cases in the 1993 term. William N. Eskridge, Jr. & Philip P. Frickey, *Forward: Law as Equilibrium*, 108 HARV. L. REV. 26, 72 (1994). By comparison, Thomas Merrill has found that the Supreme Court affirmed agencies about 70% of the time for the five years following *Chevron* as compared to 75% of the time for the three years preceding *Chevron*. Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 984 (1992).

80. Peter Schuck and Donald Elliot calculated that the rate of affirmance in the federal appellate courts was 75.5% three years after *Chevron* as compared to 70.9% for the year preceding *Chevron*. Schuck & Elliot, *supra* note 5, at 1038. Another analysis concludes that the affirmance rate dropped from the lower to mid-70% range in 1983–1987 to the 60–70% range in 1988–1990. Linda R. Cohen & Matthew L. Spitzer,

before *Chevron* was decided. More tellingly, the Supreme Court only applies the *Chevron* framework in about one-third of its cases in which agency deference is an issue.[81]

The Court may not have intended that *Chevron* establish a more determinate (and more deferential) standard of review for agency statutory interpretation.[82] *Chevron*, however, did emphasize judicial deference to agencies because Congress implicitly delegated discretion to them and because they have greater policy expertise and political accountability than the courts.[83] Moreover, as Peter Strauss has explained, the Supreme Court must establish strong craft norms to control the behavior of the lower courts because it is unable to review more than a few administrative law cases each year.[84] If the Court intended a more determinate standard, its retreat can be explained in two ways. On the one hand, the Court may have taken to heart the criticism that a high level of deference to agency interpretation of statutes threatened separation of powers principles.[85] On the other hand, the Court may have found that the original *Chevron* framework overly constrained its own capacity to pursue an outcome orientation. As Thomas Merrill has pointed out, the original framework did not allow the Justices to take into account the variability of administrative decisions.[86] Moreover, *Chevron* was decided at a time when both the Administration and the Court's dominant public policy perspectives were conservative;[87] a highly deferential *Chevron* protected the administration from the liberal judges that remained on the lower courts. The switch to a more indeterminate approach gives the Justices greater leeway to superintend the ad-

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Solving the Chevron *Puzzle*, 57 LAW & CONTEMP. PROBS., Winter-Spring 1994, at 65, 103.

81. Merrill, *supra* note 79, at 980–82, 984; *see also* Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L.Q. 351, 361–62 (1994) (stating that the Court largely ignored the *Chevron* framework in the 1992 Term).

82. *Chevron* can be understood as a modern updating of the *Hearst/Packard* distinctions. Marshall J. Breger, *Defining Administrative Law—A Review of* AN INTRODUCTION TO ADMINISTRATIVE JUSTICE IN THE UNITED STATES, 60 GEO. WASH. L. REV. 268, 285 (1991).

83. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844–45 (1984).

84. Strauss, *supra* note 5, at 1101.

85. *See supra* note 74 and accompanying text.

86. Merrill, *supra* note 79, at 1027.

87. *See* Levy, *supra* note 16, at 342.

ministrative policies of less conservative administrations. It also opens the door for more aggressive judicial review by the many conservative judges now on the lower federal courts.[88]

III. JUDICIAL REVIEW REFORM

As the foregoing analysis suggests, judicial incentives in administrative law favor the development of indeterminate standards of review that facilitate an outcome orientation. Judicial behavior is consistent with this prediction. In particular, the courts have avoided interpretations of *Chevron* and *State Farm* that would have established more determinate craft norms. Many commentators have criticized the overly aggressive judicial review that indeterminate craft norms foster, but their proposed reforms generally fail to account for the incentives that favor indeterminacy in judicial review and the mechanisms fostering that indeterminacy.

Effective reform requires a statutory reorientation of judicial review away from categorical standards and towards a single, comprehensive set of specific inquiries. These inquiries should be sufficiently demanding in order to enable courts to fulfill their proper role in the separation of powers while providing more determinate craft norms that increase the costs of improper intervention. No reform can completely eliminate outcome-driven judicial decisions, but effective reform can build on the constraining effect of craft norms.

A. *Preliminary Observations*

A wealth of literature on the appropriate scope of judicial review of agency decisions exists, with much of the recent literature spawned by *Chevron* and *State Farm* and their subsequent histories.[89] This literature reflects differing perspectives on the appropriate degree of deference that should be accorded administrative agencies,[90] and any recommendations for reform must address this issue. As in our prior work,[91] we advocate an interme-

88. *See* Cohen & Spitzer, *supra* note 80, at 108–09 (predicting that Reagan-era Justices would affirm Reagan-era appointees in the lower courts who were tough on Clinton administration policies); Eskridge & Frickey, *supra* note 79, at 76 (discussing how the 1993 Term provides "some evidence" to support the Cohen & Spitzer prediction).

89. *See* sources cited *supra* note 5.

90. *See, e.g., supra* note 74 (citing examples).

91. *See* Shapiro & Levy, *supra* note 5, at 440.

diate position: judges must have the authority to enforce the rule of law, which is their constitutional function under separation of powers, but they should not have excessive discretion to intervene simply on the basis of policy disagreements with an agency. Most observers will agree with our underlying premises. The difficulty is where the appropriate balance between these two competing considerations should be drawn.[92]

Although striking the appropriate balance is no easy matter, the foregoing discussion leads to three conclusions concerning how reform of judicial review should proceed. First, the starting point for reform is to raise the cost of pursuing outcome by decreasing the indeterminacy of craft. In particular, reform should address the two sources of indeterminacy described above: vague standards and manipulable categories. Second, our model suggests that proposals directed to the judiciary within the existing framework for review are likely to fail. As long as judges can define the degree of determinacy, they will seek to reduce the cost of pursuit of outcome by relying on indeterminate standards of review. Thus, as a threshold matter, reform of substantive review should come in statutory form, as an amendment to section 706 of the Administrative Procedure Act (APA).[93] Finally, no reform can completely eliminate the pursuit of outcome, even if this goal is appropriate. Different judges will value craft and outcome differently, and some judges will prefer an outcome orientation even in the face of relatively determinate craft. If craft norms focus on more specific issues, however, judges will be more likely to articulate their justifications for reversing agencies (or remanding decisions) in terms of appropriate considerations.

B. *Amending Section 706*

In light of the previous conclusions, we propose the following amended version of section 706:[94]

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92. *See* Glicksman & Schroeder, *supra* note 5, at 300–301 (describing the tradeoffs involved in striking an appropriate balance between the institutional roles of agencies and the courts).

93. 5 U.S.C. § 706 (1988).

94. The *Restatement of Scope-of-Review Doctrine* adopted by the Administrative Law Section of the American Bar Association is the inspiration for this approach. Section of Administrative Law, American Bar Association, *A Restatement of Scope-of-Review Doctrine*, 38 ADMIN. L. REV. 235 (1986). The section's recommendations were based on a report by Ronald Levin. Ronald M. Levin, *Scope-of-Review Doctrine Restated: An Admin-*

§ 706. Scope of Review
The reviewing court shall . . . (2) hold unlawful and set aside agency actions, findings, and conclusions if the court determines that
(A) the agency decision violates a constitutional right, power, privilege, or immunity;
(B) the agency decision was made without observance of procedure required by law;
(C) the agency decision violates its statutory mandate or other statutory provisions because:
(1) the issue has been specifically resolved by explicit statutory language;
(2) the issue has been specifically resolved by legislative history manifesting an unmistakable congressional intent; or
(3) a contrary interpretation of the statute is unequivocally required by the traditional tools of statutory construction;
(D) the agency has not offered a valid policy explanation for its decision because:
(1) it relied on policy concerns that were precluded by statute; or
(2) entirely failed to consider an important aspect of the problem; or
(E) the agency has not offered a logically coherent explanation in terms of agency expertise, credibility determinations, or policy considerations, of
(1) why the evidence in the record supports its decision; or
(2) why the contrary evidence does not preclude the decision.

Subsections (C), (D), and (E), which are the key provisions in the proposed amendment,[95] change existing law in two important respects. First, we have reoriented substantive review by avoiding the use of open-ended scope of review standards, employing instead specific inquiries that, to the extent possible, eschew the use of vague adjectives reflecting degrees of deference. Second, we have eliminated the categories of agency decisions, employing instead a single, comprehensive set of inquiries that apply to all

istrative Law Section Report, 38 ADMIN. L. REV. 239 (1986).

95. Subsections (A) and (B) retain existing language with modified phrasing not intended to affect their operation. The *de novo* review provision, currently § 706(2)(F), has been eliminated because it has no application under the statute as currently interpreted. *See* 5 U.S.C. § 706 (1988).

agency decisions, cutting down on the opportunity for manipulation of categories.[96]

Subsection (C) obviously draws on the *Chevron* test, but we have attempted to render that test more determinate in two ways. First, the application of this approach would be mandatory; judges would not be in a position to ignore it, as they have ignored *Chevron* in some recent decisions.[97] Second, subsection (C) provides more determinate standards concerning when a court should defer to an agency's construction of a statutory provision. In particular, it specifies standards for reliance on statutory text, legislative history, and tools of statutory construction. By comparison, the Court's present approach to step one of *Chevron* gives little guidance concerning this issue.

Subsections (D) and (E) incorporate the four inquiries employed in *State Farm* to define arbitrary and capricious review. Those incorporated in subsection (D) involve the relationship between the agency's policy choice and the policy judgment made by Congress, effectively requiring the agency to justify its decision in terms of the legislative policies reflected in the agency's statutory mandate.[98] Those reflected in subsection (E) address the relationship between the policy choices made by the agency and the record on which the agency bases its decision.

Although we draw on the language used in *State Farm*, our version is more determinate for several reasons. First, rather than employing these inquiries as interpretations of the open-ended arbitrary and capricious standard, we have omitted the standard altogether and require courts to move directly to consideration of the specific inquiries. This prevents courts from ignoring the *State Farm* factors and eliminates the indeterminacy inherent in the arbitrary and capricious standard of review.[99] Second, by clarify-

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96. The Administrative Conference also has recommended the merging of *Chevron* and *State Farm*. *See* Administrative Conference of the United States, Adoption of Recommendations and Statement Regarding Administrative Practice and Procedure, 59 Fed. Reg. 4669, 4671–72 (1994) [hereinafter Administrative Conference Recommendations].

97. *See supra* note 81 and accompanying text.

98. *See* Levin, *supra* note 94, at 250–53.

99. We do not believe that a separate "substantial evidence" standard for on the record adjudications is necessary in light of the convergence of fact review in rulemaking and adjudication. *See, e.g.*, PIERCE ET AL., *supra* note 70, § 7.3.3 at 342. Our formulation of these inquiries, however, incorporates some of the considerations relevant to substantial evidence review. In particular, we recognize the validity of credibility determinations as valid explanations for an agency's view of the record as well as the possibility

ing the relationship between *Chevron* and *State Farm* as part of a single inquiry,[100] our approach minimizes the opportunities for manipulation by characterizing these sorts of issues alternatively as statutory interpretation or a policy question subject to arbitrary and capricious review.[101]

C. *Allocation of Responsibility*

The proposed amendment not only makes judicial review doctrines more determinate, but also allocates responsibility between agencies and the courts for the development of administrative policy. As indicated earlier, our goal is to allocate to judges sufficient authority to enforce the rule of law, but to limit their discretion to intervene simply on the basis of policy disagreements with an agency.

As in *Chevron*, subsection (C) allocates the responsibility for statutory interpretation between the courts and agencies by focusing on legislative intent. This subsection further seeks to limit judicial intervention by circumscribing the use of statutory text, legislative history, and tools of construction. First, subsection (C)(1) requires specific and explicit language to justify reversing an agency on the basis of statutory text. This limitation recognizes the constitutionally appropriate role of the courts as interpreters of statutes without granting judges undue license to intervene. Second, subsection (C)(2) authorizes a court to overturn an agency construction on the basis of legislative history only if it provides "unmistakable" evidence of intent. Justice Scalia, of course, has opposed recourse to legislative history on the ground that only the statute has been approved by Congress and, for various reasons, legislative history may not be an accurate reflection of intent.[102] But while legislative history may not always be a reliable guide, it is in some cases; to ignore unmistakable evidence of legislative intent is, in our view, inappropriate.[103] Finally, subsection (C)(3)

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that an agency might base its factual finding on expert judgments. *See* Universal Camera Corp. v. NLRB, 340 U.S. 474, 495–97 (1951) (suggesting that a reviewing court must defer if an agency factfinding is based upon credibility determinations or expertise).

100. In effect, we treat the first two parts of the *State Farm* inquiry as *Chevron* step two. *See* Administrative Conference Recommendations, *supra* note 96, at 4672.

101. This approach also eliminates the added possibility for manipulation inherent in the separate substantial evidence standard.

102. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517.

103. *See* Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes:*

authorizes a court to overturn an agency construction on the basis of traditional tools of construction only if such tools "unequivocally" contradict the agency's interpretation. This standard should limit the manipulability of these tools without completely sacrificing whatever insights their use might produce.

Our goal in subsections (D) and (E) is to focus the reviewing court's attention on the agency's reasous, rather than its ultimate policy judgment, because we believe that courts have a constitutional responsibility to ensure the rationality of agency decisionmaking.[104] As with subsection (C), we could not completely avoid the use of qualitative judgments that leave some room for manipulation. By focusing on the agency's reasoning process, however, we attempt to limit the invitation to second-guess the agency's underlying policy choices.[105] Moreover, because subsection (E) requires only that the agency have a "coherent" explanation for its actions, judges are discouraged from establishing their own baseline for what constitutes a "rational connection between the facts found and the choice made."[106] Finally, the standards contained in our proposed amendment focus judicial review on the institutional reasons for deference. Subsections (D) and (E) make clear that the focus for judicial review is not the *result* reached by the agency, but rather whether the agency's use of expertise, credibility determinations, and policy judgment is coherent in light of its statutory mandate and the record for the decision.[107] As we have argued previously, "This distinction is important because it reminds judges that they are not to substitute their judgment for the policy choices of an agency and that the agency's

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Toward a Fact-Finding Model of Statutory Interpretation, 76 VA. L. REV. 1295, 1357–60 (1990) (discussing how factfinding approach to legislative history would improve ascertainment of legislative intent).

104. This was the thesis of our prior work on substantive review. *See* Shapiro & Levy, *supra* note 5, at 388, 440.

105. *See id.* at 437.

106. Motor Vehicles Mfrs. Ass'n v. State Farm Auto. Ins. Co., 463 U.S. 29, 43 (1983) (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)). *See* McGarity, *supra* note 65, at 1453 (advocating the use of a "pass-fail" standard to determine acceptability of agency reasons for adopting a policy); *but see* Wald, *supra* note 66, at 644 (expressing skepticism about the utility of a "pass-fail" standard).

107. *See* Seidenfeld, *supra* note 78, at 1548–49 (proposing that the reviewing court's role is to ensure that the agency interpreted its mandate in a deliberate manner).

reasoning may withstand scrutiny even if a judge disagrees with the result."[108]

Given the diversity of views on the appropriate role of courts in reviewing administrative agencies, we expect that others will disagree with the specifics of the role we prescribe for reviewing courts. In the context of this article, it is neither necessary nor possible to defend these specifics in detail. Our point in this context is that whatever standards are chosen, the statutory provisions governing substantive review of agency decisions should be rendered more determinate. Moreover, the debate over what standards to use should take place in the context of a comprehensive judicial review framework that avoids open-ended standards of deference and limits the opportunities for categorization.

D. *Implications for Judicial Behavior*

As explained above, the proposed section 706 is significantly more determinate than existing doctrines concerning both statutory interpretation and agency policy choices.[109] By increasing the level of determinacy and hence the costs of pursuing outcome, the amendment should constrain outcome-oriented behavior of judges to a greater degree than the current craft norms for judicial review.[110] To the extent that judges may nonetheless be sufficiently motivated to pursue outcome, we believe that the proposed amendment would also improve the quality of analysis in decisions reversing agencies.

Our model establishes that the more determinate the framework for review, the greater the costs of pursuing outcome. First, when craft norms are more determinate, the sacrifice of craft in pursuit of outcome is more apparent, subjecting the judge to a loss of reputation and respect (including self respect).[111] Second, even if it is ultimately possible to reconcile the pursuit of outcome with

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108. Shapiro & Levy, *supra* note 5, at 437–38.

109. *See supra* notes 95–101 and accompanying text.

110. Mark Tushnet has argued that it is impossible to establish a norm that both permits judicial review and limits the ability of judges to invalidate political decisions of the other branches. Mark V. Tushnet, *Judicial Review*, 7 HARV. J.L. & PUB. POL'Y 77, 77 (1984). While it is perhaps true that no substantive review doctrine can absolutely prevent judicial intervention in administrative policy decisions, we do believe that it is possible to increase the costs of *unwarranted* intervention by making doctrine more determinate.

111. *See supra* notes 24–27 and accompanying text.

more determinate craft norms, such a reconciliation would take additional effort on the part of judges, entailing the sacrifice of leisure.

Conversely, more determinate craft norms also decrease the ideological utility to be gained from pursuit of outcome. They increase the likelihood that institutional constraints such as collegiality and appeal would render pursuit of outcome unsuccessful.[112] Moreover, to the extent that craft is also part of ideology, more determinate craft norms increase the ideological utility from pursuit of craft.[113] This countervailing ideological consideration offsets the ideological utility from pursuit of outcome and reduces the net ideological utility derived from an outcome-oriented decision.

By increasing the costs and decreasing the benefits from pursuit of outcome, we expect that judges will be less outcome-oriented in their decisions. Of course, strong outcome related incentives may still tip the balance for individual judges in individual cases. Even in such cases, we believe that our approach to substantive review will structure the analysis more appropriately. The current approach obscures the reviewing court's real reasons for intervening by focusing the analysis on categorizing the agency decision and on whether the *result* reached by the agency is sufficiently bad to justify intervention under an open-ended test for deference. The proposed amendment to § 706, in contrast, requires judges to ask the right questions and to explain their rejection of an agency decision in terms of considerations that derive from the constitutionally designated role of the courts.

CONCLUSION

We have no magic solution to a problem—indeterminate substantive review doctrines—that has plagued administrative law since its inception. We propose, however, that if judicial incentives for preferring indeterminate standards are better understood, there is greater potential for making judicial review more determinate. Judges prefer indeterminate standards in administrative law because they reduce the loss of respect normally associated with an outcome orientation and because there are few incentives to develop determinate craft norms that control future cases. Congress can

112. *See supra* text following note 32.
113. *See supra* text following note 27.

constrain this behavior if it amends section 706 of the APA as we propose. Our proposal, which consists of a single, comprehensive set of specific inquiries, addresses both sources of indeterminacy in current substantive review doctrine: vague scope of review standards and reliance on manipulable categories to define the appropriate scope of review. Although not everyone may agree with the specific standards we have chosen, the amendment has the virtue of focusing the reform debate on what specific, comprehensive standards should be used. If Congress adopts more determinate standards, outcome-oriented behavior by judges should decrease.