

MODELING AGENCY/COURT INTERACTION

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Responding to Matthew C. Stephenson, *The Strategic Substitution Effect: Textual Plausibility, Procedural Formality, and Judicial Review of Agency Statutory Interpretations*, 120 HARV. L. REV. 528 (2006).

The positive political theory of legal rules, such as those providing for judicial review, has received far too little attention. Professor Matthew Stephenson's analysis of his strategic substitution effect is therefore a significant development.¹ In this Response, we acknowledge that he has made some material and valuable advances in the way we should think about the positive interaction of agencies and courts. However, his model has important limitations and in practice it may describe less than we would like. Nonetheless, the Article's value can be found in its original conceptual ideas, which may be expanded upon to develop a more valuable theory of the effect of legal rules in administrative law.

I. STEPHENSON'S MODEL AND ITS VIRTUES

The most significant virtue of *The Strategic Substitution Effect* is simply its approach. The Supreme Court decision in *Chevron*,² and subsequent applications such as in *Mead*,³ have seen a flood of analysis in the law reviews. These articles have commonly analyzed the doctrinal underpinnings and policy consequences of the legal rules. *Chevron* has even seen some empirical analyses of its effects. Yet the analyses to date have almost entirely lacked any descriptive theoretical analysis to model the projected consequences of different standards. Professor Stephenson importantly steps into that gap. As the author aptly notes, "the full impact of *Mead*, and of other doctrines related to agency choice of procedural form, cannot be understood without attention to the relationship between procedural formality and textual plau-

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¹ Matthew C. Stephenson, *The Strategic Substitution Effect: Textual Plausibility, Procedural Formality, and Judicial Review of Agency Statutory Interpretations*, 120 HARV. L. REV. 528 (2006).

² *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

³ *United States v. Mead Corp.*, 533 U.S. 218 (2001).

sibility as alternative devices that agencies can use to secure judicial acquiescence in their interpretive decisions.”⁴

The key advance in his analysis is the notion that different review rules will influence agency behavior. Too many past discussions have treated agency rulemaking as if it were fixed and exogenous to the system. In reality, of course, the agency’s decisions will themselves be influenced, perhaps substantially, by the standards of review applied to those decisions. This might seem obvious — “hard look” judicial review was intended to force agencies to do a better job justifying their rules. Yet the analyses of *Chevron* and related cases have largely ignored the effect of the review standards on agency behavior. Some critics of *Chevron* may have maintained that the deferential standard will *allow* agencies to promulgate “illegal” regulations (with “illegal” meaning contrary to the court’s best interpretation of the statutory authority), but they have not recognized that the standard should actually *encourage* agencies to act strategically in promulgating “illegal” regulations, due to the greater deference on judicial review.⁵ The nature of this tendency depends on the implementation of *Chevron* deference, as Professor Stephenson argues.

The “strategic substitution effect” applies if the courts give greater deference to statutory interpretations emerging from more formal rulemaking processes. The more formal an agency’s procedures, the more leeway a court will give the agency’s interpretation of the statute at issue in policymaking. The less formal the procedure, the more likely the court is to apply an “informality discount” and accept less deviance from its own preferred correct statutory interpretation (called “textual plausibility”). The agency will be allowed a measure of textual shirking in this context.⁶ Formal procedures that gain greater deference come at a cost to the agency, in terms of the time and resources required to use them.

Doctrines that provide greater deference for procedurally formal regulations will have the effect of decreasing the “textual plausibility”

⁴ Stephenson, *supra* note 1, at 563.

⁵ Professor Stephenson presumes that agencies are “interpretive instrumentalists” concerned only about policy objectives and not about legal obedience. *Id.* at 536. While he does not dismiss the possibility that agencies give some concern to obeying the law, *id.* at 536 n.22, he clearly premises his analysis on the proposition that agencies are willing to “stretch” the bounds of the law in order to achieve their policies, a perfectly plausible premise. Although his model implies that agencies could desire to stretch the statute an infinite amount in pursuit of their policies, this is not necessary to the basic understanding of the “strategic substitution effect.”

⁶ Professor Stephenson adds that the court will defer to agency interpretations accompanied by formal procedures — even if there is no informality discount. The “informality discount,” as Professor Stephenson defines the term, is the difference in intrinsic judicial deference conferred on formal and informal agency interpretations. Although intrinsic judicial deference affects actual judicial deference, actual judicial deference may vary even if intrinsic deference is constant. *Id.* at 543.

of policies made through formal procedures. By contrast, discounting deference for informal agency decisions will have the effect of increasing the “textual plausibility” of those actions, because such decisions will be held to a higher level of judicial scrutiny. However, to the extent that the courts provide agency decisions with deference generally (called “intrinsic deference”), relatively informal choices may also have limited textual plausibility.

A situation with the potential to invite significantly different levels of deference creates a tradeoff for the agency, and the “strategic substitution effect.” Proceeding via formal rulemaking has additional costs to an agency and is therefore disadvantageous. However, if such formality buys greater deference upon judicial review, the agency will be better able to effect its policy preferences and less constrained by a governing statute. Some of Professor Stephenson’s calculations are complex, but they seem clearly right and have important implications beyond the common understanding.

A second important advance in Professor Stephenson’s analysis also bears direct mention. He answers the question of “why” a court would give deference to an agency in terms of overall social benefit or welfare maximization. It is commonplace to view courts as caring about the law or about ideological politics, but judges are surely also concerned with the general welfare, independent of law or politics. This is something like Posnerian pragmatism. Judges of all ideologies share a common concern for overall welfare, operating perhaps as Kornhauser’s team model of judicial decisionmaking suggests.⁷ Professor Stephenson recognizes this as a basis for judicial deference to agency interpretations. The greater deference is granted rules adopted through procedural formality, because the costly procedures may signal to the courts the “significance of the interpretive issue to the agency’s policy agenda.”⁸ In recognition of the value of carrying out that policy agenda, the model suggests, courts will grant greater deference to formally adopted rules.

II. A ROLE FOR JUDICIAL BEHAVIORISM?

A serious concern about Professor Stephenson’s model lies in its failure to incorporate the ideological concerns of reviewing judges. While he models agency behavior as a function of policy preferences (agencies are “interpretive instrumentalists”), constrained by judicial review, his model of judicial behavior is rather obscure. At times, Pro-

⁷ See Lewis A. Kornhauser, *Adjudication by a Resource-Constrained Team: Hierarchy and Precedent in a Judicial System*, 68 S. CAL. L. REV. 1605 (1995).

⁸ Stephenson, *supra* note 1, at 529. The reviewing court may care “about the agency’s ability to achieve its substantive policy objectives.” *Id.* at 540.

fessor Stephenson seems to view judges as pure formalists, with no end other than seeking the optimal legal interpretation of the statute governing the agency. At other times they care mostly about interpretations most consistent with their own preferences (ideological or otherwise).⁹ The author nods to the thesis that “a court’s view of the best interpretation is influenced by the political ideology of the judge,” but simply notes that it is a “topic of considerable controversy.”¹⁰ We believe Professor Stephenson undersells the importance of judicial ideology in administrative law. There is a great wealth of consistent research showing that much of judicial decisionmaking is in fact driven by judicial ideology.¹¹ Indeed, there is research specific to *Chevron* deference itself that plainly demonstrates this ideological effect. Our study at the circuit court level found that *Chevron* deference varied from thirty-three percent to eighty-one percent, depending on the ideological panel alignment and ideology of the action reviewed.¹² Other studies of judicial review of agency actions have reached similar conclusions.¹³

Professor Stephenson takes the position that the model’s basic implications are the same whether one believes judges are ideological, textualists, or driven by other welfare maximization preferences. We are doubtful, especially where ideological judging is the case. At its most extreme, ideological judicial decisionmaking would render the entire enterprise of positive analysis of doctrine irrelevant, because doctrine would be meaningless — courts would effect their policy preferences regardless of legal rules. This extreme legal realism does not characterize the courts, however. Judges are influenced, at least to a degree, by governing legal standards. A study of the aftermath of the *Chevron* decision itself found that it influenced Supreme Court deference, though ideological determinants also remained very significant.¹⁴

⁹ *Id.* at 537–38.

¹⁰ *Id.* at 537.

¹¹ At the Supreme Court level, see generally JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002); JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1993). For the circuit courts, see FRANK B. CROSS, *DECISION MAKING IN THE U.S. COURTS OF APPEALS 11–38* (2007).

¹² Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 *YALE L.J.* 2155, 2173 (1998).

¹³ See, e.g., 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 (discussing role of ideology on D.C. Circuit administrative review); Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 *VA. L. REV.* 1717 (1997) (finding that panel ideology in the D.C. Circuit was a significant determinant of outcome of review of environmental regulations); Jeff Yates, *Presidential Bureaucratic Power and Supreme Court Justice Voting*, 21 *POL. BEHAV.* 349 (1999) (finding ideological alignment to be a significant determinant of Supreme Court decisions to uphold or strike administrative action).

¹⁴ Mark J. Richards et al., *Does Chevron Matter?*, 28 *LAW & POL’Y* 444 (2006).

While judges do not utterly ignore the law, there remains ample evidence that they are strongly influenced by their ideological preferences. This fact needs to be incorporated into Professor Stephenson's model. The implications of such judicial behavioralism for the model are profound and potentially eliminate some of the relationships it propounds.

Consider first a judiciary that is ideologically aligned with the agency adopting the policy. This could involve conservative judges, such as those appointed by a Republican, reviewing an agency policy promulgated by a Republican administration. Professor Stephenson notes that courts might grant agencies deference because of "a positive correlation between the political or ideological predilections of the court and the agency."¹⁵ In this scenario, he recognizes that "judicial review will be an insignificant constraint."¹⁶ In this set of circumstances, an agency would have no reason to bear the costs of procedural formality, because the ideologically friendly court will rubber-stamp its decisions. The court would need no signaling of policy importance, because it has no reason to disapprove of any agency policies. Thus, the strategic substitution effect is meaningless in the presence of such agency/court alignment (perhaps half of the time generally).

Consider the opposite scenario, in which the court and the agency are not aligned, such as a liberal judiciary reviewing a regulation of a conservative administration. The "strategic substitution effect" hypothesizes that such a judiciary will grant greater deference to formal rules of such an agency, because formality signals the policy importance of the rule. But this makes no sense. An ideologically liberal judiciary would not desire to advance the ends of a conservative administration, especially one of an agency that is purely interpretively instrumentalist. Instead, the signal of importance provided by procedural formality could have the opposite effect, causing an ideologically contrary court to disapprove the regulation precisely because it has more policy importance. The signal of conservative policy significance would only alert a liberal judiciary to be suspicious of the rule. Obviously there is a tradeoff between a court's desire for ideological outcomes and its desire for welfare maximization or textualist formality, and that tradeoff may vary based on the salience of the regulation at issue. To the extent that such tradeoffs are not included in the model, the set of phenomena explained by the model becomes even smaller:

¹⁵ Stephenson, *supra* note 1, at 540.

¹⁶ *Id.* at 544. He notes that an agency has no interest in purchasing more deference than necessary.

non-ideological interpretive issues where the court and agency do not agree about the welfare conditions of the interpretation.

Consideration of judicial behavioralism makes the “strategic substitution effect” either less relevant (in the case of aligned courts) or potentially backwards (in the case of unaligned courts). Perhaps the hypothesis might have some truth in the presence of moderate judges, lacking strong ideological predispositions. But the prevalence of such judges is unclear, and an agency does not know what the composition will be of a D.C. Circuit panel reviewing its regulation. So the agency can hardly count on a panel that will apply Professor Stephenson’s modeled informality discount. Indeed, the uncertainty about panel composition makes the model difficult to operationalize. An agency’s choice of procedure is contingent on how far it wishes to depart from the judicial construction of the statutory text, but without knowing the panel composition, the agency has no way of projecting what that judicial construction would be.¹⁷

The model’s only prospect for salvation from this quandary is the welfare maximization component, which states that ideologically contrary judges will defer to an agency because of their belief that its decision maximizes overall social benefit. Thus, a “court may believe procedural formality is positively correlated with high-quality agency decisionmaking.”¹⁸ This attempted rescue relies on the premises that (a) judges care more about neutral welfare maximization than about their ideological premises and (b) agencies will prioritize neutral welfare maximization when contrary to their own ideological preferences, thus warranting neutral deference. Both premises seem questionable. But even if both premises are true, there may be another issue: the greater deference may be grounded in the protections of the procedures themselves, not the agency signaling of policy importance that is central to Professor Stephenson’s model.¹⁹

III. OVERSIMPLIFICATION THAT THREATENS TO SWALLOW THE WHOLE MODEL

In addition to the omission of judicial behaviorism, the model takes little account of the pragmatic realities of administrative decisionmaking, seriously qualifying predictions of its real world effect. First, Professor Stephenson’s model relies on the assumption that courts can

¹⁷ The author recognizes this complication and leaves it to “future research.” *Id.* at 545 n.50. He may underestimate the significance of the qualification, though, given the profound differences of judicial interpretation grounded in judicial ideology.

¹⁸ *Id.* at 547.

¹⁹ This theory is more akin to that set out in Mark Seidenfeld, *A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83 (1994).

perfectly observe agency textual shirking with relative ease. Issues such as this might simply be considered random “noise” that does not affect the conclusions of the model, but that is not the case here, because the formality of procedures can itself influence the transparency of agency textual shirking. The model too easily accepts the critical implicit assumption that courts can easily observe or control informal agency policymaking. Agencies may be packing important policy decisions into informal and hard to review contexts (such as policy manuals or a series of adjudications) precisely because it is more difficult for a single court to observe those outcomes. Statutory shirking for informal agency actions could show up in vague language into which the agency could pour its preferences in application. In contrast, transparency is much greater in formal proceedings, with interested parties commenting on both the policy and legal analysis of the proposed rule.

The model also ignores various requirements of the Administrative Procedure Act governing formal rulemaking. By law, such rulemaking must jump through various additional procedural hoops. The Administrative Procedure Act, as interpreted, imposes various other requirements for more formal rulemaking that courts may find an agency failed to satisfy. An agency must provide notice of the proposed rule and a hearing or receipt and consideration of public comments.²⁰ Then, the agency must consider those comments and provide a statement of the basis and purpose in a published final rule.²¹ Courts have elaborated on these requirements to compel, for example, the agency to identify and make available all material technical data on which it relied.²² Court review has overridden agency actions for this and other failure to satisfy judicial standards for the management of the notice and comment process.²³ These additional bases for reversal of a formal rule would weigh against the “informality discount” propounded by the Article. Thus, the net effect of the judicial review process could be minimized or even the opposite of that propounded in the article.

Finally, Professor Stephenson’s model underplays the most likely reason why agencies invoke formal procedures: a projection of power into the future. Formal rules can only be revoked or modified by new formal rules. Thus, an agency imposes costs on future agencies that would wish to modify those rules. This makes alteration by a future, ideologically contrary administration more costly. Future administrations also have resource constraints. They will find it more costly to

²⁰ 5 U.S.C. § 553 (2000).

²¹ *Id.* § 553(c).

²² *See* Kern County Farm Bureau v. Allen, 450 F.3d 1072, 1076 (9th Cir. 2006).

²³ *See, e.g.,* Natural Res. Def. Council v. EPA, 279 F.3d 1180, 1187–88 (9th Cir. 2002) (discussing necessary correspondence between proposed and final rules).

alter those rules, thus entrenching the prior administration's preferences to some degree, a potentially considerable policy achievement.

IV. CONCLUSION

As a theoretical matter, *The Strategic Substitution Effect* is very well executed and intriguing in its implications. It is an excellent starting point for deeper analysis into strategic decisionmaking by agencies in their decisions over procedure and interpretation. However, as a practical description of real world agency/court interactions, the theory, in its present state, is seriously challenged. Professor Stephenson recognizes the fundamental limitations of his model, including some of those we have mentioned. He even notes that important contributions "have been valuable precisely because, despite their superficially plausible assumptions, they generate predictions that are inaccurate in important respects."²⁴ Professor Stephenson states that "the ultimate test of any positive theory is its ability to explain and predict real-world behavior."²⁵ We agree. We believe that the model needs some revision in its fundamental assumptions about judicial behavior, policy transparency, and procedural signals. Of course, we are asking for everything. But if these factors are properly incorporated, the model could be especially powerful and enlightening for administrative law scholarship.

²⁴ Stephenson, *supra* note 1, at 566 n.113.

²⁵ *Id.* at 566.