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INDETERMINACY AND CRAFT IN JUDICIAL
REVIEW OF ADMINISTRATIVE LAW: A
COMMENT ON SHAPIRO
AND LEVY

*Marshall J. Breger**

In a fascinating article published in the *Duke Law Journal*, Sidney Shapiro and Richard Levy argue in favor of more determinacy in the judicial review of administrative law cases.¹ They explore the reasons for indeterminacy and make some interesting suggestions to meet their goal of increased determinacy.² Specifically, Shapiro and Levy propose amending the Administrative Procedure Act³ (APA) to include "specific inquiries" in place of "open-ended scope of review standards."⁴ One of the incessant complaints of students taking Administrative Law (or practitioners practicing it) is that there often appears to be applicable black letter doctrine, and yet decisions appear to vary greatly.⁵

Put simply, Shapiro and Levy are unhappy that they cannot handicap judges in administrative law cases. I understand their concern, as I have problems picking winners at Saratoga. There is, of course, a science to success at the track (or so readers of the racing form believe). Is there a similar method of prediction at the courthouse?

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1. Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*, 44 DUKE L.J. 1051 (1995).

2. *Id.* at 1073-74.

3. 5 U.S.C. § 706 (1994).

4. Shapiro & Levy, *supra* note 1, at 1074. For example, Shapiro and Levy argue that the "arbitrary [and] capricious" and "substantial evidence" tests are imprecise in practice. *Id.* at 1065.

5. See Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 982 (1992) (arguing that the Court often fails to apply *Chevron*, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), even in cases implicating deference issues); see also Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1030-40 (describing the temporary effect of *Chevron* on appellate court affirmance rates of agency review).

Shapiro and Levy believe there should be such a method: the use by judges of craft norms which they define as “the well-reasoned application of doctrine to the circumstances of a particular case.”⁶ Craft means consistency.⁷ Shapiro and Levy claim that their approach 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.”⁸ Yet, as we will see, Shapiro and Levy want to stack the deck.

After providing us with a psychology of judicial behavior,⁹ in which they describe judges as instinctively selecting outcome norms which allow the judge to “focus[] on the result in a given case and its implications for the parties and society as a whole”¹⁰ (it is less work and better for the soul; after all, they get to choose the outcome they like!), Shapiro and Levy argue that “the average judge becomes less outcome oriented as craft becomes more determinate”¹¹ Social choice theory provides the basis for this hypothesis, one which classifies the judiciary as a utility-maximizing group.¹²

Assuming that there is often conflict between the decision a judge would like to reach and that which he is bound to reach, Shapiro and Levy further argue that the judiciary solves this tension between duty and desire by staking out, as its craft norm, doctrinal indeterminacy. This [brilliant] innovation “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 indeterminate.”¹³ In essence, Shapiro and Levy argue that judges want easily manipulated rules, allowing them to reach desired results, while still claiming adher-

6. Shapiro & Levy, *supra* note 1, at 1053.

7. *Id.* Craft means consistency between “constitutional and statutory provisions and continuity with prior case law.” *Id.* (citing ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 222 (1993)).

8. *Id.*

9. *Id.* at 1056-58. “[J]udging affect[s] the extent to which judges obtain respect, ideological rewards, and leisure.” *Id.* at 1056.

10. *Id.* at 1053. Shapiro and Levy further suggest that outcome norms reflect “the values of justice and social utility as filtered through a judge’s worldview.” *Id.*

11. *Id.* at 1059.

12. *Id.* at 1061-62. For an excellent discussion of the application of public choice theory to the law, see DANIEL A. FARBER & PHILLIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* (1991). Shapiro and Levy examine the sources of judicial utility, focusing on the respect of peers, the ability to render decisions in accord with the individual judge’s ideological preferences, and to a lesser extent, the impact on a judge’s leisure time. Shapiro & Levy, *supra* note 1, at 1055-56.

13. Shapiro & Levy, *supra* note 1, at 1061-62.

ence to settled doctrine.¹⁴ This is especially the case, the authors argue, with administrative law.¹⁵

The second section of Shapiro and Levy's article explains how current doctrines of judicial review support doctrinal indeterminacy. In their view, indeterminacy is "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."¹⁶ The exemplars of such manipulable categories, Shapiro and Levy suggest, are the present standards of review used in the APA, specifically "substantial evidence" in the record¹⁷ and "arbitrary [and] capricious."¹⁸

In viewing these standards as open-ended and subjective, Shapiro and Levy take the same view, albeit in more academic language, as do my administrative law students at the Columbus School of Law of the Catholic University of America. I, of course, try to tell them otherwise; that order exists in administrative law; and that the critical legal thinkers and other deconstructionists are wrong to conclude that a judge's reasoning ability is less important than his personal or professional biases. But now my students have the scholarship of Shapiro and Levy to draw upon.

This Essay begins by examining whether more precise codification of statutory scope of review language will actually bring about a greater degree of determinacy in judicial decisions, and explains the reasons why indeterminacy currently exists. The proposed Shapiro and Levy standard is discussed next, as is their reliance on public choice theory to explain judicial behavior. Finally, this Essay concludes that while Shapiro and Levy raise interesting points, their quest for judicial determinacy is misguided.

I. DOES MORE PRECISE CODIFICATION OF SCOPE OF REVIEW LANGUAGE ACHIEVE DETERMINACY?

Shapiro and Levy are not just describers of how things are— they are legal reformers as well. In part III of their article they seek to cajole presumably indeterminacy-loving judges into becoming more determinate through the use of statutory language.¹⁹ Yes, they want to replace

14. *Id.* at 1062.

15. The authors suggest that administrative law is particularly susceptible to indeterminate craft norms because "[f]irst, 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." *Id.*

16. *Id.* at 1064.

17. *Id.* at 1065 (citing 5 U.S.C. § 706(2)(E) (1988)).

18. *Id.* (citing 5 U.S.C. § 706(2)(A) (1988) (alteration in original)).

19. *Id.* at 1072.

the talismanic phrases “substantial evidence” and “arbitrary and capricious” with a much more lengthy revised APA § 706²⁰ which codifies both the *State Farm*²¹ and *Chevron*.²² Yet, the question we need to ask is whether or not more detailed explication of the § 706 standard will enable judges to arrive at better decisions. Consider the various approaches to regulatory reform offered by the new Republican Congress. These include The Job Creation and Wage Enhancement Act of 1995²³ (part of the Contract with America), its Senate analogue: the Comprehensive Regulatory Reform Act of 1995²⁴ (S. 343) (six versions!) and the Regulatory Reform Act of 1995²⁵ (S. 291), as well as the Walker Amendment to the Debt Limit Extension Act.²⁶

The early versions of S. 343 attempted to establish a standard of review comprised of “specific inquiries” for the court. It is instructive to compare the initial draft of the judicial review provision with the later version, which evolved from committee markup.²⁷ The differences in the

20. *Id.* at 1073-75 (proposing an amended § 706).

21. *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983). The Court rejected Petitioner's contention that the appropriate standard under which to review an agency's rescission of a regulation should be the same as the standard applied had the agency refused to promulgate the rule in the first place. *Id.* at 41-42. The Court rejected this contention and held that the “arbitrary and capricious” standard applies, requiring an agency rescinding a rule to supply a reasoned analysis. *Id.* at 41-43.

22. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The *Chevron* decision outlined a two-step analysis to be used when reviewing an agency's interpretation of a statute. *Id.* at 842. First, the court inquires whether Congress specifically has addressed the precise issue, then the agency must abide by this congressional determination. *Id.* at 842-43. If, on the other hand, Congress has not spoken to the precise question at issue, then the court determines whether the agency's interpretation of the statute is reasonable. *Id.* at 843. This is the second step of the analysis. *Id.* If the agency's interpretation is reasonable, then the court must uphold the agency's interpretation. *Id.*

23. H.R. 9, 104th Cong., 1st Sess. (Jan. 4, 1995). H.R. 1022, the Risk Assessment and Communications Act, was passed by the overwhelming vote of 286 to 141 on February 28, 1995—just five days after being referred to committee. It was then repassed as part of the larger reform bill, H.R. 9, by a vote of 277 to 141 on March 3, 1995.

24. S. 343, 104th Cong., 1st Sess. § 624 (as introduced Feb. 2, 1995) [hereinafter Version 1]; *id.* (as amended Feb. 6, 1995) [hereinafter Version 2]; *id.* (as reported from Senate Comm. on Gov't Affairs, May 26, 1995) [hereinafter Version 3]; *id.* (as reported from Senate Comm. on the Judiciary, May 26, 1995) [hereinafter Version 4]; *id.* (as amended (floor vehicle before debate) June 28, 1995) [hereinafter Version 5]; *id.* (as amended (at 3d closure vote) July 21, 1995) [hereinafter Version 6] (this version of the legislation is commonly referred to as “Dole-Grassley”).

25. S. 291, 104th Cong., 1st Sess. § 623 (Jan. 27, 1995). The Democrat alternative to S. 291, S. 1001 was deliberately similar to the Republican bill.

26. H.R. 2586, 104th Cong., 1st Sess. (Nov. 7, 1995) (amendment offered by Rep. Walker (R. Pa.) 141 Cong. Rec. H. 12064).

27. Version 4, *supra* note 24, § 706 (May 26, 1995).

earlier²⁸ and later²⁹ versions are clear. Version I of S. 343 jettisons both

28. Version 1, *supra* note 24, § 628 (“Standard for review of agency interpretations of an enabling statute”). Specifically, § 628 states:

(a) In reviewing a final agency action under section 706 of this title, or under a statute that provides for review of a final agency action, the reviewing court shall affirm the agency’s interpretation of the statute granting authority to promulgate the rule if, applying traditional principles of statutory construction, the reviewing court finds that the interpretation is clearly the interpretation of the statute intended by Congress.

(b) If the reviewing court, applying traditional principles of statutory construction, finds that an interpretation other than the interpretation applied by the agency is clearly the interpretation of the statute intended by Congress, the reviewing court shall find that the agency’s interpretation is erroneous and contrary to law.

(c) (1) If the reviewing court, applying established principles of statutory construction, finds that the statute gives the agency discretion to choose from among a range of permissible statutory constructions, the reviewing court shall affirm the agency’s interpretation where the record on review establishes that—

(A) the agency has correctly identified the range of permissible statutory constructions;

(B) the interpretation chosen is one that is within that range; and

(C) the agency has engaged in *reasoned decisionmaking* in determining that the interpretation, rather than other permissible constructions of the statute, is the one that maximizes net benefits to society.

(2) If an agency’s interpretation of a statute cannot be affirmed under paragraph (1), the reviewing court shall find that the agency’s interpretation is arbitrary and capricious.

Id. (emphasis added). Section 623 (“Decisional criteria”) of Version 1 outlines the decisional criteria an agency must use when issuing a final rule. They are as follows:

(a) No final rule subject to this subchapter shall be promulgated unless the agency finds that—

(1) the potential benefits to society from the rule outweigh the potential costs of the rule to society, as determined by the analysis required by section 622(d)(2)(B); and

(2) the rule will provide greater net benefits to society than any of the reasonable alternatives identified pursuant to section 622(c)(2)(C), including the market-based mechanisms identified pursuant to section 622(c)(2)(D).

(b) The requirements of this section shall supplement the decisional criteria for rulemaking otherwise applicable under the statute granting the rulemaking authority, except when such statute contains explicit textual language prohibiting the consideration of the criteria set forth in this section. Where the agency finds that consideration of the criteria set forth in this section is prohibited by explicit statutory language, the agency shall transmit its finding to Congress, along with the final cost-benefit analysis required by section 622(d)(2)(B).

Id.

29. Version 4, *supra* note 24, § 706(c) (“Scope of review”). In comparison to Version 1, Version 4 provides:

In reviewing an agency interpretation of a statute governing the authority for an agency action, including agency action taken pursuant to a statute that provides for review of final agency action, the reviewing court shall—

(1) hold erroneous and unlawful—

the APA "arbitrary and capricious"³⁰ and the "substantial evidence" tests for judicial review of agency action.³¹ While it appears to codify the famous *Chevron* two-step analysis in its instruction to the courts,³² its step two is clearly less deferential to agency judgments. Instead, Version 1 requires a reviewing court to determine that the agency used "reasoned decisionmaking in determining that the [agency's] interpretation . . . is the one that maximizes net benefits to society."³³ As marked up by the Committee on the Judiciary, Version 4 in contrast, gives up on codifying *Chevron* and demands only that an agency explain "in a reasoned analysis why it selected the interpretation [it did] and why it rejected other permissible interpretations of the statute."³⁴

It is unclear whether all this added specificity is in aid of 'craft,' but I doubt that these efforts at codification will actually enhance the determinacy of judicial opinions. Indeed, it is far more likely that the parsing of this quest for precision by litigants and judges will yield even more uncertainty than our present § 706. This quest for determinacy exemplifies Wittgenstein's teaching that limits exist to the understanding of the world that we can articulate through language.³⁵ Indeed, the various staffers (and lobbyists?) drafting the different iterations of S. 343 recognized this. They dropped the effort to codify *Chevron* and give specific instructions to the courts leaving (with some change) the traditional 706 judicial re-

(A) an agency interpretation that is other than the interpretation of the statute clearly intended by Congress; or

(B) an agency interpretation that is outside the range of permissible interpretations of the statute; and

(2) hold arbitrary, capricious, or an abuse of discretion—

(A) an agency action as to which the agency—

(i) has improperly classified an interpretation as being within or outside the range of permissible interpretations; or

(ii) has not explained in a reasoned analysis why it selected the interpretation and why it rejected other permissible interpretations of the statute; or

(B) in the case of agency action subject to chapter 6, an interpretation that does not give the agency the broadest discretion to develop rules that will satisfy the decisional criteria of section 624.

(d) Notwithstanding any other provision of law, the provisions of this subsection shall apply to, and supplement, the requirements contained in any statute for the review of final agency action which is not otherwise subject to this subsection.

Id. § 706 (c)-(d).

30. 5 U.S.C. § 706(2)(A) (1994).

31. *Id.* § 706(2)(E).

32. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

33. Version 1, *supra* note 24, § 628(c)(1)(C).

34. Version 4, *supra* note 24, § 706(c)(2)(A)(ii).

35. LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 66 (G.E.M. Anscombe trans. 3d ed. 1958). These concepts are well discussed in Christopher L. Kutz, *Just Disagreement: Indeterminacy and Rationality in the Rule of Law*, 103 *YALE L.J.* 997 (1994).

view standards.³⁶ Other versions of regulatory reform, like the so called Walker Amendment, also reverted in the main to traditional APA standards of review recognizing that you cannot micromanage judicial review through statutory specificity.³⁷

In any event, I do not understand what a more determinate standard of review means. Do Shapiro and Levy believe that any five judges approaching the same problem will come out with the same “determinate” result? This desire drove Judge Marvin Frankel and others to seek some form of required guidelines to establish consistency among sentencing judges.³⁸ The result, the United States Sentencing Commission and the Sentencing Guidelines, suggest the outer limits of determinacy³⁹ — some call it a procrustean bed of consistency.⁴⁰ This consistency has caused grave concern for members of the judiciary, who feel they are no longer allowed to consider the interests of justice in individual cases.⁴¹ In an extreme example, these concerns led Federal District Judge J. Lawrence Irving to resign, claiming that “‘I just can’t in good conscience, continue to do this.’”⁴² Perhaps instead, Shapiro and Levy mean that each judge will apply the same method of decision-making, even though each may end up with a different result? I think that Shapiro and Levy have the

36. Version 6, *supra* note 24, § 706(a)(2)(F) (adding to the existing list of conditions of review those agency actions “without substantial support in the rulemaking file, viewed as a whole, for the asserted or necessary factual basis, in the case of a rule adopted in a proceeding subject to section 553”).

37. See H.R. 2586, 104th Cong., 1st Sess. (Nov. 7, 1995) (amendment offered by Rep. Walker (R. Pa.) 141 CONG. REC. H 12064) (Walker Amendment) (section 706(a)(2)(A) (1994) would permit the reviewing court to set aside arbitrary or capricious decisions or abuses of discretion).

38. MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* (1972) (advocating that defects in United States sentencing need to be addressed). For a positive appraisal, see Michael Tonry, *The Success of Judge Frankel’s Sentencing Commission*, 64 U. COLO. L. REV. 713 (1993). *But see* Marvin E. Frankel, *Sentencing Guidelines: A Need for Creative Collaboration*, 101 YALE L.J. 2043, 2047, 2050-51 (1992) (defending the need for guidelines, while recognizing the need for improvement). Frankel discusses “the pattern of excessive severity” in the guidelines as currently applied. *Id.* at 2046-47.

39. See Michael Tonry, *The Failure of the U.S. Sentencing Commission’s Guidelines*, 39 CRIME AND DELINQUENCY 131, 133 (1993). The Sentencing Reform Act established the United States Sentencing Commission. See 28 U.S.C. § 991 (1988) (describing the establishment, purpose, and procedures of the United States Sentencing Commission).

40. For a detailed analysis of the Sentencing Commission’s efforts, see Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681 (1992) (tracing both the history of the Guidelines’ development and their application by various actors in sentencing proceedings, as well as highlighting shortcomings in both the structure and methods of the Commission).

41. See *Address by the Honorable Stanley Sporkin at the American University Law Review Annual Dinner*, 41 AM. U. L. REV. 1, 3-4 (1991) (discussing judicial opposition to “Guideline Sentencing”).

42. *Id.* at 3 (quoting N.Y. TIMES, Sept. 30, 1990, § 1, at 22).

former in mind and I am not certain I agree. Determinacy in the sense of outcome predictiveness is not the consistency which, I should think, is the mark of good judging. Consistency does not mean that you can predict the result, it means that like situations should be treated alike. This means that you have to read the judge's opinion to see how he distinguishes cases in order to decide whether he achieves consistency. Consistency then, may have nothing to do with outcome predictiveness.

A review of the Contract With America and its kindred legislative proposals must make one skeptical about Congress' interest in seeking neutral principles in choosing a standard of review. True, the APA was passed unanimously, but it was approved after ten years of debate, with an extraordinary amount of empirical research and over 40 separate government studies and analyses. The process included a veto of one early effort, the Walter-Logan bill,⁴³ and a five year respite for World War II, allowing much of the passion to cool before the legislation was finally passed in 1945.⁴⁴ We cannot infer from the APA experience that Congress is much interested in Shapiro and Levy's noble yet apolitical desire to increase determinacy in judicial opinions.

If anything, the present congressional disposition is apparently to support language that would do the very opposite. Congress seems to distrust agency discretion and supports efforts to control it. Thus, S. 343 includes statutory language that limits agency discretion in rulemaking by requiring a cost-benefit justification of rules,⁴⁵ demanding far more precision in the notice of proposed rulemaking⁴⁶ (thus constraining the agency from roaming beyond the notice during the comment period), reviving the legislative veto in constitutional form through a 'report and wait' pro-

43. H.R. 6324, 76th Cong., 1st Sess. (1939) (expanding judicial review of administrative agency decisions) (vetoed by President Franklin Roosevelt, 86 CONG. REC. 13,942-43 (1940)); see also Paul R. Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258, 271-74 (1978) (discussing the history of the Walter-Logan bill).

44. For a history of the APA, see Walter Gellhorn, *The Administrative Procedure Act: The Beginnings*, 72 VA. L. REV. 219 (1986) (describing the actions that led to the 1946 Administrative Procedure Act and the death of the proposals that preceded the APA); see Verkuil, *supra* note 43, at 261-76 (providing a historical analysis of administrative procedure before the 1946 APA).

45. Version 1, *supra* note 24, § 622(c)(1)(A) ("When the agency publishes a notice of proposed rulemaking for a major rule, the agency shall issue and place in the rulemaking record a draft cost-benefit analysis, and shall include a summary of such analysis in the notice of proposed rulemaking.").

46. *Id.* § 622(a)(1) ("Prior to publishing notice of proposed rulemaking for any rule . . . each agency shall determine whether the rule is or is not a major rule . . ."); see also *id.* § 622 (a)(2) ("Each notice of proposed rulemaking shall include a succinct statement and explanation of the agency's determination under paragraph (1)."); *id.* § 622(b)(2) ("Such determination or designation shall be published in the Federal Register, together with a succinct statement of the basis for the determination or designation.").

vision,⁴⁷ requiring agencies to review their existing regulations over a ten year cycle,⁴⁸ and providing for a look-back provision by which interested parties can petition agencies to reopen existing rules (including in some instances interpretative rules)⁴⁹ by requiring agencies to undertake cost-benefit analyses where appropriate.⁵⁰ Further, the latest versions of the reform legislation offers numerous opportunities for judicial review,⁵¹ so much so that the Washington Post incisively observed that “[t]he bill is set up to be enforced through litigation.”⁵² Given these efforts to structure agency discretion, it is not surprising that the bill is not amenable to notions of deference.

Shapiro and Levy must realize that Congress today wants more review of administrative agency action and less deference to supposed agency expertise. The Republican Congress wants to give itself a chance to review agency activity through either “report and wait” or “corrections day” mechanisms. Alternatively Congress proposes employing courts to look over agencies’ “shoulders” (if not review *de novo* as with the Bumpers Amendment).⁵³ They certainly do not want to turn to Tom McGarity’s formula for courts to grade rules on a pass-fail basis, much as a

47. *Id.* § 626(b)(1) (“Before a major rule takes effect as a final rule, the agency promulgating such rule shall submit to the Congress a copy of such rule and a report containing a concise general statement relating to the rule, including a complete copy of the cost-benefit analysis, and the proposed effective date of the rule.”); *id.* § 626 (b)(2) (requiring the agency to wait 45 days after Congress receives the report, or after the rule is published in the Federal Register, before the rules takes effect, unless it is vetoed by Congress).

48. *See* Version 4, *supra* note 24, § 627(b)(2) (petition for cost-benefit analysis) (noting that “the review of a rule required by this section shall be completed not later than 10 years after the date of enactment of this section or 10 years after the date on which the rule is promulgated, amended, or renewed, whichever is earlier”).

49. *See* Version 1, *supra* note 24, § 625(a) (allowing parties subject to a major rule to petition for a cost-benefit analysis). If the analysis indicates a reasonable likelihood that the costs of the regulation exceed its benefits, the agency *must* review the regulation. *Id.* While the APA allows parties to petition agencies to review existing rules, it merely provides that the “agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.” 5 U.S.C. § 553(e) (1994).

50. *See* Version 1, *supra* note 24, § 625(a)(1) (stating “[a]ny person subject to a major rule may petition the relevant agency or the President to perform a cost-benefit analysis under this subchapter for the major rule . . .”).

51. Version 5, *supra* note 24, § 625(e) (“Interlocutory Review”) (allowing review of whether a rule is a “major rule” or whether the risk assessment was performed correctly); Version 6, *supra* note 24, § 625(e) (“Interlocutory Review”) (adding review of whether the rule will significantly impact small business pursuant to 605(b)).

52. *Regulating Regulation*, WASH. POST, July 6, 1995, at A20.

53. *See* 141 CONG. REC. S10,133 (July 17, 1995) (discussing the Bumpers Amendment’s application of the substantial evidence test to informal rulemaking; substantial evidence is the standard used when examining whether the factual bases of the rule justifies the ruling).

professor would “determine whether a research paper on a topic with which he is vaguely familiar meets the minimum standards for passable work.”⁵⁴ Nor are they likely to be responsive to Shapiro and Levy’s new version of § 706.

II. WHY WE HAVE INDETERMINACY

There are at least two reasons for indeterminacy in administrative law jurisprudence.

A. *Mixed Perceptions of the Administrative Process*

The first reason is not so much the amount of pages in the Code of Federal Regulations, but rather the fact that we as a nation remain ambivalent about the administrative process. Judicial indeterminacy is attributable to our lack of social (or even elite) consensus on the role and function of administrative agencies. In the days of Woodrow Wilson administrative agencies were “experts” who understood ephemeral and changing social science realities.⁵⁵ During the New Deal, the putative expertise of administrative agencies undergirded the massive government activism deemed necessary to spur economic recovery⁵⁶ — and was damned by conservatives as reflecting the first step toward abrogating our traditional notions of due process and the rule of law.⁵⁷ Witness the views of Roscoe Pound excoriating the use of administrative tribunals to decide matters, as a “Marxist” idea.⁵⁸ English views of administrative law

54. Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385, 1453 (1992) (discussing the metaphors used to describe judicial review of administrative agencies).

55. Woodrow Wilson, *The Study of Administration*, reprinted in 56 POL. SCI. Q. 481, 501 (1941) (explaining the relationship between public opinion and administration); see also Marshall J. Breger, *Thoughts on Accountability and the Administrative Process*, 39 ADMIN. L. REV. 399, 399-402 (1987) (discussing Woodrow Wilson’s views on the separation of politics from administration).

56. See Daniel J. Gifford, *The New Deal Regulatory Model: A History of Criticisms and Refinements*, 68 MINN. L. REV. 299, 306, 1983 (discussing regulatory mechanisms of the new deal era and the deference given to agency administrators); Robert L. Rabin, *Legitimacy, Discretion, and the Concept of Rights* 92 YALE L.J. 1174, 1178-80 (1983) (discussing the new idea era and the rise of administrative expertise). See generally JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* (1938) (explaining the rise of faith in administrative expertise during the New Deal era).

57. At least the modern version of anti-bureaucratic fever does not view the government worker as potentially treasonous. Samuel Kaufman, *Is the Administrative Process a Fifth Column?*, 6 J. MARSHALL L. REV. 1, 8-9 (1940) (arguing that there must be more judicial review of administrative agency decisions).

58. *Report of the Special Committee on Administrative Law*, 63 ANN. REP. A.B.A. 331, 339-46 (1938) (stressing that the idea of “administrative absolutism” is repugnant to the idea of traditional law in the United States).

display a similar contempt for bureaucracy, castigating the rise of the administrative state as "The New Despotism."⁵⁹

For many years administrative agencies were thought to be captured by the iron triangle,⁶⁰ if not by industry itself.⁶¹ In the 1970s they were thought to provide points of entry for Nader folk pursuing public interest law.⁶² Today the agencies have been deconstructed by many as nodes of self-aggrandizement by public choice theorists.⁶³

In fact, not only is there no consensus about the administrative process, but the views we have are often schizophrenic. Consider Philip Howard's recent best seller, *The Death of Common Sense: How Law is Suffocating America*, recently featured on the cover of U.S. News and World Report.⁶⁴ Howard cites numerous examples of foolishness by government bureaucrats.⁶⁵ He points to the example of Mother Teresa, whose missionaries of charity set aside \$500,000 to renovate an abandoned building for the homeless in the Bronx.⁶⁶ The nuns did not believe that modern conveniences such as a dishwasher, washing machine, or elevator were necessary. They felt they could do without the dishwasher and elevator, but the project ran aground on the city's demand that they spend \$100,000 for an elevator they would never use.⁶⁷ After two years Mother

59. LORD HEWART OF BURY, *THE NEW DESPOTISM* 37 (2d ed. 1945). The author asserts that administrative law is "substantially the opposite of" the "rule of law." *Id.* The author also states that "happily there is no English name for [administrative law]." *Id.*

60. See, e.g., GORDON ADAMS, *THE IRON TRIANGLE: THE POLITICS OF DEFENSE CONTRACTING* 24-26 (Nancy Sokoloff ed., 1981); Harold A. McDougall, *Lawyering and the Public Interest in the 1990s*, 60 *FORDHAM L. REV.* 1, 8 (1991) ("'Iron triangles' develop between a regulatory agency, the legislative committee that oversees it, and the special interest group representing the industry that the agency is required to regulate.").

61. For one example of this sentiment, see PAUL J. QUIRK, *INDUSTRY INFLUENCE IN FEDERAL REGULATORY AGENCIES* ix (1981) (arguing that agencies allow their decisions to be influenced by the industries they regulate).

62. See, e.g., ROBERT C. FELLMETH, *THE INTERSTATE COMMERCE OMISSION: THE PUBLIC INTEREST AND THE ICC* (1970) (examining the Interstate Commerce Commission and its relationship to the general public interest). Fellmeth notes that the ICC's purpose is to serve as the aggressive and independent representative of the general public interest. *Id.* at xiv; Mark Green & Ralph Nader, *Economic Regulation vs. Competition: Uncle Sam the Monopoly Man*, 82 *YALE L.J.* 871, 874 (1973) (arguing that non-regulation of administrative agencies optimizes consumer welfare).

63. See generally, FARBER & FRICKEY, *supra* note 12, at 5-6 (advocating that public policy needs to be studied pragmatically and particularly, not merely in grand theory terms).

64. Stephen Budiensky et al., *How Lawyers Abuse the Law*, *U.S. NEWS AND WORLD REPORT*, Jan. 30, 1995, at 50 (discussing how lawyers abuse the law and the concerns that must be addressed).

65. PHILIP K. HOWARD, *THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA* 3-8 (1994).

66. *Id.* at 3-4.

67. *Id.* at 4.

Teresa finally gave up and wrote the city, “[t]he Sisters felt they could use the money much more usefully for soup and sandwiches,” noting that the episode “‘served to educate us about the law and its many complexities.’”⁶⁸

Howard writes further of the Amoco refinery in Yorktown, Virginia that spent \$31 million to put scrubbers in its smokestacks to remove benzene pursuant to Environmental Protection Agency (EPA) regulation.⁶⁹ The EPA missed the boat: the fumes were not being lost at the smokestack but at the loading docks, where cleaning costs would be infinitesimal.⁷⁰ Cleaning the loading dock, however, is not required by EPA rules.⁷¹

So far, Howard’s complaint could be written by Newt Gingrich. But Howard has a very different solution. While a severe critic of the bureaucratic process, he does not propose fewer rules or no rules; nor does he propose more detailed rules and more aggressive judicial review. Instead, his project would empower bureaucrats by giving them more responsibility (or in administrative law terms, more discretion) to take matters into their own hands. He wants to give bureaucrats flexibility to waive or not to waive rules, to accept individuated compliance solutions and ignore the letter of the law to accomplish its “spirit.”

Tracking Howard, the state of Florida has proposed repealing half of its 28,750 rules by the end of the 1996 legislative session, substituting guidelines that will devolve greater discretion to agency officials.⁷² These efforts have achieved only limited success, with the Governor having vetoed a bill to reform the rule-making process, while continuing the search for superfluous rules.⁷³ The Canadian Parliament is also considering legislation to allow persons subject to regulations to propose alternative compliance plans that will “meet[] the regulatory goals of the designated regulation.”⁷⁴ Our own Congress currently is drafting legisla-

68. *Id.*

69. *Id.* at 7.

70. *Id.*

71. *See id.* at 7-8.

72. William Booth, *Florida Seeks End to Rule By the Book*, WASH. POST, Mar. 14, 1995, at A1 (reporting Florida’s proposal to rule by common sense rather than by the book); *see also* Ken Foksett, *Miller Gives State Officials Dose of ‘Common Sense’*, THE ATLANTA CONST., Dec. 13, 1995, at 7B (discussing the genesis of a similar initiative in Georgia by Governor Zell Miller).

73. *See* Craig Quintana, *Chiles Scuttles Regulatory-Reform Bill*, ORLANDO SENTINEL, July 13, 1995, at C1 (reporting the governor’s claim that his agencies have identified nearly 6,000 rules for repeal).

74. Bill C-62, *An Act to Provide for the Achievement of Regulatory Goals Through Alternatives to Designated Regulations and Through Administrative Agreements*, 1st Sess., 35th Parl., 1994 (1ST READING, DEC. 6, 1994).

tion on “Alternate Compliance Strategies” that would allow agencies to waive regulations for private parties who offer more efficient solutions to problems.⁷⁵

All this may be terrific for those who believe bureaucrats to be kadi-in-waiting, prepared to do equity, in Justice Frankfurter’s immortal image, sitting “under a tree dispensing justice according to considerations of individual expediency.”⁷⁶ For those who share Justice Frankfurter’s optimism, there is no need to fear this regulatory approach. Indeed, even Vice President Al Gore has adopted this perspective, pointing out that “[e]ffective entrepreneurial governments . . . empower those who work on the front lines to make more of their own decisions and solve more of their own problems.”⁷⁷

But if, like many red-blooded advocates of the Contract with America, you believe that “[r]egulatory agencies have run amuck and need to be reformed,”⁷⁸ then you will focus more on “fairness” and consistency values in administrative law and demand a rigorous “cost-benefit” analysis before you allow an agency to issue regulations—all because you want to rein in those bureaucratic critters. As far back as the Brownlee Commission in the 1930s, critics have sought to restrict the flexibility and discretion of administrative agencies by procedural constraints.⁷⁹ As Philip K. Howard incisively points out, “[o]ne of the worst elements of the Republicans’ plan for regulatory reform is that they want to make it even harder to pass a new rule”⁸⁰ (in part because the harder it is to pass a new rule the harder it is to get rid of an old one).⁸¹ Indeed many would prefer

75. See *House, Senate Considering Legislation for Alternative Compliance Strategies*, BNA Daily Report for Executives, Jan. 3, 1996, at 42 (discussing House and Senate initiatives that would permit the EPA and other agencies to waive regulations if party met the intent of the regulation and offered a better solution than provided by law).

76. *Terminiello v. Chicago*, 337 U.S. 1, 11 (1949) (Frankfurter, J., dissenting).

77. AL GORE, REPORT OF THE NATIONAL PERFORMANCE REVIEW, FROM RED TAPE TO RESULTS: CREATING A GOVERNMENT THAT WORKS BETTER & COSTS LESS 7 (1993) (explaining how the reinvention and streamlining of government will help empower employees to become more productive and efficient).

78. Edmund L. Andrews, *A Rising Deregulation Wave: Republicans Advance Pro-Business Agenda*, INT’L HERALD TRIB., Jan. 3, 1996, at 12; see also Rep. Tom DeLay, *DeLay Seeks His “Holy Grail”: Regulatory Reform*, ROLL CALL, Dec. 4, 1995, at 15.

79. See generally Loren A. Smith, *Judicialization: The Twilight of Administrative Law*, 1985 DUKE L.J. 427, 438-39 (critiquing the over-proceduralization of the administrative process and urging a more focused view on substantive problems).

80. *Regulatory Reform: The Case for Common Sense, An Interview with Philip K. Howard*, THE WASH. MONTHLY, Sept. 1995, at 23, 26 (quoting Mr. Howard during an interview concerning his book, THE DEATH OF COMMON SENSE).

81. *Id.*; see *Motor Vehicle Mfrs. Ass’n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41-42 (1983) (requiring an agency revoking an established rule to “supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance”).

“clogging the wheels of the federal bureaucracy,”⁸² taking ironic pride in “add[ing] more red tape and judicial oversight,”⁸³ if not admitting that such action is a “‘recipe for paralysis.’”⁸⁴ For, as Congressman David McIntosh suggests, “many Americans think paralyzing the federal government would be a good thing.”⁸⁵

The government agencies actually “zeroed” out by the new Republican Congress include both The Congressional Office of Technology Assessment⁸⁶ and the free-standing Administrative Conference of the United States.⁸⁷ Both of these agencies reflect the notion that there is a science of administration and that administrative expertise can be brought to bear to make the regulatory process more rational and more efficient (and by so doing—more fair).

A similar disdain for regulatory process can be seen in the general view of conservatives toward the ongoing budget battle with its intermittent shutdowns of the federal government. As Donald Devine, head of the Office of Personnel Management in the Reagan administration, pointed out, “‘It’s regulation on the cheap, keeping the government shut down.’”⁸⁸

We have today a large divergence in opinion as to the what weight to give bureaucratic judgments. For many the deference to agency expertise that characterized the New Deal regulatory paradigm is no more. Indeed, the opposite is the case. It is this divergence that in large measure affects the indeterminacy of judicial opinions in administrative law. We should not ignore this reality. Nor should we glory in it.

B. *Scant Guidance From Prior Case Law*

The second reason for indeterminacy comes from the difference in opinions expressed in the myriad of discrete cases that bubble up from

82. Robert W. Hahn, *Regulatory Reform—The Whole Story*, WALL ST. J., Feb. 27, 1995, at A12 (arguing that current congressional regulatory reform efforts may be largely symbolic and that effective reform will require more substantive changes in the law).

83. *Id.*

84. *Id.*; *The Next Environmental Threat*, N.Y. TIMES, Feb. 12, 1995, § 4, at 14.

85. See *Hearings on the Regulatory Transaction Act of 1995, H.R. 450 Before the Subcomm. on National Economic Growth, Natural Resources and Regulatory Affairs, Comm. on Government Reform & Oversight*, 104th Cong., 1st Sess. (Jan. 19, 1995) (opening statement of Congressman David McIntosh stating that “unnecessary regulation has hurt the American people” and calling for a six month moratorium on new federal regulations).

86. Legislation Branch Appropriations Act, 1996, tit. I, Pub. L. No. 104-53, 109 Stat. 514, 526 (1995).

87. Treasury, Postal Service, and General Government Appropriations Act, 1996, tit. IV, Pub. L. No. 104-52, 109 Stat. 468, 480 (1995).

88. Cindy Skrzycki, *For Agencies’ Foes, Impasse Is Dream with a Double Edge*, WASH. POST, Dec. 29, 1995, at D1 (quoting Donald Devine).

the regulatory process. In the APA, as Justice Frankfurter pointed out, Congress expressed a “mood”⁸⁹ regarding the character of judicial review. But a “mood” or tone does not provide a detailed script to utilize when reviewing agency decisions. That is why as the “classic standard of review case”⁹⁰ *Universal Camera Corp. v. NLRB*,⁹¹ makes clear, when it comes to judicial review of administrative action, “judges are not automata . . . [since] There are no talismanic words that can avoid the process of judgment.”⁹² It is sound judgment from our judges, not determinacy, that is all we can expect; indeed, all that can be hoped for.

Shapiro and Levy give the game away when they point out that “[b]ecause the Supreme Court has not promoted use of the *State Farm* criteria, the definition of ‘arbitrary and capricious’ remains relatively indeterminate.”⁹³ We now can see, if only vaguely, the answer to the indeterminacy problem. As the number of judicial decisions interpreting a particular statutory or regulatory phrase increase, the more likely, over time, the meaning of the phrase will become settled or, in Shapiro and Levy’s language, “determinate.” So the answer to the debate over how to promote judicial understanding of Congressional intent is more opinions, not more precise statutes. That is the way of the common law and, like that “old time religion,” it is good enough for me. If only for determinacy’s sake.

III. THE ELUSIVE STANDARD OF REVIEW

Given the difficulty courts face because of indeterminacy, Shapiro and Levy propose a legislative solution to the scope of review problem. They wish to amend APA § 706, in effect, codifying the *Chevron* and *State Farm* tests.⁹⁴ Indeed, they believe that amending § 706 in this manner

89. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487 (1951) (explaining that when enacting the APA, Congress left unchanged the broad review standards of the Taft-Hartley Act).

90. CHARLES H. KOCH JR., *ADMINISTRATIVE PRACTICE AND PROCEDURE, TEACHERS MANUAL* 135 (2d ed. 1991).

91. 340 U.S. 474 (1951).

92. *Id.* at 488-89. See generally Alfred S. Neely, *Justice Frankfurter*, *Universal Camera and A Jurisprudence of Judicial Review of Administrative Action*, 25 U. TOL. L. REV. 1 (1994) (reviewing *Universal Camera* and criticizing Justice Frankfurter’s opinion on judicial review of administrative fact findings).

93. Shapiro & Levy, *supra* note 1, at 1067.

94. *Id.* at 1073-76. Specifically, Shapiro and Levy’s proposal is as follows:

§ 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;

would also better integrate the two decisions.⁹⁵ With their proposal, Shapiro and Levy hope to provide greater direction to judges in applying the tests, by focusing on a series of “specific inquiries.”⁹⁶

Obviously judicial review statutes will give courts guidance in how aggressive their review should be or what criteria courts should look to in undertaking that review. Experience shows that the more statutes try to codify every aspect of the judicial process, the more confusing (and unhelpful to judges) those statutes often become. In many respects, it is better to rely on the body of case law to provide guidance to the judiciary against the background of a statutorily identified “mood” than attempt to micro-manage the judiciary’s evaluation process. For these reasons, I am skeptical of recent Republican efforts to “fix” the standard of review by codifying new instructions for the court.⁹⁷ I have problems with the Shapiro and Levy approach of treating “the first two parts of the *State Farm* inquiry as *Chevron* step two.”⁹⁸ While I prefer their term ‘logically coherent explanation’ to the requirement of ‘reasoned decisionmaking,’ articulated in Version I of S. 324.⁹⁹ I certainly do not want to encourage a

(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.

Id. at 1074.

95. *Id.* at 1075-76. In fact, the proposal combines the two tests into a single line of inquiry. *Id.* at 1076 n.100.

96. *See id.* at 1074 (setting forth the proposed amendment and maintaining that the application of specific inquiries is more appropriate than the use of “open-ended scope of review standards”); *see also supra* note 94 (providing Shapiro and Levy’s proposed “specific inquiries”).

97. The Comprehensive Regulatory Reform Act of 1995, in particular, attempts to codify the reviewing court’s scope of review. Version 1, *supra* note 24. It purports to codify *Chevron*, or in some instances *Chevron-plus*. *Id.* § 624.

98. Shapiro & Levy, *supra* note 1, at 1076 n.100.

99. *See supra* note 28.

new strain of the so-called “hard look” doctrine for the sake of doctrinal simplicity.

I should make it clear that I have similar problems with the *INS v. Cardoza-Fondesca*¹⁰⁰ cut on *Chevron*, which basically suggests that when facing an issue of the clarity of a statute or regulation, a court should “turn it and turn it again” before giving up on a *Chevron* step one analysis and finding the statute or regulation unclear. But, like it or not, that is what the *Chevron* debate is really all about—how hard the court should try to find clarity before deferring to the agency decision. It is unrealistic to expect determinacy on this point (as Justice Scalia continually laments)¹⁰¹ as it is fact-bound and language-of-the-statute/regulation bound. Indeed, the more you adopt the *Cardoza-Fondesca* cut on *Chevron*, the more you are likely to accept Justice Holmes position that “every question of construction is unique, and an argument that would prevail in one case may be inadequate in another.”¹⁰² There is not much hope for determinacy here.

Indeed, it is no surprise that the business community, in general, supported the *de novo* judicial review required by the Bumpers Amendment,¹⁰³ and proposed adding requirements of “maximiz[ing] net benefits to society”¹⁰⁴ to the “reasoned decisionmaking”¹⁰⁵ that courts are asked

100. 480 U.S. 421 (1987).

101. *See id.* at 452-53 (Scalia, J., concurring in the judgment).

Justice Scalia’s plaint in *Cardoza-Fondesca* calls Justice Stevens’ opinion “not an interpretation but an evisceration of *Chevron*” which would make “deference a doctrine of desperation.” *Id.* at 454 (Scalia, J., concurring). In a letter to Justice Stevens, Justice Scalia writes “your discussion of *Chevron* deprives that case of all utility.” Bernard Schwartz, “Shooting the Piano Player”? Justice Scalia and Administrative Law, 47 ADMIN. L. REV. 1, 46 (1995) (quoting letter from Antonin Scalia to John Paul Stevens). Justice Scalia continued this lamentation in a concurring opinion in *NLRB v. United Food and Commercial Workers Union*, 484 U.S. 112, 133 (1987), where he sardonically criticized “[s]ome courts” for following the “dicta” of *Cardoza-Fondesca*. *Cardoza-Fondesca*, 480 U.S. at 454 (Scalia, J., concurring).

102. *United States v. Jin Fuey Moy*, 241 U.S. 394, 402 (1916) (discussing the fact-driven nature of judicial review of statutory construction).

103. S. 1080, 97th Cong., 1st Sess. § 5 (1981) (amending § 706). As described by Senator Grassley, the Bumpers Amendment amended the APA in the following manner:

Reviewing courts are instructed to make independent determinations on all questions of law whether they be jurisdictional, constitutional, or procedural. No presumption of validity will attach to agency regulations. The court will be the final arbiter as to whether an agency has gone beyond congressional intent in taken certain actions, and will be able to consider an agency’s interpretation based on its persuasiveness, not upon the agency presumed “all knowing” posture which has often been present in past judicial decisions regarding rulemaking.

128 CONG. REC. S 4730 (daily ed. March 18, 1982) (statement of Sen. Grassley).

104. *See* Version 1, *supra* note 24, § 628(c)(1)(C).

105. *Id.*

to undertake in reviewing agency rulemakings. The aggressive 'hard look' approach often reflected by the term 'reasoned decisionmaking' easily transmutes into an excuse for legal activism. As recently stated by Professor Pierce:

There is powerful circumstantial evidence that judges often apply the duty to engage in reasoned decisionmaking the same way most people make and explain decisions. They first make a decision and then explain that decision on grounds that may have little relation to the actual basis for the decision. Thus, a judge often decides whether to uphold or to reject a rule based on his view concerning the desirability of the rule and then explains that decision with reference to the agency's compliance with the malleable duty to engage in reasoned decisionmaking.¹⁰⁶

There is much truth, then, in Nicholas Zeppo's insight that "[g]roups—including those that sometimes prevail in the legislative arena—prefer a more aggressive standard of judicial review even though this might lead to the invalidation of [to them] beneficial federal laws."¹⁰⁷

IV. PUBLIC CHOICE AND THE JUDICIARY

Shapiro and Levy's efforts rest on an acceptance of public choice theory as explaining the behavior of judges. In Shapiro and Levy's view, judicial behavior can be explained by the judges desire to maximize utility, in the form of leisure, ideology, or respect. And they maximize utility by adherence to either a craft- or outcome-oriented decision-making process. They argue that this quest for utility maximization is subject to tension between a desire to adhere to recognized doctrine and a competing desire to achieve particular outcomes consistent with the individual judge's values.

I must confess to feeling extremely uncomfortable with the application of public choice theory to federal judges in the manner undertaken by Shapiro and Levy. I certainly appreciate that the judiciary is likely to seek higher pay and even more expansive perks. Moreover, judges are as capable (unfortunately) of blind professional interest and even *mauvais foi* as the next man or woman. But I really do think that the Shapiro/Levy notion that "judges seek to reduce their work and expand their leisure time" is absurd and their insight that "judges will pursue leisure only

106. See Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 71 (1995) (citations omitted) (stating that judges may be tempted to engage in judicial activism based on political beliefs).

107. Nicholas S. Zeppos, *Deference to Political Decisionmakers and the Preferred Scope of Judicial Review*, 88 Nw. U. L. REV. 296, 298 (1993).

when the utility they gain from it outweighs the respect-based and ideological utility they may gain through work" is vacuous.¹⁰⁸ Or more politely, that "public choice analysis, as applied to judicial behavior, necessarily yields a very meager harvest."¹⁰⁹ Such sentiments are truisms that have little relevance to the federal judges I know (admittedly a self-selected cohort!).

In large measure the application of public choice theory to federal judges fails because "[a] judge's role is sharply demarcated by custom, common law, intellectual traditions, and specific rules for interpretation that seem to permit only minimal room for self-interest and ideology."¹¹⁰ I have no doubt that trips to Europe, academic honors, and bar association approval are items to which judges respond favorably. In their non-judging roles, judges are as self-interested as the rest of us. But this is a far cry from the notion developed by Posner and Landes that judicial behavior is itself "rent-seeking." Indeed, even if it is the case that judges "enforce the 'deals' made by effective [that is to say rent-seeking] interest groups with earlier legislatures,"¹¹¹ such behavior only serves as evidence that judges will interpret statutes passed by legislatures whether the legislative enactments reflect either special interests or the "public" interest (however defined). It is the decision-making process of judges, not the "rent-seeking" of legislators that concerns us here.

The ideological utility point does have some relevance to judges. But this is far different than the outcome determinative notion. It is, I think, the legal reflection of their common political perspective that leads a group of 'Federalist Society' judges to cohere around a particular outcome which they determine to be legally appropriate (or a group of 'Great Society' judges for that matter). Judge Wald has pointed out that, to a large extent, judges appointed by Presidents of different political parties can still stake out broad agreement on matters of law.¹¹² In fact,

108. Shapiro & Levy, *supra* note 1, at 1056.

109. Richard A. Epstein, *The Independence of Judges: The Uses and Limitations of Public Choice Theory*, 1990 B.Y.U. L. REV. 827, 827 (arguing that public choice theory analysis is not effective in defining judicial behavior).

110. William C. Mitchell & Randy T. Simmons, *Public Choice and the Judiciary: Introductory Notes*, 1990 B.Y.U. L. REV. 729, 741 (explaining why, unlike elected politicians, judges face much more traditional and professional constraints on decision-making that are not addressed by public choice principles).

111. William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 894 (1975).

112. Patricia M. Wald, ". . . Doctor, Lawyer, Merchant, Chief", 60 GEO. WASH. L. REV. 1127, 1142-43 (1992) (viewing judges as independent decisionmakers who are not influenced by most political pressures). In the 1991-1992 time frame Judge Wald found dissents in only 10% of the docket. *Id.*; see also Harry T. Edwards, *The Judicial Function and the Elusive Goal of Principled Decisionmaking*, 1991 WIS. L. REV. 837, 856. Judge Edwards

empirical analysis of voting patterns have borne out Judge Wald's assertions.¹¹³

Furthermore, data gathered by Judge Harry Edwards reports similar findings in the D.C. Circuit. He notes that even on "mixed" panels, or those "consisting of one 'liberal' and two 'conservative' judges or vice versa," dissents were filed in less than ten percent of all cases decided by full opinion.¹¹⁴ This result eclipsed even the dissent rate for all panels, which recorded dissents in thirteen percent of the cases decided by full opinion.¹¹⁵ While Judge Edwards adheres to his belief in "principled decisionmaking," later work finds him questioning whether "partisan politics and ideological maneuvering have no meaningful influence on judicial decisionmaking."¹¹⁶

Continued media focus on the political aspects of the judiciary seem to have occasioned this shift. Judge Edwards complains that the cases discussed by the media evidencing an ideological split on the court, account for a small minority of the docket, and that these misperceptions, if continued, may become self-fulfilling as judges react to the widespread notion of their work as a political function.¹¹⁷ While citing to the war on drugs as "[a] [s]truggle [a]gainst [u]nprincipled [d]ecisionmaking," and addressing the history of previous ill-advised judicial compromises in

notes that, in the D.C. Circuit in 1990, dissents were filed in only 2.6% of the cases decided. *Id.* Even on "mixed panels," containing judges appointed by Presidents of different parties, the dissent rate did not exceed the general rate. *Id.*

Judge Edwards maintains that the judiciary strives to avoid ideological or partisan preferences, but surprisingly notes that "[t]oday, more than eleven years after becoming a judge, I am less sanguine in my views." *Id.* at 838. He explains this change in view as resulting from "external pressures felt by judges . . . created . . . by the continuing distortion of public perceptions . . ." *Id.*

113. See William E. Kovacic, *The Reagan Judiciary and Environmental Policy: The Impact of Appointments to the Federal Courts of Appeals*, 18 B.C. ENVTL. AFF. L. REV. 669, 696-99 (1991) (noting that the overall rate of disagreement is not significant in environmental cases, and that judges of different ideologies cast similar votes in 87% of the cases on which they sit on the same panel). Interestingly, the author notes a greater degree of discord on Judge Wald's court, the D.C. Circuit. *Id.* at 704-05; see also William E. Kovacic, *Reagan's Judicial Appointees and Antitrust in the 1990s*, 60 FORDHAM L. REV. 49, 72-77 (1991) (reaching similar results in the antitrust area). Again, it is noted that when sitting on the same panel, judges of differing political leanings agreed 87% of the time. *Id.* at 73.

114. See Harry T. Edwards, *Public Misperceptions Concerning the "Politics" of Judging: Dispelling Some Myths About the D.C. Circuit*, 56 U. COLO. L. REV. 619, 629-30 (1985). Judge Edwards cited statistics addressing decisions between July 1, 1983 and June 30, 1984. *Id.* at 629. Comparing these numbers to those for the 1990-91 term, the results seem consistent, with the dissent rate for cases decided by full opinion still roughly ten percent. Compare *id.* with Edwards, *supra* note 101, at 856.

115. Edwards, *supra* note 114, at 630.

116. Edwards, *supra* note 112, at 838.

117. *Id.* at 853 (lamenting that many believe judicial decisionmaking is determined by politics and not by the merits of each case).

times of national emergency, Judge Edwards still contends that, for the most part, federal judges struggle to reach principled decisions.¹¹⁸

Other commentary argues that a judge's background and experiences *must* play a part in the deliberative process.¹¹⁹ It is asserted that even "a decision that involves the application of a rule is not—and logically cannot be—constrained by the rule in question."¹²⁰ Professor Wells adopts a more moderate approach in describing the judicial process, which involves the intertwining of both rules of law and the individual experience of the judge. This approach makes no mention of the utility sought by the deciding judge, rather it explains how individual factors can influence decisions.¹²¹

Still, one's gut feeling is that a conservative position will fare better with judges like Ray Randolph or Steve Williams than Harry Edwards or Pat Wald. The Eskridge/Frickey study of the 1993 term provides 'some evidence' for the view that Reagan-era justices will reward Reagan-era appointees who are 'tough' on Clinton administration policies.¹²² So does Professor Pierce.¹²³ Other commentators, even those outside the legal profession, also seem convinced that an ideological rift exists in the D.C. Circuit.¹²⁴ Still, if I had to choose between a fellow Reaganaut on the bench and a good legal argument, I would choose the latter.

118. *Id.* at 839-49 (using the internment of Japanese-Americans in World War II, the Cold War suppression of First Amendment rights, and the current war on drugs as examples of problematic result-oriented decisionmaking). Judge Edwards describes the current call for result-oriented decisions as a challenge to the judiciary, and expresses confidence that the goal of principled decisionmaking will be realized. *Id.* at 840-41.

119. See Catharine Pierce Wells, *Improving One's Situation: Some Pragmatic Reflections on the Art of Judging*, 49 WASH. & LEE L. REV. 323, 330-31 (1992).

120. *Id.* at 331.

121. See William H. Rehnquist, *Remarks on the Process of Judging*, 49 WASH. & LEE L. REV. 263 (1992). The Chief Justice describes judging as a compromise, where individual beliefs are just one part of the process. See *id.* at 270. He stresses the importance of building a majority opinion, and notes that "some give and take is inevitable, and doctrinal purity may be muddied in the process." *Id.*

122. William N. Eskridge, Jr. & Phillip P. Frickey, *Forward: Law as Equilibrium*, 108 HARV. L. REV. 26, 75-76 (1994) (discussing the opinion by some commentators that the United States Supreme Court may affirm or reverse lower court decisions based on political decisions).

123. 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, 303-07 (opining that personal ideology and politics are a significant factor in the D.C. Circuit's review of agency decisions).

124. See *The Contribution of the D.C. Circuit to Administrative Law*, 40 ADMIN. L. REV. 507, 541-42 (1988) (remarks of Professor Rabkin, who characterizes the court as a partisan split between those favoring the interests of special interest groups and those favoring strong executive branch power). Judge Wald refutes these remarks, adhering to her belief that no such schism exists. *Id.* at 547.

V. CONCLUSION

The Shapiro/Levy article raises important questions in administrative law. I fear, however, that many of their questions will remain unanswered, in part because determinacy (in the sense of outcome predictive results) is not the end goal of the judicial process. One need not accept Judge Leventhal's proposition that judges should engage the administrative agencies in partnership,¹²⁵ to recognize that judges are not outcome predictive automata. It is after all, the art, not the science, of judging that our courts are all about.

125. See *Greater Boston Television Corp. v. FCC* 444 F.2d 841, 851-52 (D.C. Cir. 1970) (discussing a belief that the public interest is best served when courts and agencies work together to effectuate reasoned decision-making), *cert. denied*, 403 U.S. 923 (1971).