# Chevron's Real Impact

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Kent Barnett and Christopher Walker, *Chevron in the Circuit Courts*, 116 **Mich. L. Rev.** 1 (2017).

Empirical studies are often regarded as having less cachet than theory, and the circuit courts certainly have less cachet than the Supreme Court, so an empirical study of the circuit courts might be expected to rank somewhat low in the academic pecking order. But this article belongs at the top. A survey and analysis of all the federal Court of Appeals decisions from 2003 to 2013 that refer to the *Chevron* doctrine – some 2,272 of them – it reveals the actual operation and significance of this most famous of modern administrative law decisions. The Supreme Court invokes *Chevron* fairly regularly, of course, but often for the purpose of modifying it. In any case, Supreme Court decisions tend to be so politically charged that they frequently seem *sui generis*, a characteristic that provided the Court itself, in *King v. Burwell*, with still one more basis for modifying *Chevron* doctrine. It is in the circuit courts that the quotidian work of administrative law is carried out, and that is the pudding where the proof of *Chevron*'s real impact can be found.

The most basic conclusion that Professors Barnett and Walker reach is that *Chevron* makes a difference. Contrary to prior empirical studies of *Chevron*'s impact in the Supreme Court ("*Chevron* Supreme," as the authors call it, since wordplay with the decision's name is difficult to resist), they find that the win rate for the agencies in a circuit court ("*Chevron* Regular") is substantially higher when the court invokes the *Chevron* doctrine. At 77%, it is fully 20% higher than the win rate when the court invokes *Skidmore*. To be sure, this is hardly a surprising conclusion, and thus lacks the counter-intuitive allure that some of the best empirical studies offer. But it is a conclusion reached only after a massive amount of careful effort and it represents an important contribution to our knowledge about *Chevron's* real impact.

Moreover, Professors Barnett and Walker go beyond this basic conclusion to ask a number of important and intriguing questions about the pattern of the decisions. Distinguishing between cases decided at *Chevron* step one and step two, they find that when the case is decided at step one, the agency wins at a much lower rate than at step two, but nonetheless in a respectable 39% of the decisions, essentially the same as its win rate when the court employs a de novo standard. This suggests, although it does not prove, that *Chevron*'s two-step formulation is more coherent and more principled that its critics claim. Counting against the coherence of *Chevron*, however (and the authors are admirably neutral in reaching and reporting their conclusions) is the differential treatment of the doctrine by the circuit courts, something that only a study of this sort could reveal. In cases where the court invoked *Chevron*, the agency won 83% of the time in the First Circuit, but only 66% of the time in the Ninth, a startling differential. This variance might be the result of applying *Chevron* at different rates, and here too there are dramatic differences, from 89% of the cases in the D.C. Circuit where the doctrine was at issue to 61% in the Sixth Circuit. It might be imagined, by proponents of the doctrine, that these two variables would balance out, but that is not the case. Constructing a composite score of three different measurements (win rates for agencies, frequency with which *Chevron* is applied, and win rate when *Chevron* is applied), the authors found that the First Circuit scored 8.38 on a ten-point scale while the Ninth Circuit scored 6.85.

There are a number of other intriguing distinctions in the pattern of decisions that Professors Barnett and Walker are able to derive from their data. When the composite score for subject matter and particular agencies are computed, equally dramatic variations appear. The score, and thus the impact of the *Chevron* doctrine, is highest in the field of telecommunications (8.67), and also high in education and entitlement programs (8.15 and 8.14). It is lowest for civil rights (5.99) and similarly low in housing and prison cases (6.04 and 6.64). Agencies that receive high levels of deference include the ICC (9.38), the FCC (8.67) and the NLRB (8.26); those that fare worst are the EEOC (5.08),

HUD (5.19), the FTC (6.74) and the Bureau of Prisons (6.79). It is difficult to determine whether these variations reveal that the *Chevron* doctrine operates in a coherent fashion; that would depend on the wording of the authorizing statutes and perhaps that level of expertise that the authorization demands. This study cannot answer those questions, as the authors readily acknowledge, but it provides a framework by which the answers can be explored in future work.

*Chevron*, the insignia of modern administrative law, has fueled reconsideration of the relationship of Congress, the executive and the judiciary. The actual impact of the decision, however, has often been the subject of crude generalizations. By distilling the results of the circuit court decisions that invoke this doctrine, Professors Barnett and Walker provide a more refined account of the doctrine's development, and have thus performed a valuable service to the entire field of administrative law.

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