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OVERSEERS OR “THE DECIDERS”: THE COURTS IN ADMINISTRATIVE LAW

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Overseers or “The Deciders” – The Courts in Administrative Law

Peter L. Strauss¹

For the second time in a short period, Professors Sunstein and Miles have brought powerful tools of statistical analysis and diligent coding of court of appeals opinions together to demonstrate what the Realists long ago taught us to suspect, that significant elements of judging can be explained in terms of the jurist’s political world view – that the tension between law and politics is alive in judicial work as elsewhere, and that it is only an aspiration to seek a world “of laws and not of men.” Elements of their work, though, appear as if in criticism of contemporary doctrine rather than confirmation of human nature. Without for a moment wishing to deny that we are better served by judges who do not permit themselves the freedom to enact personal politics,² that the “tenacity” of a taught tradition³ and appropriately framed legal propositions purporting to constrain such preferences serve us well, I want to suggest that in targeting two notable Supreme Court cases each approaching its silver anniversary (*Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*⁴ and *Motor Vehicle Mfrs. Ass’n v. State Farm Mutual Auto. Ins. Co.*⁵) they may mistake the context in which the inevitable presently appears for its cause. The issues these cases address are not new. And the cases establish a more reasonable framework for appropriate relationship between executive and judicial action than Professors Sunstein and Miles suggest.

I. A Framework for the Court-Agency Relationship

For many decades, Congress has been assigning the authority to act with the force of law – to create legally binding, statute-like texts and/or to decide “cases” that it might have assigned to the judiciary – to executive authorities rather than exercise it completely itself, or confer the task on the courts.⁶ Problematic only at the fringes, these delegations of authority are generally accepted as valid, at least so long as they reserve appropriate relationships between those to whom the authority is delegated and the named authorities of constitutional government.⁷ For present purposes that

¹ Betts Professor of Law, Columbia University. Deep thanks to Professors Sunstein and Miles for sharing their draft with me in time to permit this response, and to the editors of the Chicago Law Review for agreeing to print it in the same issue.

² Cf. Richard Posner, Statutory Interpretation – in the Classroom and in the Courtroom, 50 U.Chi.L.Rev. 800, 817 (1983) (“[T]he irresponsible judge will twist any approach to yield the outcomes that he desires and the stupid judge will do the same thing unconsciously. If you assume a judge who will try with the aid of a reasonable intelligence to put himself in the place of the enacting legislators, then I believe he will do better if he follows my suggested approach.”)

³ Roscoe Pound, Economic Interpretation and the Law of Torts, 53 Harv. L. Rev. 365, 366-67, 382 (1940).

⁴ 467 U.S. 837 (1984).

⁵ 463 U.S. 29 (1983).

⁶ [If you think you need a footnote, I don’t, I’d suggest *Crowell v. Benson* and *United States v. Grimaud*]

⁷ [Again, I’d prefer minimal footnoting; but you could, if you think you must, use Strauss, the Place of
(continued...)]

relationship is the relationship between agencies and courts. Courts and Congress have been speaking to the character of this relationship from the moment of its emergence – Congress’s chief, but not exclusive, present statement may be found in Section 706 of the Administrative Procedure Act;⁸ the Courts’, in a series of cases interpreting that Act or (as in *Chevron*) indicating its understanding of Congress’s purposes in making delegations. A common problem is that for some issues, courts are entitled to be the deciders – influenced by agency view, perhaps, but nonetheless themselves independently responsible for the conclusions reached. For other issues, the conclusion that Congress has validly delegated authority to the agency carries with it the corollary that the agency is responsible for decision, and the court’s function is limited to oversight. Telling the two apart, and then securing judicial recognition of its subordinate role in the oversight context, has been a constant challenge. It is not made easier by recognition that the intensity of the court’s *supervisory* role varies with context. Still, acceptance of the proposition that for some issues courts are ultimately responsible, and for others agencies are, is central.

A. *Telling the Two Apart*

Chevron’s notorious two-step analysis is perhaps best understood as separating those elements of the judicial relationship to agency action that are appropriate for *independent* judicial judgment, from those for which the judicial role is constrained to oversight. The courts have emphasized, and Section 706 reaffirms, that determining questions of law is a matter for independent judicial judgment. However, two further propositions, that might be thought qualifications of this statement, also may be stated.

- In reaching that independent conclusion, a court might find reason to assign some weight to a responsible agency’s judgment about the matter. This is a proposition most strongly associated with Justice Jackson’s 1944 opinion in *Skidmore v. Swift & Co.*,⁹ but it is made explicit in earlier decisions¹⁰ as well.
- The court’s independent conclusion of law might be that authority over some particular question of meaning (now often reframed as one of “policy” rather than “law”) has been validly assigned to an administrative agency; in such a context, it is merely following its nose when it treats its proper relationship to that question as one of oversight rather than decision.

⁷ (...continued)

Agencies, 84 Columbia; *Whitman v. Am Trucking Assn*; I will stop pointing to the unnecessary (in my judgment) here.]

⁸ 5 U.S.C. 706(2) [I’d be happy for you to include its text, and then cite to it as appropriate in what follows.]

⁹ 323 U.S. 124 (1944)

¹⁰ *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294 (1933); *United States v. American Trucking Ass’ns*, 310 U.S. 534, 543, 549 (1940)(Compare “The interpretation of the meaning of statutes, as applied to justiciable controversies, is *exclusively* a judicial function” (emphasis supplied) with “In any case [responsible agency] interpretations are entitled to great weight. This is peculiarly true here where the interpretations involve ‘contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.’[Citing *Norwegian Nitrogen*.] Furthermore, the Commission’s interpretation gains much persuasiveness from the fact that it was the Commission which suggested the provisions’ enactment to Congress.

This proposition is associated with another 1944 opinion, *NLRB v. Hearst Publications*.¹¹

It is trivial to characterize *Chevron*'s first step as embodying a generalization of the *Hearst* approach: a court will *independently* decide what authority has been conferred on an agency, now presuming that in creating an agency with authority to act with the force of law, Congress has delegated to it the resolution of ostensibly legal questions, to the extent "traditional tools of statutory interpretation"¹² do not produce a resolution.

Notice three further propositions, that seem not to be as widely appreciated in the literature as in my judgment they deserve to be.

- "To the extent" is an important qualification. Defining the areas of ambiguity within which, *Chevron* says, agencies have presumptively the leading oar, is a part of the independent judicial task, of step one. In the *Hearst* situation, to be concrete about it, a court would properly identify any classes of worker who *must* be regarded as "employees," and any classes of worker who *may not* permissibly be so regarded. The NLRB's authority lay in the indefinite middle ground of ambiguity, as judicially determined. *Chevron*'s language tends to obscure this point, but later decisions, such as *National Cable & Telecomm. Ass'n v. Brand X Internet Services*,¹³ make it reasonably clear.
- As part of its step one determination, a court might well turn to a responsible agency's judgment about the matter, as one weight to be considered on the scales the court is using. That is, *Skidmore* deference is one of those "traditional tools of statutory interpretation" that bear on a court's independent conclusion about the extent of agency authority.
- Suppose a court finds that an agency does have primary decisional responsibility for a matter that litigation before the court requires the court to decide, but the agency has not yet acted with the dignity Congress might have expected, when it conferred this authority upon it, would be appropriate to give an agency's action law-shaping force. This was the situation in, for example, *United States v. Mead Corp.*,¹⁴ another much-mooted if somewhat younger decision. If Congress has placed that authority in the agency (again, a matter for independent judicial judgment), *whether or not it has been used*, it would seem to follow that – as in diversity cases – the judicial role is to decide the case, but *not* to fix the question of meaning Congress had assigned to another body for force-of-law resolution. This is the point directly at issue in *National Cable & Telecomm. Ass'n v. Brand X Internet Services*.¹⁵

If, then, *Chevron* step one is the terrain of independent (albeit perhaps influenced) judicial

¹¹ 322 U.S. 111 (1944).

¹² 467 U.S. at 843 n. 9.

¹³ 545 U.S. 967 (2005); accord, *Long Island Care at home, Ltd. v. Coke*, 127 S.Ct.2339 (2007).

¹⁴ 533 U.S. 218 (2001).

¹⁵ Cf. Kenneth Bamberger, Provisional Precedent: Protecting Flexibility in Administrative Policymaking, 71 NYU L. Rev. 1272 (2001); Douglas Geyser, Note, Courts Still Say "What the Law Is": Explaining the Functions of the Judiciary After Brand X, 106 Colum. L. Rev. 2129 (2006).

judgment, cases resolved at that level have more in common with other judicial judgments about statutory interpretation than with agency review, as such. Judges will accept the use of legislative history or not; will be open to liberal or constrained views of the reach of statutory language; will tend to focus on purposes or on text; will perhaps be more generous with the work of Republican-dominated legislatures than Democratic, or vice versa, across the broad range of statutory interpretation issues. The politics judges bring to the bench may influence these matters as Professors Sunstein's and Miles' analyses suggest – Republican and Democratic judicial panels may differ to a statistically significant degree in their attitudes on these matters, and mixed panels may produce an observable moderation of these tendencies – even as judges conscientiously work to subdue their politics as they don judicial robes.¹⁶

Yet there is reason to doubt that the set of *Chevron* opinions, insofar as we are making observations about step one, is the appropriately bounded set for exploration of this particular phenomenon, or that the *Chevron* test (again, to the extent we are talking about step one) is at all responsible for it. Beyond its cryptic reference to “traditional tools of statutory interpretation,”¹⁷ *Chevron* does not say how the courts are to perform their customary, independent role of law-definition. It only acknowledges a possible outcome of performing that role (the discovery that primary authority on some particular issue has been assigned to another). To be sure, one could suppose as an element of conservative-liberal political differences a differential willingness to make such a discovery. But that supposition neither defeats the proposition that Congress often does make such assignments, nor lays the groundwork for any kind of rule about the exercise of this sort of independent judicial judgment that could be effective in subduing the political differences affecting judicial decision. Indeed, one might think that rule-of-law values, in this instance, *favor* the conservative side – favor a disinclination to find a matter within an agency's assigned ambit of discretion absent a clear legislative indication that the assignment has been made. A judge who thinks he ought not “find elephants in mouseholes”¹⁸ will hold that view whatever statutory question he is considering.

B. Securing Judicial Recognition of Its Subordinate Role

Once one has crossed the bridge to the conclusion that primary authority for a matter has been placed in agency hands, the judicial role moves from decision to oversight, and Section 706(2) of the Administrative Procedure Act sets the general standards for performing that role. For matters required to be decided in “on the record” proceedings and in other contexts where Congress has used this verbal formula, agency factual assessments are to be accepted if supported by “substantial

¹⁶ Former Chief Judge Harry Edwards of the D.C. Circuit has been particularly vocal in responding to statistical demonstrations like these. E.g. Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U.Pa.L.Rev. 1639 (2003). One can only applaud a *general* attitude among judges that permission to bring their politics into the courtroom would destroy the rule-of-law enterprise. Even if we can be confident that politics' traces may inevitably be found in a judge's work, because she is at the end of the day human, and thus shaped by all that has entered her consciousness in prior life, this is an element we may expect her to work to suppress, and should hardly wish to encourage in her conscious performance of task.

¹⁷ 467 U.S. at 843 n. 9.

¹⁸ *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001); *Gonzales v. Oregon*, 543 U.S. 243, 266 (2006).

evidence” in the record as a whole. For its factual assessments in other kinds of proceedings, and for its exercises of discretion or judgment, judges are instructed to consider whether the agency action is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” It will be evident that these are not mathematically precise formulations. Indeed one can find in the cases a range of judicial characterizations what it means to be “arbitrary, capricious,” responding (in ways the statutory formulation as such does not invite) to the nature of the action under review. “Arbitrary, capricious” has one meaning for a court reviewing congressional judgments in enacting legislation,¹⁹ another for a court reviewing an agency’s decision to adopt a high-consequence regulation,²⁰ another for a court reviewing an agency’s judgment to forego rulemaking it has been petitioned to undertake,²¹ and another for review of the product of informal adjudications in relatively low-consequence matters, such as the grant or refusal of permission to open a branch bank.²²

The germinal Supreme Court opinion on this issue is neither *Chevron* nor *State Farm*, but the Supreme Court’s 1971 opinion in *Citizens to Preserve Overton Park v. Volpe*.²³ This case involved the review of a kind of informal adjudication, the Secretary of Transportation’s decision to subsidize Tennessee’s construction of a portion of Interstate 40 through an important municipal park, that a citizen’s group was (successfully) challenging. The Court’s opinion is notoriously Janus-faced on the question of review intensity, emphasizing that the judicial role *is* oversight and not the substitution of judgment, but both characterizing “the ultimate standard for review [as] a narrow one,”²⁴ and indicating that review is to be “thorough, probing, in-depth”²⁵ and “searching and careful.”²⁶ Thus were planted the seeds that became “hard look” and *State Farm*. Transparently, these formulations, too, are incapable of preventing, if indeed they do not invite, the kinds of politically driven variation Professors Sunstein and Miles have found. But before reaching conclusions about the desirability of formulae that would leave more to agency politics – that is, loosen judicial controls over delegated authority – it would in my judgment be useful to pay more attention to statutory and situational variations that their analysis appears to elide.

Review of factual judgments: The APA deploys two different standards for fact review – “unsupported by substantial evidence ... [considering] the whole record” for proceedings required

¹⁹ *Pacific States Box & Basket v. White*, 296 U.S. 176 (1935).

²⁰ *Motor Vehicles Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29 (1983).

²¹ *American Horse Protection Ass’n v. Lyng*, 812 F.2d 1 (D.C. Cir. 1987).

²² *Camp v. Pitts*, 411 U.S. 138 (1973).

²³ 401 U.S. 402 (1971). See Peter L. Strauss, *Revisiting Overton Park: Political and Judicial Controls Over Administrative Actions Affecting the Community*, 39 UCLA L. Rev. 1251 (1992) and Peter L. Strauss, *Citizens to Preserve Overton Park v. Volpe – of Politics and Law, Young Lawyers and the Highway Goliath* in Peter L. Strauss, ed., *Administrative Law Stories* 258 (2006).

²⁴ 401 U.S. 416.

²⁵ 401 U.S. 414.

²⁶ 401 U.S. 416.

to be decided “on the record”²⁷ (and other proceedings as Congress may provide) and “arbitrary, capricious ... [considering] the whole record.”²⁸ Neither is as demanding as the standard that would apply to initial proof – normally, a “preponderance of the evidence”; and indeed one consequence of recognizing Congress’s assignment of responsibility for fact-finding to an agency rather than a trial court is that neither is as demanding as the standard courts familiarly apply to the factual judgments of trial courts sitting without a jury, “clearly erroneous.” But is there, could there be, a difference between them?

Issues like this are ineffable, invariably giving courts enormous difficulty in giving them content. On the one hand, courts attach significance to the vanishingly small difference between equipoise in the record and a preponderance of the evidence, however slight.²⁹ On the other, they find it challenging to point to cases where, concretely, differing standards would produce differing outcomes.³⁰ One can certainly see that, expressed in percentage-of-the-evidence-that-supports-the-outcome terms, the range between what might be arbitrary and capricious in the judgment of Congress (essentially having no factual support whatever) and a “preponderance of the evidence” (50+%) leaves about half the field open. And when directly faced with the challenge of making the verbal differentiations meaningful, the judicial reaction has been to find in the “substantial evidence” formulation a congressional direction that review should be more intense. How much more intense is of course impossible to say with mathematical precision, but the choice has been taken to reflect a “mood,” whether made in the context of a Republican legislature’s preferences respecting judicial review of NLRB decisions³¹ or Congress’s somewhat hesitant permission to the Occupational Safety and Health Administration to adopt regulations under generous standards affecting a wide range of American industry.³²

It seems fair to suppose, as well, that courts have been under significant pressure to engage in more intense review when faced with particularly high-consequence agency decisions – notably, although perhaps not exclusively, major rulemakings such as EPA and the National Highway and Transportation Safety Agency (NHTSA, the agency responsible for the *State Farm* air bags rule) adopt, that may have consequences rivaling a statute’s for the nation’s economy. These considerations have armed the intensity of political oversight;³³ it would be surprising if they were not also responsible for some variation-in-fact in the intensity of judicial review as well. Reflecting

²⁷ 5 U.S.C. 706(2)(E).

²⁸ 5 U.S.C. 706(2)(A).

²⁹ Director, Office of Workers’ Compensation Programs v. Greenwich Collieries, 512 U.S. 267 (1994)

³⁰ Dickinson v. Zurko, 527 U.S. 150 (1999); Association of Data Processing Service Orgs. v. Board of Governors of Federal Reserve System, 745 F.2d 677 (D.C. 1984).

³¹ Universal Camera Corp. V. NLRB, 340 U.S. 474 (1951).

³² IUD v. Hodgson, 499 F.2d 467 (DC Cir. 1974).

³³ E.g., Executive Order 12866 as amended, 58 FR 51375 (9/30/1973), 67 FR 9385 (2/26/02), 72 FR 2763 (1/18/07), establishing a rigorous system for executive oversight of agency rulemaking, and giving special attention to rules having a major projected impact on the economy.

this very factor, R. Shep Melnick's work on judicial review of EPA judgments, to which Professors Sunstein and Miles properly call our attention, reported that EPA experienced different challenges, different judicial politics, and a narrower range of litigant perspectives, when its adjudicatory judgments were challenged on review – fines, say, for a regulatory violation – than when its regulations were.³⁴ It is not just that review of regulations can come from a variety of quarters, that the agency can be challenged for having done too little as well as too much; it is also that the social stakes are higher.

Review of discretion and judgment: the “arbitrary, capricious, an abuse of discretion” formula applies not only to factual matters, but to all the stuff that lives in between fact and law – to judgments about law-application, exercises of discretion, and so forth. Even for matters subject to “substantial evidence” review as to factual judgment, where the agency is relying on its experience to reach judgment this is the “test” that will be applied. Thus, review of NLRB decisions in unfair labor practice cases will distinguish between judgments about credibility – where the presiding officer's opportunity to hear the witnesses will sharply influence the substantiality of their testimony on the record as a whole – and judgments about the inferences to be drawn from certain coincidences, that may embody both the Labor Board's experience and its views on appropriate labor law policy. That an organizer is fired very shortly after his affiliations have come to management attention permits a secondary inference about management intentions, wholly apart from any testimony about his violation or not of workplace disciplinary rules; and this secondary inference is the Board's business, not the presiding officer's. The question will be whether it is “arbitrary, capricious, an abuse of discretion.” So also, respecting the judgments reached in handling the modeling of air flows when assessing the possible environmental consequences of discharging a chemical into the atmosphere.

One's impression is that this last setting – checking disputable scientific or technical judgment affecting high-consequence issues – has been the domain in which “hard look” has done its most important work. The disagreement between majority and concurrence in *State Farm* offers an example. In stating its judgment that seatbelts that *could* be entered and left without detaching them (but that were nonetheless detachable) would not significantly increase seatbelt use, the NHTSA rulemakers omitted the consideration that such seatbelts, once buckled, would remain effective until unbuckled – that one was not *required* to unbuckle such a belt to leave one's seat, and so might not. While for the concurrers it may have been relevant that there was a new President in office, NHTSA had not placed its decision in politics but in science and, as a Republican appointee to the DC Circuit plangently observed, it was that which made the science “the vulnerable point.”³⁵

One may suggest, further, that political controls are most virtuous when exercised as such, and not by bending science. An agency official who was an early enthusiast for “hard look” observed in oft-quoted passages

“... [D]etailed factual review of [EPA] regulations by those with the power to change them takes place in two forums only - at the level of the office of primary interest and working group inside EPA, and in court. The working group generally will understand the technical

³⁴ R. Shep Melnick, *Regulation and the Courts: The Case of the Clean Air Act* ch. 10 (1983)

³⁵ Stephen Williams, *The Roots of Deference*, 100 *Yale L. J.* 1103, 1108 (1991).

complexities of a regulation. So to a great extent will members of the industry being regulated. But the review process within the agency and the executive branch does not spur a working group to make sure that the final regulation adequately reflects these complexities. To the extent that internal review is the only review worried about, comments by the affected industry or (to pick a less frequent case) by environmental groups may not be given the kind of detailed consideration they deserve. Since the higher levels of review are unwilling or unable to consider the more complex issues, the best hope for detailed, effective review of complex regulations is the judiciary.

"It is a great tonic to discover that even if a regulation can be slipped or wrestled through various layers of internal or external review [inside the bureaucracy] without significant change, the final and most prestigious reviewing forum of all - a circuit court of appeals - will inquire into the minute details of methodology, data sufficiency and test procedure and will send the regulations back if these are lacking. The effect of such judicial opinions within the agency reaches beyond those who were concerned with the specific regulations reviewed. They serve as a precedent for future rulewriters *and give those who care about well-documented and well-reasoned decisionmaking a lever with which to move those who do not.*"³⁶

While judicial politics may, as Sunstein and Miles suggest, influence the precise outcomes of these explorations – in ways agency officials, not knowing the composition of the appellate panels they may eventually face, dare not try to predict – the impact thus reported is to support science against politics. And for high-consequence rulemakings, the kind already also being significantly impacted (ossified?) by congressionally-endorsed processes of OMB review widely suspected to be implicated in some science-bending, it is hard to think such a “hard look” impact untoward.

II. Review Variation and the Sunstein-Miles Study

The Miles-Sunstein studies indicate, as we might have expected, both that judicial outcomes are somewhat affected by judges’ political orientations, and – more important – that when judges of differing political orientation sit together, this effect is moderated. Could one imagine resulting legislation requiring three-judge court of appeals panels to be composed, not at random, but – to the extent feasible – as mixtures of judges who had been appointed by different Presidents, perhaps even by Presidents of different parties? Although there is some support for such a judgment in the common congressional practice of requiring bipartisan membership in independent regulatory commissions, such a measure might appear to be endorsing the proposition that politics plays a *legitimate* role on judicial review. That endorsement might cost more in its impacts on judicial *and* public conceptions of judges’ roles than any possible benefit it could deliver. Putting this to one side, however, it is hard to accept that these studies support adoption of agency review standards different from those now deployed.

The discussion so far has suggested that in analyzing *Chevron* decisions, step one decisions should be pooled with other cases involving direct judicial statutory interpretation, and not with *Chevron* step two decisions. There’s little reason to expect a different empirical result, but reframing

³⁶ WILLIAM F. PEDERSEN, JR., FORMAL RECORDS AND INFORMAL RULEMAKING, 85 Yale L.J. 38, 59-60 (1975) (emphasis supplied).

the issue that way would focus our attention on the cause (political differences among judges) and not on a particular symptom. Here, I want to suggest a variety of other distractions, to the same end.

*Chevron step two and State Farm issues are both decided under APA §706(2)(A).*³⁷ The *Chevron* step two issue is whether the agency’s judgment, on a matter within what the reviewing court has found to be the agency’s delegated authority, is “reasonable.”³⁸ That is to say, translating this into the APA’s terms governing the standards for review, it is a matter respecting which the court’s responsibility, under §706(2)(A), is to say whether it is “arbitrary, capricious, an abuse of discretion.” This is the identical language as underlay *State Farm*. One might argue, perhaps, that some issues regularly associated with *Chevron* “Step two” – whether or not to adopt a bubble policy – will have less factual content and more simple political preference content – than those regularly associated with *State Farm*. How one assesses what is “arbitrary, capricious, an abuse of discretion” does vary with context. Still, “the President told me to do it” will not count as a “reasonable” basis for action under §706(2)(A) unless the statute makes that a dispositive factor; the agency must have reasons that satisfy its statutory charge.³⁹ And courts have no authority to vary the directive of §706. To the extent one is looking for a Section 706(2)(A) data set, which is what the Miles-Sunstein study appears to be about, then, that set arguably should include *both* step two *and* “hard look” cases.

Not all EPA cases may address the same issue. The authors appear to have lumped EPA adjudications with EPA rules, perhaps because the relatively small number of EPA rules will make it hard to achieve statistically significant results. But as indicated, the literature specifically looking at these two sets – years ago to be sure, and more impressionistically – found striking differences in judicial review performance between them. Intuitively this seems just what one would expect. Socially, adjudications are lower consequence events; they are less open to review “from all sides”; and they are more likely to turn on particular facts, not science or engineering judgment. Very often the significant review will be “substantial evidence” review, not §706(2)(A) review. By statute,⁴⁰ the difficult judgmental questions underlying the agency’s rulemaking judgments are often precluded from attack *except* on review of the rule, promptly following its adoption. “Hard look” may not be at issue.

NLRB cases, predominantly, and State Farm cases do not address the same issue. The data set the authors use is dominated, 12:1, by NLRB cases, yet in my judgment these are apples to *State Farm* oranges.

- NLRB cases result from on-the-record adjudications respecting particular disputed incidents. They are subject to “substantial evidence” review much more than 706(2)(A) “arbitrary capricious” review. Incident facts, and not hard scientific or technical judgments, are at their heart. The authors do not mention, and it seems highly dubious, that *State Farm*’s “hard look” plays any role in these cases, which do not involve the kinds of considerations or

³⁷ Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 Chi.-Kent L. Rev. 1253 (1997).

³⁸ To repeat, in my judgment to say that the agency is acting outside the area of discretion that has been statutorily committed to its charge is a judgment at Step One, not Step Two.

³⁹ Cf. *Hazardous Waste Treatment Council v. EPA*, 886 F.2d 355 (D.C. Cir. 1989)

⁴⁰ E.g., 42 U.S.C. 7607.

judgments that animated *State Farm* and its predecessors in the D.C. Circuit. A prominent Labor Law casebook, in its 1996 edition, mentions *Chevron* as having possibly complicated judicial review for the NLRB, but not *State Farm*.⁴¹

- One readily supposes that a study of NLRB cases from *any* decade following the *Universal Camera* decision would show variations like those Professors Sunstein and Miles have found, particularly as it became clear to the courts of appeal that their judgments on these issues were more unlikely than most to see Supreme Court review.⁴² Absent a marked shift in these variations in the years following 1984, and absent any indication reviewing courts regularly thought *State Farm* a part of their repertoire, NLRB cases should not be taken as speaking to the impact of that case's construction of "arbitrary, capricious."
- Other empirical work, using over 1200 NLRB review cases from the period 1986-93, has demonstrated strong variations in outcome depending on the particular issues involved.⁴³ A leading Labor Law casebook reported at about the same time tremendous variation on a geographic basis – for example, the 8th Circuit fully affirming NLRB cases at barely half the rate (42%) of the Ninth (81%) in fiscal 1994.⁴⁴ Such variations have their own possible groundings in political view; labor unions are more popular/less contested in some parts of the country than others. But they have no demonstrable connection to contemporary understandings of "arbitrary, capricious."
- NLRB judgments are not self-enforcing. Although most often accepted – indeed, not taken to the point even of formal Board judgment – the consequence is that the Board must affirmatively seek their enforcement if it doubts voluntary compliance will occur. EPA rules must be promptly challenged, or else take effect. EPA adjudication products (licenses and fines) may take effect if not affirmatively made the subject of review. These differences, reflecting inter alia political judgments by Congress, could have differential outcome effects

Conclusion

The authors' point appears to be to urge a change in the *State Farm* review standard. Since (they have shown) judicial judgments will be shaped to some degree by political orientation, wouldn't it be preferable to leave control to the politicians of the current administration, rather than holdovers from prior ones? Shouldn't Justice Rehnquist's concurrence have prevailed?

Changing the *State Farm* standard will have no impact on the cases to which it is not applied. That set (i.e., NLRB cases) appears to constitute the overwhelming proportion of the database Professors Sunstein and Miles have used. One may confidently predict a continued capacity to

⁴¹ Cox, Bok, Gorman & Finkin, Labor Law 12th ed. 1996 at 108.

⁴² James L. Brudney, A FAMOUS VICTORY: COLLECTIVE BARGAINING PROTECTIONS AND THE STATUTORY AGING PROCESS, 74 NC L Rev 939, 944 (1996).

⁴³ Brudney, op. cit. supra.

⁴⁴ Cox et al. at 108.

demonstrate politics-driven differences in outcome on review of NLRB adjudications, *whatever* review standard is deployed. We may hope, I do hope, that the “tenacity of a taught tradition,” the understanding that results must be justified in the terms that the law allows (which do not include political preferences), will constrain these differences, as I believe they do today. But it would be bootless to think we could eliminate them. And we certainly would not affect them by altering a standard that is rarely if ever relevant to their determination.

Let us assume – it is almost certainly the case – that the general result Professors Sunstein and Miles have found holds in *all* settings in which a judge’s political view intersects with some matter in the case before her. Again, though, in my judgment one needs to understand the extent to which that is a *constrained* result, one limited by the tenacity of the taught tradition and the understanding that results must be justified in the terms that the law allows (which do not include political preferences). And one ought to be concerned that recognition of this fact may make judging the more, not less, political. When turning to the impact of changing the *State Farm* standard for those cases in which it *is* regularly deployed, especially high-consequence rulemakings turning to a significant degree on disputable judgments about scientific, technological or like questions, shouldn’t one seek some indication whether the judicial politicization problem is *worse* in this context than in others? If I have correctly suggested significant problems with the data set they have used, their analysis does not show this; nor is one’s intuition that this should prove to be true.

In addition one would like to have seen more attention paid to the gains “hard look” might bring for “rational” decision-making in the highly freighted and significant contexts to which it seems most important. Within the agency, an EPA official wrote, hard look review “reaches beyond those who were concerned with the specific regulations reviewed. They serve as a precedent for future rulewriters *and give those who care about well-documented and well-reasoned decisionmaking a lever with which to move those who do not.*”⁴⁵ “Those who do not,” we have certainly learned, include politicians inside and outside the agency who care about results and not about science.⁴⁶ Since agency officials cannot know who their judicial reviewers will be, they can have no incentive to bend their science to particular supposed tastes. The knowledge that there *will be* review, looked at hard in the context of these difficult judgments, endows “those who care about well-documented and well-reasoned decisionmaking a lever with which to move those who do not.” Why, in this context, should we wish to give that lever up?

⁴⁵ WILLIAM F. PEDERSEN, JR., FORMAL RECORDS AND INFORMAL RULEMAKING, 85 Yale L.J. 38, 60 (1975) (emphasis supplied).

⁴⁶ Thomas McGarity and Wendy Wagner, *Bending Science* (forthcoming Spring 2008, Harvard University Press; manuscript with author) [if you don’t like this, <http://www.guardian.co.uk/usa/story/0,12271,1151187,00.html>] will give you a way of constructing something more concrete.]