

# **JUDICIAL REVIEW OF AGENCY ACTION: RECENT TRENDS--AND REASONS TO WORRY?**

**Michael S. Greve**

**George Mason University School of Law  
Law & Economics Center**

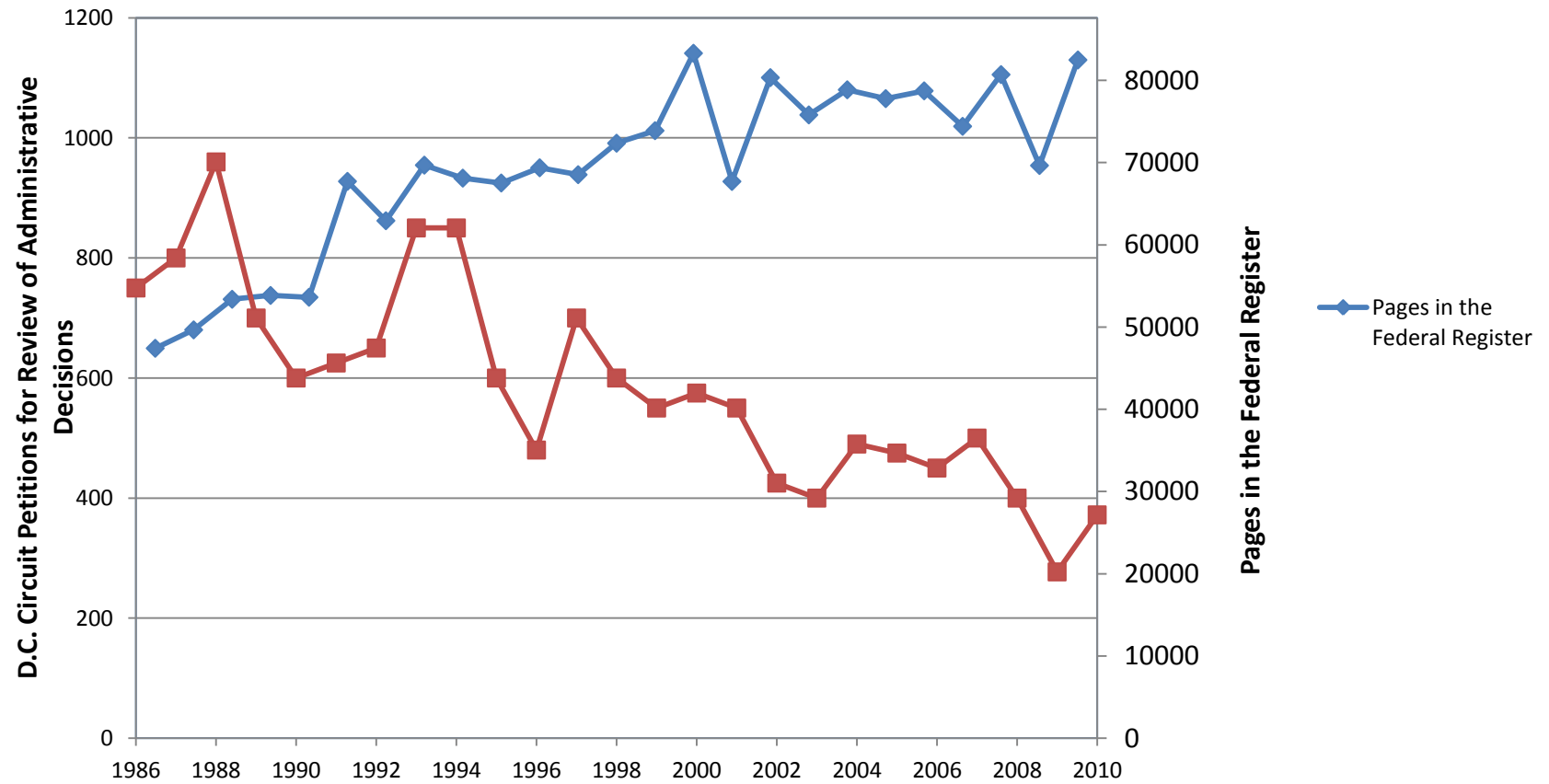
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## 5 U.S. Code § 706 - Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. **The reviewing court shall—**

- (1)** compel agency action unlawfully withheld or unreasonably delayed; and
- (2)** **hold unlawful and set aside agency action, findings, and conclusions found to be—**
  - (A)** **arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;**
  - (B)** contrary to constitutional right, power, privilege, or immunity;
  - (C)** **in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;**
  - (D)** without observance of procedure required by law;
  - (E)** unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
  - (F)** unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

# THE STRANGE DISAPPEARANCE OF APPELLATE REVIEW



# YouTube Clip – American Economics

- <https://www.youtube.com/watch?v=wz-PtEJEaqY>

# ***CHEVRON, U.S.A. v. NATURAL RESOURCES DEFENSE COUNCIL***

467 U.S. 837 (1984)

**Step Zero:** Does *Chevron* apply?

## **Step 1**

First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.

## **Step 2**

[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

## **(Step 3)**

“Hard Look” Review

## Sec. 1311

**(b)(1) IN GENERAL-** Each State shall, not later than January 1, 2014, establish an American Health Benefit Exchange (referred to in this title as an `Exchange') for the State [...]

## Sec. 1321

**(c)(1) If-**

**A) a State is not an electing State under subsection (b); [...]**

the Secretary shall [...] establish and operate **such Exchange** within the State and the Secretary shall take such actions as are necessary to implement such other requirements.

## 26 U.S. CODE § 36B

**(a) In the case of an applicable taxpayer, there shall be allowed as a credit against the tax imposed by this subtitle for any taxable year an amount equal to the premium assistance credit amount of the taxpayer for the taxable year.**

**(2) Premium assistance amount**

The premium assistance amount determined under this subsection with respect to any coverage month is the amount equal to the lesser of—

**(A) the monthly premiums for such month for 1 or more qualified health plans offered in the individual market within a State which cover the taxpayer, the taxpayer's spouse, or any dependent [...] of the taxpayer and **which were enrolled in through an Exchange established by the State under 1311 of the Patient Protection and Affordable Care Act, [...]****

# IS THAT CLEAR?

The statute unambiguously forecloses the government's position  
(*Halbig v. Burwell*, majority opinion)

The statute unambiguously favors the government's position  
(*King v. Burwell*, concurring opinion)

The statute is clearly ambiguous  
(*Halbig v. Burwell*, dissenting opinion)

The statute is ambiguous; government has “the stronger position, although only slightly”  
(*King v. Burwell*, majority opinion)

“If the Congress enacted into law something different from what it intended, then it should amend the statute to conform it to its intent.”  
*Lamie v. U.S. Trustee*, 540 U.S. 526, 542 (2004).