

# **CHEVRON AT THE ROBERTS COURT: STILL FAILING AFTER ALL THESE YEARS**

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## INTRODUCTION

This Essay looks at how *Chevron* deference<sup>1</sup> has fared at the U.S. Supreme Court since John G. Roberts became Chief Justice.<sup>2</sup> As followers of U.S. administrative law know, the Court's 1984 *Chevron* decision famously created an apparently new two-step process for reviewing federal agency decisions interpreting statutes they administer. Since then, the *Chevron* decision has been the most-cited Supreme Court administrative law decision, and the *Chevron* doctrine has spawned legions of law review articles analyzing its numerous twists and turns. This Essay looks at *Chevron* deference at the Roberts Court from three distinct angles. First, the Essay examines the voting records of individual Justices in cases citing *Chevron* to illuminate each Justice's commitment to deference to agency statutory construction. Second, the Essay qualitatively examines a select sample of opinions citing *Chevron*, to see whether the Roberts Court has been any more successful than its predecessor in constructing a coherent *Chevron* doctrine. Third, the Essay looks closely at how the Roberts Court has handled one of the most vexing issues under *Chevron*, namely the boundary between *Chevron* deference and judicial review under other standards of judicial review such as the arbitrary or capricious standard that governs all reviewable agency action.

To the first point, in an earlier article,<sup>3</sup> I presented data on Justices' voting records. In that article, I looked at all of the Supreme Court decisions during Chief Justice Roberts' first four Terms in which *Chevron* was applied by the majority or cited in a dissent.<sup>4</sup> What I found was that the Court generally split along familiar ideological lines, with liberals

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

2. This Essay is part of a larger symposium entitled *Chevron at 30: Looking Back and Looking Forward*. For an overview of the symposium, see Peter M. Shane & Christopher J. Walker, *Foreword: Chevron at 30: Looking Back and Looking Forward*, 83 *FORDHAM L. REV.* 475 (2014).

3. See Jack M. Beermann, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 *CONN. L. REV.* 779, 839–40 (2010).

4. *Id.* at 839 n.226.

deferring to liberal agency interpretations and conservatives deferring to conservative agency interpretations.<sup>5</sup> During that period, when there was disagreement on the Court, “there were six decisions by the conservative wing against deference, three decisions by the liberal wing against deference, two decisions by the conservative wing in favor of deference and four decisions by the liberal wing in favor of deference.”<sup>6</sup> Chief Justice Roberts and Justices Scalia and Alito voted contrary to the liberal/conservative divide most often, with Justice Scalia sometimes joining liberals to vote against deference and Justices Roberts and Alito sometimes joining liberals in favor of deference.<sup>7</sup> “Justice Scalia’s eleven votes against deference was the highest number of votes among the Justices against deference. Justice Alito voted most often in favor of deference with ten votes.”<sup>8</sup> Chief Justice Roberts voted with liberals twice, bringing his total in the period to eight votes in favor of deference.<sup>9</sup> The updated data presented below confirms this general pattern.<sup>10</sup> In recent years, however, Justice Alito has been deferring less often while, perhaps due to the addition of two liberal Justices appointed by the current President, the Court seems to be deferring to agency decisions in a higher proportion of cases.<sup>11</sup>

To the second point, a perusal of decisions citing *Chevron* shows that the Roberts Court has not been more successful than the Rehnquist Court in bringing a measure of coherence to the *Chevron* doctrine. The Court has not increased the clarity of the key elements of the *Chevron* doctrine. The Court continues to ignore *Chevron* in cases in which, on its terms, it ought to be applied or at least considered, and it has not increased the certainty of the *Mead* doctrine,<sup>12</sup> referred to as *Chevron* Step Zero, which maps the boundary between *Chevron* and other forms of deference.<sup>13</sup>

To the third point, the Roberts Court has failed miserably to clarify the boundary between *Chevron* and other standards of review such as arbitrary or capricious review. On the positive side, under Chief Justice Roberts’s leadership, the Court has rejected arguments for exceptionalism and applied *Chevron* in at least one new context in which it had not previously been applied.<sup>14</sup> It has also extended *Chevron* deference to statutory issues implicating agency jurisdiction, although in this case Chief Justice Roberts

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5. *Id.*

6. *See id.* at 838–39 n.226.

7. *See id.* at 838–39 nn.226–27.

8. *See id.* at 839 n.227.

9. *Id.* at 839.

10. *See infra* note 35 and accompanying text.

11. *See infra* note 40 (detailing Justice Alito’s five votes against agencies since 2012); *infra* notes 46–47 and accompanying text (discussing the voting records of Justices Kagan and Sotomayor).

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

13. *See* Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 191 (2006) (defining *Chevron* “Step Zero” as “the initial inquiry into whether the *Chevron* framework applies at all”).

14. *See Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704 (2011) (applying *Chevron* deference to Treasury regulations).

dissented.<sup>15</sup> By and large, however, the uncertainty over *Chevron*'s coverage has not been reduced. When asked, the Court was unable to articulate a boundary between *Chevron* deference and arbitrary or capricious review.<sup>16</sup> Further, the Court's discussion of the relationship between *Chevron* Step Two and arbitrary or capricious review has been confusing, and leads to uncertainty over whether *Chevron* is about deference to agency interpretation or deference to agency policymaking.<sup>17</sup> Finally, there are cases in which *Chevron* could have been employed but were instead decided without any explanation under another standard of review such as the arbitrary or capricious standard.<sup>18</sup> In short, there is no way to know in advance whether a case should be decided under the *Chevron* doctrine or under the arbitrary or capricious standard specified in the Administrative Procedure Act (APA).<sup>19</sup>

### I. CHEVRON VOTING AT THE ROBERTS COURT

As noted in the introduction, the voting records of the Justices in *Chevron* cases during the first four Terms of the Roberts Court revealed an interesting pattern. In general, when there was disagreement among the Justices, the voting fell along familiar liberal/conservative patterns, and did not seem to turn on a diversity of views concerning *Chevron* deference and related doctrines.<sup>20</sup> The updated data indicate that this general pattern continues with a couple of important reservations. First, agencies seem to be winning at the Supreme Court more often during the last few years (agencies have prevailed in 9.5<sup>21</sup> of the thirteen cases decided since the earlier article was published) and slightly fewer than half of the decisions are unanimous (six of thirteen), leaving a very small sample of nonunanimous decisions to analyze.<sup>22</sup>

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15. See *City of Arlington v. FCC*, 133 S. Ct. 1863, 1872 (2013).

16. See *infra* notes 84–113 and accompanying text.

17. See *infra* notes 84–113 and accompanying text.

18. See *infra* notes 73–83 and accompanying text.

19. 5 U.S.C. §§ 551, 706 (2012).

20. See Beermann, *supra* note 3, at 838–40. In another contribution to this symposium, James Brudney reviews 730 Supreme Court decisions—pre- and post-*Chevron*—to evaluate the use of *Chevron* and *Skidmore* in the workplace-law context, and his findings illustrate that the Justices' substantive views were more important than their views on the deference standards. See James J. Brudney, *Chevron and Skidmore in the Workplace: Unhappy Together*, 83 *FORDHAM L. REV.* 497, 520–21 (2014).

21. *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2449 (2014) (employing *Chevron* analysis to uphold one of two agency interpretations, which explains the fractional total).

22. The nonunanimous decisions citing *Chevron* during the relevant period are: *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014); *EPA v. EME Homer City Generation, LP*, 134 S. Ct. 1584 (2014); *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013); *United States v. Home Concrete & Supply, LLC*, 132 S. Ct. 1836 (2012); *Roberts v. Sea-Land Services, Inc.*, 132 S. Ct. 1350 (2012); *Barber v. Thomas*, 560 U.S. 474 (2010). The unanimous decisions citing *Chevron* are: *Sebelius v. Auburn Regional Medical Center*, 133 S. Ct. 817 (2013); *Freeman v. Quicken Loans, Inc.*, 132 S. Ct. 2034 (2012); *Astrue v. Capato ex rel. B.N.C.*, 132 S. Ct. 2021 (2012); *Holder v. Martinez Gutierrez*, 132 S. Ct. 2011 (2012); *Mayo Foundation for Medical Education & Research v. United States*, 131 S. Ct. 704 (2011); *Judulang v. Holder*, 132 S. Ct. 476 (2011).

In the nonunanimous decisions citing *Chevron* since the publication of my prior article, the agency prevailed in 5.5<sup>23</sup> of the seven decisions.<sup>24</sup> The small sample is made even smaller by the fact that one of the decisions was by an eight-to-one vote,<sup>25</sup> making it impossible to characterize the decision along the liberal/conservative divide. In the six remaining cases, one has a mixed majority and a dissent composed of three members who often vote as part of the conservative bloc—Chief Justice Roberts and Justices Anthony Kennedy and Samuel Alito.<sup>26</sup> Another has a very mixed-up lineup, with the Chief Justice and Justices Scalia, Kennedy, Ginsburg, and Kagan voting with the agency and Justices Thomas, Breyer, Alito, and Sotomayor voting against the agency.<sup>27</sup> The other three fell along more familiar liberal/conservative patterns with slight variations. For example, in a 2014 case involving environmental protection, the Court approved a protective interpretation that had been rejected by the D.C. Circuit, with Chief Justice Roberts joining swing Justice Kennedy and generally liberal Justices Ginsburg, Breyer, Sotomayor, and Kagan.<sup>28</sup> Justices Scalia and Thomas voted against the agency, and Justice Alito did not participate.<sup>29</sup> In the other environmental law case that resulted in a victory for the Environmental Protection Agency (EPA) on one issue and a defeat on the other, liberal Justices Ginsburg, Breyer, Sotomayor, and Kagan would have affirmed the agency on both issues and conservative Justices Thomas and Alito would have rejected the agency's decision on both issues.<sup>30</sup> Chief Justice Roberts and Justices Scalia and Kennedy voted for the agency on one issue and against the agency on another.<sup>31</sup> (On both issues, the EPA advanced a more environmentally protective position than the other side.) In a case involving the calculation of good-time credits by the Federal Bureau of Prisons within the Department of Justice, the three dissenters were swing Justice Kennedy and liberal Justices Stevens (in his last Term

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23. Again, because of the split decision in *Utility*, the total is fractional.

24. I did not include *Lawson v. FMR LLC*, 134 S. Ct. 1158 (2014), because in that case, *Chevron* was raised only in dissent and the decision did not involve judicial review of an agency decision. The dissent pointed out that the interpretation arrived at by the majority had been adopted by an agency, but not in a form that would warrant *Chevron* deference. *Id.* at 1186–87 (Sotomayor, J., dissenting).

25. *Roberts*, 132 S. Ct. at 1353. Justice Ginsberg dissented in part from this eight-to-one decision which ruled against an employee in a dispute over workers' compensation benefits. *Id.* at 1363–67 (Ginsberg, J., dissenting in part).

26. *City of Arlington*, 133 S. Ct. at 1865. Justice Scalia wrote the majority opinion in favor of *Chevron* deference to agency decisions affecting the agency's jurisdiction. *Id.* at 1868. He was joined by conservative ally Justice Clarence Thomas and usually liberal Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan. *Id.* at 1866. The dissenters were Chief Justice Roberts and Justices Anthony Kennedy and Samuel Alito, two of the four conservative voting bloc members and swing Justice Kennedy.

27. *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191 (2014). This unusual lineup may be due to the fact that the agency's decision in *Cuellar de Osorio* involved an interpretation of an immigration statute by the U.S. Citizenship and Immigration Services that was unfavorable to immigrants.

28. *EPA v. EME Homer City Generation, LP*, 134 S. Ct. 1584 (2014).

29. *Id.* at 1590.

30. *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014).

31. *See id.* at 2441, 2447.

on the Court) and Ginsburg,<sup>32</sup> and in a case involving tax liability, the five-to-four decision fell along similar lines, with swing Justice Kennedy in dissent along with liberal Justices Ginsburg, Kagan, and Sotomayor.<sup>33</sup> In a number of these cases, generally liberal Justice Breyer voted along with the Court's conservative bloc,<sup>34</sup> perhaps signaling that he is not as reliably liberal on administrative law matters as in some other areas of law. That the disagreements among the Justices in these cases appear to be more about the underlying merits than about the proper application of *Chevron* and related doctrines confirms my general sense that the time and effort that litigants, and the Justices, spend analyzing whether and how *Chevron* applies is wasted.

The aggregate voting totals for each Justice still on the Court during the entire period studied (since the beginning of the Roberts Court) tell an interesting story. The totals are indicated in the following table.<sup>35</sup>

<b>Supreme Court Voting Splits in Cases Citing <i>Chevron</i></b>		
<i>Supreme Court Justice</i>	<i>With Agency</i>	<i>Against Agency</i>
Chief Justice Roberts	19.5	10.5
Justice Scalia	16.5	13.5
Justice Kennedy	19.5	10.5
Justice Thomas	17.0	12.0
Justice Alito	18.0	10.0
Justice Ginsburg	18.0	12.0
Justice Breyer	18.0	10.0
Justice Sotomayor	10.0	3.0
Justice Kagan	9.0	2.0

32. *Barber v. Thomas*, 560 U.S. 474 (2010).

33. *United States v. Home Concrete & Supply, LLC*, 132 S. Ct. 1836, 1849–53 (2012).

34. See *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191 (2014); *Home Concrete*, 132 S. Ct. 1836; *Barber*, 560 U.S. 474.

35. This table reflects information gathered for this Essay and for my earlier article urging that the *Chevron* test be abandoned. For the cases discussed in my earlier article, see Beermann, *supra* note 3, at 838 n.226. The more recent decisions citing *Chevron* are: *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014); *Cuellar de Osorio*, 134 S. Ct. 2191; *EME Homer City Generation, LP*, 134 S. Ct. 1584; *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013); *Sebelius v. Auburn Regional Medical Center*, 133 S. Ct. 817 (2013); *Freeman v. Quicken Loans, Inc.*, 132 S. Ct. 2034 (2012); *Astrue v. Capato ex rel. B.N.C.*, 132 S. Ct. 2021 (2012); *Holder v. Martinez Gutierrez*, 132 S. Ct. 2011 (2012); *Home Concrete*, 132 S. Ct. 1836 (2012); *Roberts v. Sea-Land Services, Inc.*, 132 S. Ct. 1350 (2012); *Mayo Foundation for Medical Education & Research v. United States*, 131 S. Ct. 704 (2011); *Judulang v. Holder*, 132 S. Ct. 476 (2011); *Barber*, 560 U.S. 474. For this Essay, I re-counted all of the cases, which resulted in slightly different conclusions. Determining which Justices were deferring to an agency and which were not was very easy in most of the cases. The most difficult one to characterize was *Carcieri v. Salazar*, 555 U.S. 379 (2009). I decided to treat the eight-member majority in that case as deferring to the agency, and only Justice Stevens, in dissent, as voting against the agency.

By a small margin, Justice Scalia remained most likely to vote against an agency interpretation in cases citing *Chevron*, with 13.5 total votes against agencies in the thirty<sup>36</sup> cases involving *Chevron* since John Roberts became Chief Justice.<sup>37</sup> Justice Thomas's three votes against agencies in 2014<sup>38</sup> moved him into a tie with Justice Ginsburg<sup>39</sup> for second place with twelve votes against agency interpretations, with Chief Justice Roberts and Justice Kennedy tied for fourth place at 10.5,<sup>40</sup> followed closely by Justices Alito and Breyer at ten each.<sup>41</sup> Chief Justice Roberts and Justice Kennedy voted

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36. Not all Justices participated in all thirty cases, either because they came on the Court after John Roberts became Chief Justice or due to recusal (or both).

37. See *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014). In this decision, Justice Scalia voted with the agency on one issue and against the agency on another; he was in the majority on both issues. Justice Scalia voted against the agency in: *EME Homer City Generation, LP*, 134 S. Ct. 1584; *Freeman*, 132 S. Ct. 2034; *Home Concrete*, 132 S. Ct. 1836; *Judulang*, 132 S. Ct. 476; *Cuomo v. Clearing House Ass'n*, 557 U.S. 519 (2009); *Negusie v. Holder*, 555 U.S. 511 (2009); *Morgan Stanley Capital Group Inc. v. Public Utility District No. 1*, 554 U.S. 527 (2008); *Federal Express Corp. v. Holowecki*, 552 U.S. 389 (2008); *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007); *Zuni Public School District No. 89 v. Department of Education*, 550 U.S. 81 (2007); *Global Crossing Telecommunications, Inc. v. Metrophones Telecommunications, Inc.*, 550 U.S. 45 (2007); *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1 (2007); *Rapanos v. United States*, 547 U.S. 715 (2006).

38. In 2014, Justice Thomas voted against the agency in: *Utility*, 134 S. Ct. 2427; *Cuellar de Osorio*, 134 S. Ct. 2191; *EME Homer City Generation, LP*, 134 S. Ct. 1584. In pre-2014 cases, he voted against the agency in: *Freeman*, 132 S. Ct. 2034; *Home Concrete*, 132 S. Ct. 1836; *Judulang*, 132 S. Ct. 476; *Morgan Stanley Capital Group Inc.*, 554 U.S. 527; *Federal Express Corp.*, 552 U.S. 389; *Ledbetter*, 550 U.S. 618; *Zuni Public School District No. 89*, 550 U.S. 81; *Global Crossing Telecommunications, Inc.*, 550 U.S. 45; *Rapanos*, 547 U.S. 715.

39. Justice Ginsburg voted against agency interpretations in: *Freeman*, 132 S. Ct. 2034; *Roberts*, 132 S. Ct. 1350; *Judulang*, 132 S. Ct. 476; *Barber*, 560 U.S. 474; *Cuomo*, 557 U.S. 519; *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 557 U.S. 261 (2009); *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208 (2009); *Negusie*, 555 U.S. 511; *Morgan Stanley Capital Group Inc.*, 554 U.S. 527; *Dada v. Mukasey*, 554 U.S. 1 (2008); *National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007); *Gonzales v. Oregon*, 546 U.S. 243 (2006).

40. Chief Justice Roberts voted for the agency on one issue and against the agency in the other in *Utility*, 134 S. Ct. 2427. He voted against the agency in: *City of Arlington*, 133 S. Ct. 1863; *Freeman*, 132 S. Ct. 2034; *Home Concrete*, 132 S. Ct. 1836; *Judulang*, 132 S. Ct. 476; *Negusie*, 555 U.S. 511; *Morgan Stanley Capital Group Inc.*, 554 U.S. 527; *Ledbetter*, 550 U.S. 618; *Zuni Public School District No. 89*, 550 U.S. 81; *Watters*, 550 U.S. 1; *Rapanos*, 547 U.S. 715. Justice Kennedy voted against agency interpretations in: *Utility*, 134 S. Ct. 2427 (one of two issues); *City of Arlington*, 133 S. Ct. 1863; *Freeman*, 132 S. Ct. 2034; *Judulang*, 132 S. Ct. 476; *Barber*, 560 U.S. 474; *Negusie*, 555 U.S. 511; *Morgan Stanley Capital Group Inc.*, 554 U.S. 527; *Dada*, 554 U.S. 1; *Ledbetter*, 550 U.S. 618; *Gonzales*, 546 U.S. 243; *Rapanos*, 547 U.S. 715.

41. Justice Breyer voted against agency interpretations in: *Cuellar de Osorio*, 134 S. Ct. 2191; *Freeman*, 132 S. Ct. 2034; *Home Concrete*, 132 S. Ct. 1836; *Judulang*, 132 S. Ct. 476; *Cuomo*, 557 U.S. 519; *Negusie*, 555 U.S. 511; *Morgan Stanley Capital Group, Inc.*, 554 U.S. 527; *Dada*, 554 U.S. 1; *National Ass'n of Home Builders*, 551 U.S. 644; *Gonzales*, 546 U.S. 243. Justice Alito voted against agency interpretations in: *Utility*, 134 S. Ct. 2427 (on both issues); *Cuellar de Osorio*, 134 S. Ct. 2191; *City of Arlington*, 133 S. Ct. 1863; *Freeman*, 132 S. Ct. 2034; *Home Concrete*, 132 S. Ct. 1836; *Judulang*, 132 S. Ct. 476; *Negusie*, 555 U.S. 511; *Morgan Stanley Capital Group Inc.*, 554 U.S. 527; *Ledbetter*, 550 U.S. 618; *Rapanos*, 547 U.S. 715.

with agencies the most with 19.5 votes each,<sup>42</sup> followed closely by Justices Ginsburg, Breyer, and Alito with 18 votes each in favor of agencies.<sup>43</sup> Of the Justices who have served for the entire Roberts Court, Justices Thomas and Scalia have voted with agencies the fewest number of times, with 17 and 16.5 votes respectively.<sup>44</sup> In their shorter time on the Court, Justices

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42. Chief Justice Roberts voted in favor of agency interpretations in: *EME Homer City Generation, LP*, 134 S. Ct. 1584; *Cuellar de Osorio*, 134 S. Ct. 2191; *Sebelius v. Auburn Regional Medical Center*, 133 S. Ct. 817 (2013); *Astrue v. Capato ex rel. B.N.C.*, 132 S. Ct. 2021 (2012); *Holder v. Martinez Gutierrez*, 132 S. Ct. 2011 (2012); *Roberts*, 132 S. Ct. 1350; *Mayo Foundation for Medical Education & Research v. United States*, 131 S. Ct. 704 (2011); *Barber*, 560 U.S. 474; *Cuomo*, 557 U.S. 519; *Coeur Alaska, Inc.*, 557 U.S. 261; *Entergy Corp.*, 556 U.S. 208; *Carcieri v. Salazar*, 555 U.S. 379 (2009); *United States v. Eurodif S.A.*, 555 U.S. 305 (2009); *Dada*, 554 U.S. 1; *Federal Express Corp.*, 552 U.S. 389; *National Ass'n of Home Builders*, 551 U.S. 644; *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007); *Global Crossing Telecommunications, Inc.*, 550 U.S. 45; *Gonzales*, 546 U.S. 243. In *Utility*, 134 S. Ct. 2427, Chief Justice Roberts voted with the agency on one issue and against the agency on another. Justice Kennedy voted in favor of agency interpretations in: *Cuellar de Osorio*, 134 S. Ct. 2191; *EME Homer City Generation, LP*, 134 S. Ct. 1584; *Auburn Regional Medical Center*, 133 S. Ct. 817; *Astrue*, 132 S. Ct. 2021; *Martinez Gutierrez*, 132 S. Ct. 2011; *Home Concrete*, 132 S. Ct. 1836; *Roberts*, 132 S. Ct. 1350; *Mayo Foundation for Medical Education & Research*, 131 S. Ct. 704; *Cuomo*, 557 U.S. 519; *Coeur Alaska, Inc.*, 557 U.S. 261; *Entergy Corp.*, 556 U.S. 208; *Eurodif S.A.*, 555 U.S. 305; *Carcieri*, 555 U.S. 379; *Federal Express Corp.*, 552 U.S. 389; *National Ass'n of Home Builders*, 551 U.S. 644; *Long Island Care at Home, Ltd.*, 551 U.S. 158; *Global Crossing Telecommunication, Inc.*, 550 U.S. 45; *Zuni Public School District No. 89*, 550 U.S. 81; *Watters*, 550 U.S. 1. In *Utility*, 134 S. Ct. 2427, Justice Kennedy voted with the agency on one issue and against the agency on another.

43. Justice Breyer voted with the agency in: *Utility*, 134 S. Ct. 2427; *EME Homer City Generation, LP*, 134 S. Ct. 1584; *City of Arlington*, 133 S. Ct. 1863; *Auburn Regional Medical Center*, 133 S. Ct. 817; *Astrue*, 132 S. Ct. 2021; *Martinez Gutierrez*, 132 S. Ct. 2011; *Roberts*, 132 S. Ct. 1350; *Mayo Foundation for Medical Education & Research*, 131 S. Ct. 704; *Barber*, 560 U.S. 474; *Coeur Alaska, Inc.*, 557 U.S. 261; *Entergy Corp.*, 556 U.S. 208; *Eurodif S.A.*, 555 U.S. 305; *Federal Express Corp.*, 552 U.S. 389; *Long Island Care at Home, Ltd.*, 551 U.S. 158; *Ledbetter*, 550 U.S. 618; *Global Crossing Telecommunications, Inc.*, 550 U.S. 45; *Zuni Pub. School District No. 89*, 550 U.S. 81; *Watters*, 550 U.S. 1; *Rapanos*, 547 U.S. 715. In *Entergy*, although Justice Breyer dissented in part on the Chevron issue, he agreed with the agency (and the Court majority). Justice Ginsburg voted with the agency in: *Utility*, 134 S. Ct. 2427; *Cuellar de Osorio*, 134 S. Ct. 2191; *EME Homer City Generation, LP*, 134 S. Ct. 1584; *City of Arlington*, 133 S. Ct. 1863; *Auburn Regional Medical Center*, 133 S. Ct. 817; *Astrue*, 132 S. Ct. 2021; *Martinez Gutierrez*, 132 S. Ct. 2011; *Home Concrete*, 132 S. Ct. 1836; *Mayo Foundation for Medical Education & Research*, 131 S. Ct. 704; *Carcieri*, 555 U.S. 379; *Eurodif S.A.*, 555 U.S. 305; *Federal Express Corp.*, 552 U.S. 389; *Long Island Care at Home, Ltd.*, 551 U.S. 158; *Ledbetter*, 550 U.S. 618; *Global Crossing Telecommunications, Inc.*, 550 U.S. 45; *Zuni Public School District No. 89*, 550 U.S. 81; *Watters*, 550 U.S. 1; *Rapanos*, 547 U.S. 715. Justice Alito voted with the agency in: *Auburn Regional Medical Center*, 133 S. Ct. 817; *Astrue*, 132 S. Ct. 2021; *Martinez Gutierrez*, 132 S. Ct. 2011; *Roberts*, 132 S. Ct. 1350; *Mayo Foundation for Medical Education & Research*, 131 S. Ct. 704; *Barber*, 560 U.S. 474; *Cuomo*, 557 U.S. 519; *Coeur Alaska, Inc.*, 557 U.S. 261; *Entergy Corp.*, 556 U.S. 208; *Carcieri*, 555 U.S. 379; *Eurodif S.A.*, 555 U.S. 305; *Dada*, 554 U.S. 1; *Federal Express Corp.*, 552 U.S. 389; *National Ass'n of Home Builders*, 551 U.S. 644; *Long Island Care at Home, Ltd.*, 551 U.S. 158; *Global Crossing Telecommunications, Inc.*, 550 U.S. 45; *Zuni Public School District No. 89*, 550 U.S. 81; *Watters*, 550 U.S. 1.

44. Justice Scalia voted with the agency in: *Cuellar de Osorio*, 134 S. Ct. 2191; *City of Arlington*, 133 S. Ct. 1863; *Auburn Regional Medical Center*, 133 S. Ct. 817; *Astrue*, 132 S. Ct. 2021; *Martinez Gutierrez*, 132 S. Ct. 2011; *Roberts*, 132 S. Ct. 1350; *Mayo Foundation for Medical Education & Research*, 131 S. Ct. 704; *Barber*, 560 U.S. 474; *Coeur Alaska*,

Sotomayor and Kagan have voted in favor of agency interpretations in a higher proportion of cases than other Justices: Justice Kagan has nine votes in favor of agencies and two votes against;<sup>45</sup> Justice Sotomayor has ten votes in favor of agencies and three votes against.<sup>46</sup> Perhaps it should not be surprising that relatively liberal Justices would vote in favor of agencies during a liberal presidency, especially during the tenure of the President who appointed them.

## II. A QUALITATIVE LOOK AT A FEW INTERESTING ROBERTS COURT *CHEVRON* CASES

This part looks qualitatively at a few of the Court's recent decisions under *Chevron* to illustrate the Court's continued failure to clarify the *Chevron* doctrine. It also briefly examines a relatively new controversy over deference to agency construction of the agency's own regulations under what has become known as "Auer deference."<sup>47</sup> This is not meant to be a representative sample, but these cases raise interesting questions about *Chevron* and the Roberts Court that are not discussed in Part III.

Agency flexibility after initial judicial review has been an area of particular controversy under *Chevron*. Agencies sometimes change their views on issues<sup>48</sup> to which *Chevron* applies even after the agency's prior views have been subjected to judicial review. In two pre-Roberts Court decisions, the Court rejected *Chevron* deference when, in its view, the Court had already determined the meaning of the statute at issue, not merely

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*Inc.*, 557 U.S. 261; *Entergy Corp.*, 556 U.S. 208; *Carcieri*, 555 U.S. 379; *Eurodif S.A.*, 555 U.S. 305; *Dada*, 554 U.S. 1; *National Ass'n of Home Builders*, 551 U.S. 644; *Long Island Care at Home, Ltd.*, 551 U.S. 158; *Gonzales*, 546 U.S. 243. In *Utility*, 134 S. Ct. 2427, Justice Scalia voted with the agency on one issue and against the agency on another. Justice Thomas voted with the agency in: *City of Arlington*, 133 S. Ct. 1863; *Auburn Regional Medical Center*, 133 S. Ct. 817; *Astrue*, 132 S. Ct. 2021; *Martinez Gutierrez*, 132 S. Ct. 2011; *Roberts*, 132 S. Ct. 1350; *Mayo Foundation for Medical Education & Research*, 131 S. Ct. 704; *Barber*, 560 U.S. 474; *Cuomo*, 557 U.S. 519; *Coeur Alaska, Inc.*, 557 U.S. 261; *Entergy Corp.*, 556 U.S. 208; *Negusie*, 555 U.S. 511; *Carcieri*, 555 U.S. 379; *Eurodif S.A.*, 555 U.S. 305; *Dada*, 554 U.S. 1; *National Ass'n of Home Builders*, 551 U.S. 644; *Long Island Care at Home, Ltd.*, 551 U.S. 158; *Gonzales*, 546 U.S. 243.

45. Justice Kagan voted with the agency in *Utility*, 134 S. Ct. 2427; *Cuellar de Osorio*, 134 S. Ct. 2191; *EME Homer City Generation, LP*, 134 S. Ct. 1584; *City of Arlington*, 133 S. Ct. 1863; *Auburn Regional Medical Center*, 133 S. Ct. 817; *Astrue*, 132 S. Ct. 2021; *Martinez Gutierrez*, 132 S. Ct. 2011; *Home Concrete*, 132 S. Ct. 1836; *Roberts*, 132 S. Ct. 1350. She voted against the agency in *Judulang*, 132 S. Ct. 476, and *Freeman*, 132 S. Ct. 2034.

46. Justice Sotomayor voted with the agency in: *Utility*, 134 S. Ct. 2427; *EME Homer City Generation, LP*, 134 S. Ct. 1584; *City of Arlington*, 133 S. Ct. 1863; *Auburn Regional Medical Center*, 133 S. Ct. 817; *Astrue*, 132 S. Ct. 2021; *Martinez Gutierrez*, 132 S. Ct. 2011; *Home Concrete*, 132 S. Ct. 1836; *Roberts*, 132 S. Ct. 1350; *Mayo Foundation for Medical Education & Research*, 131 S. Ct. 704; *Barber*, 560 U.S. 474. She voted against the agency in: *Cuellar de Osorio*, 134 S. Ct. 2191; *Freeman*, 132 S. Ct. 2034; *Judulang*, 132 S. Ct. 476.

47. See *Auer v. Robbins*, 519 U.S. 452 (1997); see also *Christensen v. Harris County*, 529 U.S. 576, 588 (2000) (using the term "Auer deference" for the first time).

48. Although it might be appropriate to be more specific and characterize the issue as changed agency views on issues of "statutory interpretation," I hesitate to do so because of the Court's continued lack of clarity over the nature of the issues to which *Chevron* applies.



upheld the agencies' interpretations under deferential judicial review.<sup>49</sup> However, when an agency's prior interpretation had been upheld on deferential judicial review, the situation was not so clear. In *National Cable & Telecommunications Ass'n v. Brand X Internet Services*,<sup>50</sup> decided just before Chief Justice Roberts joined the Court, Justice Thomas's opinion for the Court explicitly provided for the possibility that an agency's interpretation might receive *Chevron* deference even if a reviewing court had previously adopted a contrary interpretation: "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion."<sup>51</sup> In *Chevron* terms, what this seems to mean is that if the meaning of the statute was determined under *Chevron* Step One, the agency cannot adopt a different interpretation, but if the agency had been upheld under *Chevron* Step Two, the agency remains free to adopt a different "permissible" interpretation.<sup>52</sup>

This doctrine was tested recently in *United States v. Home Concrete & Supply, LLC*,<sup>53</sup> involving a new Treasury rule that was contrary to a prior Supreme Court decision on the same matter.<sup>54</sup> A plurality of the Court, in an opinion by Justice Breyer, held that the government's new rule was not entitled to *Chevron* deference because it was directly contrary to the Court's prior decision in *Colony, Inc. v. Commissioner*.<sup>55</sup> In that case, the Court had rejected the agency's reading of the statute, which might indicate that it was hopeless for the agency to try again, since it meant either that the Court determined the statute's clear and unambiguous meaning, or that the agency's interpretation was not "permissible."<sup>56</sup> However, because *Colony* was decided long before *Chevron*, the implications are not so clear. The Court in *Colony* explicitly stated that the statute was "ambiguous" with regard to the issue in the case, and then the Court went on to employ traditional statutory construction principles to arrive at what it found to be the best reading of the statute.<sup>57</sup> Had *Colony* been litigated post-*Chevron*,

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49. See *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992); *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990).

50. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

51. *Id.* at 982. As Abbe Gluck notes in her contribution to this symposium, *Brand X* has "enormous repercussions for the allocation of power between courts and agencies." Abbe R. Gluck, *What 30 Years of Chevron Teach Us About the Rest of Statutory Interpretation*, 83 *FORDHAM L. REV.* 607, 625 (2014).

52. See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Additional complications arise when the initial judicial interpretation was rendered in a controversy between two private parties not involving an agency interpretation. Those complications are not addressed here.

53. 132 S. Ct. 1836 (2012).

54. *Id.*

55. See *Colony, Inc. v. Comm'r*, 357 U.S. 28 (1958).

56. *Id.*

57. *Id.* "Although we are inclined to think that the statute on its face lends itself more plausibly to the taxpayer's interpretation, it cannot be said that the language is unambiguous. In these circumstances we turn to the legislative history of § 275(c)." *Id.* at 33. The Court also cited the purposes of the provision at issue and the decisions of four Courts of Appeals

the finding of statutory ambiguity presumably would have sent the case to *Chevron* Step Two, under which the agency's interpretation would have been evaluated under the "permissible construction" standard. Perhaps it would have been upheld.

Justice Breyer's plurality opinion in *Home Concrete* did not satisfactorily answer the government's argument for *Chevron* deference, which was noted in Justice Kennedy's dissenting opinion, joined by Justices Ginsburg, Sotomayor, and Kagan.<sup>58</sup> Justice Scalia, concurring in the judgment, would have resolved the case under *Chevron* Step Two and would have found that the government's new interpretation was unreasonable.<sup>59</sup> Justice Kennedy's group of four dissenting Justices concluded that the *Brand X* issue was irrelevant to the case because the statute had been altered so much on reenactment after *Colony* that the agency was not constrained by the Court's interpretation of the prior statutory provision.<sup>60</sup> Accordingly, it is uncertain whether the plurality's understanding of *Brand X* would be adopted by a majority of the Court, leaving an annoying lack of clarity over whether pre-*Chevron* judicial interpretations of ambiguous statutes are binding on agencies post-*Chevron*. However, looking at the lineup of Justices' votes, perhaps once again what we see is a case decided based on the substantive views of the Justices in accord with the familiar liberal/conservative divide on the Court (with Justice Breyer displaying his somewhat more conservative views on regulatory matters than in other areas) and not by any systematic application of principles of judicial review.<sup>61</sup> Unless the Court adopts and applies a firm rule that agencies

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(other than the one under review which the Court was reversing) for support. *Id.* at 36–37. Two dissenters stated that they "would follow the interpretation consistently given § 275(c) by the Tax Court for many years and affirm the judgment of the Court of Appeals in this case." *See id.* at 38 (Warren, C.J. & Black, J., dissenting).

58. *United States v. Home Concrete & Supply, LLC*, 132 S. Ct. 1836, 1851–52 (2012) (Kennedy, J., dissenting).

59. *Id.* at 1847 (Scalia, J., concurring in part and concurring in judgment) ("[H]aving decided to stand by *Colony* and to stand by *Brand X* as well, the plurality should have found—in order to reach the decision it did—that the Treasury Department's current interpretation was unreasonable."). Justice Scalia found that in order for the plurality to avoid *Chevron* analysis, it had to revise the relationship between *Chevron* and *Brand X*:

To trigger the *Brand X* power of an authorized "gap-filling" agency to give content to an ambiguous text, a pre-*Chevron* determination that language is ambiguous does not alone suffice; the pre-*Chevron* Court must in addition have found that Congress wanted the particular ambiguity in question to be resolved by the agency. And here, today's plurality opinion finds, "[t]here is no reason to believe that the linguistic ambiguity noted by *Colony* reflects a post-*Chevron* conclusion that Congress had delegated gap-filling power to the agency." The notion, seemingly, is that post-*Chevron* a finding of ambiguity is accompanied by a finding of agency authority to resolve the ambiguity, but pre-*Chevron* that was not so. The premise is false. Post-*Chevron* cases do not "conclude" that Congress wanted the particular ambiguity resolved by the agency; that is simply the legal effect of ambiguity—a legal effect that should obtain whenever the language is in fact (as *Colony* found) ambiguous.

*Id.* at 1847.

60. *Id.* at 1852 (Kennedy, J., dissenting).

61. *See supra* notes 22–42 and accompanying text (discussing the voting splits of Supreme Court Justices).

cannot under any circumstances return to interpretations that had been rejected pre-*Chevron*, even if the pre-*Chevron* Court's analysis was less deferential than *Chevron* Step Two, the Court's decisions in such cases do not appear to be constrained by the *Chevron* framework or any other discernible set of interpretive principles.

Related to *Chevron* deference is the question whether agencies' views on the meaning of their own regulations should receive deference. For some time, the conventional wisdom has been that agencies should receive a great deal of deference when they interpret their own regulations, perhaps even more deference than *Chevron* Step Two.<sup>62</sup> The standard has been stated as requiring acceptance of an agency's view of the meaning of its own regulations, unless the agency's interpretation is "plainly erroneous or inconsistent with the regulation."<sup>63</sup> The reason for this deference should be obvious: as compared with reviewing courts, agencies are likely to have superior knowledge of the meaning of regulations that they drafted, and agency expertise is likely to contribute to agencies' ability to construe their regulations. However, this deference presents its own dangers: "*Auer* deference encourages agencies to be 'vague in framing regulations, with the plan of issuing "interpretations" to create the intended new law without observance of notice and comment procedures."<sup>64</sup> Justice Scalia is currently alone on the Court in refusing to defer to agency interpretations of their own regulations, but Chief Justice Roberts and Justice Alito have expressed a willingness to examine the issue when it is properly raised by the parties to a case.<sup>65</sup> Does this willingness arise out of concern over deference generally, or is this the conservative wing of the Court regretting that its doctrines currently result in deference to agencies within a relatively liberal administration?

### III. CONTINUED UNCLARITY ON *CHEVRON*'S DOMAIN<sup>66</sup>

A major problem with the *Chevron* doctrine, going back to the immediate aftermath of the *Chevron* decision itself, has been the lack of a discernible boundary between cases that should be resolved using *Chevron* deference and cases that should be resolved under some other doctrine, such as the less deferential *Skidmore* deference, non-deferential statutory construction, or arbitrary or capricious review under the Administrative Procedure Act § 706(2)(A).<sup>67</sup> At first, the difficulty involved *Chevron*'s suggestion that

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62. See *Auer v. Robbins*, 519 U.S. 452 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).

63. *Seminole Rock*, 325 U.S. at 414.

64. *Decker v. Nw. Env'tl. Def. Ctr.*, 133 S. Ct. 1326, 1341 (2013) (Scalia, J., dissenting) (quoting Robert Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 ADMIN. L.J. AM. U. 1, 11–12 (1996)); see also John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612 (1996).

65. *Decker*, 133 S. Ct. at 1338–39 (Roberts, C.J., concurring).

66. The phrase "*Chevron*'s domain" was coined by Thomas W. Merrill and Kristin E. Hickman in their 2001 article *Chevron's Domain*, 89 GEO. L.J. 833 (2001).

67. See *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

“[t]he judiciary is the final authority on issues of statutory construction.”<sup>68</sup> The implication, picked up again by the Court in 1987, was that “pure question[s] of statutory construction” are “for the courts to decide”<sup>69</sup> and are thus not subject to *Chevron* deference. This controversy, which has persisted into the Roberts Court,<sup>70</sup> leaves unsettled a fundamental question about *Chevron* deference—does it involve deference to decisions of statutory construction or deference to agency policy decisions?<sup>71</sup> Unless the Roberts Court resolves this issue, it cannot claim success in taming the *Chevron* doctrine.

Despite this puzzling controversy over whether *Chevron* applies to decisions of statutory construction, the Court has developed a parallel doctrine, known as the *Mead* standard, referred to by many scholars as *Chevron* Step Zero,<sup>72</sup> purporting to govern whether *Chevron* or *Skidmore* deference applies to review of a particular agency statutory interpretation. Building upon the congressional intent basis for *Chevron* deference, the *Mead* doctrine instructs federal courts to apply *Chevron* when governing statutes indicate “express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed.”<sup>73</sup> As the Court explained, “[i]t is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force.”<sup>74</sup> Because the Court did not create a bright line rule reserving *Chevron* deference for cases involving rulemaking or formal adjudication (or requiring *Chevron* deference in such cases), Justice Scalia rightly complained in dissent that *Mead* created additional uncertainty over the applicability of *Chevron*.<sup>75</sup> Although some cases may be easy under *Mead*,<sup>76</sup> uncertainty over application of this doctrine has persisted in recent years,<sup>77</sup> and shows no signs of abating.

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68. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984).

69. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987).

70. In one of his last opinions as a member of the Court, Justice Stevens, the author of *Chevron*, protested that the issue in *Negusie v. Holder* was a “pure question of statutory construction for the courts to decide” and thus was not subject to *Chevron* deference. 555 U.S. 511, 529 (2009) (Stevens, J., dissenting).

71. See Beermann, *supra* note 3, at 804–07.

72. *United States v. Mead Corp.*, 533 U.S. 218 (2001). A number of other contributions to this symposium focus extensively on this *Chevron* Step-Zero question. See Kristin E. Hickman, *The Three Phases of Mead*, 83 FORDHAM L. REV. 527, 528–30 (2014); Thomas W. Merrill, *Step Zero After City of Arlington*, 83 FORDHAM L. REV. 753, 756–58 (2014); Peter L. Strauss, *In Search of Skidmore*, 83 FORDHAM L. REV. 789, 792–93 (2014).

73. *Mead*, 533 U.S. at 229.

74. *Id.* at 230.

75. *Id.* at 245 (Scalia, J., dissenting).

76. *United States v. Eurodif S.A.*, 555 U.S. 305, 316 (2009).

77. *Barber v. Thomas*, 560 U.S. 474 (2010). Justice Breyer’s majority opinion cites *Chevron*, but Justice Kennedy’s dissenting opinion, for himself and Justices Stevens and Ginsburg, argues that under *Mead*, the decision at issue should not have been analyzed under *Chevron*. See *id.* at 2516–17 (Kennedy, J., dissenting).

*Chevron* will not succeed unless and until the Court provides clear instructions on when it applies and when it does not.

Another point of uncertainty is the boundary between *Chevron* deference and review under the APA's arbitrary or capricious standard. In many cases, the issue is not mentioned, and the Court resolves the case under one standard or the other, presumably because that is how the case was litigated by the parties. The best example of this is the Court's decision in *FCC v. Fox Television Stations, Inc.*,<sup>78</sup> a widely noted case involving the Federal Communications Commission's (FCC) regulation of the broadcast of indecent language.<sup>79</sup> The federal Communications Act provides for fines and imprisonment of any broadcaster that "utters any obscene, indecent, or profane language" on radio or television between the hours of 6 a.m. and midnight.<sup>80</sup> The FCC has power to enforce this prohibition through civil penalties and adverse licensing decisions.<sup>81</sup>

After years of decisions in which the FCC determined that no enforcement action would be taken against fleeting, nonliteral uses of vulgar language, in 2004, the agency reversed course and decided that even a fleeting use of certain words violated the ban on indecent language.<sup>82</sup> The agency then cited (but did not fine or otherwise penalize) Fox Television for airing vulgar language during live broadcasts of the 2002 and 2003 Golden Globe awards.<sup>83</sup> On judicial review, the Second Circuit reversed, finding that under the Supreme Court's application of APA § 706(2)(A)'s arbitrary or capricious standard in *Motor Vehicle Manufacturers Ass'n v. State Farm*,<sup>84</sup> the FCC had not adequately justified its change in policy.<sup>85</sup> The Supreme Court then reversed the Second Circuit, declaring that the case did not require greater justification for agency policy changes than for initial policy decisions.<sup>86</sup>

For present purposes, the important point about *Fox Television* is that *Chevron* was not cited in Justice Scalia's majority opinion or in any of the four concurring and dissenting opinions. The question is why not? The decision seems to turn on the Commission's understanding of the meaning of "obscene, indecent, or profane language."<sup>87</sup> In fact, the Commission's decision in *Fox Television* is a similar mix of linguistic and policy considerations as the EPA's decision in *Chevron* that the Clean Air Act's provision requiring the EPA to regulate "stationary sources" of air pollution can be understood to accommodate the bubble concept approved in

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78. 556 U.S. 502 (2009).

79. *Id.*

80. 18 U.S.C. § 1464 (2012); note following 47 U.S.C. § 303 (2012).

81. *See Fox Television*, 556 U.S. at 506 (2009) (citing various provisions of the Public Telecommunications Act of 1992).

82. *See In re Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 FCC Red. 4975, 4976 n.4 (2004).

83. *Id.* at 4982–83.

84. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

85. *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 455 (2d Cir. 2007).

86. *Fox Television*, 556 U.S. at 530.

87. *Id.* at 505.

*Chevron*.<sup>88</sup> There is simply no way to know in advance whether an agency decision like the one in *Fox Television* should be analyzed under *Chevron* or under the APA's arbitrary or capricious standard.

The one time that the Court has directly confronted the boundary between *Chevron* deference and arbitrary or capricious review, the Court failed to provide a satisfactory explanation for choosing one over the other. In *Judulang v. Holder*,<sup>89</sup> the Court reviewed a Board of Immigration Appeals (BIA) doctrine governing discretionary relief from deportation for noncitizen convicted criminals.<sup>90</sup> Called the "comparable-grounds" rule in rules promulgated in 2004<sup>91</sup> and a BIA decision from 2005,<sup>92</sup> it was determined that deportable aliens were entitled to consideration for discretionary relief only if the grounds for deportation were comparable to grounds for exclusion under repealed § 212(c) of the Immigration and Nationality Act (INA).<sup>93</sup> A split among the circuits developed over whether the comparable-grounds rule was a proper approach, with the Second Circuit rejecting the doctrine<sup>94</sup> and every other circuit that considered the matter accepting it.<sup>95</sup>

The Supreme Court rejected the comparable-grounds rule, finding it to be arbitrary or capricious.<sup>96</sup> The Solicitor General had argued that the comparable-grounds rule was entitled to deference under *Chevron* Step Two due to the ambiguity of former § 212(c) of the INA.<sup>97</sup> *Judulang*'s brief argued instead for review under the arbitrary or capricious standard, but claimed in a footnote that the result would be the same either way because the real question under *Chevron* Step Two is "whether the BIA's policy is

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88. The EPA's decision whether to use the "bubble" concept in defining "stationary source" under the Clean Air Act involved both a linguistic question of whether "stationary source" could bear the EPA's proposed interpretation and whether the "bubble" was an effective method of regulating air pollution. See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 854 (1984). Similarly, the FCC's decision that fleeting uses of certain words were encompassed in the statutory phrase "obscene, indecent, or profane language" raised both the linguistic question of the meaning of the statutory phrase and whether treating the words in question that way made sense as a matter of policy. See *Fox Television*, 556 U.S. at 509–10.

89. 132 S. Ct. 476 (2011).

90. *Id.* at 483.

91. See Application for the Exercise of Discretion Under Former Section 212(c), 8 C.F.R. § 1212.3 (2010).

92. See *In re Blake*, 23 I. & N. Dec. 722 (B.I.A. 2005).

93. The Supreme Court decided in *INS v. St. Cyr* that aliens whose crimes pre-dated the 1996 repeal of § 212(c) were entitled to have their cases determined under prior law because they may have relied on § 212(c) when deciding whether to plead guilty. 533 U.S. 289, 326 (2001).

94. See *Blake v. Carbone*, 489 F.3d 88 (2d Cir. 2007).

95. See generally *Koussan v. Holder*, 556 F.3d 403 (6th Cir. 2009); *Abebe v. Gonzales*, 493 F.3d 1092 (9th Cir. 2007); *Caroleo v. Gonzales*, 476 F.3d 158 (3d Cir. 2007); *Valere v. Gonzales*, 473 F.3d 757 (7th Cir. 2007); *Kim v. Gonzales*, 468 F.3d 58 (1st Cir. 2006).

96. *Judulang v. Holder*, 132 S. Ct. 476, 483–84 (2011).

97. See Brief for Respondent at 19, *Judulang*, 132 S. Ct. 476 (No. 10-694), 2011 WL 3821400, at \*19.

‘arbitrary or capricious in substance.’”<sup>98</sup> The Supreme Court, in an opinion by Justice Elena Kagan, gave two reasons for rejecting *Chevron* deference in the case, the first one adopting the petitioner’s argument that arbitrary or capricious review and *Chevron* Step Two are the same, and the second that the BIA’s decision was not a matter of statutory construction:

The Government urges us instead to analyze this case under the second step of the test we announced in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, to govern judicial review of an agency’s statutory interpretations. Were we to do so, our analysis would be the same, because under *Chevron* step two, we ask whether an agency interpretation is “‘arbitrary or capricious in substance.’” *Mayo Foundation for Medical Ed. and Research v. United States*. But we think the more apt analytic framework in this case is standard “arbitrary [or] capricious” review under the APA. The BIA’s comparable-grounds policy, as articulated in *In re Blake*, and *In re Brieva–Perez*, is not an interpretation of any statutory language—nor could it be, given that § 212(c) does not mention deportation cases.<sup>99</sup>

While the Court may be correct that arbitrary or capricious review is the more “apt analytic framework,” neither of the Court’s reasons supports this conclusion.<sup>100</sup>

The Court’s first reason for rejecting *Chevron* deference in *Judulang*—that “our analysis would be the same”<sup>101</sup> under *Chevron* Step Two and the arbitrary or capricious standard—is puzzling at best. The analysis under *Chevron* Step Two is completely different from the usual analysis under the arbitrary or capricious standard. *Chevron* Step Two asks simply whether the agency’s interpretation is reasonable or permissible.<sup>102</sup> Arbitrary or capricious review asks whether the agency took a hard look at the issues relevant to the policy decision under review, whether the agency considered the relevant factors, whether there is a rational connection between the facts found and the choice made, whether the agency made a clear error in judgment,<sup>103</sup> and whether the agency decision “is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”<sup>104</sup> In the *Chevron* opinion, the Court disavowed judicial review of the policy implications of statutory construction,<sup>105</sup> while the heart of

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98. Brief for Petitioner at 44 n.16, *Judulang*, 132 S. Ct. 476 (No. 10-694), 2011 WL 2678268, at \*44 n.16 (quoting *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 711 (2011)).

99. *Judulang*, 132 S. Ct. at 483 n.7 (citations omitted).

100. *Id.*

101. *Id.*

102. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (“Rather, if 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.”).

103. See generally *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983); *Citizens To Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

104. *Motor Vehicle*, 463 U.S. at 43.

105. “When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency’s policy, rather than whether it is

arbitrary or capricious review is examination of the policy basis for agency action.<sup>106</sup> The analysis could not be more different and is certainly not “the same.”

I recognize that the Court has stated more than once that *Chevron* Step Two is equivalent to arbitrary or capricious review,<sup>107</sup> most recently in 2012 with the following language: “The Commissioner’s regulations are neither ‘arbitrary or capricious in substance, [n]or manifestly contrary to the statute.’ They thus warrant the Court’s approbation.”<sup>108</sup> As I have previously explained, and for the reasons recited above, this statement makes little sense.<sup>109</sup> There is no opinion in which the Court, applying Step Two, examines the wisdom of agency policy decisions in the manner typical of judicial review under the arbitrary or capricious standard.

The Court’s second reason for rejecting *Chevron* deference in *Judulang*—that it “is not an interpretation of any statutory language”<sup>110</sup>—also fails to provide a satisfactory boundary between *Chevron* cases and arbitrary or capricious cases. As noted above, the *Fox Television* case involved the interpretation of the provision of the Communications Act prohibiting the broadcast of obscene, indecent, and profane language, and yet *Chevron* did not apply.<sup>111</sup> Under *Chevron*, if the statutory language does not address the issue involved in the case, then the legal decision, like the one in *Judulang*, would be reviewed under *Chevron* Step Two.<sup>112</sup> The Court’s second reason is also inconsistent with the Court’s prior decisions<sup>113</sup> that equate *Chevron* Step Two with review of the wisdom of the agency’s policy choice. Under these opinions, the question is whether the agency reached a reasonable policy decision,<sup>114</sup> not whether the agency’s decision is consistent with the statutory language. And if this is really the reason for not applying *Chevron* in *Judulang*, then the Court’s

a reasonable choice within a gap left open by Congress, the challenge must fail.” *Chevron*, 467 U.S. at 866.

106. *Overton Park*, 401 U.S. at 416 (“[T]he court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.”); *Motor Vehicle*, 463 U.S. at 43 (same).

107. In *Judulang*, the Court cited *Mayo Foundation for Medical Education & Research v. United States*, 131 S. Ct. 704, 711 (2011), and *Household Credit Services, Inc. v. Pfennig*, 541 U.S. 232, 242 (2004), for this point. The latter decision provides better support than the former: “Because § 1605 is ambiguous, the Board’s regulation implementing § 1605 ‘is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute.’” *Household Credit Servs.*, 541 U.S. at 242 (quoting *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001)); see also *Verizon Commc’ns Inc. v. FCC*, 535 U.S. 467, 527 n.38 (2002).

108. *Astrue v. Capato ex rel. B.N.C.*, 132 S. Ct. 2021, 2034 (2012) (citing *Mayo Found. for Med. Educ. & Research*, 131 S. Ct. at 711 and *Barnhart v. Walton*, 535 U.S. 212, 217–222, 225 (2002)).

109. Beermann, *supra* note 3, at 806–07.

110. *Judulang*, 132 S. Ct. at 483 n.7.

111. See *supra* notes 81–88 and accompanying text.

112. See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

113. See *supra* notes 108–09 and accompanying text.

114. See *supra* notes 97–100 and accompanying text (discussing Step Two and arbitrary or capricious standard).



first reason, that the analysis would be the same, makes no sense. Perhaps by “analysis” the Court meant “result,” but if that is the case, it constitutes a serious slip of the pen.

Further evidence of the Roberts Court’s failure to clarify the boundary between the *Chevron* doctrine and arbitrary or capricious review is illustrated by the diversity of approaches taken by the lower courts reviewing BIA decisions applying the comparable-grounds rule that was rejected in *Judulang*. None of the circuits either accepting or rejecting the comparable-grounds doctrine analyzed the case under the arbitrary or capricious standard employed by the Supreme Court in *Judulang*. Two accepted it under *Chevron* deference<sup>115</sup> and three accepted it without citing either *Chevron* or the arbitrary or capricious standard.<sup>116</sup> The one circuit that, like the Supreme Court, rejected the comparable-grounds rule, did so based on the doctrine of constitutional avoidance, rejecting *Chevron* deference but not applying the arbitrary or capricious standard.<sup>117</sup> Something is amiss if six Courts of Appeals fail to apply what the Supreme Court identifies as the proper standard of judicial review.<sup>118</sup> The Court needs to provide clearer instructions to the lower courts.<sup>119</sup>

Additional evidence exists that uncertainty over *Chevron*’s domain has persisted in the Roberts Court. In *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*,<sup>120</sup> the Court approved the EPA’s interpretation of the Clean Water Act that granted the U.S. Army Corps of Engineers authority to grant permits to discharge combined solid matter and water into a body of water protected under the Clean Water Act.<sup>121</sup> Environmental groups had claimed that the Corps did not have authority to grant the permits because the discharges violated the Act.<sup>122</sup> The opinions in the

115. See generally *Abebe v. Gonzales*, 493 F.3d 1092 (9th Cir. 2007); *Caroleo v. Gonzales*, 476 F.3d 158 (3d Cir. 2007).

116. See generally *Koussan v. Holder*, 556 F.3d 403 (6th Cir. 2009); *Valere v. Gonzales*, 473 F.3d 757 (7th Cir. 2007); *Kim v. Gonzales*, 468 F.3d 58 (1st Cir. 2006).

117. *Blake v. Carbone*, 489 F.3d 88, 100 (2d Cir. 2007).

118. As Richard Re has recently observed, the Courts of Appeals have not received clear instructions from the Supreme Court on the basic question of how many steps the *Chevron* doctrine contains. See Richard M. Re, *Should Chevron Have Two Steps?*, 89 IND. L.J. 605, 637 (2014) (“The fact that federal judges sometimes dispute whether to adhere to traditional two-step *Chevron* demonstrates that the choice among the varieties of *Chevron* has real consequences. . . . What courts need are principles for the appropriate exercise of their *Chevron* discretion.”).

119. In his contribution to this symposium, Peter Shane defends the status quo failure to draw clear lines between the two inquiries. Peter M. Shane, *Chevron Deference, the Rule of Law, and Presidential Influence in the Administrative State*, 83 FORDHAM L. REV. 679, 689–90 (2014); accord Shane & Walker, *supra* note 2, at 483 n.53 (“Whether a court uses one or the other rubric for its decision is most likely to turn on whether the challenge to agency reasonableness is based on an alleged lack of principled connection between agency action and the purposes and boundaries set in the relevant statute—which makes the dispute look interpretive—or whether the agency is assertedly lacking in its demonstration that the connections it posits actually exist on the record, which sounds more like an arbitrary and capricious challenge.”).

120. *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 557 U.S. 261 (2009).

121. *Id.* at 273–75.

122. *Id.* at 266.

case are all over the place with regard to the applicability of *Chevron*. The majority opinion by Justice Kennedy first resolved the issue of whether the Corps has authority to grant the permits by reading the statute itself and without mentioning *Chevron*.<sup>123</sup> Then, the Court addressed whether the particular permits were lawful. The Court applied *Chevron*, found the relevant provision ambiguous and deferred “to the agencies’ reasonable decision to continue their prior practice.”<sup>124</sup> However, the Court found that the EPA’s memorandum, in which this decision was embodied, did not qualify for *Chevron* deference under the *Mead* standard, and it purported to afford this memorandum some deference, but less than full *Chevron* deference.<sup>125</sup> On this conclusion, Justice Scalia observed that the Court was, in violation of *Mead*, effectively providing the memorandum *Chevron* deference, but he was happy to join the opinion: “I favor overruling *Mead*. Failing that, I am pleased to join an opinion that effectively ignores it.”<sup>126</sup> Justice Ginsburg’s dissenting opinion, joined by Justices Stevens and Souter, read the statutory scheme to prohibit the permits issued by the Corps and did not mention *Chevron* or any form of deference at all.<sup>127</sup> Once again, the disagreement here may be more about substantive policy concerns than matters of judicial methodology. *Chevron* does not appear to constrain the analysis at all.

In another illustrative case, the Court agreed with the Department of Labor and the Equal Employment Opportunity Commission that an employee who complains orally has “filed” a complaint within the meaning of a statute prohibiting retaliation against persons who file complaints of violations of the Fair Labor Standards Act.<sup>128</sup> Justice Breyer’s opinion for the Court mentions deference but is unclear on what sort of deference is being applied.<sup>129</sup> The opinion does not cite *Chevron* but includes citations to decisions applying the arbitrary or capricious test, *Skidmore* deference, and *Chevron*,<sup>130</sup> without specifying the type of deference being applied. Justices Scalia and Thomas dissented, and Scalia’s dissenting opinion posited that “[t]he actual quantum of deference measured out by the Court’s opinion is unclear—seemingly intentionally so.”<sup>131</sup> For his part, Justice Scalia found the statute “clear in light of its context”<sup>132</sup> and thus did not defer to the agencies’ finding that oral complaints are sufficient to trigger

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123. *Id.*

124. *Id.* at 291.

125. *Id.* at 283–84.

126. *Id.* at 296 (Scalia, J., concurring).

127. *Id.* at 296–304 (Ginsburg, J., dissenting).

128. *See* *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325 (2011).

129. *Id.*

130. *See id.* at 1335–36 (citing *United States v. Mead Corp.*, 533 U.S. 218 (2001); *Babbitt v. Sweet Home Chapter of Commys. for Great Or.*, 515 U.S. 687, 703–04 (1995); *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983)).

131. *See id.* at 1340 n.5 (Scalia, J., dissenting) (“The Court says that it is giving ‘a degree of weight’ to the Secretary and EEOC’s views ‘given Congress’ delegation of enforcement powers to federal administrative agencies.’ But it never explicitly states the level of deference applied, and includes a mysterious citation of *United States v. Mead Corp.*”).

132. *Id.* at 1339.

the anti-retaliation provisions. Given that the dissent comprises two of the Court's most conservative members, it seems more likely that substantive differences over whether oral complaints should trigger the anti-retaliation obligation provide more explanatory power than methodological concerns.

In another pair of decisions concerning *Chevron's* coverage, the Roberts Court has had some modest success in eliminating complications concerning when *Chevron* applies. In one of the cases, however, Chief Justice Roberts dissented from the Court's move toward more uniformity. In *Mayo Foundation*,<sup>133</sup> in an opinion written by Chief Justice Roberts, the unanimous Court held that *Chevron* deference applies to Department of the Treasury regulations concerning the administration of income tax laws.<sup>134</sup> The Court, stressing the need for uniformity in standards of judicial review of agency action,<sup>135</sup> expressly rejected a less deferential standard that had been applied in some earlier cases reviewing Treasury regulations.<sup>136</sup>

In the other decision, *City of Arlington v. FCC*,<sup>137</sup> Chief Justice Roberts dissented from the Court's decision that *Chevron* deference applies even when a case involves the scope of agency jurisdiction.<sup>138</sup> Although it was sometimes claimed that this issue had been resolved long ago,<sup>139</sup> it had also been identified as one of those lingering uncertainties surrounding the *Chevron* doctrine.<sup>140</sup> Justice Scalia, writing for the majority, found application of *Chevron* to issues of agency jurisdiction to follow from his conclusion that "the distinction between 'jurisdictional' and 'nonjurisdictional' interpretations is a mirage. No matter how it is framed, the question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, *whether the agency has stayed within the bounds of its statutory authority.*"<sup>141</sup> To Justice Scalia, then, all agency statutory interpretations are jurisdictional in the sense that they all concern the scope of agency authority. Chief Justice Roberts, in a dissenting opinion for himself and Justices Kennedy and Alito, found the majority's view inconsistent with the congressional-intent basis of the *Chevron* doctrine:

A court should not defer to an agency until the court decides, on its own, that the agency is entitled to deference. Courts defer to an agency's interpretation of law when and because Congress has conferred on the agency interpretive authority over the question at issue. An agency cannot exercise interpretive authority until it has it; the question whether

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133. *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704 (2011).

134. *Id.* at 711–12.

135. *Id.* at 713.

136. *See id.* (citing *Nat'l Muffler Dealers Ass'n, Inc. v. United States*, 440 U.S. 472 (1979)).

137. 133 S. Ct. 1863 (2013).

138. *See id.* at 1877–86 (Roberts, C.J., dissenting).

139. *See Dole v. United Steelworkers*, 494 U.S. 26, 43–44 (1990) (White, J., dissenting) (arguing that the Court had previously applied *Chevron* to agency statutory decisions affecting agency jurisdiction).

140. *See Merrill & Hickman, supra* note 66, at 844 n.54.

141. *City of Arlington*, 133 S. Ct. at 1868.

an agency enjoys that authority must be decided by a court, without deference to the agency.<sup>142</sup>

This disagreement between Justice Scalia and Chief Justice Roberts illustrates a significant weakness in the *Chevron* doctrine. Chief Justice Roberts is, in my view, correct that deference to jurisdictional determinations is inconsistent with the theoretical basis of the *Chevron* doctrine. However, Justice Scalia may also be correct that the dissent's view would lead to "chaos" because it would be impossible to construct a clear rule distinguishing jurisdictional issues from nonjurisdictional ones.<sup>143</sup> This shows that doctrines built upon fictional theoretical bases are inherently unstable.<sup>144</sup>

A final thought on this lingering uncertainty over *Chevron*'s domain: it is tempting to attribute the problems the Court has had in constructing the *Chevron* doctrine to the nature of a multimember Court and the inevitability of disagreement over the politically charged issues that arise in administrative law. This temptation should be resisted. In other areas of law, the Supreme Court has been much more successful in crafting decision frameworks that do not suffer from the same degree of uncertainty over their domains. Examples include the tiers of scrutiny that govern equal protection claims and the entitlement doctrine that governs the existence of property interests in government benefits and employment. It would be very surprising if the Court failed to apply strict scrutiny to a racial classification,<sup>145</sup> or if the Court determined whether a government employee had a property interest in her job without reference to entitlement theory.<sup>146</sup> In judicial review of agency legal determinations, it is often very difficult to know in advance what framework the federal courts will apply. This may be due to the complexity of the issues in administrative law and the variety of circumstances in which these issues arise. Perhaps a multifactor standard, like *Skidmore*<sup>147</sup> deference, provides a more promising framework than *Chevron* for reviewing agency legal determinations.

#### CONCLUSION

For many reasons, the *Chevron* doctrine is a failure that should be jettisoned at the earliest possible time.<sup>148</sup> However, it appears that the Roberts Court is likely to give us more of the same—that is, an incoherent, imprecise, and arbitrarily applied set of principles for reviewing agency statutory construction, and decisions that by and large reflect the views of the Justices on the substantive issues involved and not disagreement over

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142. *Id.* at 1877 (Roberts, C.J., dissenting).

143. *Id.* at 1874 (majority opinion).

144. *See* Beermann, *supra* note 3, at 796–97 (discussing how *Chevron* is built on a fictional construction of congressional intent).

145. *See, e.g.,* *Loving v. Virginia*, 388 U.S. 1 (1967).

146. *See, e.g.,* *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538–39 (1985).

147. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

148. *See* Beermann, *supra* note 3.

methodology. It would be easy to ignore inconsistency at the Supreme Court if it were not for the Court's failure to provide guidance to the lower courts that are supposed to follow the Supreme Court's instructions on proper standards of judicial review. Further, endless arguments over the applicability of *Chevron* continue to consume litigation resources and distract attention from the substantive merits of agency action under review. These are among the numerous reasons for my hope that there will be no need for another symposium marking an anniversary of the *Chevron* decision.