ADMINISTRATIVE LAW IN THE ROBERTS COURT: THE FIRST FOUR YEARS

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INTRODUCTION

When John G. Roberts took over as Chief Justice of the Supreme Court of the United States on September 29, 2005, he ushered in a new phase of the Court's history. Of course, there were two changes of Justices that fall, given Chief Justice William Rehnquist's death and Associate Justice Sandra Day O'Connor's retirement, resulting in the confirmations of both Chief Justice Roberts and Associate Justice Samuel Alito.

Four years later, the Supreme Court is again changing. At the end of the 2008–2009 Term, Associate Justice David Souter retired from the Court. As a result, the four Terms from October 2005 to June 2009 represent a distinct phase in the Court's history: the first iteration of the Roberts Court.

In those four years, the Supreme Court decided a number of core administrative law cases and many other cases relevant to administrative law practice. The Court decided issues ranging from constitutional questions, such as standing and federalism, to more basic administrative law questions such as federal court review of federal agency actions,

contested issues of statutory interpretation, and the ongoing refinement of the *Chevron* doctrine.

This Article reviews the first four years of the Roberts Court's administrative law decisions. Part I presents an overview of the cases that involved issues of access to the federal courts: standing and mootness; the federal courts' jurisdiction; statutes of limitation; and doctrines limiting federal courts' authority to review agency actions, such as exhaustion of administrative remedies. Part II reviews the Roberts Court's decisions dealing with the relationship between states and the federal government. These decisions grapple with due process requirements for the states, federal preemption of state laws, the dormant Commerce Clause, and the Court's use of federalism considerations in statutory interpretation.

Finally, Part III analyzes the Supreme Court's decisions that reveal the Roberts Court's perspective on the "proper" role of the federal courts within the federal government. Substantively, these cases cover constitutional review of federal legislation, the interpretation of the Constitution itself, "arbitrary and capricious" review of federal agency actions, and *Chevron* deference to agencies' interpretation of statutes. Attitudinally, however, these decisions reveal a Court majority that—except in a few contexts—is consciously, and perhaps overzealously, determined to constrain its own authority.

Specifically, this Article concludes that what emerges from these often-divided decisions is a Court that is generally deferential to the other two branches of government, except when constitutional rights and principles are at issue. This deference is most apparent in the *Chevron* cases, particularly in those where the Supreme Court wrestles with the relationship between agency decisions and federal court precedent.

I. ACCESS TO THE FEDERAL COURTS

A. Standing and Mootness

Over the course of many decades, the Supreme Court determined that the federal courts' Article III restriction to hearing only "cases" and "controversies"[1] requires plaintiffs both to have "standing" before their cases can be heard in federal court and to maintain a "live" controversy throughout the litigation. As the Court describes the standing analysis in its 1992 decision in *Lujan v. Defenders of Wildlife*, a federal court plaintiff must meet a three-part test: (1) the plaintiff must have an injury that is concrete, particularized, and either actual or imminent; (2) that injury must

1. U.S. CONST. art. III, § 2.

be "fairly traceable" to the defendant's conduct; and (3) it must be likely that the federal courts can redress the injury.[2] In turn, the Court polices the live-controversy requirement through the doctrine of mootness, which requires the federal courts to dismiss litigation when legal relief is futile. As is classically the case, standing and mootness issues before the first iteration of the Roberts Court were most prominent in public interest litigation.

1. Taxpayer Standing

Taxpayer standing is a long-discredited theory whereby plaintiffs attempt to challenge government action on the basis that they are taxpayers.[3] Given the very limited circumstances under which federal courts allow taxpayer standing, it was unsurprising that the Supreme Court unanimously decided in May 2006, in an opinion by Chief Justice Roberts, that state taxpayers lacked standing to challenge Ohio's franchise tax credit on Commerce Clause grounds.[4] Noting that it had an obligation to assure itself that standing exists, the Supreme Court reviewed the taxpayer standing theory and concluded that it was generally a poor theory that would not work in this case because the plaintiffs' injuries were too generalized and hypothetical.[5] Moreover, while the Court recognized that taxpayer standing can be sufficient in an Establishment Clause challenge to government action,[6] it refused to create a similar rule for Commerce Clause challenges.[7]

Similarly, in its March 2007 decision in *Lance v. Coffman*, the Supreme Court analyzed the standing of four citizens to challenge, pursuant to the Elections Clause of the United States Constitution, both a Colorado state court's redrawing of congressional districts following the Colorado legislature's failure to do so after the 2000 census and the Colorado Supreme Court's injunction against a subsequent 2003 legislative

2. 504 U.S. 555, 560–61 (1992).

3. *See, e.g.*, Doremus v. Bd. of Educ., 342 U.S. 429, 434–35 (1952) (placing strict special-injury requirements on taxpayer standing).

4. DaimlerChysler Corp. v. Cuno, 547 U.S. 332, 354 (2006).

5. *See id.* at 340, 342–46 (noting that state policymakers retain "broad discretion" to make state fiscal policy decisions).

6. *See* Flast v. Cohen, 392 U.S. 83, 105–06 (1968) (holding that because "the Establishment Clause . . . specifically limit[s] the taxing and spending power conferred by Art. I, § 8," "[a] taxpayer will have standing consistent with Article III to invoke federal judicial power when he alleges that congressional action under the taxing and spending clause is in derogation of" the Establishment Clause).

7. *See DaimlerChrysler*, 547 U.S. at 347–49 (noting the special importance of the purpose of the Establishment Clause to limit taxing and spending to favor one religion over another as the primary justification for conferring taxpayer standing in such cases, a concern not present in Commerce Clause decisions).

redistricting.[8] Plaintiffs asserted that the Colorado Supreme Court's decision denied them their federal constitutional right to have the Colorado legislature control elections.

In a unanimous per curiam decision, the Supreme Court decided that the plaintiffs lacked standing because they failed to assert a particularized stake in the litigation.[9] Using the *Lujan* framework[10] and providing a thorough review of the Court's taxpayer standing decisions, the Court emphasized that "[o]ur refusal to serve as a forum for generalized grievances has a lengthy pedigree."[11] The four plaintiffs failed to allege anything other than a generalized grievance because "[t]he only injury plaintiffs allege is that the law—specifically the Elections Clause—has not been followed. This injury is precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past."[12]

In June 2007, however, the Court was far less in agreement regarding taxpayer standing in an actual Establishment Clause case, *Hein v. Freedom from Religion Foundation*.[13] In a 5–4 decision by Justice Alito, the Supreme Court concluded that the Freedom from Religion Foundation did not have standing under the taxpayer standing doctrine to bring an Establishment Clause challenge to President Bush's Faith-Based and Community Initiatives Program.[14] Emphasizing "that the payment of taxes is generally not enough to establish standing to challenge an action taken by the Federal Government,"[15] the majority concluded that the organization did not meet the "narrow exception" created in *Flast v. Cohen*.[16] In *Hein*, "*Congress* did not specifically authorize the use of federal funds to pay for the conferences or speeches that the plaintiffs challenged. Instead, the conferences and speeches were paid for out of general *Executive Branch* appropriations."[17] As a result, the *Flast* exception allowing taxpayer standing did not apply.[18]

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8. 549 U.S. 437, 437–38 (2007).
9. *Id.* at 442.
10. *See supra* note 2 and accompanying text.
11. *Lance*, 549 U.S. at 439.
12. *Id*. at 442.
13. 551 U.S. 587 (2007).
14. *See id.* at 605 (concluding that the same "link between congressional action and constitutional violation that supported taxpayer standing in *Flast* is missing" in the present case).
15. *Id*. at 593.
16. *Id.* at 603 (citing *Flast*, 392 U.S. at 105–06). The Court concluded, "Under *Flast*, a plaintiff asserting an Establishment Clause claim has standing to challenge a law authorizing the use of federal funds in a way that allegedly violates the Establishment Clause." *Id.* at 593.
17. *Id*. (emphases added).
18. *See id*. at 603–15 (emphasizing the rigor with which the "narrow" exception

Justice Souter dissented, joined by Justices Stevens, Ginsburg, and Breyer. They questioned the majority's distinction between the Legislative and Executive Branches, arguing "that when [any branch of] the Government spends money for religious purposes a taxpayer's injury is serious and concrete enough to be 'judicially cognizable.'"[19]

2. Environmental Standing

Standing decisions in environmental cases traditionally divide the Supreme Court, and this remains true for the Roberts Court. For example, standing was a contentious issue in the Court's April 2007 decision in *Massachusetts v. EPA*,[20] the so-called global warming case. In that case, twelve states, four local governments, and thirteen public interest organizations challenged the Environmental Protection Agency's (EPA's) refusal to regulate greenhouse gas emissions from motor vehicles pursuant to § 202 of the federal Clean Air Act.[21] The EPA challenged the plaintiffs' standing to bring the lawsuit.

In a 5–4 decision by Justice Stevens, the Supreme Court concluded that at least the State of Massachusetts had standing to bring its action.[22] Quickly dismissing arguments that the case involved a political question, an advisory opinion, or a mooted issue, the majority announced that *Lujan v. Defenders of Wildlife* provided the proper analytical framework to assess standing.[23]

Nevertheless, the majority emphasized Justice Kennedy's concurring opinion from *Lujan*, especially his approval of Congress's power to define new injuries.[24] The majority pointed out that the Clean Air Act itself provides plaintiffs with "the right to challenge agency action unlawfully withheld"[25] and that "[w]hen a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant."[26]

However, the majority's treatment of standing for states in *Massachusetts v. EPA* will likely generate more standing litigation in cases

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created by *Flast* should be applied).

19. *Id*. at 643 (Souter, J., dissenting).

20. 549 U.S. 497 (2007).

21. *See* 42 U.S.C. § 7521(a)(1) (2006) (establishing the EPA Administrator's authority to set standards for the emission of air pollutants from new motor vehicles).

22. Massachusetts v. EPA, 549 U.S. at 526.

23. *Id*. at 517.

24. *Id*. at 516 (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment)).

25. *Id.* at 517 (citing 42 U.S.C. § 7607(b)(1) (2006)).

26. *Id*. at 518.

with state plaintiffs and limit the decision's applicability in the federal courts more generally. Despite its alleged adherence to the *Lujan* analysis, the majority stressed "the special position and interest of Massachusetts. It is of considerable relevance that the party seeking review here is a sovereign State and not, as it was in *Lujan*, a private individual."[27] Citing *Georgia v. Tennessee Copper Co*. for the proposition "that States are not normal litigants for the purposes of invoking federal jurisdiction" and may sue to protect their territory from outside harms,[28] the majority argued that the fact "[t]hat Massachusetts does in fact own a great deal of the 'territory alleged to be affected' only reinforces the conclusion that its stake in the outcome of this case is sufficiently concrete to warrant the exercise of federal judicial power."[29]

The majority then proceeded through the *Lujan* three-part test for standing. With respect to injury, it emphasized that "[t]he harms associated with climate change are serious and well recognized"[30] and that Massachusetts's unchallenged evidence showed that climate change was causing sea-level rise that has "already begun to swallow Massachusetts' coastal land."[31] As for causation, the "EPA does not dispute the existence of a causal connection between man-made greenhouse gas emissions and global warming."[32] While regulating car emissions in the United States might not solve the entire climate change problem, "Agencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop."[33] Moreover, "reducing domestic automobile emissions is hardly a tentative step" because "[c]onsidering just emissions from the transportation sector, which represent less than one-third of this country's total carbon dioxide emissions, the United States would still rank as the third-largest emitter of carbon dioxide in the world, outpaced only by the European Union and China."[34] Finally, with respect to redressability, the majority concluded that "[w]hile it may be true that regulating motor-vehicle emissions will not by itself *reverse* global warming, it by no means follows that we lack jurisdiction to decide whether EPA has a duty to take steps to *slow* or *reduce* it."[35] Thus, Massachusetts had standing.

Writing for the four dissenters on the standing issue, Chief Justice Roberts argued that "[r]elaxing Article III standing requirements because

27. *Id*.
28. *Id.* (citing Georgia v. Tenn. Copper Co., 206 U.S. 230, 237 (1907)).
29. *Id.* at 519.
30. *Id*. at 521.
31. *Id*. at 522.
32. *Id*. at 523.
33. *Id.* at 524.
34. *Id*. at 524–25.
35. *Id*. at 525.

asserted injuries are pressed by a State . . . has no basis in our jurisprudence."[36] In applying the *Lujan* test, moreover, the dissenters argued that if the majority were to accept Massachusetts's "asserted loss of coastal land as the injury in fact[,]" then "they must ground the rest of the standing analysis in that specific injury."[37] The dissenters questioned whether Massachusetts's injury was either "actual" in the face of debates over the extent of sea-level rise or "imminent" given that the computer models relied on by Massachusetts predicted the seas would continue to rise through 2100.[38] Moreover, the complexities of climate change made direct causation nearly impossible to prove.[39] Finally, "[r]edressability is even more problematic," given the long causation chains and the fact that 80% of greenhouse gas emissions originate outside the United States.[40] Overall, according to the dissenters, the majority had engaged in "sleight of hand" by "failing to link up the different elements of the three-part standing test."[41]

In March 2009, the Roberts Court returned to the issue of environmental standing in *Summers v. Earth Island Institute*,[42] this time in the context of the Forest Service Decisionmaking and Appeals Reform Act of 1992.[43] This statute requires the U.S. Forest Service to establish notice, comment, and appeals processes for "proposed actions of the Forest Service concerning projects and activities implementing land and resource management plans developed under the Forest and Rangeland Renewable Resources Planning Act of 1974."[44] In regulations implementing this requirement,[45] the U.S. Forest Service established that certain public participation procedures—notice, comment, and appeal—do not apply to projects categorically excluded from the Environmental Impact Statement requirement of the National Environmental Policy Act.[46] As a result, fire rehabilitation activities on less than 4,200 acres and salvage timber sales of 250 acres or less were excluded from public notification, comment, and

36. *Id*. at 536 (Roberts, C.J., dissenting).
37. *Id*. at 540.
38. *See id*. at 541–42 (arguing that a finding of standing under such circumstances "renders requirements of imminence and immediacy utterly toothless").
39. *Id*. at 544–45.
40. *Id*. at 545.
41. *Id*. at 546.
42. 129 S. Ct. 1142 (2009).
43. Pub. L. No. 102-381, § 322, 106 Stat. 1374, 1419 (codified at 16 U.S.C. § 1612 note (2006)).
44. *Id.* § 332(b)(1).
45. *See* 36 C.F.R. § 215.4(a) (2008) (exempting projects from the notice-and-comment requirement); 36 C.F.R. § 215.12(f) (exempting projects from being subject to appeal).
46. *See* 42 U.S.C. § 4332(C) (2006) (requiring that every recommendation or report on legislation and major federal action affecting the environment be accompanied by a detailed statement on the environmental impact of the proposed action).

challenge.[47]

Environmental organizations originally sought to challenge these regulations in the specific context of the September 2003 Burnt Ridge Project, a salvage sale of timber on 238 acres of fire-damaged land in the Sequoia National Forest. All parties admitted that the plaintiffs established standing to challenge that specific project through the affidavit of a member who used the relevant area for recreation.[48] However, after the district court granted a preliminary injunction against the Burnt Ridge Project, the parties settled that part of the litigation. The plaintiffs then pursued a general challenge to the regulations on the ground that those regulations would inevitably be applied to future Forest Service projects. The Court first noted that it must determine whether the plaintiffs had standing to continue.[49]

In a 5–4 decision by Justice Scalia (Justices Breyer, Stevens, Souter, and Ginsburg dissented), the Supreme Court concluded that the plaintiffs failed to allege adequate injury-in-fact to challenge the regulations outside the context of the Burnt Ridge Project.[50] The majority began by reciting the standing test from *Lujan*.[51] It then emphasized that "[t]he regulations under challenge here neither require nor forbid any action on the part of [Earth Island]. The standards and procedures that they prescribe for Forest Service appeals govern only the conduct of Forest Service officials engaged in project planning."[52] As a result, because they were parties not directly regulated by the Forest Service, the plaintiffs had the burden of demonstrating injury-in-fact, the only standing element at issue.

The majority concluded that the environmental challengers did not establish an injury-in-fact sufficient to support a facial challenge to the regulations. While affidavits from members of the plaintiff organizations established individual injury with respect to the Burnt Ridge Project, that aspect of the case settled, and

> [w]e know of no precedent for the proposition that when a plaintiff has sued to challenge the lawfulness of certain action or threatened action but has settled that suit, he retains standing to challenge the basis for that action (here, the regulation in the abstract), apart from any concrete application that threatens imminent harm to his interests.[53]

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47. *Summers*, 129 S. Ct. at 1147.
48. *Id*. at 1149.
49. *Id*. at 1147–48.
50. *See id*. at 1152–53 (analogizing the instant matter to Sierra Club v. Morton, 405 U.S. 727 (1972)).
51. *Id*. at 1149 (citing Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 180–81 (2000)).
52. *Id.*
53. *Id*. at 1149–50.

The only other affidavit that the majority considered, the Bensman affidavit, alleged past injury from Forest Service developments but failed to challenge any particular future timber sale or to connect Bensman's injury to specific tracts of national forests.[54] As a result, the majority noted,

> [W]e are asked to assume not only that Bensman will stumble across a project tract unlawfully subject to the regulations, but also that the tract is about to be developed by the Forest Service in a way that harms his recreational interests, and that he would have commented on the project but for the regulation.[55]

This chain of causation, the majority concluded, was too tenuous to support standing.

The majority also rejected plaintiffs' procedural injury argument even though the plaintiff organizations argued that the Forest Service illegally denied them congressionally mandated participation in the agency's decisionmaking processes. According to the Court, "[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing."[56] Justice Kennedy concurred specifically on this point, stating, "This case would present different considerations if Congress had sought to provide redress for a concrete injury 'giv[ing] rise to a case or controversy where none existed before.'"[57] More forcefully, the dissenters argued that if Congress enacted a statutory provision that allowed plaintiffs to sue if they participated in public processes with the Forest Service in the past and were likely to do so in the future, that provision would be constitutional; thus, a constitutional bar on standing was inappropriate here.[58]

Beyond this fairly routine debate over injury-in-fact, however, three aspects of the case are noteworthy. First, after settling as to the Burnt Ridge Project and the entry of the district court's judgment on those claims, the plaintiffs submitted additional affidavits that the dissenters argued would have established standing for the remaining issues in the case and that the Supreme Court should have considered given the procedural posture of the standing challenge.[59] The majority, however, refused to

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54. *See id*. at 1150 (asserting that these allegations of past injury fail to link Bensman's injuries to the challenged regulations).

55. *Id*.

56. *Id*. at 1151.

57. *Id*. at 1153 (Kennedy, J., concurring) (alteration in original) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring)).

58. *Summers*, 129 S. Ct. at 1154–55 (Breyer, J., dissenting).

59. *See id*. at 1157–58 (asserting that "the Constitution does not bar the filing of further affidavits" and that "[t]hese allegations and affidavits more than adequately show a 'realistic threat' of injury to plaintiffs brought about by reoccurrence of the challenged conduct—conduct that the Forest Service thinks lawful and *admits* will reoccur").

consider these affidavits, concluding that "[i]f respondents had not met the challenge to their standing at the time of judgment, they could not remedy the defect retroactively."[60] Thus, *Summers* suggests that, in procedurally convoluted administrative challenges, proper application of the Federal Rules of Civil Procedure may be critical to plaintiffs' standing.

Second, and reflecting an issue that has been prominent in lower federal courts since *Laidlaw* and *Massachusetts v. EPA*, the majority and the dissent debated the role of probability in assessing injury-in-fact. According to the dissent, past injury *is* relevant to evaluating current standing: "Where the Court has directly focused upon the matter, *i.e.*, where, as here, a plaintiff has *already* been subject to the injury it wishes to challenge, the Court has asked whether there is a *realistic likelihood* that the challenged future conduct will, in fact, recur and harm the plaintiff."[61] Moreover, "a threat of future harm may be realistic even where the plaintiff cannot specify precise times, dates, and GPS coordinates."[62] The dissenters emphasized that "[t]he Forest Service admit[ed] that it intend[ed] to conduct thousands of further salvage-timber sales and other projects exempted under the challenged regulations 'in the reasonably near future'" and that "the Government has conceded[] that the Forest Service took wrongful actions (such as selling salvage timber) 'thousands' of times in the two years prior to suit."[63] As a result, the dissenters argued, the majority could not credibly claim that it was unlikely that the Forest Service would injure the plaintiff groups and their members in the foreseeable future with illegal salvage timber sales.[64]

According to the majority, however, "The dissent proposes a hitherto unheard-of test for organizational standing: whether, accepting the organization's self-description of the activities of its members, there is a statistical probability that some of those members are threatened with concrete injury."[65] It rejected the dissent's attempt to "replace the requirement of 'imminent' harm . . . with the requirement of 'a *realistic* threat' that reoccurrence of the challenged activity would cause [the plaintiff] harm 'in the reasonably near future.'"[66]

60. *Id*. at 1150 n.* (majority opinion).
61. *Id*. at 1155–56 (Breyer, J., dissenting).
62. *Id*. at 1156.
63. *Id*.
64. *Id*. at 1155.
65. *Id*. at 1151.
66. *Id*. at 1152–53 (bracketed alteration in original).

3. Parents Involved in Community Schools v. Seattle School District No. 1

In June 2007, the Supreme Court concluded that parents had standing to bring an Equal Protection Clause challenge against the Seattle School District's student assignment plan, which relied on racial classifications as tiebreakers to assign students to oversubscribed high schools.[67] In an 8–1 decision by Chief Justice Roberts, the Court determined that the parents had sufficient injuries-in-fact to support standing. The school district argued that members of the group Parents Involved in Community Schools (Parents Involved) "will only be affected if their children seek to enroll in a Seattle public high school and choose an oversubscribed school that is integration positive—too speculative a harm to maintain standing."[68] According to the Court, however,

> The group's members have children in the district's elementary, middle, and high schools, and the complaint sought declaratory and injunctive relief on behalf of Parents Involved members whose elementary and middle school children may be "denied admission to the high schools of their choice when they apply for those schools in the future." The fact that it is possible that children of group members will not be denied admission to a school based on their race—because they choose an undersubscribed school or an oversubscribed school in which their race is an advantage—does not eliminate the injury claimed.[69]

Moreover, "one form of injury under the Equal Protection Clause is being forced to compete in a race-based system that may prejudice the plaintiff, an injury that the members of Parents Involved can validly claim on behalf of their children."[70]

At the time of the Court's decision, the Seattle school district had ceased to use its racial tiebreaker policy, raising a secondary argument that the case was moot. According to the Court, however, the change in school district policies neither destroyed standing nor mooted the case, because "[v]oluntary cessation does not moot a case or controversy."[71] Because the school district vigorously defended the constitutionality of its policy and could resume using the racial tiebreaker if it received a judgment in its favor, the Court found that it had jurisdiction to hear the controversy.[72]

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67. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 702 (2007).
68. *Id*. at 718.
69. *Id*. at 718–19 (citations omitted).
70. *Id*. at 719 (citations omitted).
71. *Id*.
72. *Id*. at 719–20.

4. Federal Election Commission v. Wisconsin Right to Life, Inc.

Mootness was also relevant in an elections advertisement decision. Despite concurrences and dissents, the Justices apparently unanimously agreed that the "capable of repetition, yet evading review" exception to the mootness doctrine applied to Wisconsin Right to Life, Inc.'s (WRTL's) claim against the Federal Elections Commission (FEC) that the "electioneering communications" provisions of the Bipartisan Campaign Reform Act violated the First Amendment.[73] The Act makes it illegal for banks, corporations, and labor organizations to broadcast candidate-specific campaign advertisements shortly before an election.[74]

The FEC argued that the cases, which were based on three advertisements that the WRTL ran in the 2004 elections and did not intend to use again, were moot.[75] According to the Supreme Court, in a 5–4 decision by Chief Justice Roberts, "these cases fit comfortably within the established exception to mootness for disputes capable of repetition, yet evading review."[76] First, it was unreasonable to expect that the WRTL could obtain full judicial review of its claims in time to air its ads during the relevant election blackout periods, especially given that "groups like WRTL cannot predict what issues will be matters of public concern during a future blackout period."[77] Second, the "WRTL credibly claimed that it planned on running 'materially similar' future targeted broadcast ads mentioning a candidate within the blackout period."[78] The Court concluded that "[u]nder the circumstances, particularly where WRTL sought another preliminary injunction based on an ad it planned to run during the 2006 blackout period, we hold that there exists a reasonable expectation that the same controversy involving the same party will recur."[79]

Justices Alito[80] and Scalia[81] concurred in the opinion, the latter joined by Justices Kennedy and Thomas. Justice Souter dissented,[82] joined by Justices Stevens, Ginsburg, and Breyer. None of these opinions, however, quibbled with the mootness analysis.

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73. Fed. Election Comm'n v. Wisconsin Right to Life, Inc., 551 U.S. 449, 457 (2007).
74. 2 U.S.C. § 441b(a) (2006).
75. *Wisconsin Right to Life*, 551 U.S. at 462.
76. *Id*. (citing Los Angeles v. Lyons, 461 U.S. 95, 109 (1983); S. Pac. Terminal Co. v. ICC, 219 U.S. 498, 515 (1911)).
77. *Id.*
78. *Id*. at 463.
79. *Id*. at 463–64 (citation omitted).
80. *Id*. at 482–83 (Alito, J., concurring) (emphasizing that he believed the Act to be unconstitutional).
81. *Id.* at 483–504 (Scalia, J., concurring) (arguing that the Court should rework the relevant precedents).
82. *Id.* at 504–36 (Souter, J., dissenting) (arguing in favor of upholding the law).

5. Horne v. Flores

Late in the 2009 Term, in *Horne v. Flores*,[83] the Supreme Court briefly considered whether a school district superintendent had standing to request relief from a continuing federal district court injunction regarding the Nogales Unified School District's implementation of § 204(f) of the Equal Educational Opportunities Act of 1974 (EEOA)[84] through its English Language Learner programs. Relying on the *Lujan* three-part constitutional standing test and *Summers v. Earth Island Institute*, the Court agreed with the Ninth Circuit that the superintendent had standing "because he 'is a named defendant in the case[,] the Declaratory Judgment held him to be in violation of the EEOA, and the current injunction runs against him.'"[85]

The challenge to the superintendent's standing was based on a chain-of-command argument—specifically, respondent argued "that the superintendent answers to the State Board of Education, which in turn answers to the Governor, and that the Governor is the only Arizona official who 'could have resolved the conflict within the Executive Branch by directing an appeal.'"[86] The Court avoided directly ruling on this argument, noting that the Governor of Arizona had, in fact, directed an appeal.[87] Moreover, "Because the superintendent clearly has standing to challenge the lower courts' decisions, we need not consider whether the Legislators also have standing to do so."[88]

6. Overall Developments in the Supreme Court's Standing Jurisprudence

The Supreme Court's standing cases over the last three years make it clear that the injury-in-fact element of standing remains the most contentious. Moreover, the Court clearly prefers readily identifiable, individualized harms over less-concrete assertions of injury. Thus, the Court in both *Lance v. Coffman* and *Hein v. Freedom from Religion Foundation* found that generalized grievances based on taxpayer status were insufficient to establish standing, while the Court in *Summers v. Earth Island Institute* required the plaintiff to connect injury-in-fact to specific

83. 129 S. Ct. 2579 (2009).

84. *See* 20 U.S.C. § 1703(f) (2006) (providing that "[n]o State shall deny equal educational opportunity to an individual" by failing to take "appropriate action" to overcome language barriers that might inhibit equal participation by students).

85. *Horne*, 129 S. Ct. at 2592 (quoting Flores v. Arizona, 516 U.S. 1140, 1164 (9th Cir. 2008)) (alteration in original).

86. *Id.* (quoting Brief for Respondent Flores at 22, Horne v. Flores, 129 S. Ct. 2579 (2009)).

87. *Id.*

88. *Id.*

federal agency projects rather than to general federal regulations.

At the same time, however, the Supreme Court's conception of what should qualify as an injury can sometimes waiver, particularly in cases that involve constitutional considerations. In *Massachusetts v. EPA*, for example, the majority emphasized both the high probability of harm to Massachusetts from climate change and, with a nod to federalism concerns, its special status as a state to find sufficient injury-in-fact. Specifically, despite the potentially long-term timeline of the impact of climate change and the many uncertainties as to the specifics of those impacts, generalized loss of coastline to sea-level rise was sufficient, according to the Court. Similarly, the EPA's inability to single-handedly redress all of Massachusetts's harms was irrelevant: it was good enough that the EPA could potentially help to reduce those harms. Even more decisively, the Supreme Court found standing in *Parents Involved in Community Schools* for the plaintiffs to challenge a racial preference system for high school, which raised equal protection concerns, even though it was far from clear that the school district would ever apply that system to any of their children.

In light of these other cases, therefore, the two standing decisions from these three years that are most difficult to reconcile are *Massachusetts v. EPA* and *Summers v. Earth Island Institute*. One can read into the Court's jurisprudence a reluctance to allow challenges to executive branch actions unless fundamental rights are involved, an explanation that makes sense in light of *Hein v. Freedom from Religion Foundation*, *Federal Election Commission v. Wisconsin Right to Life*, and *Summers v. Earth Island Institute*—but not *Massachusetts v. EPA*. Alternatively, one can suggest that the distinction between standing and mootness, a distinction that the Court first emphasized in *Laidlaw*, appears to have been critical in both *Parents Involved in Community Schools* and *Wisconsin Right to Life*, so that once these plaintiffs established a concrete injury-in-fact, the Court was reluctant to dismiss the case. However, that explanation does not fully square with the Court's standing analysis in *Summers v. Earth Island Institute*, especially in light of the fact that the plaintiffs offered additional affidavits. Thus, at the end of the 2008–2009 Term, standing jurisprudence in the Supreme Court remains a quandary.

B. Federal Courts' Jurisdiction

Absent constitutional problems, Congress can restrict access to the federal courts. The issue of whether Congress actually did so was the subject of eight Supreme Court opinions in the first four years of the Roberts Court.

1. Federal Court Jurisdiction over the Guantanamo Bay Detainees

Section 1005(e)(1) of the Detainee Treatment Act of 2005 (DTA)[89] amends 28 U.S.C. § 2241 to provide that "[n]o court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States."[90] The Act also vested the U.S. Court of Appeals for the D.C. Circuit with exclusive jurisdiction to review decisions of the Combat Status Review Tribunals, which the Department of Defense established to determine detainees' status as "enemy combatants."[91] These provisions eliminated the federal courts' authority to hear many kinds of actions involving the Guantanamo Bay detainees, including habeas petitions, which had become the major vehicle for detainees to gain access to the courts.

Nevertheless, despite the DTA's limitations, in its June 2006 decision in *Hamdan v. Rumsfeld*,[92] the Supreme Court upheld federal court jurisdiction over the *pending* habeas claims of Guantanamo Bay enemy combatants.[93] It further held that the Executive Branch's proposed military commissions to try those prisoners were illegal.[94] Mr. Hamdan is a Yemeni national captured in Afghanistan and held by the United States at Guantanamo Bay. He filed a habeas petition to challenge the military commission that the United States intended to use to try him on conspiracy charges.

In a 5–3 decision by Justice Stevens (Chief Justice Roberts did not participate), the Supreme Court held that the military commission lacked authority to proceed "because its structure and procedures violate[d] both the [Uniform Code of Military Justice] and the Geneva Conventions."[95] Before reaching that substantive conclusion, however, the Court addressed the Government's motion to dismiss on the grounds that the DTA stripped federal courts of the authority to hear habeas petitions from Guantanamo Bay prisoners. Hamdan challenged this provision on both constitutional and statutory grounds, but the Court resolved the issue purely through statutory interpretation, invoking the presumption against the retroactive

89. Pub. L. No. 109–148, § 1005, 119 Stat. 2680, 2741–42 (2005).
90. 28 U.S.C. § 2241(e)(1) (2006).
91. 28 U.S.C. § 2241(e)(2).
92. 548 U.S. 557 (2006).
93. *See id*. at 583–84 (concluding that the Government's argument that Congress could "have no good reason" for preserving jurisdiction over pending habeas petitions is not only without merit, but is contradicted by the legislative history of the DTA).
94. *See id*. at 590–635 (concluding that although the President has authority to convene military commissions where justified under certain circumstances, such as to try violations of the laws of war, none of Hamdan's alleged actions violated the laws of war and nothing in the particular circumstances rendered it impracticable to apply the rules set forth for regular courts-martial proceedings).
95. *Id*. at 567.

application of statutes.[96] It noted that § 1005(e)(2) and § 1005(e)(3) of the DTA both explicitly apply to pending habeas petitions, while § 1005(e)(1) was silent on the "pending vs. future" issue.[97] In addition, the majority concluded that there was no reason to abstain until the commission reached a final decision.[98]

2. Federal District Courts' Jurisdiction and Other Tribunals

In *Whitman v. Department of Transportation*, an employee of the Federal Aviation Administration (FAA) sued in federal court to challenge the FAA's alcohol and drug testing policies, claiming that they violated employees' First Amendment rights, without first pursuing the grievance procedures in his collective bargaining agreement.[99] An FAA statute incorporates the provision of the Civil Service Reform Act of 1976[100] that gives exclusive jurisdiction over federal-employee grievances for most employment-related claims to the grievance bodies established through collective bargaining agreements.[101]

Given these statutory provisions, both the district court and the U.S. Court of Appeals for the Ninth Circuit dismissed the FAA employee's case for lack of subject-matter jurisdiction. In a unanimous per curiam opinion (Justice Alito did not participate), the Supreme Court vacated the lower courts' decisions because, although both the petitioner and the FAA stipulated that the collective bargaining agreement's grievance procedure covered the claim, neither the FAA nor the Court of Appeals made any findings to that effect.[102] As a result, the Court remanded to the Court of Appeals for a more explicit determination that the statutory exclusivity provisions actually applied to the case and for determinations on two issues: (1) whether the employee is actually appealing a final agency action and (2) how the doctrine of exhaustion of administrative remedies should apply (or not) to the lawsuit.[103]

In May 2007, in a unanimous opinion by Chief Justice Roberts, the Supreme Court determined in *Hinck v. United States* that the Tax Court

96. *Id*. at 575–78.
97. *Id.* at 578.
98. *See id*. at 584–88 (dismissing the Government's two arguments that civilian courts should await final judgment in ongoing military proceedings before "entertaining an attack on those proceedings" (internal quotation marks omitted)).
99. 547 U.S. 512 (2006).
100. 5 U.S.C. § 7121(a)(1) (2006).
101. *See Whitman*, 547 U.S. at 513 (outlining the operation of the FAA's framework for the resolution of employee claims).
102. *Id*. at 514 ("It may be, for example, that the FAA's actions . . . constitute a 'prohibited personnel practice,'" but concessions on matters of jurisdiction "ought not to be accepted out of hand.").
103. *Id.* at 514–15.

was the exclusive venue for challenging the Internal Revenue Service's (IRS's) interest abatement decisions; plaintiffs could not challenge the IRS's decisions in federal district court or the Court of Federal Claims.[104] The Court relied on two principles to reach this conclusion. First, it emphasized "the well-established principle that, in most contexts, 'a precisely drawn, detailed statute pre-empts more general remedies.'"[105] Second, the Court cited its "past recognition that when Congress enacts a specific remedy when no remedy was previously recognized, or when previous remedies were 'problematic,' the remedy provided is generally regarded as exclusive."[106] Because the new interest abatement remedy was both precisely drawn and designed to provide a remedy to taxpayers after courts said that none existed, the Tax Court's jurisdiction was exclusive, despite the statute's silence on the issue of exclusivity.[107]

3. Statutes of Limitation and the Federal Government

In December 2006, in a unanimous decision by Justice Alito (Chief Justice Roberts and Justice Breyer did not participate), the Supreme Court determined in *BP America Production Co. v. Burton* that, in the absence of clear indications to the contrary, "actions" and "complaints" refer only to court proceedings, not to administrative enforcement actions.[108] More specifically, the Court held that the six-year statute of limitations in 28 U.S.C. § 2415(a) did *not* apply to the Minerals Management Service's (MMS's) administrative royalty payment orders regarding pre-September 1, 1996 oil and gas production on non-Indian federal lands.[109]

The statute of limitations in § 2415(a) states that

> every *action* for money damages brought by the United States . . . founded upon any contract . . . shall be barred unless the *complaint* is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later.[110]

In 1997, the MMS issued royalty payment orders to BP's predecessor Amoco regarding oil and gas production on federal lands from January 1989 through December 1996. Amoco, and then BP, argued that the six-year statute of limitations in § 2415(a) barred these agency orders.

Both the district court and the U.S. Court of Appeals for the D.C. Circuit

104. Hinck v. United States, 550 U.S. 501, 506 (2007).
105. *Id*. (quoting EC Term of Years Trust v. United States, 550 U.S. 429, 433 (2007)).
106. *Id.* (citing Block v. N.D. *ex rel.* Bd. of Univ. & Sch. Lands, 461 U.S. 273, 285 (1983)) (internal quotation marks omitted).
107. *Id*. at 506–10.
108. BP Am. Prod. Co. v. Burton, 549 U.S. 84, 91–95 (2006).
109. *Id*. at 101.
110. 28 U.S.C. § 2415(a) (2006) (emphases added).

held that the statute of limitations did *not* bar the MMS's administrative orders, and the Supreme Court agreed.[111] The Supreme Court viewed its decision as primarily one of statutory construction. Under its plain meaning analysis, it concluded, "The key terms in this provision—'action' and 'complaint'—are ordinarily used in connection with judicial, not administrative, proceedings."[112] Moreover, "[n]othing in the language of § 2415(a) suggests that Congress intended these terms to apply more broadly to administrative proceedings," especially given the fact that § 2415(a) specifically refers to both general accrual and the termination of administrative proceedings.[113]

The Court then expanded its interpretation by looking at the terms *action* and *complaint* individually. It noted that when Congress intends the word *action* to refer to administrative proceedings, it tends to qualify that word, citing as examples uses of the phrases "administrative action, a civil or administrative action, or administrative enforcement actions."[114] In contrast, § 2415(a) contained no such qualifications, indicating that *action* refers only to court proceedings.[115] Similarly, "the occasional use of the term [*complaint*] to describe certain administrative filings does not alter its primary meaning, which concerns the initiation of 'a civil action.'"[116] This limitation was especially appropriate for the MMS's royalty payment orders because those orders function as final administrative enforcement orders, not as the initiation of enforcement proceedings.[117]

The Supreme Court reinforced its interpretation of § 2415(a) with "the rule that statutes of limitation are construed narrowly against the government."[118] "A corollary of this rule is that when the sovereign elects to subject itself to a statute of limitations, the sovereign is given the benefit of the doubt if the scope of the statute is ambiguous."[119]

In light of the statute's plain meaning and the sovereignty canon, the Court rejected all of BP's structural and policy arguments in favor of applying the six-year statute of limitations to the MMS's administrative payment orders—subsections rendered superfluous, peculiarities in record-keeping requirements, and frustration of the statute's purpose of providing repose.[120] Instead, the Court emphasized that Congress could have

111. *BP America*, 549 U.S. at 90.
112. *Id.* at 91.
113. *Id*. at 92.
114. *Id*. at 92–93 (internal quotation marks omitted).
115. *Id*. at 93.
116. *Id*. at 95 (quoting BLACK'S LAW DICTIONARY 356 (9th ed. 2009)).
117. *Id.*
118. *Id*. (citation omitted).
119. *Id*. at 96.
120. *See id*. at 95–101 (summarizing and dispensing with BP's primary arguments).

amended the relevant statutes so that they clearly applied to administrative actions, that BP's arguments "must be considered in light of the traditional rule exempting proceedings brought by the sovereign from any time bar," and that the focus of the Court's inquiry "is simply how far Congress meant to go when it enacted the statute of limitations in question."[121] As a result, the Court upheld MMS's right to seek the additional royalty payments for pre-September 1, 1996 oil and gas production.[122]

The exact holding of *BP America* may be limited in import: Congress amended the relevant minerals leasing statutes in 1996 to impose seven-year statutes of limitation on both judicial and administrative royalty payment proceedings occurring after September 1, 1996. However, the underlying logic and interpretive analysis of *BP America* establishes a clear presumption against the application of general statutes of limitations to federal administrative enforcement proceedings.

The Supreme Court also emphasized federal sovereign immunity in the context of statutes of limitations in its January 2008 decision in *John R. Sand & Gravel Co. v. United States*.[123] This case involved the special statute of limitations governing suits against the United States in the Court of Federal Claims, and the Court concluded, 7–2 (Justices Stevens and Ginsburg dissented), that the federal courts must consider sua sponte whether the plaintiff violated the statute of limitations even if the United States technically waived its statute of limitations defense.[124]

The Supreme Court emphasized that because lawsuits in the Court of Federal Claims involved the federal government by definition, and hence federal sovereign immunity, the special statute of limitations seeks "to achieve a broader system-related goal" than just encouraging timeliness of lawsuits.[125] As a result, the Court treats these kinds of statutes of limitation as "more absolute" than the normal kind.[126] The Court's precedents—some dating to the 19th century—support that reading.[127] Moreover, subsequent modifications to the statutory language did not require a different outcome.[128] Finally, the plaintiffs offered no convincing arguments for overruling the Court's prior decisions.[129]

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121. *Id*. at 100.
122. *Id*. at 101.
123. 552 U.S. 130 (2008).
124. *Id*. at 132, 134.
125. *Id*. at 133.
126. *Id*. at 134.
127. For a list of the Court's relevant precedents, see *id*. at 134–35.
128. *Id*. at 135–36.
129. *See id*. at 136–39 (rejecting plaintiffs' arguments that the Court already overturned the earlier precedent and that the Court explicitly considered the court of claims limitations statute, describing it as unexceptional).

4. Sovereign Immunity and the Federal Tort Claims Act

Federal sovereign immunity has been important in other contexts besides statutes of limitation, such as the Federal Tort Claims Act's (FTCA's) waiver of immunity. The FTCA generally waives the federal government's sovereign immunity for tort lawsuits.[130] However, the Act also creates several exceptions to that waiver.[131]

As one example, the FTCA specifies that its provisions, including its waivers of federal sovereign immunity, do not apply to "[a]ny claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter."[132] In February 2006, in *Dolan v. United States Postal Service*, seven Justices decided, in an opinion by Justice Kennedy, that this FTCA provision does *not* shield the U.S. Postal Service from claims that a postal carrier acted negligently in leaving mail on a porch, causing the plaintiff to trip and fall, resolving a conflict between the Second and Third Circuits.[133]

What is most interesting about this case is that the seven-Justice majority consciously rejected a plain meaning interpretation of *negligent transmission*. This phrase, the majority acknowledged, could

> in isolation . . . embrace a wide range of negligent acts committed by the Postal Service in the course of delivering mail, including creation of slip-and-fall hazards from leaving packets and parcels on the porch of a residence. After all, in ordinary meaning and usage, transmission of the mail is not complete until it arrives at the destination.[134]

However, the majority decided that context was more important than the isolated plain meaning of the statutory phrase:

> The definition of words in isolation, however, is not necessarily controlling in statutory construction. A word in a statute may or may not extend to the outer limits of its definitional possibilities. Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis. Here, we conclude both context and precedent require a narrower reading, so that "negligent transmission" does not go beyond negligence causing mail to be lost or to arrive late, in damaged condition, or at the wrong address.[135]

As a result, the majority concluded that "Congress intended to retain immunity, as a general rule, only for injuries arising, directly or

130. *See* 28 U.S.C. § 2674 (2006) (establishing that "[t]he United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances").

131. *See id.* § 2680 (listing such exceptions).

132. § 2680(b).

133. Dolan v. U.S. Postal Serv., 546 U.S. 481, 482, 492 (2006).

134. *Id*. at 486 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2429 (1971)).

135. *Id*.

consequentially, because mail either fails to arrive at all or arrives late, in damaged condition, or at the wrong address."[136]

Justice Thomas, the lone dissenter (Justice Alito did not participate in the decision), would have applied the broad plain meaning of *negligent transmission*.[137] Moreover, if that phrase is ambiguous, Justice Thomas would have resolved the ambiguity by applying the normal rule that waivers of the federal government's sovereign immunity should be construed narrowly and in favor of the government.[138]

In late January 2008, the Supreme Court again addressed the FTCA's waiver of sovereign immunity and its exceptions in *Ali v. Federal Bureau of Prisons*.[139] In this case, a prisoner brought an FTCA claim against various prison officials who lost the prisoner's personal property in the course of prison transfers. The Bureau of Prisons officials claimed that the prisoner's lawsuit fell within another of the exceptions to the FTCA's waiver of sovereign immunity—this time, for a "claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or *any other law enforcement officer*."[140]

The Supreme Court split 5–4 in deciding that this exception *did* apply to the Bureau of Prisons officials and hence that the lawsuit was barred.[141] In an opinion by Justice Thomas (Justices Kennedy, Stevens, Souter, and Breyer dissented), the question for the majority was whether Bureau of Prisons officials qualified as "any other law enforcement officer[s]" under the Act.[142] This time, the majority relied on a plain meaning interpretation, emphasizing that Congress repeatedly referred to "any" other law enforcement officer and that the term *any* "suggests a broad meaning."[143] Moreover, the majority invoked separation-of-powers considerations in its interpretation, concluding that "[w]e are not at liberty to rewrite the statute to reflect a meaning we deem more desirable. Instead, we must give effect to the text Congress enacted . . . ."[144]

The dissenters would have given the FTCA that "more desirable" interpretation through the use of canons of statutory construction that would have connected the phrase "any other law enforcement officer" to

136. *Id*. at 489.
137. *Id*. at 493 (Thomas, J., dissenting).
138. *Id*.
139. 552 U.S. 214 (2008).
140. 28 U.S.C. § 2680(c) (2006) (emphasis added).
141. *Ali*, 552 U.S. at 216.
142. *Id*. (quoting § 2680(c)).
143. *Id*. at 218–19.
144. *Id*. at 228 (footnote omitted).

the exception's focus on the collection of taxes and customs duties.[145] In particular, Justice Kennedy emphasized that

> [s]tatutory interpretation, from beginning to end, requires respect for the text. The respect is not enhanced, however, by decisions that foreclose consideration of the text within the whole context of the statute as a guide to determining a legislature's intent. To prevent textual analysis from becoming so rarefied that it departs from how a legislator most likely understood the words when he or she voted for the law, courts use certain interpretative rules to consider text within the statutory design.[146]

Applying the contextual principles embodied in the *ejusdem generis* and *noscitur a sociis* canons of construction, the dissenters concluded that, in order for this exception to the FTCA's waiver of sovereign immunity to apply, the phrase *other law enforcement officers* had to be acting like the "officers of customs or excise"—that is, detaining property in connection with the collection of taxes or customs duties.[147] Because the Bureau of Prisons officials had no connection to taxes or customs duties, the dissenters would have held the exception inapplicable and allowed the lawsuit to proceed.[148]

5. Implied Private Rights of Action

Also in January 2008, a divided Supreme Court (Justice Breyer did not participate) held that the private right of action judicially implied into § 10(b) of the Securities Exchange Act of 1934[149] could not be extended to a securities fraud class action brought by investors against two cable TV services corporations, Scientific–Atlanta and Motorola, whose knowingly fraudulent actions caused Charter Communications to inflate its own revenue statements, when the investors relied on those statements.[150] In his opinion for the five-Justice majority in *Stoneridge Investment Partners, LLC v. Scientific–Atlanta, Inc.*, Justice Kennedy emphasized that the implied right of action did not extend to the two companies "because the investors did not rely upon their statements or representations" when deciding to invest in Charter.[151] Citing to its own precedent, Congress's reactions, and the common law tradition that underlies § 10(b), the majority concluded that the implied right of action does not extend to aiders and abettors. Instead, the plaintiffs had to show that each defendant engaged in

145. *Id*. at 231–32 (Kennedy, J., dissenting).
146. *Id*. at 228–29.
147. *Id*. at 232.
148. *Id*. at 228–33.
149. *See* 15 U.S.C. § 78j(b) (2006) (outlawing manipulative and deceptive practices).
150. Stoneridge Inv. Partners, LLC v. Scientific–Atlanta, Inc., 552 U.S. 148, 153 (2008).
151. *Id*. at 153.

a deceptive practice before the implied right of action applied.[152]

The majority also relied on separation-of-powers principles to avoid extending the scope of the private right of action. Noting that judicially implied private rights of action impinge on Congress's legislative authority, the majority concluded that these "[c]oncerns with the judicial creation of a private cause of action caution against its expansion."[153]

Justice Stevens wrote the dissenting opinion, joined by Justices Souter and Ginsburg. The dissenters did not oppose the majority's interpretation of the scope of the implied right of action; rather, they focused on the argument that Scientific–Atlanta and Motorola engaged in deceptive practices for purposes of the Securities Exchange Act because Charter inflated its revenue statements in reliance on their knowingly fraudulent actions, on which the investors then relied through reliance on Charter's revenue statements when deciding to invest.[154] As a result, the dissenters would have concluded that the investors' suit fell within the scope of the implied right of action.

C. Other Doctrines Limiting Federal Court Review of Federal Agency Action

1. Exhaustion of Administrative Remedies

Exhaustion of administrative remedies is largely a court-made doctrine. At common law, this doctrine requires persons challenging administrative agency action to exhaust their administrative remedies before proceeding to federal court.[155] Section 704 of the Administrative Procedure Act (APA) sets out the exhaustion requirements for lawsuits brought under the APA:

> Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.[156]

The Supreme Court previously concluded that the last clause in § 704 limits the applicability of the exhaustion requirement in lawsuits brought

152. *Id*. at 158.

153. *Id*. at 164–65.

154. *See id*. at 167–69 (Stevens, J., dissenting) (distinguishing between this case and *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), which, unlike the present case, involved no allegations of deceptive conduct and, therefore, "did not *itself* violate § 10(b)").

155. *See, e.g.*, McCarthy v. Madigan, 503 U.S. 140, 144–46 (1992) (discussing the doctrine of exhaustion of administrative remedies).

156. 5 U.S.C. § 704 (2006).

under the APA.[157]

Exhaustion requirements can arise from several kinds of statutes. For example, the Prisoner Litigation Reform Act (PLRA) states that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted."[158] In its June 2006 decision in *Woodford v. Ngo*, the Supreme Court considered whether an untimely or otherwise procedurally defective administrative challenge could satisfy this exhaustion requirement.[159] The Court determined, 6–3, that the PLRA requires prisoners to *properly* exhaust all available remedies before challenging prison conditions in federal courts,[160] even though California's prison system allowed prisoners only fifteen working days to file grievance appeals.[161]

Justice Alito authored the opinion, which more specifically concluded that the PLRA requires prisoners to exhaust all "available" remedies in *any* lawsuit challenging prison conditions, not just those suits brought under § 1983.[162] The majority noted that "[p]roper exhaustion demands compliance with an agency's deadlines and other critical procedural rules because no adjudicative system can function effectively without imposing some orderly structure on the course of its proceedings."[163] The majority added that, as a statutory matter, § 1997e(a) appeared to use *exhausted* in the administrative law sense and that requiring exhaustion fits with the general scheme of the PLRA, which "attempts to eliminate unwarranted federal-court interference with the administration of prisons."[164] In addition, exhaustion is the normal requirement in habeas-type litigation.[165]

Justices Stevens dissented, joined by Justices Souter and Ginsburg. The dissenters considered California's deadlines too short to benefit from a strict exhaustion requirement, emphasizing that

> [t]he citizen's right to access an impartial tribunal to seek redress for official grievances is so fundamental and so well established that it is sometimes taken for granted. A state statute that purported to impose a 15-day period of

157. *See* Darby v. Cisneros, 509 U.S. 137, 145–47 (1993) (concluding that § 704 requires exhaustion of "all intra-agency appeals mandated either by statute or by agency rule," and thus that "it would be inconsistent with the plain language of [§ 704] for the courts to require litigants to exhaust optional appeals as well").

158. 42 U.S.C. § 1997e(a) (2006).

159. 548 U.S. 81 (2006).

160. *Id*. at 83–84.

161. *See id*. at 85–86 (describing a prisoner's appeal process).

162. *Id*. at 85.

163. *Id*. at 90–91.

164. *Id*. at 93.

165. *Id*. at 92–93.

> limitations on the right of a discrete class of litigants to sue a state official for violation of a federal right would obviously be unenforceable in a federal court.[166]

The dissenters would have allowed any pursuit of administrative remedies, even if procedurally defaulted, to confer access to the federal courts.[167]

2. Limiting Challenges to Agency Action

In June 2007, the Supreme Court concluded in *Wilkie v. Robbins*, a 7–2 decision by Justice Souter, that Robbins, the owner of a commercial guest ranch in Wyoming, could not bring claims against the Bureau of Land Management (BLM) pursuant to either the *Bivens* doctrine or the Racketeer Influenced and Corrupt Organizations Act (RICO).[168] Robbins's challenges focused on the retaliatory conduct of BLM officials as they tried to reestablish an easement over Robbins's property, which BLM lost as a result of its failure to record the relevant deed.[169] The Court concluded that a *Bivens* remedy was inappropriate because "Robbins has an administrative, and ultimately a judicial, process for vindicating virtually all of his complaints" and because "any damages remedy for actions by Government employees who push too hard for the Government's benefit may come better, if at all, through legislation."[170] Robbins's RICO claim turned on whether the BLM committed acts of extortion that violated the Hobbs Act. The Court emphasized that "[t]he importance of the line between public and private beneficiaries for the common law and Hobbs Act extortion is confirmed by our own case law, which is completely barren of an example of extortion under color of official right undertaken for the sole benefit of the Government."[171] As a result, Robbins lacked a cause of action for either claim.[172]

Justice Ginsburg, joined by Justice Stevens, dissented. They argued that given the BLM's seven-year pattern of harassment and interference with Robbins's property rights, and given the inadequacy of piecemeal administrative remedies, the Court should recognize a *Bivens* cause of action based on the federal government's alleged violations of the Fifth

166. *Id*. at 104 (Stevens, J., dissenting).
167. *See id*. at 113–16, 123 (concluding that the "correct interpretation of the [PLRA] would recognize that . . . Congress created a rational regime designed to reduce the quantity of frivolous prison litigation while adhering to their constitutional duty 'to respect the dignity of all persons'" (quoting Roper v. Simmons, 543 U.S. 551, 560 (2005))).
168. Wilkie v. Robbins, 551 U.S. 537, 537–41 (2007).
169. *See id*. at 541–49 (recounting the facts and procedural posture of the case).
170. *Id*. at 553, 562.
171. *Id*. at 564–65.
172. *Id*. at 567–68.

Amendment.[173]

D. Actions Against the Federal Government and Agencies Under the Roberts Court: An Overall Summary

Although individual cases can vary considerably, the overall trend of the Roberts Court seems to be to shield the federal government, including federal agencies, from lawsuits in the federal courts. The Court has accomplished this through a variety of means. First, this first iteration of the Roberts Court limited the federal courts' availability as a forum, suggesting in *Whitman v. Department of Transportation* that employees suing the FAA must proceed through the dispute resolution mechanisms of collective bargaining agreements, deciding in *Hinck v. United States* that the IRS can be challenged only in Tax Court, and requiring proper exhaustion of remedies in *Woodford v. Ngo* in attempted suits against federal prison authorities. Second, the Court limited the causes of action available against the federal government and federal agencies, such as in *Wilkie v. Robbins* when it concluded that a *Bivens* action was not available against the BLM. Finally, as its standing decisions generally suggested, the Court is also willing to limit the people who can sue to challenge federal action.

Perhaps the pairing of cases most indicative of this trend is *BP America Production Co. v. Burton* and *John R. Sand & Gravel Co. v. United States*. In the former case, involving the MMS's administrative royalty payment orders, the Court interpreted the relevant statute of limitations so that it would not prohibit the agency's enforcement action, despite the passage of time. In contrast, in *John R. Sand & Gravel Co.*, the Court strictly enforced the Court of Federal Claims' statute of limitations against a private challenger even though the United States technically waived its statute of limitations defense. In both cases, the federal government won.

There have been two prominent exceptions to this trend of limiting the availability of federal lawsuits against the federal government and federal agencies. First, as was true in the standing context, the Roberts Court is less willing to cede federal court jurisdiction when Congress attempts to limit those courts' authority to hear civil rights and constitutional challenges, as in *Hamdan v. Rumsfeld*. Second, the Court will generally respect Congress's waivers of federal sovereign immunity when Congress clearly states an intent to subject the federal government to certain kinds of lawsuits, such as through the FTCA.

Nevertheless, the Supreme Court's interpretation of Congress's statutory

173. *See id*. at 568–70 (Ginsburg, J., dissenting) (arguing that this was "no ordinary case of 'hard bargaining'" (quoting *id.* at 560 (majority opinion)).

language is still a significant factor in the implementation of those statutes. One clear example of the importance of the Court's statutory construction is the significant difference in interpretive methodologies that the Court used for FTCA exceptions in *Dolan v. U.S. Postal Service* and *Ali v. Federal Bureau of Prisons.* The Court's purpose-based approach to the exception at issue in *Dolan* produced a result arguably at odds with the Court's stricter plain meaning approach to the exception at issue in *Ali*, producing anomalous results regarding how FTCA exceptions should apply.

II. FEDERALISM AND INTERACTIONS BETWEEN STATES AND THE FEDERAL GOVERNMENT

Federalism concerns the proper allocation of authority and responsibilities between the federal government, on the one hand, and the state governments, on the other. Issues of federalism can arise in a variety of litigation contexts. Moreover, the Supreme Court was already becoming more attentive to federalism concerns even before Chief Justice Roberts was confirmed.

Perhaps the first significant indication that federalism was assuming a more important role came in 1995 with the *United States v. Lopez* decision.[174] In this 5–4 decision, the Rehnquist Court limited Congress's regulatory authority under the Commerce Clause for the first time in several decades, striking down the Gun-Free School Zones Act as being outside Congress's Commerce Clause power.[175] The Court also delineated the three categories of Congress's authority to legislate under the Commerce Clause:

> First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce.[176]

Five years after *Lopez*, the Supreme Court underscored that the Commerce Clause imposes real limits on federal power when it invalidated part of the Violence Against Women Act as also being beyond Congress's Commerce

174. 514 U.S. 549 (1995).

175. *See id.* at 559–63 (pointing out that the Government failed to demonstrate the required connection between the Act and interstate commerce, that the Act, on its face, has nothing to do with commerce or economic enterprises, and that the Act contains no jurisdictional element limiting its reach that is explicitly connected with or affects interstate commerce).

176. *Id*. at 558–59 (citations omitted).

Clause authority.[177]

Closely related to Congress's Commerce Clause limitations are its Tenth Amendment limitations. The Supreme Court emphasized this relationship in 1997 in *Printz v. United States*[178] when it struck down part of the Brady Handgun Violence Prevention Act[179] because the Act allowed the federal government to unconstitutionally commandeer state and local police.[180] However, three years later, the Court found no such Tenth Amendment violation in the Driver's Privacy Protection Act[181] because that statute did not commandeer state resources.[182] Although the Act "establishes a regulatory scheme that restricts the States' ability to disclose a driver's personal information without the driver's consent,"[183] it "does not require the States in their sovereign capacity to regulate their own citizens[,] . . . to enact any laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals."[184]

A more specialized form of federalism and respect for state sovereignty is found in the Eleventh Amendment, which the Supreme Court interpreted to deprive federal courts of jurisdiction over citizens' suits against states and arms of the states,[185] subject to the *Ex parte Young* exception.[186] Thus, while the Supreme Court continues to acknowledge that Congress has the power to abrogate states' Eleventh Amendment sovereign immunity pursuant to the Fourteenth Amendment,[187] it has, since 1996, eliminated

177. *See* United States v. Morrison, 529 U.S. 598, 609–17 (2000) (analogizing and relying upon the Court's reasoning in *Lopez*).

178. 521 U.S. 898 (1997).

179. Pub. L. No. 103-159, 107 Stat. 1536 (1993), *invalidated in part by* Printz v. United States, 521 U.S. 898 (1997).

180. *See Printz*, 521 U.S. at 932–34 (noting that the "whole *object* of the law [is] to direct the functioning of the state executive, and hence to compromise the structural framework of dual sovereignty").

181. 18 U.S.C. §§ 2721–2725 (2006).

182. *See* Reno v. Condon, 528 U.S. 141, 149–51 (2000) (arguing that while the Driver's Privacy Protection Act will indeed require some time and effort on the part of state employees, the Act does not violate the principles established in *Printz*).

183. *Id*. at 144.

184. *Id*. at 151.

185. *See* Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440, 446 (2004) (noting that "we have recognized that the States' sovereign immunity is not limited to the literal terms of the Eleventh Amendment"); Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 779 (1991) (confirming that the Eleventh Amendment prohibits lawsuits in federal courts against states based on federal-question jurisdiction or diversity jurisdiction unless they consent to such suits).

186. *See Ex parte* Young, 209 U.S. 123, 155–56, 159–60 (1908) (setting out the exception that the Eleventh Amendment does not bar suits against states or state officials acting in violation of federal constitutional law); Green v. Mansour, 474 U.S. 64, 68 (1985) (describing the exception created in *Ex parte Young*).

187. *See, e.g.*, Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 726 (2003) (acknowledging that Congress can abrogate state immunity in federal court "if it makes its intention to abrogate unmistakably clear in the language of the statute and acts pursuant to a

almost all other claims of federal power to abrogate states' Eleventh Amendment immunity.[188]

Another constitutional influence on the proper outlines of federalism is the Supremacy Clause, which gives Congress the authority to preempt state law. Preemption is especially likely when Congress explicitly preempts state law,[189] the state law actively conflicts with federal law,[190] or the state is trying to legislate in an area where the federal government occupies the field.[191] Thus, under the Rehnquist Court, Massachusetts's Burma law was invalid under the Supremacy Clause because the President had exclusive authority to level economic sanctions against the nation of Burma.[192] Similarly, the Federal Cigarette Labeling and Advertising Act[193] preempted Massachusetts's regulation of outdoor and point-of-sale cigarette advertising.[194]

Beyond these constitutional precepts, however, federalism concerns among the Rehnquist Court Justices also influenced the Supreme Court's decisions in cases not dealing with constitutional issues. For example, federalism concerns prompted the Court to outline specific conditions

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valid exercise of its power under § 5 of the Fourteenth Amendment").

188. *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 55–56 (1996) (holding that although Congress stated clearly its intent to abrogate Florida's Eleventh Amendment immunity, it nevertheless lacked authority to abrogate state Eleventh Amendment immunity pursuant to the Indian Commerce Clause or the Interstate Commerce Clause, overruling *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989)); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 635–36 (1999) (holding that neither the Patent Clause nor the Commerce Clause allowed Congress to abrogate states' Eleventh Amendment immunity).

189. *See, e.g.*, Ray v. Atl. Richfield Co. 435 U.S. 151, 157 (1978) (noting that the Court's precedents recognize an assumption that "the historic police powers of the States were not to be superseded by [federal law] unless that was the clear and manifest purpose of Congress" (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) and Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977))).

190. *See id.* at 158 ("Even if Congress has not completely foreclosed state legislation in a particular area, a state statute is void to the extent that it actually conflicts with a valid federal statute."); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 541 (2001) ("State action may be foreclosed by . . . implication because of a conflict with a congressional enactment.").

191. *See* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) ("The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it."); Cloverleaf Butter Co. v. Patterson, 315 U.S. 148, 156 (1942) (noting that "[w]here the United States exercises its power of legislation so as to conflict with a regulation of the State, either specifically or by implication, the state legislation becomes inoperative and the federal legislation exclusive in its application").

192. *See* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 373–74 (2000) (identifying the Massachusetts Burma law as an "obstacle to the accomplishment of Congress's full objectives under the federal Act").

193. 15 U.S.C. §§ 1331–1341 (2006).

194. *See* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 550 (2001) (holding narrowly that the FLAA preempts only state regulation of cigarette advertising, not state regulation of cigarette sales and use).

under which consent decrees involving state Medicaid programs could be enforced in federal courts.[195] Federalism concerns also influenced the Rehnquist Court's interpretation of statutes and agency regulations, even if the Court did not find those provisions unconstitutional. Perhaps most obviously in the 2001 decision of *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, the Court emphasized proper respect for the states' traditional authority over land and water use as a reason for limiting the Army Corps' and the EPA's regulatory authority under the Clean Water Act.[196]

Federalism issues, being constitutionally based, continue to be issues of concern in the Roberts Court. Moreover, as in the Rehnquist Court, federalism concerns can also carry over into statutory interpretation.

A. Local Sovereign Immunity

As noted, state sovereign immunity derives from the Eleventh Amendment. Nevertheless, lingering questions persist regarding the extent to which local governments can claim sovereign immunity.

In April 2006, a unanimous Supreme Court opinion by Justice Thomas in *Northern Insurance Co. of New York v. Chatham County, Georgia* resolved this issue, overturning precedent from the U.S. Courts of Appeals for the Fifth and Eleventh Circuits in the process.[197] These two circuits allowed municipalities to claim "residual" common law sovereign immunity based solely on delegations of state power, even when the municipality in question did not qualify as an "arm of the state" for Eleventh Amendment purposes.[198]

In *Northern Insurance Co.*, Chatham County owned, operated, and maintained the Causton Bluff drawbridge under authority delegated from the State of Georgia. When a party whose boat was injured by the malfunctioning bridge and that party's insurance company sought damages in admiralty against the county, Chatham County defended on the basis of state sovereign immunity. The Supreme Court acknowledged its "recognition of preratification sovereignty as the source of immunity from suit," but it emphasized that all remaining state sovereign immunity is

195. *See* Frew *ex rel.* Frew v. Hawkins, 540 U.S. 431, 441–42 (2004) (noting that "principles of federalism require that state officials with front-line responsibility for administering the program be given latitude and substantial discretion").

196. *See* 531 U.S. 159, 172–74 (2001) (explaining that the Supreme Court will not allow an agency's interpretation of a statute to encroach upon traditional state powers unless Congress clearly states its intent to do so).

197. *See* N. Ins. Co. of New York v. Chatham County, 547 U.S. 189, 196–97 (2006) (overruling Broward County v. Wickman, 195 F.2d 614 (5th Cir. 1952)) (finding that the county was unprotected by sovereign immunity).

198. *Id.* at 194.

encompassed within the Eleventh Amendment.[199] As a result, there exists no common law "residual immunity" test that is broader than the Eleventh Amendment.[200] Moreover, the "Court has repeatedly refused to extend sovereign immunity to counties" "even when, as respondent alleges here, such entities exercise a slice of state power."[201] The Court also refused to create a special immunity for suits in admiralty.[202] Therefore, because "[t]he County conceded below that it was not entitled to Eleventh Amendment immunity, and both the County and the Court of Appeals appear to have understood this concession to be based on the County's failure to qualify as an arm of the State under our precedent," the County enjoyed no immunity from suit.[203]

B. Due Process Limitations on States

Constitutional requirements can impose federal law limitations on how states behave even when they do not define the relationship between the federal government and the states per se. In contrast to much of its other federalism jurisprudence, the Roberts Court repeatedly showed no hesitation in prescribing requirements for, and limitations upon, the states pursuant to the Due Process Clause of the Fourteenth Amendment.

1. Jones v. Flowers

In the April 2006 case of *Jones v. Flowers*, the Supreme Court resolved a conflict among the states' highest courts and the federal courts of appeals regarding states' due process duties when mailed notices of tax foreclosure sales are returned to the state.[204] In a 5–3 decision (Justice Alito did not participate) written by Chief Justice Roberts, the Court held "that when mailed notice of a tax sale is returned unclaimed, the State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is reasonable to do so."[205] While due process does not require the property owner to actually receive notice, it does require states to give notice in a manner reasonably calculated to reach the recipient.[206] "We do not think that a person who actually desired

199. *Id*. at 193–94.
200. *See id*. at 194 (holding that Chatham County's only claim to immunity arises if it was acting as an arm of the state in operating the drawbridge).
201. *Id*. at 193–94 (internal quotation marks omitted).
202. *Id*. at 195–96.
203. *Id*. at 194.
204. 547 U.S. 220 (2006).
205. *Id*. at 225.
206. *Id*. at 226 (quoting Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)).

to inform a real property owner of an impending tax sale of a house he owns would do nothing when a certified letter sent to the owner is returned unclaimed."[207] Because additional reasonable steps were in fact available to the state in this case, the Court reversed the tax sale.[208]

Justice Thomas dissented, joined by Justices Scalia and Kennedy, arguing that "the State's notice methods clearly satisfy the requirements of the Due Process Clause" under the Court's precedents.[209] Moreover, as a policy matter, "The meaning of the Constitution should not turn on the antics of tax evaders and scofflaws. Nor is the self-created conundrum in which petitioner finds himself a legitimate ground for imposing additional constitutional obligations on the State."[210]

2. Philip Morris USA v. Williams

In February 2007, in a 5–4 decision by Justice Breyer, the Supreme Court held in *Philip Morris USA v. Williams*[211] that the Due Process Clauses of the Fifth and Fourteenth Amendments prohibit juries from imposing punitive damages on civil defendants to punish those defendants for injuries to third parties not represented in the litigation.[212] Punitive damages, the majority concluded, can undermine notions of due process in several ways: by depriving defendants of fair notice of the range of punishment available in response to certain conduct, by threatening arbitrary punishments, and by allowing one state or one jury to impose its policy preferences unfairly.[213]

Using punitive damages to punish defendants for injuries to third parties similarly offends the Due Process Clause. "For one thing, the Due Process Clause prohibits a State from punishing an individual without first providing that individual with 'an opportunity to present every available defense,'" and that opportunity cannot exist if the defendant is to be punished for injuries to nonparties, against whom the defendant cannot establish the validity of the injury or the existence of any defense.[214] "For another, to permit punishment for injuring a nonparty victim would add a near standardless dimension to the punitive damages equation."[215] "Finally," the Court noted, "we can find no authority supporting the use of

207. *Id*. at 229.
208. *Id*. at 234–35.
209. *Id*. at 240 (Thomas, J., dissenting).
210. *Id*. at 248.
211. 549 U.S. 346 (2007).
212. *See id*. at 349 (holding that such activity amounts to a taking of property without due process).
213. *Id*. at 352–53.
214. *Id*. at 353–54 (citation omitted).
215. *Id*. at 354.

punitive damages awards for the purpose of punishing a defendant for harming others."[216]

The majority did acknowledge that jurors *could* properly consider injuries to third parties when assessing the reprehensibility of the defendant's conduct, another prong of the punitive damages assessment.[217] However, because the Oregon Supreme Court had not clearly distinguished proper uses of third-party injuries from improper uses, the Court remanded the punitive damages award at issue for reconsideration.[218]

Justice Stevens, writing in dissent and joined by an unusual alliance of Justices Ginsburg, Thomas, and Scalia, acknowledged that "[t]he Due Process Clause of the Fourteenth Amendment imposes both substantive and procedural constraints on the power of the States to impose punitive damages on tortfeasors."[219] However, he considered the majority's limitation on the consideration of third-party injuries to be "novel" and saw "no reason why an interest in punishing a wrongdoer 'for harming persons who are not before the court' should not be taken into consideration when assessing the appropriate sanction for reprehensible conduct."[220] Justice Thomas, in turn, wrote separately to emphasize that due process considerations should not constrain the *size* of punitive damages awards, either.[221] Finally, Justice Ginsburg, writing for herself, Justice Scalia, and Justice Thomas, argued that the Oregon Supreme Court had properly applied the U.S. Supreme Court's rulings on punitive damages and would uphold the award of punitive damages in order to punish the defendant's reprehensibility.[222]

3. Tennessee Secondary School Athletic Ass'n v. Brentwood Academy

In a plethora of concurring opinions, the Supreme Court in June 2007 addressed the First Amendment and procedural due process rights of schools in the context of sanctions by state interscholastic athletic associations.[223] While the overall decision was fractured, six Justices joined Justice Stevens's analysis of the Brentwood School's claim that the

216. *Id*.
217. *Id*. at 355.
218. *See id*. at 356–58 (concluding that state courts cannot authorize procedures creating an unreasonable risk of confusion as to the permissible uses of third-party injuries by the jury).
219. *Id*. at 358 (Stevens, J., dissenting).
220. *Id*. (citation omitted).
221. *Id*. at 361–62 (Thomas, J., dissenting).
222. *See id*. at 362–64 (Ginsburg, J., dissenting) (noting that she would accord more respect for the proceedings below, arguing the majority reached beyond the "sole objection Philip Morris preserved").
223. Tenn. Secondary Sch. Athletic Ass'n v. Brentwood Acad., 551 U.S. 291 (2007).

Tennessee Secondary School Athletic Association (TSSAA) violated its procedural due process rights when the full board, "during its deliberations, heard from witnesses and considered evidence that the school had no opportunity to respond to."[224]

The district court and the court of appeals both "found that the consideration of the *ex parte* evidence influenced the board's penalty decision and contravened the Due Process Clause," but the Supreme Court disagreed.[225] It stressed that

> [t]he decision to sanction Brentwood for engaging in prohibited recruiting was preceded by an investigation, several meetings, exchanges of correspondence, an adverse written determination from TSSAA's executive director, a hearing before the director and an advisory panel composed of three members of TSSAA's Board of Control, and finally, a *de novo* review by the entire TSSAA Board of Directors."[226]

The Court was thus unconvinced by Brentwood's claim of prejudice, because "[d]espite having had nearly a decade since the hearing to undertake that cross-examination and review, Brentwood has identified nothing the investigators shared with the board that Brentwood did not already know."[227] The Court was skeptical that the ex parte evidence "increased the severity of the penalties leveled against Brentwood," but more importantly, Brentwood failed to show that it would have proceeded differently if it knew that the board was going to consider the evidence.[228]

4. Caperton v. A.T. Massey Coal Co.

The Roberts Court's most unusual due process case came at the end of the 2008–2009 Term and involved a state supreme court justice's refusal to recuse himself.[229] In this 5–4 decision by Justice Kennedy, the majority concluded that Justice Benjamin of the West Virginia Supreme Court violated the Due Process Clause of the Fourteenth Amendment by not recusing himself.[230]

The majority did stress that the facts of the case were extreme. First, the five-justice West Virginia Supreme Court voted 3–2 to reverse a trial court judgment against A.T. Massey Coal Company on a jury verdict of $50 million, and Justice Benjamin was part of that three-justice majority.

224. *Id*. at 301.
225. *Id*. at 303. The Court noted, "Even accepting the questionable holding that TSSAA's closed-door deliberations were unconstitutional, we can safely conclude that any due process violation was harmless beyond a reasonable doubt." *Id*.
226. *Id*. at 300–01 (citations omitted).
227. *Id*. at 304.
228. *Id*. at 303–04.
229. Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252 (2009).
230. *Id.* at 2256–57.

Second, after the original trial verdict, but before the appeal to the West Virginia Supreme Court, Don Blankenship, A.T. Massey's chairman, chief executive officer, and president, contributed $1,000 to Benjamin's campaign committee, $2.5 million to a political organization that supported Benjamin, and $500,000 for independent expenditures, such as direct mailings, in support of Benjamin's election to that court. Blankenship's contributions "were more than the total amount spent by all other Benjamin supporters and three times the amount spent by Benjamin's own committee."[231] Third, Benjamin won the election for chief justice with 53.3% of the vote. Fourth, the coal company's appeal came before Justice Benjamin about two years after the election, with the reversal decision issuing about a year later.[232]

The U.S. Supreme Court's earlier rulings on judicial recusals held "that the Due Process Clause incorporated the common-law rule that a judge must recuse himself when he has 'a direct, personal, substantial, pecuniary interest' in a case."[233] In *A.T. Massey*, the majority went beyond that common law rule, concluding that a due process violation can also arise when there "are circumstances 'in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.'"[234] The Court concluded that

> there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent.[235]

Chief Justice Roberts dissented, joined by Justices Scalia, Thomas, and Alito. They characterized the majority's new rule as requiring recusal for a "probability of bias," which the dissenters argued "provides no guidance to judges and litigants about when recusal will be constitutionally required."[236] They concluded that "the cure is worse than the disease."[237] Justice Scalia added in his own dissent that "[t]he Court today continues its quixotic quest to right all wrongs and repair all imperfections through the Constitution."[238]

231. *Id*. at 2257–58.
232. *Id*. at 2257–58, 2274.
233. *Id*. at 2259 (quoting Tumey v. Ohio, 273 U.S. 510, 523 (1927)).
234. *Id*. (quoting Withrow v. Larkin, 421 U.S. 35, 47 (1975)).
235. *Id*. at 2263–64.
236. *Id*. at 2267 (Roberts, C.J., dissenting) (internal quotation marks omitted).
237. *Id*. at 2274.
238. *Id*. at 2275 (Scalia, J., dissenting).

C. Federal Preemption of State Law

The Supremacy Clause of the U.S. Constitution specifies that the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding."[239] This clause helps to define the relationship between the states and the federal government by allowing Congress to preempt state law through federal statute.[240]

Whether Congress has actually preempted state law has been the subject of a series of cases in the Roberts Court. Moreover, these cases are often as interesting for the unusual alignment of Justices in the resulting opinions as for the decisions themselves.

1. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit

In March 2006, a unanimous Supreme Court (Justice Alito did not participate), in an opinion by Justice Stevens, broadly interpreted a section of the Securities Litigation Uniform Standards Act of 1998 (SLUSA)[241] to preempt state law class actions by securities holders as well as purchasers and sellers, regardless of whether the plaintiffs had a federal claim.[242] The U.S. Court of Appeals for the Second Circuit had held that SLUSA preempts state law claims only if the plaintiffs have a private remedy under federal law,[243] while the U.S. Court of Appeals for the Seventh Circuit had held that SLUSA preempts *all* covered state law claims.[244] The Supreme Court agreed with the Seventh Circuit's reading, holding that "[t]he background, the text, and the purpose of SLUSA's pre-emption provision all support the broader interpretation adopted by the Seventh Circuit."[245]

According to the Second Circuit, because the class action in question "alleged that brokers were fraudulently induced, not to sell or purchase, but to retain or delay selling their securities, it fell outside SLUSA's pre-emptive scope."[246] The Supreme Court disagreed, noting that multiple

239. U.S. CONST. art. VI, cl. 2.

240. *See supra* notes 189–91 and accompanying text.

241. *See* 15 U.S.C. § 78bb(f)(1)(A) (2006) (prohibiting the maintenance of any "class action based upon the statutory or common law of any State or subdivision thereof . . . in any State or Federal court by any private party alleging a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security").

242. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit, 547 U.S. 71 (2006).

243. Dabit v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 395 F.3d 25, 43–44 (2d Cir. 2005), *vacated*, 547 U.S. 71 (2006).

244. Kircher v. Putnam Funds Trust, 403 F.3d 478, 484 (7th Cir. 2005), *vacated for lack of jurisdiction*, 547 U.S. 633 (2006).

245. *Dabit*, 547 U.S. at 74.

246. *Id*. at 77.

court cases and SEC rulings in other contexts interpreted the "in connection with" language to give it a broad construction.[247] As a result,

> Congress can hardly have been unaware of the broad construction adopted by both this Court and the SEC when it imported the key phrase—'in connection with the purchase or sale'—into SLUSA's core provision. And when 'judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its . . . judicial interpretations as well.'[248]

Moreover, a narrow interpretation would "run contrary to SLUSA's stated purpose" of preventing class action lawsuits from frustrating the objectives of the 1995 Reform Act.[249]

The Court acknowledged the "general 'presum[ption] that Congress does not cavalierly pre-empt state-law causes of action.'"[250] However, it explained that broad preemption is appropriate because

> that presumption carries less force here than in other contexts because SLUSA does not actually pre-empt any state cause of action. It simply denies plaintiffs the right to use the class-action device to vindicate certain claims. The Act does not deny any individual plaintiff, or indeed any group of fewer than 50 plaintiffs, the right to enforce any state-law cause of action that may exist.[251]

2. Watters v. Wachovia Bank

In April 2007, the Supreme Court concluded, in a 5–3 decision by Justice Ginsburg (Justice Thomas did not participate), that the National Bank Act (NBA) preempts state law regulation of a national bank's state-law-chartered operating subsidiaries.[252] Wachovia Bank, a national bank, conducts its real estate lending business through a state-chartered corporation licensed by the Office of the Comptroller of the Currency (OCC) pursuant to the NBA as an "operating subsidiary" of the bank.[253] Both the NBA and the OCC's regulations allow for such operating subsidiaries.[254] In *Watters v. Wachovia Bank, N.A.*, the issue for the Court

247. *See id*. at 85 (noting that although a narrow construction would not be unreasonable, the Court consistently adopts the broader view).

248. *Id*. at 85–86 (quoting Bragdon v. Abbott, 524 U.S. 624, 645 (1998)).

249. *Id*. at 86.

250. *Id*. at 87 (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996)) (alteration in original).

251. *Id*.

252. *See* Watters v. Wachovia Bank, N.A., 550 U.S. 1, 18–19 (2007) (noting that the Court's historical focus in considering preemption and the NBA is on the powers of national banks, rather than their corporate structure).

253. *Id*. at 7.

254. 12 U.S.C. § 24a(g)(3)(A) (2006); *see also* 12 C.F.R. § 5.34(e)(1) (2009) (authorizing national banks to conduct activities in an operating subsidiary that are

was whether such operating subsidiaries are subject to state regulation.

National banks have historically been free from the burden of state regulation,[255] and the NBA provides that "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law."[256] "Beyond genuine dispute, state law may not significantly burden a national bank's own exercise of its real estate lending power, just as it may not curtail or hinder a national bank's efficient exercise of any other power, incidental or enumerated under the NBA."[257] Moreover, because the NBA's preemption focuses on "a national bank's *powers*, not on its corporate structure,"[258] preemption of state regulation extends to OCC-licensed operating subsidiaries.[259] The Supreme Court sidestepped issues of deference and the OCC's independent authority to preempt state law because the regulation at issue, 12 C.F.R. § 7.4006, "merely clarifies and confirms what the NBA already conveys."[260] As a result, the OCC's regulation stating the same principle of preemption did not violate the Tenth Amendment or principles of federalism.[261]

More interesting for administrative law, federalism analyses, and statutory interpretation was Justice Stevens's dissent, joined, unusually, by Chief Justice Roberts and Justice Scalia. Arguing that "the Court endorses an agency's incorrect determination that the laws of a sovereign State must yield to federal power," resulting in a "significant impact . . . on the federal–state balance,"[262] the dissenters reviewed the history of the NBA to conclude that "Congress itself has never authorized national banks to use subsidiaries incorporated under state law to perform traditional banking functions. Nor has it authorized the OCC to 'license' any state-chartered entity to do so."[263] Instead, Congress at best "acquiesced in the OCC's expansive interpretation of its authority," which "is a plainly insufficient basis for finding preemption."[264]

Unlike the majority, therefore, the dissenters considered the source of preemption to be the OCC's regulation and argued that, because of its

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permissible for national banks "either as part of, or incidental to, the business of banking").

255. *See Watters*, 550 U.S. at 10–11 (surveying the development of America's dual banking system, and Congress's preference for placing national banks beyond the reach of the States).

256. 12 U.S.C. § 484(a) (2006). "Visitorial powers" refer to the government's supervisory powers over banks. *See infra* notes 855–59 and accompanying text (discussing these powers in more detail).

257. *Watters*, 550 U.S. at 13.

258. *Id*. at 18.

259. *Id*. at 19.

260. *Id*. at 20–21.

261. *Id*. at 22.

262. *Id*. (Stevens, J., dissenting).

263. *Id*. at 30.

264. *Id*. at 30–31.

federalism implications, the OCC's regulation was not entitled to *Chevron* deference.[265] "No case from this Court has ever applied such a deferential standard to an agency decision that could so easily disrupt the federal–state balance."[266] Moreover, the dissenters explicitly linked statutory preemption to the Tenth Amendment and to principles of constitutional federalism,[267] concluding, "Never before have we endorsed administrative action whose sole purpose was to pre-empt state law rather than to implement a statutory command."[268]

3. Preston v. Ferrer

In February 2008, the Supreme Court decided three preemption cases, two of which touch on the role of federal agencies in preemption analyses. *Preston v. Ferrer*[269] involved the relationship between the Federal Arbitration Act[270] and state agencies. Specifically, the California Talent Agencies Act (TAA)[271] lodges the initial dispute resolution authority for conflicts arising under the Act in the California Labor Commission, a state agency. In June 2005, Preston demanded arbitration of his TV-show contract with Ferrer in accordance with the arbitration clause in that contract. A month later, Ferrer petitioned the California Labor Commissioner, arguing that the contract was invalid and unenforceable under the TAA because Preston acted as a talent agent without the appropriate state license.[272]

The issue was therefore whether § 2 of the Federal Arbitration Act, which makes arbitration clauses enforceable despite state law, required the issue of the contract's validity to be heard before the arbitrator, or whether the courts should respect California's assignment of that task to the California labor commissioner.[273] The U.S. Supreme Court, in an 8–1 opinion by Justice Ginsburg (Justice Thomas dissented), swiftly concluded that the Federal Arbitration Act preempted state law.[274] According to the Court, "when parties agree to arbitrate all questions arising under a contract, state laws lodging primary jurisdiction in another forum, *whether*

265. *See id*. at 41 (noting that "unlike Congress, administrative agencies are clearly not designed to represent the interests of States").
266. *Id*.
267. *Id*. at 43–44.
268. *Id*. at 44.
269. 128 S. Ct. 978 (2008).
270. 9 U.S.C. §§ 1–307 (2006).
271. CAL. LAB. CODE § 1700.44 (West 2003).
272. *Preston*, 128 S. Ct. at 982.
273. *See id*. at 981 (asking whether the Federal Arbitration Act preempts "state statutes that refer certain disputes initially to an administrative agency").
274. *Id.*

judicial or administrative, are superseded by the F[ederal] A[rbitration] A[ct]."[275] The Court emphasized that, under its previous Federal Arbitration Act jurisprudence, "attacks on the validity of an entire contract, as distinct from attacks aimed at the arbitration clause, are within the arbitrator's ken."[276]

Ferrer tried to differentiate the administrative proceeding from court proceedings by arguing that the California statute merely required parties to exhaust their administrative remedies before proceeding to arbitration. The Supreme Court, however, was unconvinced, emphasizing that this interpretation would ignore conflicts between the TAA and the Federal Arbitration Act. Specifically, the Court found that

> [p]rocedural prescriptions of the TAA thus conflict with the F[ederal] A[rbitration] A[ct]'s dispute resolution regime in two basic respects: First, the TAA, in § 1700.44(a), grants the Labor Commissioner exclusive jurisdiction to decide an issue that the parties agreed to arbitrate; second, the TAA, in § 1700.45, imposes prerequisites to enforcement of an arbitration agreement that are not applicable to contracts generally."[277]

In light of these conflicts, the Federal Arbitration Act preempted the state law.[278]

4. Riegel v. Medtronic, Inc.

The Supreme Court's second preemption decision in February 2008 was *Riegel v. Medtronic, Inc*.[279] In this 8–1 decision by Justice Scalia (Justice Ginsburg dissented; Justice Stevens concurred in the judgment), the Court concluded that the Food and Drug Administration's (FDA's) premarket approval process under the 1976 Medical Device Amendments (MDA) to the Food, Drug, and Cosmetic Act[280] could impose device-specific "requirements" sufficient to trigger the MDA's express preemption provision and hence to preempt state negligence and strict liability torts related to the medical device so approved.[281]

After reviewing the extensive FDA premarket approval process, the Court reiterated prior case law concluding that federal preemption under the MDA is specific to particular medical devices. As a result, the FDA's

275. *Id*. (emphasis added).
276. *Id*. at 984 (citing Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403–04 (1967)).
277. *Id*. at 985 (citations omitted).
278. *Id*. at 989.
279. 128 S. Ct. 999 (2008).
280. 21 U.S.C. § 360c(a)–(i) (2006).
281. *See Riegel*, 128 S. Ct. at 1007 (noting that premarket approval is specific to individual medical devices and encapsulates the requirements resulting from a federal safety review).

regulations must impose specific duties with respect to particular devices before those regulations can preempt state law.[282] However, unlike in its general regulations, the FDA *does* impose device-specific requirements in its premarket approvals, and hence those requirements could be the basis of federal preemption of state law. [283]

Moreover, the Supreme Court affirmed its prior conclusion that state negligence and strict liability duties impose potentially contradictory state law requirements on the use of such medical devices.[284] As a result, the FDA's premarket approvals for medical devices preempt state law tort claims to the extent that tort duties conflict with duties imposed under the MDA.[285]

5. Rowe v. New Hampshire Motor Transport Ass'n

The third case of the February 2008 preemption trilogy was *Rowe v. New Hampshire Motor Transport Ass'n*.[286] In this unanimous opinion by Justice Breyer, with Justice Stevens concurring in part, the Court concluded that, pursuant to express preemption provisions, certain provisions of the Federal Aviation Administration Authorization Act (FAAAA)[287] preempted Maine laws regulating the delivery of tobacco to customers in Maine.[288]

The FAAAA prohibits states from enacting laws or regulations "related to a price, route, or service of any motor carrier," while the Maine statute "forbids anyone other than a Maine-licensed tobacco retailer to accept an order for delivery of tobacco" and requires licensed retailers to use a specific recipient-verification service.[289] The Court found that the FAAAA preempted the state requirements because the Maine tobacco statute focuses "on trucking and other motor carrier services . . . , thereby creating a direct 'connection with' motor carrier services."[290] Moreover, as the Court noted, the Maine law "has a 'significant' and adverse 'impact' in

282. *See id*. at 1006–07 (citing Medtronic, Inc. v. Lohr, 518 U.S. 470, 493–501 (1996)) (discussing its holding in *Lohr* and noting that federal manufacturing and labeling requirements that applied across the board did not preempt common law negligence and strict liability claims).

283. *See id*. at 1007 (noting that this is so because the process of premarket approval is equivalent to federal safety review).

284. *See id*. at 1007–08 (stating the principal that "[a]bsent other indication, reference to a State's 'requirements' [in a federal enactment] includes its common-law duties").

285. *Id*. at 1011.

286. 128 S. Ct. 989 (2008).

287. 49 U.S.C. §§ 14501(c)(1), 41713(b)(4)(A) (2006).

288. *Rowe*, 128 S. Ct. at 996.

289. *Id*. at 993–94 (citing 49 U.S.C. § 14501(c) (2006); ME. REV. STAT. ANN. tit. 22, § 1555-C(1), (3)(c) (2004)).

290. *Id*. at 995 (quoting Morales v. Trans World Airlines, Inc., 504 U.S. 374, 384 (1992)).

respect to the federal Act's ability to achieve its pre-emption-related objectives."[291]

D. The Commerce Clause and Federalism

1. Gonzales v. Oregon*: Congress's Authority over the Medical Profession*

As discussed above, limitations on Congress's Commerce Clause authority have been an important source of federalism decisions since 1995, when the Supreme Court decided *Lopez*. In its January 2006 opinion in *Gonzales v. Oregon*,[292] the Supreme Court again found limits on Congress's authority to intrude upon state affairs. The Court decided 6–3 that the U.S. Attorney General lacked authority to interpret the federal Controlled Substances Act (CSA)[293] to prohibit doctors from prescribing controlled substances for use in assisted suicides regulated under Oregon law.[294]

The case turned on the validity of the Attorney General's November 9, 2001 interpretive rule, and most of the decision discussed the proper standard of review for that rule.[295] However, the Court also extensively discussed federalism considerations in the context of the regulation of physicians. The CSA allows the Attorney General to register physicians to administer Schedule II drugs.[296] However, "The structure and operation of the CSA presume and rely upon a functioning medical profession regulated under the States' police powers."[297] Congress expressly disclaimed any intent in the CSA to "occupy the field" of physician regulation,[298] and it expressed an intent for national uniform standards of medical practice with respect only to narcotic-addiction treatment.[299] Thus, "In the face of the CSA's silence on the practice of medicine generally and its recognition of state regulation of the medical profession it is difficult to defend the

291. *Id*. (citing *Morales*, 504 U.S. at 390).
292. 546 U.S. 243 (2006).
293. Pub. L. No. 91-513, 84 Stat. 1242 (1970) (codified as amended in scattered sections of 21 U.S.C.).
294. *See* Gonzales v. Oregon, 546 U.S. at 269–71 (quoting relevant language from the Act announcing Congress's intent not to preempt the states' general regulation of medical practice absent express language to that effect).
295. *Id*. at 249. See also discussion *infra* notes 567–81 and accompanying text (discussing the standard of review portions of the opinion).
296. Gonzales v. Oregon, 546 U.S. at 250–51 (citing 21 U.S.C. §§ 822(a)(2), 824(a)(4) (2006)).
297. *Id*. at 270.
298. *See id*. at 270–71 (citing 21 U.S.C. § 903 (2006)) (discussing the CSA's preemption provision).
299. *See id.* at 271 (citing 42 U.S.C. § 290bb-2a (2006)) (noting that although the regulation of health and safety is primarily a matter of local concern, "there is no question" that the federal government may determine uniform national standards in these areas).

Attorney General's declaration that the statute impliedly criminalizes physician-assisted suicide."[300] Indeed, "The CSA's substantive provisions and their arrangement undermine [an] assertion of an expansive federal authority to regulate medicine,"[301] which would "effect a radical shift of authority from the States to the Federal Government to define general standards of medical practice in every locality."[302] In other words, because medicine is an area traditionally left to the states to regulate, the Court wanted much clearer language from Congress than the CSA provides before it would assume a federal intrusion into this state-dominated sphere of activity.

2. The Dormant Commerce Clause

The dormant Commerce Clause is a judicially created doctrine arising by implication from the Interstate Commerce Clause, which provides that "Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[303] According to the U.S. Supreme Court, this clause "has long been understood . . . to provide 'protection from state legislation inimical to the national commerce [even] where Congress has not acted.'"[304]

In April 2007, the Supreme Court determined in *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Management Authority* that state- and local-government-owned solid waste facilities are entitled to special consideration under the dormant Commerce Clause.[305] This 5–1–3 decision by Chief Justice Roberts was the latest entry in a long series of dormant Commerce Clause decisions by the Supreme Court involving solid waste. In *United Haulers*, the Supreme Court considered whether the public ownership of the destination waste-processing facility changed the constitutional validity of county flow-control ordinances.[306] Previously, in *C&A Carbone, Inc. v. Clarkstown*, the Court held that flow-control ordinances that required trash haulers to deliver solid waste to particular privately owned waste-processing facilities violated the dormant Commerce Clause.[307]

The *United Haulers* Court concluded that the ordinances at issue did not

300. *Id*. at 272.
301. *Id*. at 273.
302. *Id*. at 275.
303. U.S. CONST. art. I, § 8, cl. 3.
304. Barclays Bank PLC v. Franchise Tax Bd. of Cal., 512 U.S. 298, 310 (1994) (quoting S. Pac. Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761, 769 (1945)) (alteration in original).
305. 550 U.S. 330 (2007).
306. *Id*. at 342.
307. 511 U.S. 383, 393–95 (1994).

facially discriminate against interstate commerce because "[t]he flow control ordinances in this case benefit a clearly public facility, while treating all private companies exactly the same."[308] According to the Court, "States and municipalities are not private businesses—far from it,"[309] so "it does not make sense to regard laws favoring local government and laws favoring private industry with equal skepticism," particularly because "[l]aws favoring local government . . . may be directed toward any number of legitimate goals unrelated to protectionism."[310] In contrast, "The contrary approach of treating public and private entities the same under the dormant Commerce Clause would lead to unprecedented and unbounded interference by the courts with state and local government."[311]

Because there was no facial discrimination, the Court applied the balancing test from *Pike v. Bruce Church, Inc*.[312] Concluding that "any arguable burden does not exceed the public benefits of the ordinances,"[313] the majority emphasized that "[t]he ordinances give the Counties a convenient and effective way to finance their integrated package of waste disposal services" and "increase recycling in at least two ways, conferring significant health and environmental benefits upon the citizens of the Counties."[314]

Justice Scalia refused to join the majority's balancing analysis and concurred to argue instead that the dormant Commerce Clause is "an unjustified judicial invention," to be limited to existing precedent.[315] Justice Thomas concurred in the judgment but argued that the *C&A Carbone* decision should be overruled.[316] Justice Alito, in a dissent joined by Justices Stevens and Kennedy, argued that the *C&A Carbone* rule should apply with equal force to the ordinances at issue in *United Haulers*.[317]

In May 2008, in *Department of Revenue v. Davis*,[318] the Roberts Court emphasized its holding in *United Haulers* by upholding the Commonwealth of Kentucky's income tax structure against dormant Commerce Clause challenges despite the fact that the tax scheme exempted interest income on Kentucky bonds while taxing interest income from bonds issued by other

308. *United Haulers*, 550 U.S. at 342.
309. *Id*.
310. *Id*. at 343.
311. *Id*.
312. *Id*. at 346.
313. *Id*.
314. *Id*. at 346–47.
315. *Id*. at 348 (Scalia, J., concurring in part).
316. *Id*. at 349 (Thomas, J., concurring).
317. *Id*. at 356 (Alito, J., dissenting).
318. 128 S. Ct. 1801 (2008).

states.[319] Justice Souter wrote this 7–2 decision, which emphasized that "[t]he modern law of what has come to be called the dormant Commerce Clause is driven by concern about 'economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.'"[320] The Court concluded that the logic of *United Haulers* "applies with even greater force to laws favoring a State's municipal bonds, given that the issuance of debt securities to pay for public projects is a quintessentially public function."[321] The Court also found applicable *United Haulers*' concern about "'unprecedented . . . interference' with a traditional government function," namely state taxation.[322] Finally, the Court considered the *Pike* balancing test inapplicable because "the rule in *Pike* was never intended to authorize a court to expose the States to the uncertainties of the economic experimentation the [plaintiffs] request."[323]

Justice Kennedy dissented, joined by Justice Alito. They argued that the majority weakened the dormant Commerce Clause by undermining the *Pike* substantial burden test and would have preferred a special *sui generis* rule for taxation of bonds.[324]

E. Federalism in Statutory Interpretation

1. Federalism, Statutory Construction, and Unanimous Results

When federal statutes implicate state interests, the Supreme Court will occasionally and consciously consider the federalism implications of various statutory meanings. Moreover, the Court's decision to consider a statute's federalism implications, or not, can occasionally bring unanimity to the Court's statutory interpretation decisions.

In May 2006, for example, the Supreme Court unanimously decided *S.D. Warren Co. v. Maine Board of Environmental Protection*.[325] In an opinion by Justice Souter, the Court affirmed the Supreme Judicial Court of Maine regarding the state's right to condition a Federal Energy Regulatory Commission (FERC) relicensing of hydroelectric dam projects.[326] Section 401 of the Clean Water Act requires applicants for federal licenses and permits to obtain water-quality certifications from the relevant state if the

319. *Id*. at 1810–11.
320. *Id*. at 1808 (quoting New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 273–74 (1988)).
321. *Id*. at 1810.
322. *Id*. at 1811.
323. *Id*. at 1819.
324. *Id*. at 1830 (Kennedy, J., dissenting).
325. 547 U.S. 370 (2006).
326. *Id*. at 375.

licensed or permitted activity may result in a "discharge" that can affect state water quality.[327] In *S.D. Warren*, the parties disputed whether a "discharge" would occur that would trigger § 401.

To interpret the term *discharge*, the Court looked first to statutory definitions, noting that the Act does not precisely define *discharge* but rather only states that the term "'includes a discharge of a pollutant, and a discharge of pollutants.'"[328] In accordance with its standard statutory interpretation methodology, therefore, the Court sought the term's plain meaning in dictionaries. According to *Webster's New International Dictionary*, the ordinary meaning of *discharge* when applied to water is "a 'flowing or issuing out'" or "'[t]o emit; to give outlet to; to pour forth; as, the Hudson *discharges* its waters into the bay.'"[329] The Supreme Court found support for its proposed interpretation of the word *discharge* in non-Clean Water Act cases,[330] in a prior § 401 decision,[331] and in statements by the EPA and FERC.[332]

The Court noted that the agencies were not entitled to deference regarding this definition "because neither the EPA nor FERC has formally settled the definition"; nevertheless, "the administrative usage of 'discharge' in this way confirms our understanding of the everyday sense of the term."[333] The Court then rejected S.D. Warren's objections to its interpretation based on the canon of *noscitur a sociis*;[334] on the Court's interpretation of "discharge of a pollutant"—a defined term under the Act—for purposes of the § 402 permit program because § 401 and § 402 are separate provisions of the Clean Water Act with different statutory triggers;[335] and on legislative history, a part of the opinion Justice Scalia would not join, referring to S.D. Warren's highly technical argument about wording based on drafting amendments as "a lawyer's argument."[336]

Unusually and notably, the Court then extended its discussion beyond

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327. 33 U.S.C. § 1341(a) (2006).

328. *See S.D. Warren*, 547 U.S. at 375–76 (quoting 33 U.S.C. § 1362(16) (2006)) (reasoning that the term must therefore be construed in accord with its ordinary and natural meaning).

329. *Id*. at 376 (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY 742 (2d ed. 1954)).

330. *Id*.

331. *See id.* at 376–77 (discussing its holding in *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700 (1994)).

332. *Id*. at 377–78.

333. *Id*. at 378.

334. *See id*. at 378–80 (discounting S.D. Warren's argument that based upon *noscitur a sociis* and the assertion that discharge includes a discharge of pollutants, there can thus be no discharge without the addition of a pollutant to the water).

335. *See id*. at 380–81 (noting that the statutory trigger is not a discharge alone, but more specifically and narrowly, a discharge of a pollutant).

336. *See id*. at 382–83 (determining that, if anything, the legislative history contradicts S.D. Warren's position).

the narrow issue of the meaning of *discharge*, which was all that was needed to decide the case, to emphasize the federalism implications of water-quality protection. Noting that S.D. Warren's technical arguments "miss the forest for the trees,"[337] the Court emphasized the states' role in implementing the Act's broader purposes: "to 'restore and maintain the chemical, physical, and biological integrity of the Nation's waters,' the 'national goal' being to achieve 'water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water.'"[338] As a result, "Changes in the river like [those caused by the hydroelectric dam] fall within a State's legitimate legislative business, and the Clean Water Act provides for a system that respects the States' concerns."[339] In the Court's opinion, "Reading § 401 to give 'discharge' its common and ordinary meaning preserves the state authority apparently intended."[340]

In other decisions, however, the Supreme Court explicitly discounted federalism considerations in unanimous decisions. For example, in December 2007, a unanimous Court determined in *CSX Transportation, Inc. v. Georgia State Board of Equalization*[341] that, under a provision of the Railroad Revitalization and Regulatory Reform Act,[342] railroads may challenge state methods for determining the value of railroad property for *ad valorem* tax purposes.[343] The Court concluded that, in order to effectuate Congress's purpose in the Act, "district courts must calculate the true market value of in-state railroad property."[344] Such calculations, in turn, require that the federal courts be able to "look behind a State's valuation methods."[345]

In overturning the U.S. Court of Appeals for the Eleventh Circuit's decision, the Supreme Court discounted federalism arguments that the Eleventh Circuit found worthy of judicial consideration. First, the Supreme Court rejected Georgia's argument that federal court examination of state taxation valuation methodologies interfered with principles of federalism because the federal courts would be interfering with the states' sovereign power to tax. The Court emphasized instead that Congress mandated such "interference" (if it was truly interference at all) because "judicial scrutiny of [the States'] methodologies is authorized by the . . . Act's clear

337. *Id*. at 384.
338. *Id*. at 385.
339. *Id*. at 386 (citing 33 U.S.C. §§ 1251(b), 1256(a), 1370 (2006)).
340. *Id*. at 387.
341. 552 U.S. 9 (2007).
342. 49 U.S.C. § 11501 (2006).
343. *CSX Transportation*, 552 U.S. at 12.
344. *Id*. at 16.
345. *Id.* at 21.

command to find true market value."[346] Similarly, the Court rejected Georgia's argument that the Court's interpretation interfered with states' ability to choose a valuation methodology. According to the Court, states remain free to choose any valuation methodology they want, so long as they do not discriminate in the taxation of railroad property.[347] *CSX Transportation* thus suggests that federalism values are less important in federal court statutory interpretation when (1) Congress's intent and commands are clear and (2) clear federal interests, such as railroads, are involved.

Perhaps most dramatically, in 2009, in *Northwest Austin Municipal Utility District No. One v. Holder*,[348] the Supreme Court decided, 8–1 in part and 9–0 in part (Justice Thomas concurred in part and dissented in part), to avoid a constitutional evaluation of § 5 of the Voting Rights Act,[349] deciding instead on statutory grounds that a Texas municipal utility district was a "political subdivision" eligible to file suit to bail out of the Act's preclearance requirements. The utility district has an elected board, and § 5 requires it to preclear any changes in its election rules with federal authorities.[350] The Voting Rights Act's "bailout" provision allows courts to release a state or "political subdivision" from the preclearance requirement if the political subdivision meets a list of requirements. However, the Act defines *political subdivision* to be "any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting."[351] Because the utility district did not conduct its own registration for voting, the lower court concluded that it was not a "political subdivision" eligible for bailout.

The Supreme Court was very concerned about the federalism implications of § 5, "which authorizes federal intrusion into sensitive areas of state and local policymaking, [and hence] imposes substantial federalism costs."[352] "The Act also differentiates between the States, despite our historic tradition that all the States enjoy 'equal sovereignty.'"[353] As the Court noted, "These federalism concerns are underscored by the argument that the preclearance requirements in one State would be unconstitutional

346. *Id*. at 20–21.
347. *Id*. at 21.
348. 129 S. Ct. 2504 (2009).
349. 42 U.S.C. § 1973c(a) (2006).
350. *Nw. Austin*, 129 S. Ct. at 2509–10.
351. 42 U.S.C. § 1973*l*(c)(2) (2006).
352. *Nw. Austin*, 129 S. Ct. at 2511 (quoting Lopez v. Monterey County, 525 U.S. 266, 282 (1999) (quoting Miller v. Johnson, 515 U.S. 900, 926 (1995))) (internal quotation marks omitted).
353. *Id*. at 2512 (quoting United States v. Louisiana, 363 U.S. 1, 16 (1960)).

in another."[354]

Nevertheless, the Court opted for constitutional avoidance, deferring to both Congress and its own rules of decisional preferences. As for Congress, the Court noted that

> [i]n assessing those questions [of the constitutionality of the Voting Rights Act], we are keenly mindful of our institutional role. We fully appreciate that judging the constitutionality of an Act of Congress is "the gravest and most delicate duty that this Court is called on to perform." "The Congress is a coequal branch of government whose Members take the same oath we do to uphold the Constitution of the United States." The Fifteenth Amendment empowers "Congress," not the Court, to determine in the first instance what legislation is needed to enforce it. Congress amassed a sizable record in support of its decision to extend the preclearance requirements . . . .[355]

In addition to respecting Congress's decisions, "'It is a well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case.'"[356]

Nevertheless, lingering federalism concerns appear to have pushed the Court into a liberal—arguably even extratextual—construction of the Act. Thus, in addressing the statutory issue of whether the utility district could qualify as a "political subdivision," the Supreme Court began by announcing that "[s]tatutory definitions control the meaning of statutory words, of course, in the usual case. But this is an unusual case."[357] The Court's prior decisions already established that the statutory definition of *political subdivision* did not govern every use of that term in the Voting Rights Act.[358] In addition, the Court noted that a restrictive interpretation of *political subdivision* "has helped to render the bailout provision all but a nullity. Since 1982, only 17 jurisdictions—out of the more than 12,000 covered political subdivisions—have successfully bailed out of the Act."[359] As a result, the Court concluded "that all political subdivisions—not only those described in § 14(c)(2)—are eligible to file a bailout suit."[360]

Thus, the *Northwest Austin* decision simultaneously demonstrated themes from both *S.D. Warren* and *CSX Transportation* to reach a nearly unanimous Supreme Court construction of a federal statute. As in *CSX Transportation*, the Court was conscious that it was issuing a decision in an area of strong federal interest and where deference to Congress was

354. *Id*.
355. *Id*. at 2513 (citations omitted).
356. *Id*. (quoting Escambia County v. McMillan, 466 U.S. 48, 51 (1984) (per curiam)).
357. *Id*. at 2514 (quoting Lawson v. Suwannee Fruit & S.S. Co., 336 U.S. 198, 201 (1949)) (internal quotation marks omitted).
358. *Id*. at 2514–15.
359. *Id*. at 2516.
360. *Id*.

particularly warranted, given the Constitution's language. As in *S.D. Warren*, however, the significant federalism implications of the statute's construction in *Holder* prompted a broad interpretation that conferred more freedom and authority on states and their subdivisions vis-à-vis the federal government.

2. Federalism, Statutory Construction, and Split Decisions

Despite the occasional unanimous opinion, the conflicting impulses to consider and ignore the federalism implications of a particular statutory construction are far more likely to split the Roberts Court than to unify it. For example, the Supreme Court considered several federalism-related canons of construction in its June 2008 decision in *Florida Department of Revenue v. Piccadilly Cafeterias, Inc.*[361] This 7–2 decision (Justices Breyer and Stevens dissented) involved the Bankruptcy Code's provision exempting assets transferred under a plan confirmed under Chapter 11 of the Code from the imposition of stamp and similar taxes.[362] The Court held that this tax exemption does not apply until after the plan is confirmed.[363]

The Court considered a number of interpretive tools in reaching this conclusion and exhibited far more solicitude for states and their taxation schemes than was evident in *CSX Transportation*, despite the prominent federal role in bankruptcy protections. In particular, the Court approved Florida's invocation of three canons of statutory construction that serve to protect state interests. First, Florida raised the canon "that 'Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change.'"[364] Second, Florida argued "that courts should proceed carefully when asked to recognize an exemption from state taxation that Congress has not clearly expressed."[365] Finally, "Florida notes that the canon also discourages federal interference with the administration of a State's taxation scheme."[366] As in *Northwest Austin*, therefore, the majority's interpretation essentially cabined the federal limitations on state authority as narrowly as the statutory language would allow.

Federalism was also relevant to the Supreme Court's 5–4 decision in

361. 128 S. Ct. 2326 (2008).

362. *Id*. at 2326, 2329; *see also* 11 U.S.C. § 1146(a) (2006) (exempting from the imposition of stamp taxes and similar taxes assets transferred under a plan confirmed under Chapter 11 of the Code).

363. *See Piccadilly Cafeterias*, 128 S. Ct. at 2330 (holding that the provision does not apply to transfers made before a plan is confirmed).

364. *Id*. at 2336 (quoting Lorillard v. Pons, 434 U.S. 575, 580–81 (1978)).

365. *Id*. at 2336–37 (quoting Cal. State Bd. of Equalization v. Sierra Summit, Inc., 490 U.S. 844, 851–52 (1989)) (internal quotation marks omitted).

366. *Id*. at 2337.

Horne v. Flores,[367] which involved the Nogales Unified School District's implementation of § 204(f) of the Equal Educational Opportunities Act of 1974 (EEOA).[368] This provision requires states "to take appropriate action to overcome language barriers that impede equal participation by its students in instructional programs."[369] Since 2000, the school district had been operating under a federal district court order to comply with the Act, which the court extended to the entire State of Arizona in 2001.[370]

In 2006, after Arizona enacted legislation to increase state funding for English Language Learner (ELL) students, the state and the school district moved for relief from the district court's order pursuant to Federal Rule of Civil Procedure 60(b)(5), arguing that changed circumstances warranted relief from the judgment. The district court denied the motion, concluding that the increased funding was not rationally related to effective ELL programming, that a two-year limit on the increased funding was irrational, and that the Arizona statute violated federal law by using federal funds to supplant rather than supplement state education funding.[371] The U.S. Court of Appeals for the Ninth Circuit affirmed,[372] but the Supreme Court reversed.

In an opinion by Justice Alito, the majority in *Horne v. Flores* concluded that the lower courts did not apply Rule 60(b)(5) flexibly enough in this situation and instead fixated improperly on the state funding provided for ELL programs.[373] The majority classified the case as "institutional reform litigation" and underscored the importance of Rule 60(b)(5) relief in such cases.[374] In particular, "institutional reform injunctions often raise sensitive federalism concerns. Such litigation commonly involves areas of core state responsibility, such as public education."[375] Moreover, "[f]ederalism concerns are heightened when, as in these cases, a federal court decree has the effect of dictating state or local budget priorities" and can constrain state and local officials in the exercise of their elected offices.[376] Finally, when state officials themselves disagree as to how to comply with the

367. 129 S. Ct. 2579 (2009).
368. *See* 20 U.S.C. § 1703(f) (2006) (prohibiting a state from denying equal educational opportunity to an individual by failing to take appropriate action to overcome language barriers).
369. *Id*.
370. *Horne*, 129 S. Ct. at 2584–85.
371. Flores v. Arizona, 480 F. Supp. 2d 1157, 1164–67 (D. Ariz. 2007), *aff'd*, 516 F.3d 1140 (9th Cir. 2008), *rev'd sub nom.* Horne v. Flores, 129 S. Ct. 2579 (2009).
372. Flores v. Arizona, 516 F.3d 1140, 1179–80 (9th Cir. 2008), *rev'd sub nom.* Horne v. Flores, 129 S. Ct. 2579 (2009).
373. *Horne*, 129 S. Ct. at 2597–98.
374. *Id.* at 2593.
375. *Id*.
376. *Id*. at 2593–94.

federal order, federalism concerns are also increased: "Precisely because different state actors have taken contrary positions in this litigation, federalism concerns are elevated. And precisely because federalism concerns are heightened, a flexible approach to Rule 60(b)(5) relief is critical."[377]

The district court and the Ninth Circuit, according to the Supreme Court, improperly confined their analyses to the scope of the original order, disallowing the school district from demonstrating compliance with the EEOA in any way except through increased state ELL funding.[378] As a result, the Court remanded the case for

> a proper examination of at least four important factual and legal changes that may warrant the granting of relief from the judgment: the State's adoption of a new ELL instructional methodology, Congress' enactment of [the No Child Left Behind Act], structural and management reforms in Nogales, and increased overall education funding.[379]

Justice Breyer, joined by Justices Stevens, Souter, and Ginsburg, dissented. They argued that the lower courts thoroughly considered all of the changed circumstances that the majority mentioned and that were presented in the case; moreover, they objected to the "institutional reform litigation" label relied upon by the majority.[380] In particular, they argued that the majority's main criticism of the lower courts—that they focused too much on education funding—was misplaced because "the State's provision of adequate resources to its English-learning students . . . has always been the basic contested issue in this case."[381]

III. THE FEDERAL COURTS' ROLES VIS-À-VIS CONGRESS AND THE EXECUTIVE BRANCH: DEFERENCE AND INSTITUTIONAL COMPETENCE

Since the start of its 2005 Term, the Supreme Court has repeatedly wrestled with the overarching issue of the proper role of the federal courts in the United States' tripartite division of power at the federal level. Indeed, with respect to the Executive Branch and administrative agencies, the Supreme Court has demonstrated a high level of deference, although this deference becomes somewhat muddled when agencies contend with prior Supreme Court precedent.

This Part presents the recent decisions that give insight into the Roberts

377. *Id*. at 2596.

378. *See id*. at 2597–98 (noting that although the Ninth Circuit purported to engage in a "changed circumstances" analysis, in effect, it only asked whether the changed circumstances affected ELL funding, and finding similar errors by the district court).

379. *Id*. at 2600.

380. *Id*. at 2608 (Breyer, J., dissenting).

381. *Id*. at 2609.

Court's often-divided view of its own role in the federal government. These cases arise in three main contexts: the Supreme Court's interpretation of the Constitution itself, the Supreme Court's review of challenges to federal statutes, and the Supreme Court's review of federal agency actions. In the last category, moreover, three types of decisions have been important: arbitrary and capricious review of agency actions; cases involving *Chevron* deference and federal agency interpretations of federal statutes; and cases involving the intersection of federal agency actions and prior federal court—especially Supreme Court—precedent.

A. Constitutional Interpretation: The Roberts Court and the Second Amendment

As the Roberts Court's discussions of due process limitations on states suggest,[382] one area where the Supreme Court strongly maintains its role as the final decisionmaker is in direct interpretation and application of the U.S. Constitution. Another example of the Court's asserted dominance in this area came in what was arguably the most controversial decision of the Court's 2007–2008 Term, *District of Columbia v. Heller*.[383] In a 5–4 decision by Justice Scalia (Justices Stevens, Souter, Ginsburg, and Breyer dissented), the Court decided that the Second Amendment confers an individual right to keep and bear arms and, as a result, that statutes completely banning handgun possession are unconstitutional.[384] While the substance of the Second Amendment is generally outside the scope of administrative law practice, the majority's statements regarding the interpretation of the U.S. Constitution are nevertheless notable.

First, the Supreme Court emphasized that

> [i]n interpreting this text, we are guided by the principle that "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation.[385]

The majority thus incorporated both a strict plain meaning and an originalist approach to its interpretation of the Second Amendment—the latter evidenced in its exhaustive historical review of that amendment.[386]

382. *See supra* Part II.B.
383. 128 S. Ct. 2783 (2008).
384. *Id*. at 2816, 2821–22.
385. *Id*. at 2788 (quoting United States v. Sprague, 282 U.S. 716, 731 (1931), and citing Gibbons v. Ogden, 9 Wheat. 1, 188 (1824)).
386. *See id*. at 2793–2801 (reviewing the meaning to the term *bear*, in relationship to *arms*, in view of those words' eighteenth-century historical and social context).

Second, the majority divided the Second Amendment into a prefatory clause—"[a] well-regulated Militia, being necessary to the security of a free State"—and an operative clause—"the right of the people to keep and bear Arms, shall not be infringed."[387] It then determined that, while the prefatory clause may "resolve an ambiguity in the operative clause, . . . [the] prefatory clause does not limit or expand the scope of the operative clause."[388] As such, the majority concluded that an equivalent phrasing of the Second Amendment could have been "Because a well regulated Militia is necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed."[389] Accordingly, the majority focused its textual analysis on the operative clause, returning to the prefatory clause only "to ensure that our reading of the operative clause is *consistent* with the announced purpose."[390] Thus, the Amendment's purpose did not limit the scope of the right but instead provided one reason for ensuring that right.

In contrast, in his dissent, Justice Stevens argued that the purpose of the Second Amendment—"to protect the right of the people of each of the several States to maintain a well-regulated militia"[391]—also defined the scope of the right. He noted,

> Neither the text of the Amendment nor the arguments advanced by its proponents evidenced the slightest interest in limiting any legislature's authority to regulate private civilian uses of firearms. Specifically, there is no indication that the Framers of the Amendment intended to enshrine the common-law right of self-defense in the Constitution.[392]

Justice Stevens thus would have pursued a more purpose-based approach to interpreting the Constitution.

Justice Breyer agreed "that the Second Amendment protects militia-related, not self-defense-related, interests."[393] In addition, he argued that governments still maintain the authority to regulate rights protected in the Constitution, so long as the regulations are reasonable.[394]

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387. *See id.* at 2789–91, 2799 (identifying and discussing the operative and prefatory clauses). For the relevant language, see U.S. CONST. amend. II.
388. *Heller*, 128 S. Ct. at 2789.
389. *Id*.
390. *Id*. at 2789–90 (emphasis added).
391. *Id*. at 2822 (Stevens, J., dissenting).
392. *Id*.
393. *Id*. at 2847 (Breyer, J., dissenting).
394. *See id*. (concluding that the "Amendment permits government to regulate the interests that it serves").

B. Separation of Powers in Favor of the Court: Habeas Corpus and the Court's Role in Protecting Detainees

In the same month that it decided *Heller*, the Supreme Court, in another 5–4 decision, asserted its role to protect the constitutional rights of detainees against congressional attempts to limit those rights. Prisoners held at Guantanamo Bay, Cuba were the subject of the Supreme Court's expositions on the constitutional role of judicial review in *Boumediene v. Bush*.[395] Justice Kennedy authored the majority opinion, joined by Justices Stevens, Souter, Ginsburg, and Breyer. Chief Justice Roberts, joined by Justices Scalia, Thomas, and Alito, dissented.

Boumediene involved Congress's authority to suspend the writ of habeas corpus. After the Supreme Court determined in *Hamdan v. Rumsfeld*[396] that the Detainee Treatment Act (DTA) of 2005 did not apply to pending habeas proceedings, Congress enacted the Military Commissions Act of 2006 (MCA).[397] Section 7 of the MCA amends 28 U.S.C. § 2241 and purports to strip the federal courts of jurisdiction over pending as well as future habeas petitions by or on behalf of alien Guantanamo detainees determined to be enemy combatants or awaiting such determination.[398] The *Boumediene* Court determined that the procedures for reviewing detainees' status in the DTA "are not an adequate and effective substitute for habeas corpus" and hence that § 7 of the MCA "operates as an unconstitutional suspension of the writ."[399]

The Court's opinion in *Boumediene* incorporated both a historical review of the role of habeas corpus and technical interpretations of both the statutes and the Constitution.[400] From an administrative law perspective, however, the most interesting parts of the opinion are the discussions of separation-of-powers principles.

First, the Supreme Court noted that the writ of habeas corpus is an essential component in the constitutional protection of individual liberty, a part of the Constitution's overall separation-of-powers scheme. "The Framers' inherent distrust of governmental power was the driving force behind that constitutional plan that allocated powers among three independent branches . . . . [T]he Framers considered the writ a vital instrument for the protection of individual liberty . . . ."[401] As a result, the

395. 128 S. Ct. 2229 (2008).
396. *See supra* notes 92–98 and accompanying text.
397. Military Commissions Act of 2006, Pub. L. No. 109-336, 120 Stat. 2600 (codified in scattered sections of 10 and 42 U.S.C.).
398. 28 U.S.C. § 2241(e) (2006).
399. *Boumediene*, 128 S. Ct. at 2240.
400. *Id*. at 2244–51.
401. *Id*. at 2246.

Constitution allowed Congress only limited grounds to suspend the writ, and the Court concluded that the Suspension Clause thus "ensures that, except during periods of formal suspension, the Judiciary will have the time-tested device, the writ, to maintain the 'delicate balance of governance' that is itself the surest safeguard of liberty."[402]

Second, the Supreme Court rejected the Government's formal interpretation of the extraterritorial application of the Constitution and hence the availability of the writ, in part on separation-of-powers grounds. Noting that "[t]he United States has maintained complete and uninterrupted control of [Guantanamo Bay] for over 100 years," the Court rejected the idea "that the Constitution had no effect there, at least to noncitizens, because the United States disclaimed sovereignty in the formal sense of the term."[403] In effect, the Government's argument proved too much:

> The necessary implication of the argument is that by surrendering formal sovereignty over any unincorporated territory to a third party, while at the same time entering into a lease that grants total control over the territory back to the United States, it would be possible for the political branches to govern without legal constraint.[404]

Such decisions, the Court determined, were not for the Executive Branch and Congress to make: "Our basic charter cannot be contracted away like this. The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply."[405] Moreover, "The test for determining the scope of [the Suspension Clause] must not be subject to manipulation by those whose power it is designed to restrain."[406] In particular, "Where a person is detained by executive order, rather than, say, after being tried and convicted in a court, the need for collateral review is most pressing."[407]

The majority, therefore, asserted the Court's duty to oversee and constrain the other branches of the federal government. The dissenters, in contrast, viewed the Court as over-enthusiastically striking down

> the most generous set of procedural protections ever afforded aliens detained by this country as enemy combatants . . . without bothering to say what due process rights the detainees possess, without explaining how the statute fails to vindicate those rights, and before a single petitioner has even attempted to avail himself of the law's operation.[408]

The dissenters would have been far more deferential to the political

402. *Id*. at 2247.
403. *Id*. at 2258.
404. *Id*. at 2258–59.
405. *Id*. at 2259.
406. *Id*.
407. *Id*. at 2269.
408. *Id*. at 2279 (Roberts, C.J., dissenting).

branches "amidst an ongoing military conflict," and perceived a different kind of separation-of-powers problem: "One cannot help but think, after surveying the modest practical results of the majority's ambitious opinion, that this decision is not really about the detainees at all, but about control of federal policy regarding enemy combatants."[409]

C. Separation of Powers Against the Court: Supreme Court Precedent and Congress's Amendments of Federal Statutes

Over the course of the first four years of the Roberts Court, several opinions suggest that when statutory construction connects to a particular kind of constitutional issue, the Court's treatment of the statute will skew toward that issue—toward protection of individuals when constitutional civil rights are at stake, toward recognition of state sovereignty when federalism concerns are raised, and toward congressional authority in the context of the Voting Rights Act's implementation of the Fifteenth Amendment. When specific constitutional connections did not immediately present themselves, however, the Roberts Court was overtly deferential to Congress regarding federal statutes and statutory amendments, even in the face of seemingly relevant Supreme Court precedents.

For example, the Age Discrimination in Employment Act of 1967 (ADEA)[410] was the subject of the Court's 5–4, June 2009 decision in *Gross v. FBL Financial Services, Inc.*[411] This case raised the issue of whether and how courts should engage in parallel interpretations of the ADEA and Title VII, addressing specifically whether a plaintiff in an ADEA case "must present direct evidence of age discrimination in order to obtain a mixed-motives jury instruction."[412] In an opinion by Justice Thomas, the majority concluded that, unlike in the case of Title VII, such an instruction is *never* appropriate under the ADEA.[413] Specifically, the Court concluded that "[b]ecause Title VII is materially different with respect to the relevant burden of persuasion, [the Court's Title VII] decisions do not control our construction of the ADEA."[414]

From a separation-of-powers perspective, *Gross* raised the issue of what happens when Congress "ratifies" a Supreme Court interpretation through amendments to one statute but does not similarly amend a related statute—here, respectively, Title VII and the ADEA. In the majority's view,

409. *Id*.
410. 29 U.S.C. §§ 621–634 (2006).
411. 129 S. Ct. 2343 (2009).
412. *Id*. at 2346.
413. *Id*.
414. *Id*. at 2348.

Congress's failure to amend both statutes eliminates the applicability of the Court's prior interpretation to the unamended statute.[415] As background, in *Price Waterhouse v. Hopkins*,[416] a splintered Supreme Court determined that in a Title VII case, the burden of persuasion shifts to the employer after a plaintiff shows that discrimination was a "motivating" or "substantial" factor in the employer's decision.[417]

The *Gross* Court noted that "Congress has since amended Title VII by explicitly authorizing discrimination claims in which an improper consideration was 'a motivating factor' for an adverse employment decision,"[418] but Congress did not similarly amend the ADEA. As a result, the majority refused to "import" its Title VII jurisprudence into the ADEA, because "[u]nlike Title VII, the ADEA's text does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor. Moreover, Congress neglected to add such a provision to the ADEA when it amended Title VII . . . even though it contemporaneously amended the ADEA in several ways . . . ."[419] It emphasized that "[w]e cannot ignore Congress' decision to amend Title VII's relevant provisions but not make similar changes to the ADEA. When Congress amends one statutory provision but not another, it is presumed to have acted intentionally."[420] As a result, the Court's Title VII jurisprudence is not relevant to the ADEA,[421] and the Court held that an ADEA plaintiff "must prove, by a preponderance of the evidence, that age was the 'but-for' cause of the challenged adverse employment action. The burden of persuasion does not shift to the employer . . . ."[422]

Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, dissented. They noted that the ADEA "makes it unlawful for an employer to discriminate against any employee 'because of' that individual's age" and that "[t]he most natural reading of this statutory text prohibits adverse employment actions motivated in whole or in part by the age of the employee."[423] Noting that the Supreme Court had rejected the majority's "but for" causation test for Title VII in 1991, the dissenters also emphasized that the fact that

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415. *Id*. at 2349.
416. 490 U.S. 228 (1989).
417. *Id*. at 249, 258.
418. 129 S. Ct. at 2349 (quoting 42 U.S.C. § 2000e-2(m) (2006)).
419. *Id.* (quoting Fed. Express Corp. v. Holowecki, 128 S. Ct. 1147, 1153 (2008), and citing Civil Rights Act of 1991, Pub. L. No. 102-166, §§ 115, 302, 105 Stat. 1079, 1088 (1991)).
420. *Id*. (citing EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 256 (1991)).
421. *Id*.
422. *Id*. at 2352.
423. *Id*. at 2353 (Stevens, J., dissenting).

> the Court is construing the ADEA rather than Title VII does not justify this departure from precedent. The relevant language in the two statutes is identical, and we have long recognized that our interpretations of Title VII's language apply "with equal force in the context of age discrimination, for the substantive provisions of the ADEA 'were derived *in haec verba* from Title VII.'"[424]

The 1991 amendments to Title VII had no bearing on these pre-amendment interpretations: "*Price Waterhouse*'s construction of 'because of' remains the governing law for ADEA claims."[425] Indeed, "the fact that Congress endorsed this Court's interpretation of the 'because of' language in *Price Waterhouse* (even as it rejected the employer's affirmative defense to liability) provides all the more reason to adhere to that decision's motivating-factor test."[426]

Nevertheless, the Supreme Court's deference to Congress's amendments is not universal. For example, in *Forest Grove School District v. T.A.*,[427] in an opinion by Justice Stevens, the Court held 6–3 that the Individuals with Disabilities Education Act (IDEA)[428] continues to allow for reimbursement of private-school education costs even if the child did not previously receive special education services from the school district. The majority reached this decision despite the fact that Congress amended IDEA in 1997 to add "clause (ii)," which states that a "court or hearing officer may require [a public agency] to reimburse the parents for the cost of [private school] enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available" and the child has "previously received special education and related services under the authority of [the] public agency."[429] The Court instead maintained the continuing vitality of its own decision in *School Committee v. Department of Education*, which allowed courts to require reimbursement of private education.[430]

In *Forest Grove*, the Forest Grove School District failed to acknowledge the severity of plaintiff–student's attention deficit hyperactivity disorder (ADHD), concluding instead that he did not qualify for special education services, and hence it did not provide him with any individualized education program (IEP) or other services, as IDEA requires. The student's parents enrolled him in private school for his senior year. In the resulting administrative hearing, the hearing officer found that the student's

424. *Id*. at 2354 (quoting Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985) (quoting Lorillard v. Pons, 434 U.S. 575, 584 (1978))).
425. *Id*. at 2356 (Stevens, J., dissenting).
426. *Id*.
427. 129 S. Ct. 2484 (2009).
428. 20 U.S.C. §§ 1400–1482 (2006).
429. 20 U.S.C. § 1412(a)(10)(C)(ii) (2006).
430. 471 U.S. 359, 370 (1985).

ADHD adversely affected his educational performance, that the school district violated IDEA in not providing special education services, and that the district had to reimburse the parents for the costs of private school. On appeal, the district court set aside the award, finding that the 1997 amendments to IDEA categorically bar reimbursement awards if the student did not previously receive special education services. The U.S. Court of Appeals for the Ninth Circuit reversed and remanded, finding that no categorical bar on reimbursement existed but requiring a reexamination of the equities.[431]

The Supreme Court affirmed the Ninth Circuit. It first noted that, in its own cases interpreting IDEA, the Court had determined that reimbursement of private-school costs could be an appropriate remedy for IDEA violations.[432] The specific factual situation of the student was largely irrelevant in those cases

> because our analysis in the earlier cases depended on the language and purpose of the Act and not the particular facts involved. Moreover, . . . a school district's failure to propose an IEP of any kind is at least as serious a violation of its responsibilities under IDEA as a failure to provide an adequate IEP.[433]

Thus, unless in the 1997 amendments Congress expressed a clear intent to eliminate reimbursement as a remedy, the background case law allowed it.[434]

The majority found no such clear intent. It emphasized that in the 1997 amendment, Congress intended to do more "to guarantee children with disabilities adequate access to appropriate services."[435] The Court concluded that because clause (ii) "is phrased permissively, stating only that courts 'may require' reimbursement in those circumstances, it does not foreclose reimbursement awards in other circumstances."[436] In the general context of IDEA, moreover,

> clause (ii) is best read as elaborating on the general rule that courts may order reimbursement when a school district fails to provide a [free appropriate public education] by listing factors that may affect a reimbursement award in the common situation in which a school district has provided a child with some special-education services and the child's parents believe those services are inadequate.[437]

This reading is also "necessary to avoid the conclusion that Congress

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431. *See Forest Grove*, 129 S. Ct. at 2489–90 (discussing the lower courts' decisions).
432. *Id.* at 2490–92 (emphasizing Sch. Comm. v. Dep't of Educ., 471 U.S. 359 (1985) and Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 (1993)).
433. *Id*. at 2491.
434. *Id*. at 2492.
435. *Id*. at 2491.
436. *Id*. at 2493.
437. *Id*.

abrogated *sub silentio*" prior Supreme Court decisions on the same issue, like *Burlington*.[438] Finally, "A reading of the Act that left parents without an adequate remedy when a school district unreasonably failed to identify a child with disabilities would not comport with Congress' acknowledgment of the paramount importance of properly identifying each child eligible for services."[439]

The majority thus required Congress to be clear if it intended to abrogate prior Supreme Court decisions, an approach to interactions between Congress and the Supreme Court over statutes arguably at odds with the Court's construction of the ADEA in *Gross*. Justice Souter, joined by Justices Scalia and Thomas in dissent, made this point. Specifically, they argued that Congress superseded *Burlington* in the 1997 amendments to IDEA, that "the assessment of congressional policy aims falls short of trumping" the plain meaning of clause (ii), and that the majority improperly imposed "a heightened standard before Congress can alter a prior judicial interpretation of a statute."[440] According to the dissenters, the majority's "clear statement rule" misstated the law. "If Congress does not suggest otherwise, reenacted statutory language retains its old meaning; but when a new enactment includes language undermining the prior reading, there is no presumption favoring the old, and the only course open is simply to read the revised statute as a whole."[441]

D. The Supreme Court and Federal Agencies: The Basics of the Federal Administrative Procedure Act

A key aspect of the Supreme Court's role in administrative law is its interpretation of the APA[442] and its use of the APA as a gap filler for other administrative law purposes. The Roberts Court has already engaged in several such interpretations, most in the context of "arbitrary and capricious" review of federal agency actions.

1. The IDEA's Burden of Proof

Section 556(d) of the APA puts the burden of proof in formal adjudications on "the proponent of a rule or order," regardless of whether that proponent is the plaintiff or the defendant.[443] As a result, it is usually the agency that bears the burden of proof in such adjudications.

438. *Id*. at 2493–94.
439. *Id*. at 2495.
440. *Id*. at 2498 (Souter, J., dissenting).
441. *Id*. at 2501.
442. 5 U.S.C. §§ 551–559, 701–706 (2006).
443. *Id.* § 556(d).

Nevertheless, in its November 2005 decision in *Schaffer v. Weast*,[444] the Supreme Court determined 6–2 (new Chief Justice Roberts took no part in the decision) that, in administrative "due process" hearings pursuant to IDEA,[445] the parent of a child with disabilities has the burden of persuasion when challenging a school district's IEP for that child.[446] This decision fills a gap in IDEA's otherwise fairly specific requirements for such "due process" hearings.[447] The majority's opinion by Justice O'Connor affirmed the divided U.S. Court of Appeals for the Fourth Circuit's assignation of the burden of persuasion to parents, despite the district court's conclusion that the burden of proof more properly belonged with the school district.[448]

Because "[t]he plain text of IDEA is silent on the allocation of the burden of persuasion," the Supreme Court majority "beg[a]n with the ordinary default rule that plaintiffs bear the risk of failing to prove their claims."[449] Interestingly, the majority cited § 556(d) as evidence of Congress's broad adoption of this ordinary default rule,[450] although more faithful application of the APA in this IDEA case would place the burden of proof on the proponent of the challenged IED, i.e., on the school district.

Nevertheless, the Court concluded, "Absent some reason to believe that Congress intended otherwise . . . the burden of persuasion lies where it usually falls, upon the party seeking relief."[451] It rejected plaintiffs' argument that placing the burden of proof on the school district would provide a procedural safeguard that would help to ensure that school districts effectuated IDEA's purpose of providing appropriate education to all disabled students. Instead, characterizing the plaintiffs' argument as "in effect ask[ing] this Court to assume that every IEP is invalid until the school district demonstrates that it is not," the Court cited to financial considerations and IDEA's "stay-put" provision, under which students remain in their current placements during the IEP "due process" hearing, as evidence that the normal default rule was the better approach.[452] In addition, the Court explained, "Congress appears to have presumed instead that, if the Act's procedural requirements are respected, parents will prevail when they have legitimate grievances."[453]

The Court was less dismissive of the plaintiffs' argument that school

444. 546 U.S. 49 (2005).
445. 20 U.S.C. §§ 1400–1482 (2006).
446. *Schaffer*, 546 U.S. at 51.
447. *See id*. at 53–54 (discussing the procedural requirements in 20 U.S.C. § 1415).
448. *See id*. at 55 (recounting the procedural history of the case).
449. *Id*. at 56.
450. *Id*. at 57.
451. *Id*. at 57–58.
452. *Id*. at 59.
453. *Id*. at 60.

districts should bear the burden of proof based on the school districts' greater access to the relevant information.[454] However, although it acknowledged that "[s]chool districts have a 'natural advantage' in information and expertise," the majority again concluded that Congress's procedural safeguards in IDEA were sufficient to resolve the disparity.[455] Specifically, the Court noted that "IDEA hearings are deliberately informal and intended to give ALJs the flexibility that they need to ensure that each side can fairly present its evidence," and the statute guarantees parents access to the school district's information.[456] Thus, the Court found that "[t]he burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief."[457]

In deciding *Schaffer*, the Supreme Court majority relied on *federal* law to reach its decision, assuming without explanation that federal law dictates the procedures used to adjudicate rights created by federal statute, despite the fact that *state* and *local* officials conduct the IDEA IEP "due process" hearings, and despite the majority's acknowledgement that IDEA is based on cooperative federalism.[458] Justice Breyer dissented specifically to argue that because Congress "did not decide the 'burden of persuasion' question," it instead "left the matter to the States for decision."[459] Because Maryland had state rules of administrative procedure in place at the time of the IEP hearing, Justice Breyer would have remanded to the state ALJ for a determination of how *state* law would have resolved the burden of persuasion issue.[460] The *Schaffer* decision thus raises a converse-*Erie* issue that increasingly arises in federal administrative schemes that are based on federal delegations of programs to state governments: to what extent must federal procedural requirements accompany state implementation of federal programs?[461]

2. Arbitrary and Capricious Review

The APA allows the federal courts to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary,

454. *Id*. at 60–61.
455. *Id*.
456. *Id*. at 61.
457. *Id.* at 62.
458. *Id*. at 52, 61–62.
459. *Id*. at 69 (Breyer, J., dissenting).
460. *See id*. at 71 (arguing such respect for the state's right to decide this procedural matter is consistent with the cooperative federalism approach).
461. *See, e.g.*, Legal Envtl. Assistance Found., Inc. v. EPA, 400 F.3d 1278, 1280–81 (11th Cir. 2005) (challenging the EPA's delegation of Clean Air Act permitting programs to Florida and Alabama on the grounds that the state requirements for standing would not match the federal requirements).

capricious, an abuse of discretion, or otherwise not in accordance with law."[462] Arbitrary and capricious review is by nature deferential to federal agencies. As the Supreme Court explained in its classic formulation of this standard of review:

> The scope of review under the "arbitrary and capricious" standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made." . . . Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[463]

In its decisions employing arbitrary and capricious review since the 2005–2006 Term began, the Supreme Court was deferential to the federal agency in two cases but reversed the federal agency in one. The reversal came in the first of the three cases, the Supreme Court's April 2007 decision in *Massachusetts v. EPA*.[464] Two of the most interesting aspects of the Court's interpretation of the federal Clean Air Act[465] in this case were the explicit debate over when and whether statutory terms are ambiguous and the implied debate over the relative roles of *Chevron* deference and arbitrary and capricious review.

In *Massachusetts v. EPA*,[466] the EPA denied a rulemaking petition to regulate greenhouse gas emissions from motor vehicles pursuant to § 202 of the Clean Air Act, which requires the EPA Administrator to "prescribe . . . standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare."[467] The EPA denied the petition on primarily two grounds. First, relying on *FDA v. Brown & Williamson Tobacco Corp.*,[468] the EPA concluded that, given Congress's many other statutes addressing climate change and its awareness of the issue during amendments of the Clean Air Act,

462. 5 U.S.C. § 706(2)(A) (2006).

463. Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)).

464. 549 U.S. 497 (2007); *see also* discussion *supra* notes 20–41 and accompanying text (discussing the standing issue in this case).

465. 42 U.S.C. §§ 7401–7671q (2006).

466. 549 U.S. 497.

467. 42 U.S.C. § 7521(a)(1).

468. 529 U.S. 120 (2000).

Congress's decision not to explicitly address climate change in the Clean Air Act meant that greenhouse gases were not "air pollutants" within the EPA's authority to regulate.[469] Second, the EPA concluded that, for policy reasons and in deference to the Bush Administration's other programs for addressing climate change, it would refuse to regulate greenhouse gases under the Clean Air Act even if it did have the authority to do so.[470]

Writing for the five-Justice majority, Justice Stevens rejected both rationales. First, the majority concluded that the Clean Air Act's arbitrary and capricious standard of review[471] applied in this case, although it also noted the potential role of *Chevron* deference.[472] Second, the majority used the plain meaning of the Act's definition of *air pollutant*—"*any* air pollution agent or combination of such agents, including *any* physical, chemical . . . substance or matter which is emitted into or otherwise enters the ambient air"[473]—to conclude that "[t]he statute is unambiguous" and "embraces all airborne compounds of whatever stripe, and underscores that intent through the repeated use of the word 'any.'"[474] As a result, the Clean Air Act's definition of *air pollutant* includes greenhouse gases. Third, the majority concluded that regulation of greenhouse gases through the Clean Air Act differed in two significant respects from the attempted regulation of tobacco pursuant to the Food, Drug, and Cosmetic Act (FDCA) that was at issue in *Brown & Williamson*: first, the FDA would have had to ban tobacco under the FDCA, which clashed with common sense, while the EPA would only have to regulate greenhouse gases under the Clean Air Act; and second, no congressional action regarding climate change actually conflicted with the EPA's regulation of greenhouse gases.[475] As a result, the Court concluded that the EPA had proper regulatory authority.

Finally, the majority used a standard arbitrary and capricious analysis to conclude that the EPA's refusal to regulate was invalid. According to the majority,

> Under the clear terms of the Clean Air Act, EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it

469. *See* Massachusetts v. EPA, 549 U.S. at 511–13 (noting that the EPA concluded that if it were to regulate emissions through increased fuel economy, its regulatory authority would be superfluous to the Department of Transportation's existing authority to regulate emissions).

470. *Id*. at 513.

471. 42 U.S.C. § 7607(d)(9)(A) (2006).

472. Massachusetts v. EPA, 549 U.S. at 527–28.

473. 42 U.S.C. § 7602(g).

474. Massachusetts v. EPA, 549 U.S. at 529.

475. *See id*. at 530–31 (distinguishing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000)).

cannot or will not exercise its discretion to determine whether they do.[476]

Because the EPA's explanation addressed policy issues rather than these statutory factors, that explanation was arbitrary and capricious and the EPA's decision had to be reversed.[477] However, the majority declined to conclude that the EPA was bound to make an endangerment finding on remand.

In an opinion by Justice Scalia, the four dissenting Justices would have accorded the EPA far more discretion and decided the case entirely on the basis of *Chevron* deference. Specifically, the dissenters would have deferred to the EPA's interpretation of the "in his judgment" language in § 202 and allowed the EPA to assess the decision to regulate in terms of policy as well as potential endangerment;[478] would have considered the term *air pollutant* to be ambiguous;[479] and would have focused more on the term *air pollution*, which is not defined in the Clean Air Act, to accord *Chevron* deference to the EPA's conclusion that climate change is not air pollution for purposes of the Clean Air Act.[480]

The majority's opinion in *Massachusetts v. EPA* suggests that the Supreme Court regards basic issues regarding the scope of a federal agency's regulatory authority to be a proper matter for judicial resolution, with less deference to the agency's own views. After all, Congress does not—and probably cannot, under the nondelegation doctrine[481]—delegate to the agency the authority to definitively interpret the scope of its own regulatory authority. In contrast, when a federal agency actually implements statutory authority given to it by Congress the Court tends to be more deferential.

Thus, for example, the Supreme Court's June 2007 decision in *National Ass'n of Home Builders v. Defenders of Wildlife*[482] upheld the EPA's approval of Arizona's state permitting program under the federal Clean Water Act.[483] In approving Arizona's permit program under that statute, the EPA had to decide whether it was bound to comply with the federal Endangered Species Act's (ESA's) federal agency consultation

476. *Id*. at 533.

477. *See id.* at 533–34 (noting that although the Court has "neither the expertise nor the authority to evaluate [EPA's] policy judgments" against regulating greenhouse gases, "it is evident they have nothing to do with whether greenhouse gas emissions contribute to climate change").

478. *Id*. at 552–53 (Scalia, J., dissenting).

479. *Id*. at 555–58.

480. *Id*. at 558–60.

481. *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 371–72 (1989) (noting that the doctrine is rooted in the principle of separation of powers and "mandate[s] that Congress generally cannot delegate its legislative power to another Branch").

482. 551 U.S. 644 (2007).

483. 33 U.S.C. §§ 1251–1387 (2006).

requirements[484] as well as to assess the criteria for state delegations in the Clean Water Act.[485] In a 5–4 decision authored by Justice Alito, the Supreme Court held that the EPA correctly approved the delegation to Arizona under only the Clean Water Act criteria.[486]

The Court first determined whether the EPA's decision to approve the delegation to Arizona was arbitrary and capricious, on grounds that the EPA and the U.S. Fish and Wildlife Service "'relied . . . on legally contradictory positions regarding [their ESA] obligations,'" rendering the decision "internally inconsistent."[487] The Court noted that the proper response to an arbitrary and capricious finding was to remand the matter to the agency.[488] It then emphasized the deferential nature of the arbitrary and capricious standard of review,[489] concluding that the agencies, and especially the EPA, did *not* act arbitrarily or capriciously because (1) the inconsistencies arose in the early stages of consideration, not in the EPA's final decision; (2) although the EPA's final *Federal Register* statement indicating that it completed the ESA consultation process appeared to conflict with its overall legal position that the ESA consultation requirement was not triggered, "the question whether that consultation had been *required*, as opposed to voluntarily undertaken by the Agency, was simply not germane to the final agency transfer decision"; and (3) the EPA gave the challengers sufficient opportunity to participate in the process during the comment period.[490]

Next, the Supreme Court addressed how to reconcile the two statutory commands: the Clean Water Act's command that the EPA "shall approve" a permit program delegation to a state when the state meets several enumerated criteria, none of which involve the ESA; and the ESA's command that federal agencies shall consult with the U.S. Fish and Wildlife Service when their actions could affect listed species. Although Congress enacted the ESA after the Clean Water Act, the Court stressed that "'repeals by implication are not favored.'"[491] Characterizing the application of the ESA's consultation requirement to the Clean Water Act's

484. *See* 16 U.S.C. § 1536(a)(2) (2006) ("Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by the such agency . . . is not likely to jeopardize the continued existence of any endangered species . . . .").

485. *See* 33 U.S.C. § 1342(b) (providing that states may establish their own regulatory scheme for discharges into navigable waters).

486. *Nat'l Ass'n of Home Builders*, 551 U.S. at 649–50.

487. *Id.* at 657–58 (quoting Defenders of Wildlife v. EPA, 420 F.3d 946, 959 (9th Cir. 2005)).

488. *Id*. at 657.

489. *Id*. at 658.

490. *Id*. at 658–60.

491. *Id*. at 662 (quoting Watt v. Alaska, 451 U.S. 259, 267 (1981)).

delegation process as an "implicit repeal" of the Clean Water Act,[492] the Court instead deferred to the U.S. Fish and Wildlife Service and National Marine Fisheries Service's regulatory interpretation of the consultation requirement. According to the majority, this interpretation—which, the Court stressed, the agencies issued "following notice-and-comment rulemaking procedures"—indicates that the ESA consultation requirement applies only to discretionary agency actions.[493] Moreover, the Court upheld the agencies' interpretation under a *Chevron* analysis because it harmonized the two statutes and resolved "a fundamental ambiguity" regarding how to read the ESA's requirements against the backdrop of other statutory commands in a reasonable way.[494]

Finally, having accepted that the ESA's consultation requirement applied only to discretionary agency actions, the Supreme Court concluded that the EPA had no discretion to deny Arizona's request for delegation of the Clean Water Act permit program. Specifically, the Court noted, "Nothing in the text of [the Clean Water Act] authorizes the EPA to consider the protection of threatened or endangered species as an end in itself when evaluating a transfer application."[495]

Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, dissented. The dissenters stressed that the Supreme Court's primary duty in cases with competing statutory mandates is "to give full effect to both if at all possible."[496] The dissenters then argued that

> [t]he Court fails at this task. Its opinion unsuccessfully tries to reconcile the [Clean Water Act] and the ESA by relying on a federal regulation, which it reads as limiting the reach of [the ESA consultation requirement] to *only* discretionary federal actions. Not only is this reading inconsistent with the text and history of [the regulation], but it is fundamentally inconsistent with the ESA itself.[497]

The dissenters argued "that EPA's decision was arbitrary and capricious under the Administrative Procedure Act and would remand to the Agency for further proceedings consistent with this opinion."[498]

The Supreme Court's third arbitrary and capricious review case came in 2009 and involved indecency in broadcasting. Federal statutes prohibit the

492. *Id*. at 664.
493. *Id*. at 664–65 (quoting 50 C.F.R. § 402.03 (2006)).
494. *See id*. at 665–69 (noting that when read against the backdrop of other statutory mandates the ESA would "implicitly abrogate or repeal," the ESA leaves a "fundamental ambiguity that is not resolved by the statutory text").
495. *Id*. at 671.
496. *Id*. at 673 (Stevens, J., dissenting) (citing Morton v. Mancari, 417 U.S. 535, 551 (1974)).
497. *Id*. at 674 (citations omitted).
498. *Id*. at 695 (citation omitted).

broadcasting of "any . . . indecent . . . language,"[499] which the Supreme Court previously had concluded includes expletives of a sexual or excretory nature.[500] The Federal Communications Commission (FCC) enforces this prohibition in connection with its licensing authority under the Communications Act of 1934 and the Public Telecommunications Act of 1992.[501]

Until 2006, the FCC had a policy of not taking enforcement actions against broadcasters who broadcast a single "fleeting expletive"—generally, an unscripted exclamation during live broadcasts. In March 2006, however, the FCC issued an enforcement order against Fox Television Stations and its affiliates in response to its broadcasts of two fleeting expletives—one by the singer Cher during the 2002 Billboard Music Awards, and the other by the celebrity Nicole Richie during the 2003 Billboard Music Awards. After challenges and a remand to more fully hear the parties' objections, the FCC upheld its indecency findings.[502] On appeal, the U.S. Court of Appeals for the Second Circuit reversed the order, finding the FCC's reasoning arbitrary and capricious under the APA, in part because the Second Circuit concluded that the FCC had not adequately explained its change in enforcement policies and in part because it feared that the FCC's enforcement policy would violate that First Amendment, although the Second Circuit did not reach the constitutional issue.[503]

In its 5–4 decision in *FCC v. Fox Television Stations, Inc.*[504] by Justice Scalia, the Supreme Court reversed, concluding that the FCC was not arbitrary and capricious in its enforcement order.[505] The majority began by noting that the arbitrary and capricious standard is a "'narrow' standard of review" that requires an agency to "'examine the relevant data and articulate a satisfactory explanation for its action.'"[506] Moreover, "'a court is not to substitute its judgment for that of the agency,' and should 'uphold

499. 18 U.S.C. § 1464 (2006).

500. *See* FCC v. Pacifica Found., 438 U.S. 726, 739–40 (1978) (holding that the plain language of the statute did not support Pacifica's argument that sexual or excretory references were not indecent within the meaning of the statute).

501. *See* 47 U.S.C. § 303 (2006) (listing powers and duties of the Commission); 47 U.S.C. § 309(k) (2006) (setting out broadcast station renewal procedures); 47 U.S.C. § 312(a)(6) (2006) (establishing administrative sanctions); 47 U.S.C. § 503(b)(1) (2006) (noting activities constituting violations authorizing forfeiture penalties).

502. *See* FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1808–09 (2009) (giving the background of the case).

503. *See id.* at 1809–10 (explaining the lower court's decision).

504. 129 S. Ct. 1800.

505. *See id.* at 1814 (holding specifically that "[t]he agency's decision to retain some discretion does not render arbitrary or capricious" its enforcement order).

506. *Id.* at 1810 (quoting Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)).

a decision of less than ideal clarity if the agency's path may reasonably be discerned.'"[507]

Most significantly, the majority announced that there is no heightened APA review for decisions involving a change in agency position.[508] The Court noted that it found "no basis in the Administrative Procedure Act or in our opinions for a requirement that all agency change be subjected to more searching review. The Act mentions no such heightened standard."[509] Further, the Court's earlier opinions "neither held nor implied that every agency action representing a policy change must be justified by reasons more substantial than those required to adopt a policy in the first instance";[510] indeed, "The statute makes no distinction . . . between initial agency action and subsequent agency action undoing or revising that action."[511]

The Court did provide some caveats, however. First, "the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position."[512] Second, agencies cannot ignore valid regulations still in effect.[513] Finally,

> the agency must show that there are good reasons for the new policy. But it need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates.[514]

The Court also determined that constitutional avoidance does not demand heightened review in cases where constitutional rights are implicated. As the Court explained, "The so-called canon of constitutional avoidance is an interpretive tool, counseling that ambiguous statutory language be construed to avoid serious constitutional doubts. We know of no precedent for applying it to limit the scope of authorized executive action."[515] Instead, if the agency's authorized action is unconstitutional, the court can set it aside under the APA as "unlawful."[516]

Under these rules, the FCC's enforcement actions were not arbitrary and capricious. First, the FCC openly acknowledged that its decision that the

507. *Id*. (quoting Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281, 286 (1974)) (citation omitted).
508. *Id*. at 1810–11.
509. *Id*. at 1810.
510. *Id*.
511. *Id*. at 1811.
512. *Id*.
513. *Id*.
514. *Id*. (emphases in original).
515. *Id*. at 1811–12 (citation omitted).
516. *Id*. at 1812.

fleeting expletives at issue warranted enforcement broke new ground—in fact, it declined to assess penalties in recognition of that fact.[517] Second, "the agency's reasons for expanding the scope of its enforcement activity were entirely rational," given that it carefully explained how both literal and nonliteral uses of sexual and scatological expletives could be offensive and indecent, it declined to create safe harbors in the past, and new technologies made it much "easier for broadcasters to bleep out offending words."[518] Empirical evidence regarding the impact of fleeting expletives was not required,[519] and the FCC's retention of discretion to regard fleeting expletives as indecent in some contexts—music award shows likely to draw many children viewers—while not in others—*Saving Private Ryan*—did not render the enforcement policy arbitrary and capricious.[520] Finally, the majority found entirely logical the FCC's conclusion that a per se exemption for fleeting expletives would likely increase the number of fleeting expletives broadcast during prime-time television.[521]

Justice Kennedy concurred to suggest that agencies might in fact have to provide more-detailed explanations of changes in policies in some circumstances. He noted, "The question whether a change in policy requires an agency to provide a more-reasoned explanation than when the original policy was first announced is not susceptible, in my view, to an answer that applies in all cases."[522] Instead, he explained,

> The question in each case is whether the agency's reasons for the change, when viewed in light of the data available to it, and when informed by the experience and expertise of the agency, suffice to demonstrate that the new policy rests upon principles that are rational, neutral, and in accord with the agency's proper understanding of its authority.[523]

Justice Breyer, in a dissent joined by Justices Stevens, Souter, and Ginsburg, argued that the FCC failed to adequately explain why it changed its enforcement policy with respect to fleeting expletives.[524] Regarding the arbitrary and capricious standard itself, the dissenters emphasized that the "law grants those in charge of independent administrative agencies broad authority to determine relevant policy. But it does not permit them to make policy choices for purely political reasons nor to rest them primarily upon

517. *Id*. at 1812.
518. *Id*. at 1812–13.
519. *See id*. at 1813 (noting the moral difficulty of conducting such a study).
520. *Id*. at 1814.
521. *See id*. (arguing that although the court of appeals found such an argument unconvincing, the lack of evidence or date renders the agency's expert predictive judgment persuasive).
522. *Id*. at 1822–23 (Kennedy, J., concurring).
523. *Id*. at 1823.
524. *Id*. at 1829 (Breyer, J., dissenting).

unexplained policy preferences."[525] The arbitrary and capricious standard, in turn, "helps assure agency decisionmaking based upon more than the personal preferences of the decisionmakers" and makes it clear that agency discretion is not unlimited.[526] The standard requires that agencies engage in "a process of learning through reasoned argument," "follow a 'logical and rational' decisionmaking 'process,'" "act consistently," and "follow its own rules."[527] In addition, "when an agency seeks to change those rules, it must focus on the fact of change and explain the basis for that change," which "requires the agency to answer the question, 'Why did you change?'" with "a more complete explanation than would prove satisfactory were change itself not at issue."[528]

Substantively, the dissenters argued that the FCC failed to discuss two important factors. "First, the FCC said next to nothing about the relation between the change it made in its prior 'fleeting expletive' policy and the First-Amendment-related need to avoid 'censorship,' a matter as closely related to broadcasting regulation as is health to that of the environment."[529] "Second, the FCC failed to consider the potential impact of its new policy upon local broadcasting coverage."[530] As a result, the dissenters concluded that the FCC was arbitrary and capricious in its enforcement order.[531]

E. The Supreme Court and Federal Agencies: Statutory Interpretation and Chevron *Deference in the Absence of Federal Court Precedent*

The Roberts Court acknowledged that, in the absence of agency interpretation, the Supreme Court remains the final arbiter of statutory meaning. This Supreme Court role is most common in federal criminal law. As one example, in its April 2008 decision in *Burgess v. United States*,[532] a unanimous Supreme Court, in an opinion by Justice Ginsburg, construed the meaning of *felony drug offense* in the Controlled Substances Act[533] for purposes of determining whether a criminal defendant's sentence should be doubled. Specifically, the Court addressed the interpretive issue of whether the Act's definition of *felony* in § 802(13)—an "offense

525. *Id.*
526. *Id*. at 1830.
527. *Id*.
528. *Id*.
529. *Id*. at 1833.
530. *Id.* at 1835.
531. *See id*. at 1840–41 (concluding that the FCC's change in policy leaves critical matters unaddressed).
532. 128 S. Ct. 1572 (2008).
533. *See* 21 U.S.C. § 841(b)(1)(A) (2006) (prescribing penalties for controlled-substances offenses).

classified by applicable Federal or State law as a felony"—limited the Act's definition of *felony drug offense* in § 802(44), which otherwise defines such offenses as certain drug crimes that are "punishable by imprisonment for more than one year."[534] The Court held that the term "'felony drug offense' . . . is defined exclusively by § 802(44) and does not incorporate § 802(13)'s definition of 'felony.' A state drug offense punishable by more than one year therefore qualifies as a 'felony drug offense,' even if state law classifies the offense as a misdemeanor."[535]

Similarly, in *United States v. Santos*,[536] the Court addressed the issue of whether *proceeds* in the federal money-laundering statute[537] means "receipts" or "profits." An unusual alignment of five Justices—Justices Scalia, Souter, Ginsburg, Thomas, and Stevens—agreed that the defendant was entitled to postconviction relief. Justice Scalia's plurality concluded that because "[t]he federal money-laundering statute does not define 'proceeds' . . . we give it its ordinary meaning."[538] However, after consulting the *Oxford English Dictionary*, *Random House Dictionary of the English Language*, and *Webster's New International Dictionary*, the plurality concluded, "'Proceeds' can mean either 'receipts' or 'profits.' Both meanings are accepted, and have long been accepted, in ordinary usage."[539] Moreover, the plurality concluded that the term *proceeds* "has not acquired a common meaning in the provisions of the Federal Criminal Code."[540] As a result, the rule of lenity applied, entitling the defendant to relief.[541] However, the rule of lenity also carries interpretive force with it: "Because the 'profits' definition of 'proceeds' is always more defendant-friendly than the 'receipts' definition, the rule of lenity dictates that it should be adopted."[542]

More importantly for this discussion, in his concurrence, Justice Stevens emphasized, "When Congress fails to define potentially ambiguous statutory terms, it effectively delegates to federal judges the task of filling gaps in a statute."[543] However, he also recognized "that the same word can have different meanings in the same statute" and hence disagreed with Justice Alito that the Court must pick one meaning for the term

534. *Burgess*, 128 S. Ct. at 1577.
535. *Id.* at 1575.
536. 128 S. Ct. 2020 (2008).
537. *See* 18 U.S.C. § 1956(a)(1) (2006) (defining the offense of "laundering of monetary instruments").
538. *Santos*, 128 S. Ct. at 2024.
539. *Id*.
540. *Id*.
541. *See id.* at 2025 ("The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them.").
542. *Id*.
543. *Id*. at 2031 (Stevens, J., concurring).

proceeds.[544] In addition, Justice Stevens disagreed with Justice Alito's conclusion that the statute's legislative history required *proceeds* to mean "gross receipts."[545] As a result, "the rule of lenity may weigh in the determination," and he concurred in the judgment.[546]

Outside of criminal law, the Supreme Court often confronts statutory interpretation with an intervening interpretation by an administrative agency. In contrast to the Court's assertion of its role in constitutional interpretation in *Heller*, its willingness to stand up to Congress in *Boumediene*, and its acceptance of its role as primary statutory interpreter in federal criminal law, the Court displays a consistent tendency to set aside its own role in statutory interpretation in favor of executive agencies. The most common vehicle for this view of relative institutional competence is the doctrine of *Chevron* deference.

1. Overview of Chevron *Deference*

The Supreme Court created the two-step review of agency interpretations of the statutes they administer in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[547] which involved a rather technical interpretation of the Clean Air Act. In applying *Chevron*, federal courts first ask whether the statutory provision at issue is clear and covers the facts at hand, or, in contrast, whether Congress left an ambiguity or gap in the statutory regime for the agency to resolve.[548] If the statute is clear, that ends the matter, and the court follows the express will of Congress.[549] However, if there is an ambiguity or gap, the federal court proceeds to the second step in the analysis, asking whether the agency's interpretation is reasonable.[550]

Federal agencies rarely fail this second step, so the Court's statutory interpretation methodology in step one of the *Chevron* analysis is critical. Thus, one aspect of the evolution of *Chevron* deference—and the Court's approach to statutory interpretation in general—has been the continuing debate among the Justices regarding the proper methodology for statutory interpretation. This debate is most evident around the role of legislative and statutory history in statutory interpretation, with Justice Stevens generally leading those Justices who will look at the full history of a

544. *Id*. at 2032.
545. *Id*.
546. *Id*. at 2033–34.
547. 467 U.S. 837 (1984).
548. *Id*. at 842–43.
549. *Id*.
550. *See id*. at 843–44 (noting additionally that such gaps represent implicit delegations of authority by Congress for the agency to elucidate upon).

statute, including congressional reports and debates, in order to effectuate Congress's purpose. In contrast, Justice Scalia usually argues for a strict "plain meaning" approach to statutory interpretation that resists looking beyond the dictionary meaning of the specific words Congress chose to use in the legislation.[551]

In addition, and of more import to the Roberts Court, *Chevron* deference raises the issue of the "proper" relationships between Congress, federal agencies, and the federal courts. In the first five years of the twenty-first century, before Congress confirmed Chief Justice Roberts and Justice Alito, the Supreme Court progressively limited the situations in which federal agencies would receive full *Chevron* deference for their interpretations of federal statutes. For example, in the 2000 decision in *FDA v. Brown & Williamson Tobacco Corp.*,[552] the Supreme Court held that the FDA was not entitled to *Chevron* deference for its interpretation of the FDCA[553] because the history of that Act indicated that Congress had not authorized the FDA to regulate tobacco.[554] Later that year, the Court held in *Christensen v. Harris County*[555] that an agency opinion letter issued under the Fair Labor Standards Act[556] was not entitled to *Chevron* deference because it did not carry the force of law; however, the agency's interpretation was entitled to some deference pursuant to *Skidmore v. Swift & Co.*[557] to the extent that it had the "power to persuade."[558]

Building on these themes, the Supreme Court held in 2001 in *United States v. Mead Corp.*[559] that tariff rulings were not entitled to *Chevron* deference, which applies only when Congress has delegated authority to the relevant agency to write rules that have the force of law and the agency actually uses that authority in issuing its interpretation.[560] Also in 2001, the Court held in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* that the Army Corps of Engineers and the EPA were not entitled to *Chevron* deference when their interpretation of the Clean Water Act "invokes the outer limits of Congress' power," raising

551. *See generally* Robin Kundis Craig, *The Stevens/Scalia Principle and Why It Matters: Statutory Conversations and a Cultural Critical Critique of the Strict Plain Meaning Approach*, 79 TUL. L. REV. 955 (2005) (concluding that the strict plain meaning approach leads to overemphasis on statutory imprecision at the expense of statutory purpose).

552. 529 U.S. 120 (2000).

553. 21 U.S.C. §§ 301–395 (1994).

554. *Brown & Williamson*, 529 U.S. at 126.

555. 529 U.S. 576 (2000).

556. 29 U.S.C. §§ 201–219 (1994).

557. 323 U.S. 134 (1944).

558. *Christensen*, 529 U.S. at 587–88 (citing *Skidmore*, 323 U.S. at 140).

559. 533 U.S. 218 (2001).

560. *Id.* at 221, 226–27.

constitutional issues, because "Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority."[561]

Given these restrictions on *Chevron* deference, the Equal Employment Opportunity Commission's interpretive guidelines, according to the Supreme Court in 2002, were not entitled to *Chevron* deference because they lacked the requisite formal exercise of legal authority with the force of law.[562] Moreover, the relationship between statutory interpretation and *Chevron* deference became clear in 2004, when the Supreme Court denied *Chevron* deference to an agency interpretation of the Age Discrimination in Employment Act (ADEA).[563] In a fairly clear assertion of the Supreme Court's primacy in statutory interpretation, the Rehnquist Court declared, "Even for an agency able to claim all the authority possible under *Chevron*, deference to its statutory interpretation is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent."[564] The agency's interpretation received no deference in that case because "regular interpretive method leaves no serious question, not even about purely textual ambiguity in the ADEA."[565]

As a result, as the Rehnquist Court concluded, agencies were likely to receive *Chevron* deference only when they were engaged explicitly in statutory gap filling clearly authorized by Congress through fairly formal processes of interpreting statutes that were obviously ambiguous or highly technical.[566] One of the more subtle but important changes in the Roberts Court's administrative law jurisprudence is an increased willingness to subordinate the federal courts' role in statutory interpretation to federal agencies, particularly when neither constitutional issues nor questions of the agency's own authority are involved.

2. Applications of Chevron *in Cases Involving the Agency's Jurisdiction, Authority, or Both*

a. Gonzales v. Oregon

As noted above, the Supreme Court's January 2006 decision in *Gonzales v. Oregon*[567] involved the U.S. Attorney General's claim of authority to

561. 531 U.S. 159, 172–73 (2001).
562. *See* Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 110 n.6 (2002) (explaining that the interpretative guidelines were instead entitled to *Skidmore* deference).
563. 29 U.S.C. §§ 621–634 (2000).
564. Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 600 (2004).
565. *Id.*
566. *See, e.g.*, Verizon Commc'ns, Inc. v. FCC, 535 U.S. 467, 523 (2002) (according *Chevron* deference to the FCC's local competition rules under the Communications Act).
567. 546 U.S. 243 (2006).

regulate the medical profession pursuant to the federal Controlled Substances Act (CSA)[568] in the specific context of Oregon's legalization of physician-assisted suicide. In a November 9, 2001 interpretive rule, the Attorney General determined that "using controlled substances to assist suicide is not a legitimate medical practice" under the CSA.[569] Dissenting Justices Scalia, Roberts, and Thomas would have accorded the Attorney General's interpretation *Chevron* deference, but the majority, in an opinion by Justice Kennedy, disagreed.

The majority began by noting, "An administrative rule may receive substantial deference if it interprets the issuing agency's own ambiguous regulation,"[570] a type of deference known as *Auer* deference. However, the regulation that the 2001 interpretive rule purportedly interpreted "does little more than restate the terms of the statute itself. The language the Interpretive Rule addresses comes from Congress, not the Attorney General, and the near equivalence of the statute and regulation belies the Government's argument for *Auer* deference."[571]

Chevron deference also accords "substantial deference" to the agency, but it "is warranted only 'when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.'"[572] The interpretive rule was not entitled to *Chevron* deference, even though *legitimate medical purpose* was an ambiguous term, because Congress had not delegated the requisite authority to the Attorney General.[573] Moreover, the majority explained, "The CSA gives the Attorney General limited powers, to be exercised in specific ways,"[574] which include deregistration of physicians but *not* the general authority to regulate medicine by determining, on a national scale, what constitutes a "legitimate medical practice."[575] As a result, "the CSA does not give the Attorney General authority to issue the Interpretive Rule as a statement with the force of law."[576]

As a result, the Attorney General's interpretation was entitled only to *Skidmore* deference.[577] Moreover, the Attorney General failed to persuade the majority of the interpretation's reasonableness, largely for the same

568. 21 U.S.C. §§ 801–971 (2000).
569. Gonzales v. Oregon, 546 U.S. at 249.
570. *Id*. at 255 (citing Auer v. Robbins, 519 U.S. 452, 461–63 (1997)).
571. *Id*. at 257 (discussing 21 C.F.R. § 1306.04 (2005)).
572. *Id*. at 255–56 (quoting United States v. Mead Corp., 533 U.S. 218, 226–27 (2001)).
573. *Id*. at 258.
574. *Id*. at 259.
575. *Id*. at 259–68.
576. *Id*. at 268.
577. *Id*.

reasons that the Court concluded that the Attorney General lacked authority to regulate physicians' conduct.[578] In particular, the majority emphasized that the states have traditionally regulated physicians through their police powers,[579] and hence that the Attorney General was violating principles of federalism by intruding into traditional state concerns. In addition, "The deference here is tempered by the Attorney General's lack of expertise in this area and the apparent absence of any consultation with anyone outside the Department of Justice who might aid in a reasoned judgment."[580]

Justice Scalia, joined by Chief Justice Roberts and Justice Thomas, dissented. The dissenters would have either accorded *Auer* deference to the interpretive rule, upheld the interpretive rule as "by far the most natural interpretation of the Regulation," or accorded the interpretive rule *Chevron* deference and upheld its interpretations of the statutory terms *public interest* and *public health and safety*.[581]

b. Rapanos v. United States

Some of the Supreme Court's most contested applications of *Chevron* deference arise in the context of environmental law. In June 2006, for example, the Court decided *Rapanos v. United States*,[582] issuing a fractured non-decision regarding the scope of "waters of the United States" under the federal Clean Water Act.[583]

Rapanos consolidated two cases, *Rapanos* and *Carabell v. U.S. Army Corps of Engineers*,[584] both of which involved the issue of the Army Corps' jurisdiction pursuant to § 404 of the Clean Water Act[585] over the dredging and filling of wetlands that are adjacent to tributaries of the traditional navigable waters (that is, waters navigable by ships for commerce). The Justices issued five opinions, splitting 4–1–4 with a very narrow majority decision to remand the cases back to the lower courts.

The plurality clearly considered federalism issues relevant to the scope of *Chevron* deference, a perspective consistent with the Supreme Court's assertion of dominance in the field of constitutional law, and accorded little to no deference to the Army Corps and the EPA. Writing for Chief Justice Roberts, Justice Thomas, and Justice Alito, Justice Scalia emphasized in

578. *Id*. at 268–74.
579. *Id*. at 270.
580. *Id*. at 269.
581. *Id*. at 275–76 (Scalia, J., dissenting) (referencing 21 U.S.C. §§ 823(f), 824(a) (2000)).
582. 547 U.S. 715 (2006).
583. *See* 33 U.S.C. § 1362(7) (2006) (defining jurisdictional "navigable waters" to be "waters of the United States, including the territorial seas").
584. 391 F.3d 704 (6th Cir. 2004).
585. 33 U.S.C. § 1344 (2000).

the plurality opinion what he considered to be the Army Corps' vast violation of federalism principles in applying § 404. Justice Scalia began by announcing, "The enforcement proceedings against Mr. Rapanos are a small part of the immense expansion of federal regulation of land use that has occurred under the Clean Water Act—without any change in the governing statute—during the past five Presidential administrations."[586] Moreover, "rather than 'preserv[ing] the primary rights and responsibilities of the States,'" Justice Scalia asserted that the theory advanced by the Corps "would have brought virtually all 'plan[ning of] the development and use . . . of land and water resources' by the States under federal control."[587] Thus, the plurality found it was "an unlikely reading of the phrase 'the waters of the United States."[588]

Nevertheless, the plurality dismissed Rapanos's argument that Clean Water Act jurisdiction was limited to the traditional "navigable waters."[589] Instead, it focused on the meaning of *waters*, relying on *Webster's New International Dictionary* to "confirm that 'the waters of the United States' in § 1362(7) cannot bear the expansive meaning that the Corps would give it."[590] The Justices concluded that "'the waters of the United States' include only relatively permanent, standing or flowing bodies of water"—that is, "continuously present, fixed bodies of water, as opposed to ordinary dry channels through which water occasionally or intermittently flows."[591] Given this definition of *waters*, "*only* those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the [Clean Water] Act."[592]

The plurality also indicated that its interpretation of the Act would foreclose *Chevron* deference for any future Army Corps and EPA regulations. Specifically, it concluded that only its definition of *waters of the United States* was consistent with principles of federalism and the Act's policy of respecting the rights of States.[593] Thus, the plurality indicated that it was controlling all future agency interpretations of the term *waters of the United States*.

Justice Kennedy wrote separately to concur in the plurality's decision to

586. *Rapanos*, 547 U.S. at 722.
587. *Id*. at 737 (alterations in original).
588. *Id*.
589. *See id.* at 730–31 (discussing the petitioners' argument that this traditional definition pertains only to waters "navigable in fact, or susceptible of being rendered so").
590. *Id*. at 731–32.
591. *Id*. at 732–33.
592. *Id*. at 742.
593. *Id*. at 737.

remand but otherwise offered his own analysis of *waters of the United States*. According to Justice Kennedy, the scope of "navigable waters" should be resolved through a "significant nexus" test that the Court had announced in 2001 in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (*SWANCC*).[594] Thus, Justice Kennedy in effect argued that the Supreme Court had *already* limited the agencies' discretion to define *waters of the United States* and hence had limited the deference available for their existing regulations. He reasoned that

> *Riverside Bayview* and *SWANCC* establish the framework for the inquiry in the cases now before the Court: Do the Corps' regulations, as applied to the wetlands in *Carabell* and the three wetlands parcels in *Rapanos*, constitute a reasonable interpretation of "navigable waters" as in *Riverside Bayview* or an invalid construction as in *SWANCC*?[595]

Justice Kennedy emphasized that his interpretation "[did] not raise federalism or Commerce Clause concerns sufficient to support a presumption against its adoption," because "in most cases regulation of wetlands that are adjacent to tributaries and possess a significant nexus with navigable waters will raise no serious constitutional or federalism difficulty."[596] Moreover, he noted "[t]he possibility of legitimate Commerce Clause and federalism concerns in some circumstances does not require the adoption of an interpretation that departs in all cases from the Act's text and structure."[597]

Justice Stevens authored a dissenting opinion for himself and Justices Breyer, Souter, and Ginsburg. The dissenters, essentially arguing for the status quo ante, would have given full *Chevron* deference to the agencies' broad interpretations of *waters of the United States*,[598] emphasizing Congress's broad purposes in enacting the Clean Water Act.[599] Notably, the dissenters accused the plurality of undoing "more than 30 years of practice by the Army Corps" and "disregard[ing] the nature of the congressional delegation to the agency and the technical and complex character of the issues at stake."[600] Justice Kennedy's approach was better but still failed "to give proper deference to the agencies entrusted by Congress to implement the Clean Water Act."[601]

As a result, the dissenters would have affirmed both *Rapanos* and

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594. *Id.* at 759 (Kennedy, J., concurring) (citing Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 162, 172 (2001)).
595. *Id*. at 767.
596. *Id*. at 782.
597. *Id*. at 783 (citing Gonzales v. Raich, 545 U.S. 1, 17 (2005)).
598. *Id*. at 788 (Stevens, J., dissenting).
599. *See id*. at 787–88 (recounting the history of the Clean Water Act).
600. *Id*. at 788.
601. *Id.* at 810.

Carabell. However, recognizing that the split between Justices Scalia and Kennedy left the lower courts with no clear test, the dissenters instructed that "on remand each of the judgments should be reinstated if *either* of those tests is met."[602]

c. Carcieri v. Salazar

The Supreme Court's February 2009 decision in *Carcieri v. Salazar*[603] involved the application of the Indian Reorganization Act (IRA)[604] to the Narragansett Indian tribe in Rhode Island and the Secretary of the Interior's authority to take land in trust for the tribe. As in *Rapanos* and *Gonzales v. Oregon*, the Supreme Court did not defer to the agency's interpretation of its own authority.

Under § 465 of the IRA, the Secretary of the Interior may acquire land and hold it in trust "for the purpose of providing land for Indians."[605] However, the Act defines *Indian* to "include all persons of Indian descent who are members of any recognized Indian tribe *now under Federal jurisdiction*."[606] In 1998, relying on its IRA authority, the Secretary of the Interior took a thirty-one-acre parcel of land in the town of Charlestown, Rhode Island, into trust for the tribe, over the protests of the state, the Governor, and the town.[607]

However, the federal government did not formally recognize the Narragansett as a tribe until 1983, almost fifty years after Congress enacted the IRA. As a result, the Court had to determine what the phrase *now under Federal jurisdiction* in the IRA means. The town and the state sued the Secretary pursuant to the federal APA, claiming that the Secretary's action was illegal because the tribe was not "now" under federal jurisdiction in 1934, when Congress enacted the IRA. The Secretary, in turn, argued that *now* applied to the moment of land acquisition, and hence that the land transfer was legal because the Narragansett was a recognized tribe in 1998 when the Secretary acted.[608]

In a 6–3 decision by Justice Thomas (Justices Souter and Ginsburg concurred in part and dissented in part, while Justice Stevens dissented), the Supreme Court concluded that Rhode Island and the Town of Charlestown were correct: the Secretary of the Interior could not take land

602. *Id*.
603. 129 S. Ct. 1058 (2009).
604. 25 U.S.C. §§ 465, 479 (2006).
605. § 465.
606. § 479 (emphasis added).
607. *See Carcieri*, 129 S. Ct. at 1062 (providing the factual background to the case).
608. *See id.* at 1065 (describing the Secretary's "current interpretation" of *now*).

into trust for tribes not formally recognized in 1934.[609] According to the majority, the statute was unambiguous in its meaning on this point. In 1934, "the primary definition of 'now' was '[a]t the present time; at this moment; at the time of speaking.'"[610] As a result, *Chevron* deference was not appropriate.[611]

The Court was content with the contemporaneous dictionary definition for several reasons. First, it was "consistent with interpretations given to the word 'now' by this Court, both before and after passage of the IRA, with respect to its use in other statutes."[612] Second, this meaning aligned "with the natural reading of the word within the context of the IRA."[613] In particular, the majority emphasized that in other sections of the IRA, Congress explicitly referred to both contemporaneous and future events through the phrase *now or hereafter*.[614] In contrast, the definition of *Indian* referred only to *now*.[615] Third, "the Secretary's current interpretation is at odds with the Executive Branch's construction of [§§ 465 and 479] at the time of enactment," which interpreted *now* to mean "recognized in 1934."[616] While the Court made it clear that it was not deferring to this earlier interpretation, it did agree with it.[617]

Fourth, and perhaps most importantly, the majority rejected the Secretary's arguments that the term *now* was ambiguous. Although acknowledging that, in general, *now* was susceptible of more than one meaning, the Court nevertheless underscored the importance of statutory context in statutory construction, concluding that "the susceptibility of the word 'now' to alternative meanings 'does not render the word . . . whenever it is used, ambiguous,' particularly where 'all but one of the meanings is ordinarily eliminated by context.'"[618]

Fifth, the Court rejected the Secretary's argument that the definition of *tribe* was controlling rather than the definition of *Indian* because the

609. *See id.* at 1068 (emphasizing that the language of § 479 "unambiguously" referred to tribes under federal jurisdiction at the time of the enactment of the Indian Reorganization Act).

610. *Id*. at 1064 (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY 1671 (2d ed. 1934)).

611. *Id*. at 1063–65.

612. *Id*. at 1064.

613. *Id*.

614. *Id.* at 1065.

615. *Id*. at 1064–65.

616. *Id*. at 1065.

617. *See id.* (suggesting that deference would be inappropriate as the statute itself is unambiguous).

618. *Id*. at 1066 (quoting Deal v. United States, 508 U.S. 129, 131–32 (1993)); *see also* Abuelhawa v. United States, 129 S. Ct. 2102, 2103 (2009) (emphasizing that "statutes are not read as a collection of isolated phrases" and that "'[a] word in a statute may or may not extend to the outer limits of its definitional possibilities'" (quoting Dolan v. U.S. Postal Service, 546 U.S. 481, 486 (2006))).

Secretary's authority to take lands in trust was for "Indian tribes," and the definition of *tribe* also incorporated the definition of *Indian*.[619] Thus, there simply was "no legitimate way to circumvent the definition of 'Indian' in delineating the Secretary's authority under §§ 465 and 479."[620] Nor did the later-enacted Indian Land Consolidation Act[621] remove the problem because it neither expanded the Secretary's authority to take lands into trust nor altered the definition of the word *Indian*.[622] As a result, the Secretary had no authority to take the thirty-one-acre parcel into trust for the Narragansett tribe.[623]

Justices Souter and Ginsburg concurred in part and dissented in part to point out that § 479 refers to "any recognized Indian tribe now under Federal jurisdiction," which allows for the possibility that tribal recognition and being "under Federal jurisdiction" might be separate statuses, triggered by different events.[624] If so, then the Narragansett need only have been "under Federal jurisdiction" in 1934—not necessarily formally recognized.[625] These two Justices would have remanded the case to the Secretary for clarification of these two points.[626] Justice Stevens dissented, arguing primarily that, in the IRA's overall structure, the distinction between individual Indians and tribes was critical, with the result that "'now,' the temporal limitation in the definition of 'Indian,' only affects an individual's ability to qualify for benefits under the IRA," not a tribe's eligibility for land.[627]

d. Wyeth v. Levine

In March 2009, the Court's decision in *Wyeth v. Levine*[628] restricted an agency's authority to preempt state tort law. In this products-liability action, the plaintiff claimed that Wyeth failed to provide sufficient warnings regarding the use of Phenergan, an anti-nausea drug that can cause severe problems, often leading to gangrene and amputation, when

619. *Id.* at 1068.
620. *Id.* at 1067.
621. *See* 25 U.S.C. § 2202 (2006) (providing that nothing in the Indian Land Consolidation Act is intended to supersede any other federal law authorizing the acquisition of lands for Indians).
622. *Carcieri*, 129 S. Ct. at 1067–68.
623. *See id.* at 1068 (establishing that the Narragansett Tribe was "neither federally recognized nor under the jurisdiction of the federal government" at the time Congress enacted the IRA).
624. *Id.* at 1071 (Souter, J., concurring in part and dissenting in part).
625. *Id.*
626. *Id.*
627. *Id.* at 1073–78 (Stevens, J., dissenting).
628. 129 S. Ct. 1187 (2009).

injected directly into a vein.[629] Wyeth defended the action on the ground that the FDA approved Phenergan's labeling pursuant to the FDCA and hence that the FDCA preempted the tort lawsuit.[630]

In a 6–3 decision by Justice Stevens, the Court first concluded that Wyeth failed to demonstrate that it was impossible to comply with both state tort law and the FDCA's labeling requirements.[631] Wyeth then argued that the FDA determined that the agency's labeling decisions preempted state tort claims based on failure to warn because the approved labels constitute both a floor and a ceiling for labeling requirements.[632]

The Court noted that "an agency regulation with the force of law can pre-empt conflicting state requirements."[633] However, no such regulation existed, leaving the Court to determine what level of deference to give the FDA's view of the preemptive effect of its approvals of drug labels.[634] The Court concluded that it would give no weight to the "agency's *conclusion* that state law is pre-empted. Rather, [it would have] attended to an agency's explanation of how state law affects the regulatory scheme."[635] Even then, however, the FDA was entitled only to *Skidmore* deference,[636] and the Court was not persuaded by the agency's assertion of preemption:

> Under this standard, the FDA's 2006 preamble does not merit deference. When the FDA issued its notice of proposed rulemaking in December 2000, it explained that the rule would "not contain policies that have federalism implications or that preempt State law." In 2006, the agency finalized the rule and, without offering States or other interested parties notice or opportunity for comment, articulated a sweeping position on the FDCA's pre-emptive effect in the regulatory preamble. The agency's views on state law are inherently suspect in light of this procedural failure.[637]

The Court also emphasized that the FDA's view contradicted Congress's apparent intent in the FDCA and represented a reversal of the FDA's own long-standing view of the FDCA, both of which further undercut the agency's position.[638]

Thus, as in other contexts in which an agency interpreted the scope of its

629. *Id.* at 1191.
630. *Id.* at 1192.
631. *Id.* at 1198–99.
632. *Id.* at 1200.
633. *Id.*
634. *Id.* at 1201.
635. *Id.*
636. *Id.*
637. *Id.* (citations omitted).
638. *Id.* at 1201–02; *see also id.* at 1204 ("Congress has repeatedly declined to pre-empt state law, and the FDA's recently adopted position that state tort suits interfere with its statutory mandate is entitled to no weight. Although we recognize that some state-law claims might well frustrate the achievement of congressional objectives, this is not such a case.").

own authority, the Roberts Court accorded little deference to the FDA's attempt to preempt state law, an issue with direct federalism implications. As such, the *Wyeth* decision is consistent with *Gonzales* and *Rapanos* in demonstrating the Roberts Court's reluctance to defer to agencies when those agencies intrude into areas of law traditionally left to the states.

e. Coeur Alaska, Inc. v. Southeast Alaska Conservation Council

Justice Kennedy authored the majority opinion for the Supreme Court's 6–3 decision in *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*,[639] which involved the issue of which permit program under the federal Clean Water Act[640] applied to Coeur Alaska's discharge of a slurry of gold mining wastes ("tailings") into Lower Slate Lake in Alaska. The U.S. Army Corps of Engineers issued the relevant permit pursuant to its authority under § 404 of the Clean Water Act to permit discharges of "dredged" or "fill" material.[641] The environmental challengers argued that the slurry was subject to the EPA's permitting authority under § 402 under the phrase all other "discharges of a pollutant."[642] If they were right, the discharge would be illegal under an EPA regulation, known as a new source performance standard, which prohibits all discharges of process wastewater from new froth flotation gold mines like Coeur Alaska's.[643] Alternatively, the challengers argued that EPA's new source performance standard applied to § 404 permits as well, rendering the Army Corps permit illegal in violation of the APA. All parties agreed that if Coeur Alaska was allowed to discharge its slurry into the lake, those discharges over time would fill the lake, killing almost all life within it—although Coeur Alaska would have to restore the lake when it was done mining.[644]

The Supreme Court began by establishing that the Act's two permit programs are mutually exclusive because the EPA may issue permits only "as provided" in § 404.[645] With respect to § 404 permits, moreover, the EPA has only two functions—to write guidelines for the Army Corps and to veto any § 404 permit issued by the Army Corps that causes too much environmental damage.[646]

The Court then turned to the agencies' joint regulation defining *fill*

639. 129 S. Ct. 2458 (2009).
640. 33 U.S.C. §§ 1251–1387 (2006).
641. *See id.* § 1344 (providing the Secretary the authority to "issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites").
642. *Id.* § 1342.
643. 40 C.F.R. § 440.104(b)(1) (2007).
644. *Coeur Alaska*, 129 S. Ct. at 2480 (Ginsburg, J., dissenting).
645. *Id.* at 2467 (majority opinion) (citing 33 U.S.C. § 1342(a)(1)).
646. *Id*. (citing 33 U.S.C. § 1344 (2006)).

material to be "any material [that] has the effect of . . . [c]hanging the bottom elevation" of a body of water.[647] "As all parties concede[d], the slurry [met] the definition of fill material agreed upon by the agencies in a joint regulation promulgated in 2002."[648] Thus, the discharge of the slurry was a discharge of fill material subject to Army Corps permitting under § 404.

That left the issue of whether the Army Corps' permits were subject to the EPA's new source performance standards, which in turn created a muddled issue of *Chevron*, *Mead*, or *Skidmore* deference. The majority first concluded that "[b]ecause Congress has not 'directly spoken' to the 'precise question' of whether an EPA performance standard applies to discharges of fill material, the statute alone does not resolve the case."[649] Under § 306(e) of the Clean Water Act, "it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source,"[650] suggesting that *all* dischargers have to comply with new source performance standards, regardless what permit program governs their discharge.[651] On the other hand, § 402 explicitly requires EPA permits to comply with the new source performance standards and protects permit holders from enforcement actions involving new source performance standards, while § 404 does neither, suggesting that new source performance standards are not relevant to § 404 permits.[652] As a result, "The [Clean Water Act] is ambiguous on the question whether § 306 applies to discharges of fill material regulated under § 404."[653]

The ambiguity provoked the Court, in its application of *Chevron*, to turn to the agencies' regulations.[654] However, "The regulations, like the statutes, [did] not address the question whether § 306, and the EPA new source performance standards promulgated under it, apply to § 404 permits . . . ."[655]

Nevertheless, while "[t]he regulations do not give a definitive answer to the question . . . [the Court did] find that agency interpretation and agency

647. *Id.* at 2468 (citing 40 C.F.R. § 232.2 (2008)).
648. *Id*.
649. *Id*. at 2469 (quoting Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842 (1984)).
650. 33 U.S.C. § 1316(e) (2006).
651. *Coeur Alaska*, 129 S. Ct. at 2470–71.
652. *See id*. at 2471 (citing 33 U.S.C. §§ 1342(a), 1342(k), 1344(a), 1344(p) (2006)) (opining that Congress probably did not intend § 306(e) to apply to the Corps' § 404 permits or to discharges of fill material).
653. *Id*.
654. *See id*. at 2469, 2472 (turning to the agencies' regulations because the statute did not directly address the question at hand, and thus did not itself resolve the issue).
655. *Id*. at 2472.

application of the regulations are instructive and to the point."[656] Specifically, the Court discussed a May 2004 memorandum sent from the Director of the EPA's Office of Wetlands, Oceans, and Watersheds to the Director of the EPA regional office with jurisdiction over Coeur Alaska's mine (the "Regas Memorandum"), which explained that the new source performance standards do not apply to discharges permitted under § 404.[657]

Citing *Auer v. Robbins*,[658] the Court deferred to the memorandum's interpretation for five reasons.[659] "First, the Memorandum preserves a role for the EPA's performance standard" because "[i]t confines the Memorandum's scope to closed bodies of water, like the lake here."[660] "Second, the Memorandum acknowledges that this is not an instance in which the discharger attempts to evade the requirements of the EPA's performance standard."[661] "Third, the Memorandum's interpretation preserves the Corps' authority to determine whether a discharge is in the public interest."[662] "Fourth, the Regas Memorandum's interpretation does not allow toxic pollutants . . . to enter the navigable waters."[663] Finally, the Court found the interpretation "a sensible and rational construction that reconciles §§ 306, 402, and 404, and the regulations implementing them, which the alternatives put forward by the parties do not."[664]

Justice Scalia concurred specifically to address the *Chevron* issue. He joined the majority except for its unwillingness to accord the memorandum *Chevron* deference.[665] Justice Scalia argued that *Auer* deference was inapplicable because the Memorandum interpreted the statutory scheme and *Auer* deference applies only "to an agency's interpretation *of its own ambiguous regulation*."[666] As a result, Justice Scalia accused the Court of making *Chevron* deference even more complicated than *Mead* had already managed.[667] Justice Scalia also noted the appearance in lower courts of "the phenomenon of *Chevron* avoidance—the practice of declining to opine

656. *Id*. at 2472–73 (citing Auer v. Robbins, 519 U.S. 452, 461 (1997)).

657. *See id*. at 2473 (explaining that while the memorandum was not entitled to *Chevron* deference because of its informality, it was entitled to a measure of deference because it interpreted the agencies' own regulatory scheme).

658. 519 U.S. 452, 461 (1997).

659. *Coeur Alaska*, 129 at 2473–74 (deferring to the agency's interpretation in the memorandum because it was not "'plainly erroneous or inconsistent with the regulations'").

660. *Id*. at 2473.

661. *Id*.

662. *Id*.

663. *Id*. at 2474.

664. *Id*.

665. *See id*. at 2479 (Scalia, J., concurring) (asserting that the memorandum's opinion is reasonable and noting that it was consistently followed by both EPA and the Corps of Engineers).

666. *Id*.

667. *Id*. at 2479–80 (referring to United States v. Mead Corp., 533 U.S. 218, 239 (2001) (Scalia, J., dissenting)).

whether *Chevron* applies or not"—and advocated the overruling of *Mead*.[668]

Justice Ginsburg dissented, joined by Justices Stevens and Souter. Instead of starting, as the majority did, with the question of which permit program applies to Coeur Alaska's discharge, the dissenters started with the Clean Water Act's basic prohibition: "[T]he discharge of any pollutant by any person shall be unlawful," except as in compliance with the Act.[669] To that they added the fact that "Coeur Alaska's proposal is prohibited by the [EPA] performance standard forbidding any discharge of process wastewater from new 'froth-flotation' mills into the waters of the United States."[670] At that point, the issue became whether "a pollutant discharge prohibited under § 306 of the Act [is] eligible for a § 404 permit as a discharge of fill material," which the dissenters concluded should be answered in the negative.[671] "No part of the statutory scheme . . . calls into question the governance of EPA's performance standard," and § 306(e) clearly requires all discharges to comply with that standard.[672] As a result,

> The Court's reading, in contrast, strains credulity. A discharge of a pollutant, otherwise prohibited by firm statutory command, becomes lawful if it contains sufficient solid matter to raise the bottom of a water body, transformed into a waste disposal facility. Whole categories of regulated industries can thereby gain immunity from a variety of pollution-control standards.[673]

Because the dissenters viewed the statutory provisions as clearly resolving the issue, *Chevron* deference played no role in their analysis.

3. Nonjurisdictional Agency Constructions of Statutes and Chevron *Deference*

The Roberts Court is far more likely to defer to agency constructions of statutes outside jurisdictional and federalism contexts. Several decisions over the last four Terms make this point clear. However, they also often reveal recurring splits among the Justices regarding the Court's role and principles of statutory interpretation.

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668. *Id*.
669. *Id*. at 2481 (Ginsburg, J., dissenting).
670. *Id*. at 2480.
671. *See id*. (citing the statute's text, structure, and purpose as mandating adherence to EPA's pollution-control requirements).
672. *See id*. at 2482 (quoting the statute, which proscribes "any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source").
673. *Id*. at 2483.

a. Environmental Defense v. Duke Energy Corp.

In April 2007, the Supreme Court decided *Environmental Defense v. Duke Energy Corp.*,[674] a case that involved an interpretation of the Clean Air Act (CAA).[675] This decision produced a fairly unified Supreme Court willing to stress both deference to the EPA and contextual understandings of statutory terms. *Duke Energy* involved the Act's new source review (NSR) requirements—specifically, the requirement that existing sources that "modify" their facilities install "the best technology for limiting pollution."[676] There are two NSR requirements in the Act, one in the provisions governing new source performance standards (NSPS)[677] and one in the provisions creating the Prevention of Significant Deterioration (PSD) program.[678] The issue for the case, while fairly technical, was essentially whether the EPA could define *modification* differently for the two NSR requirements.[679]

Writing for eight Justices (Justice Thomas concurred on this point), Justice Souter concluded that "principles of statutory construction are not so rigid" as to require the EPA to interpret *modification* exactly the same way in all sections of the Clean Air Act.[680] The presumption in favor of identical meanings is rebuttable because "[a] given term in the same statute may take on distinct characters from association with distinct statutory objects calling for different implementation strategies."[681] All nine Justices agreed that the D.C. Circuit erred in trying to force the PSD modification regulations to track the NSPS modification regulations.[682]

Duke Energy illustrates that even when agency constructions of statutes are at issue, *Chevron* deference is not always relevant. In the particular procedural posture of this case, the U.S. Court of Appeals for the Fourth Circuit concluded that the Supreme Court created an "effectively irrebutable" presumption that a statutory term must be interpreted the same way throughout a statute.[683] As a result, the Fourth Circuit attempted to

674. 549 U.S. 561 (2007).
675. 42 U.S.C. §§ 7401–7671q (2006).
676. *Duke Energy*, 549 U.S. at 565–67.
677. *See* 42 U.S.C. § 7411(a)(4) (2006) (defining *modification*).
678. *See* 42 U.S.C. § 7479(2)(C) (defining the term *construction* for purposes of the Clean Air Act to include any modification).
679. *See Duke Energy*, 549 U.S. at 569–70 (describing the discrepancy in the use of the statutory term *modification* between the two requirements).
680. *Id*. at 574.
681. *Id*.
682. *Id*. at 577–81.
683. *See* United States v. Duke Energy Corp., 411 F.3d 539, 550 (4th Cir. 2005) (citing Rowan Cos. v. United States, 452 U.S. 247, 250 (1981)) (noting the absolute strength of the presumption that a statutory term must be interpreted consistently throughout a particular statute such that even the different purposes of the New Source Performance Standards

harmonize the PSD regulations with the NSPS regulations' definition of *modification*.[684] It was the Fourth Circuit's reinterpretation that the Supreme Court invalidated,[685] leaving no proper role for *Chevron* analysis. The Fourth Circuit did not properly address the challenge to the EPA's own interpretation of *modification* in the PSD regulations, and so the Court remanded that issue.[686]

b. Zuni Public School District No. 89 v. Department of Education

It was a fairly obscure provision of the Federal Impact Aid Act[687] that served as a flashpoint, in April 2007, for the Supreme Court's ongoing debates regarding the methodology of statutory interpretation. In *Zuni Public School District No. 89 v. Department of Education*,[688] the Court addressed the issue of how the Secretary of Education should assess whether a state's public school funding program "equalizes expenditures" throughout the state, as the Act requires.[689] Specifically, the issue for the Court was whether the Secretary should look at the number of pupils as well as the size of the expenditures when deciding which school districts to disregard because they had "'per-pupil expenditures . . . above the 95th percentile or below the 5th percentile of such expenditures . . . in the State.'"[690]

In a 5–4 decision authored by Justice Breyer (and including Justice Alito), the Supreme Court concluded that the number of pupils *was* properly included within the statutory language.[691] The Court considered *Chevron* deference to be the appropriate framework for assessing the Secretary's regulations interpreting the relevant statutory provision.[692] However, it reversed the normal procedure for assessing whether the

(NSPS) and Prevention of Serious Deterioration (PSD) programs could not override that presumption).

684. *Id.* at 573.

685. *See* Envtl. Def. v. Duke Energy Corp., 549 U.S. 561, 577–81 (2007) (concluding that the court of appeals' attempt to conform the PSD regulations to their NSPS counterparts resulted in "too far a stretch for the language used" in the PSD regulations).

686. *Id*. at 581–82.

687. 20 U.S.C. §§ 7701–7714 (2006).

688. 550 U.S. 81 (2007).

689. *See* 20 U.S.C. § 7709(b)(2) (2006) (establishing that in making determinations for Impact Aid Act purposes, "the Secretary shall disregard local educational agencies with per-pupil expenditures or revenues above the 95th percentile or below the 5th percentile of such expenditures").

690. *Zuni Public School District*, 550 U.S. at 84 (quoting 20 U.S.C. § 7709(b)(2)(B)(i)) (emphasis omitted).

691. *See id*. at 100 (concluding that the Secretary's reading was a reasonable reading and the method of calculation was lawful).

692. *See id.* at 89 (noting that even the challenger conceded that the Court must defer to the Secretary's reasonable interpretations of the statute if Congress left a gap for the agency to fill).

language was ambiguous, addressing the plain meaning of the statute only *after* it reviewed the background, history, and basic purposes of the Act and concluded, "Considerations other than language provide us with unusually strong indications that Congress intended to leave the Secretary free to use the calculation method before us and that the Secretary's chosen method is a reasonable one."[693]

In contrast, the majority's examination of the literal language of the statute was forced and hypertechnical,[694] a contorted act of interpretation designed to allow it to conclude "that the language of the statute is broad enough to permit the Secretary's reading."[695] Specifically, the majority emphasized Congress's silence on the subject of the relevant "population" for the statistical analysis and on how to construct the distribution.[696] Moreover,

> No dictionary definition we have found suggests that there is any *single* logical, mathematical, or statistical link between, on the one hand, the characterizing data (used for ranking purposes) and, on the other hand, the nature of the relevant population or how that population might be weighted for purposes of determining a percentile cutoff.[697]

While *Zuni* was explicitly a *Chevron* decision, the concurring and dissenting opinions made clear that the Court's own interpretive authority was also at issue. Justice Stevens concurred specifically to emphasize the legitimacy of using legislative history to interpret statutory language as part of the first step of the *Chevron* analysis.[698] Justices Scalia, Roberts, Thomas, and Souter dissented (Justice Souter joining only Part I of the dissent), arguing that the majority's opinion "is nothing other than the elevation of judge-supposed legislative intent over clear statutory text" and that statutory construction based on the "spirit" of the law is "a judge-empowering proposition if there ever was one, and . . . the Court has wisely retreated from it."[699] They concluded that the majority's plain meaning reading was "sheer applesauce."[700]

c. Long Island Care at Home, Ltd. v. Coke

In *Long Island Care at Home, Ltd. v. Coke*,[701] in an opinion by Justice Breyer, a unanimous Supreme Court applied the *Chevron* doctrine and

693. *Id*. at 90.
694. *See id*. at 93–94.
695. *See id*. at 93–100 (engaging in a literal analysis of the statute's text).
696. *Id*. at 95–96.
697. *Id*. at 96.
698. *Id*. at 105–06 (Stevens, J., concurring).
699. *Id*. at 108 (Scalia, J., dissenting).
700. *Id*. at 113.
701. 551 U.S. 158 (2007).

upheld[702] the Department of Labor's regulatory interpretation of the Fair Labor Standards Act (FLSA).[703] In 1974, Congress amended the FLSA to bring many domestic service employees within the Act's minimum-wage and maximum-hour protections.[704] However, Congress simultaneously excluded some domestic service employees, such as casual babysitters.[705] The Act also excluded "any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves."[706] The Department of Labor's regulation interpreted this exemption to include companionship workers employed by someone other than the family or household using the companion services.[707]

After reviewing the *Chevron* doctrine, the Supreme Court determined that "the FLSA explicitly leaves gaps, for example, as to the scope and definition of statutory terms such as 'domestic service employment' and 'companionship services'" and that the statute "provides the Department [of Labor] with the power to fill these gaps through rules and regulations."[708] All of the other considerations relevant to a *Chevron* analysis were also present: "The subject matter of the regulation in question concerns a matter in respect to which the agency is expert, and it concerns an interstitial matter, *i.e.*, a portion of a broader definition, the details of which . . . Congress entrusted the agency to work out."[709] Furthermore, "The Department focused fully upon the matter in question," and the Department used notice-and-comment rulemaking procedures.[710]

The Supreme Court upheld the regulation at issue, even though it appeared to conflict with the Department's general regulations, which define *domestic service employment*."[711] First, the Court concluded that if it decided that the general regulations controlled, "our interpretation would create serious problems."[712] "Second, normally the specific governs the

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702. *See id.* at 162 (citing *Chevron* for the proposition that the inquiry before the Court is "whether, in light of the statute's text and history, and a different (apparently conflicting) regulation, the [agency's] regulation is valid and binding").

703. 29 U.S.C. §§ 201–219 (2006).

704. *See id.* § 206(f) (providing that any employee "employed in domestic service in a household," or that is employed in one or more households in an aggregate of eight hours or more, shall be paid at the rate specified by minimum wage requirements).

705. *Id.* § 213(a)(15).

706. *Id*.

707. 29 C.F.R. § 552.109(a) (1977).

708. Long Island Care at Home v. Coke, 551 U.S. 158, 165 (2007).

709. *Id.*

710. *Id*.

711. *See* 29 C.F.R. § 552.3 (1977) (defining *domestic service employment* as "services of a household nature performed by an employee in or about a private home (permanent or temporary) of the person by whom he or she is employed").

712. *Long Island Care*, 551 U.S. at 169.

general."[713] Third, although the Department may have interpreted its regulations differently at different times, "as long as interpretive changes create no unfair surprise—and the Department's recourse to notice-and-comment rulemaking in an attempt to codify its new interpretation makes any such surprise unlikely here—the change in interpretation alone presents no separate ground for disregarding the Department's present interpretation."[714] Finally, although the Department apparently formulated its interpretation of its regulation during the course of litigation, "[w]here, as here, an agency's course of action indicates that the interpretation of its own regulation reflects its considered views—the Department has clearly struggled with the third-party-employment question since at least 1993—we have accepted that interpretation as the agency's own."[715]

The Court also addressed whether this interpretive regulation should be considered legally binding. It concluded "that the Department intended the third-party regulation as a binding application of its rulemaking authority."[716] First, "The regulation directly governs the conduct of members of the public, affecting individual rights and obligations."[717] Second, the Department used notice-and-comment rulemaking, which the federal APA does not require for "interpretive" rules.[718] Finally, "for the past 30 years, . . . the Department has treated the third-party regulation like the others, *i.e.*, as a legally binding exercise of its rulemaking authority."[719]

Nevertheless, "the ultimate question is whether *Congress* would have intended, and expected, courts to treat an agency's rule, regulation, application of a statute, or other agency action as within, or outside, its delegation to the agency of 'gap-filling' authority."[720] Given all the other factors and the fact that "the rule itself is reasonable, then a court ordinarily assumes that Congress intended it to defer to the agency's determination."[721]

d. Federal Express Corp. v. Holowecki

The Supreme Court's complex jurisprudence with respect to the deference given to agency interpretations of statutes played out fully in February 2008 in *Federal Express Corp. v. Holowecki*.[722] In this 7–2

713. *Id*. at 170.
714. *Id*. at 170–71 (citation omitted).
715. *Id*. at 171 (citing Auer v. Robbins, 519 U.S. 452, 462 (1997)).
716. *Id*. at 172.
717. *Id*. at 172–73 (internal quotation marks omitted).
718. *Id*. at 173.
719. *Id*.
720. *Id*.
721. *Id*. at 173–74.
722. 128 S. Ct. 1147 (2008).

decision by Justice Kennedy (Justices Thomas and Scalia dissented), the Court progressively applied *Chevron*, *Auer*, and *Skidmore* deference to determine what qualifies as a "charge" under the ADEA.[723]

The ADEA, like most employment discrimination statutes, establishes primary enforcement authority in the Equal Employment Opportunity Commission (EEOC).[724] When an employee files a "charge alleging unlawful discrimination" with the EEOC, that "charge" sets the Act's enforcement mechanisms in motion.[725] Specifically, if the EEOC does not act within sixty days of the "charge," the employee herself can file a lawsuit against the allegedly discriminating employer.[726]

In *Holowecki*, the employee submitted EEOC Form 283, an "Intake Questionnaire," together with an affidavit alleging that her employer, Federal Express, was discriminating on the basis of age.[727] More than sixty days after submitting this form, the employee filed an ADEA lawsuit in federal court.[728] Federal Express defended on the basis that the submission of the intake questionnaire was not a "charge" and hence that the courts did not have jurisdiction over the lawsuit.

The ADEA does not define the term *charge*. However, the EEOC issued regulations for the ADEA, three of which bear on the issue of what counts as a *charge*. First, the EEOC's regulations state that "*charge* shall mean a statement filed with the Commission by or on behalf of an aggrieved person which alleges that the named prospective defendant has engaged in or is about to engage in actions in violation of the Act."[729] A subsequent regulation specifies five pieces of information that should be included in the charge but also states that the charge is sufficient if it meets the requirements of § 1626.6.[730] Section 1626.6, in turn, states that a "charge" is sufficient if it is in writing, provides the name of the respondent, and generally alleges discriminatory acts.[731]

From these regulations, three arguments arose regarding the intake questionnaire at issue. Federal Express argued that the intake questionnaire could *never* serve as a "charge." The plaintiff employee argued that an intake questionnaire *always* qualified as a "charge." The EEOC, participating through the United States' amicus brief, argued that an intake questionnaire can serve as a "charge" if it expresses the filer's intent to

723. 29 U.S.C. §§ 621–634 (2006).
724. *Holowecki*, 128 S. Ct. at 1152–53.
725. 29 U.S.C. § 626(d).
726. *Id*.
727. *Holowecki*, 128 S. Ct. at 1153.
728. *Id*.
729. 29 C.F.R. § 1626.3 (2009).
730. *Id.* § 1626.8(a)–(b).
731. *Id.* § 1626.6.

activate the EEOC enforcement mechanisms.[732]

The Supreme Court began its process of deciding what *charge* means by according *Chevron* deference to the EEOC's legislative rules, so far as they went:

> The Act does not define charge. While EEOC regulations give some content to the term, they fall short of a comprehensive definition. The agency has statutory authority to issues regulations, *see* § 628; and when an agency invokes its authority to issue regulations, which then interpret ambiguous statutory terms, the courts defer to its reasonable interpretations. The regulations the agency has adopted—so far as they go—are reasonable constructions of the term charge. There is little dispute about this.[733]

However, the regulations were clearly ambiguous regarding whether *every* intake questionnaire that met the minimal requirements of § 1626.6 should qualify as a "charge."[734]

Given the ambiguity of the regulation, the EEOC claimed *Auer* deference for its interpretation of the regulation.[735] Moreover, as for the basic issue of whether everything that meets § 1626.6 qualifies as a charge, the Supreme Court granted *Auer* deference, meaning that it would reject the EEOC's interpretation only if it were "plainly erroneous or inconsistent with the regulation."[736] However, the EEOC wanted more:

> The EEOC submits that the proper test for determining whether a filing is a charge is whether the filing, taken as a whole, should be construed as a request by the employee for the agency to take whatever action is necessary to vindicate her rights. The EEOC has adopted this position in the Government's *amicus* brief and in various internal directives it has issued to its field offices over the years. The Government asserts that this request-to-act requirement is a reasonable extrapolation of the agency's regulations and that, as a result, the agency's position is dispositive under *Auer*.[737]

However, as in *Gonzales v. Oregon*,[738] the Court concluded that *Skidmore* deference was the appropriate level of deference because the EEOC was interpreting regulatory language that parroted the statutory language and its interpretations occurred in vehicles that were not entitled to *Chevron* deference.[739]

Applying *Skidmore* deference, the Court emphasized "whether the agency has applied its position with consistency."[740] In this case, the Court

732. *Holowecki*, 128 S. Ct. at 1154.
733. *Id*. (citation omitted).
734. *Id*. at 1155.
735. *Id*.
736. *Id*. (citing Auer v. Robbins, 519 U.S. 452, 461 (1997)).
737. *Id*. at 1155–56 (citations omitted).
738. *See supra* notes 570–80 and accompanying text (discussing the Court's analysis of what level of deference to give the Attorney General in *Gonzales v. Oregon*).
739. *Holowecki*, 128 S. Ct. at 1156.
740. *Id*.

noted that the EEOC's interpretation had been binding on the EEOC staff for five years.[741] Moreover, although application of the EEOC's interpretation had been inconsistent across offices and cases, "[t]hese undoubted deficiencies in the agency's administration of the statute and its regulatory scheme are not enough . . . to deprive the agency of all judicial deference. Some degree of inconsistent treatment is unavoidable when the agency processes over 175,000 inquiries a year."[742] In addition, the EEOC's interpretation was consistent with the agency's previous directives, and there was no evidence that the agency was adopting that interpretation merely as a litigation position.[743]

In addition, the Court emphasized the EEOC's role under the ADEA. Specifically, the EEOC functions both as the enforcement agency and as the public education agency.[744] As such, the agency had to have some way of sorting its education and enforcement functions in response to filings from the public.[745] As a result, the plaintiff employee's position regarding the breadth of § 1626.6 "is in considerable tension with the structure and purposes of the ADEA. The agency's interpretive position—the request-to-act requirement—provides a reasonable alternative that is consistent with the statutory framework. No clearer alternatives are within our authority or expertise to adopt; and so deference to the agency is appropriate under *Skidmore*."[746]

Having thus arrived at an interpretation of *charge*, the Court also clarified that the EEOC does not have to act on a filing to make it a charge.[747] As a result, the Court agreed with the EEOC that the plaintiff had filed a proper "charge," in large part because "[t]he agency's determination is a reasonable exercise of its authority to apply its own regulations and procedures in the course of the routine administration of the statute it enforces."[748]

Justice Thomas dissented, joined by Justice Scalia. According to the dissenters, "Today the Court decides that a 'charge' of age discrimination under the Age Discrimination in Employment Act of 1967 (ADEA) is whatever the Equal Employment Opportunity Commission (EEOC) says it is."[749] Notably, the dissenters would have begun the analysis not with the proper level of deference, but instead with the Court's own analysis of the

741. *Id*.
742. *Id*.
743. *Id*. at 1156–57.
744. *Id*. at 1157.
745. *Id*.
746. *Id*.
747. *Id*. at 1158–59.
748. *Id*. at 1159.
749. *Id*. at 1161 (Thomas, J., dissenting).

plain meaning of the term *charge*.[750] Moreover, because they concluded that this plain meaning—accusation or indictment—included a requirement of a formal charge against the respondent, they would have denied the EEOC any deference.[751]

e. United States v. Eurodif S.A.

In *United States v. Eurodif S.A.*,[752] in an opinion by Justice Souter, the Supreme Court unanimously upheld, pursuant to a *Chevron* analysis, the Commerce Department's interpretation of a provision of the Tariff Act that calls for "antidumping" duties on "foreign merchandise" sold in the United States at less than its fair value.[753] This provision does not apply to international sales of services.[754]

The issue was whether antidumping duties should apply to separative work unit (SWU) contracts for uranium processing. Under these contracts, domestic utilities send uranium abroad to be processed into low enriched uranium (LEU). Overseas processors mixed sources of uranium, so that it was unlikely that domestic utilities received back exactly the same uranium that they sent abroad. Moreover, domestic utilities allegedly paid less than fair market value for the LEU they received pursuant to SWU contracts. Thus, the SWU arrangements constitute both a sale of services, exempt from the duty, and a sale of goods, subject to the duty. The Commerce Department determined that the antidumping duties apply to the LEU received pursuant to these contracts.

Almost without pause (or much analysis), the Supreme Court deferred to the Commerce Department, engaging in only an abbreviated *Chevron* analysis, despite the fact that the Commerce Department's interpretation contradicted precedent in the U.S. Court of Appeals for the Federal Circuit.[755] The Court emphasized, "The issue is not whether, for purposes of 19 U.S.C. § 1673, the better view is that a SWU contract is one for the sale of services, not goods."[756] Instead,

> The statute gives this determination to the Department of Commerce in the first instance, and when the Department exercises this authority in the course of adjudication, its interpretation governs in the absence of unambiguous statutory language to the contrary or unreasonable resolution of language that is ambiguous.[757]

750. *Id*. at 1162.
751. *Id*. at 1163.
752. 129 S. Ct. 878 (2009).
753. 19 U.S.C. § 1673 (2006).
754. *Eurodif*, 129 S. Ct. at 882.
755. *Id*. at 886; *see also infra* Part II.F.
756. *Id.* at 886.
757. *Id*. at 886 (citation omitted).

Moreover, the Department's change in position regarding the status of SWU contracts did not affect the *Chevron* analysis.[758] According to the Court, "'[T]he whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency.'"[759]

The Court emphasized that SWU contracts do not fall neatly into either regulatory category—sale of goods or sale of services—but rather were a blend of both. As such,

> This is the very situation in which we look to an authoritative agency for a decision about the statute's scope, which is defined in cases at the statutory margin by the agency's application of it, and once the choice is made we ask only whether the Department's application was reasonable.[760]

Thus, the Court concluded, "Where a domestic buyer's cash and an untracked, fungible commodity are exchanged with a foreign contractor for a substantially transformed version of the same commodity, the Commerce Department may reasonably treat the transaction as the sale of a good under § 1673."[761]

f. Entergy Corp. v. Riverkeeper, Inc.

The Clean Water Act's technology-based effluent limitations created an issue of statutory silence for the Supreme Court—one with, arguably, too much statutory context rather than too little. Specifically, § 1326(b) of the Act applies to facilities that pump in cooling water from waters of the United States and requires that "[a]ny standard established pursuant to section 1311 of this title or section 1316 of this title and applicable to a point source shall require that the location, design, construction, and capacity of cooling water intake structures reflect *the best technology available for minimizing adverse environmental impact* [BTA]."[762] Section 1311 governs technology-based effluent limitations for *existing* point sources and generally requires that they incorporate "the best available technology economically achievable" (BAT or BATEA).[763] Section 1316 governs new point sources and requires them to comply with effluent limitations based on "the best available demonstrated control technology" (BADT).[764]

When the EPA promulgated regulations to implement § 1326(b) for

758. *Id*. at 887.
759. *Id*. (quoting Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005)).
760. *Id*. at 888.
761. *Id.* at 890.
762. 33 U.S.C. § 1326(b) (2006) (emphasis added).
763. *Id.* § 1311(b)(2)(A).
764. *Id.* § 1316(a).

large existing sources whose primary activity is the generation and transmission of electricity (the "Phase II regulations"), it allegedly engaged in an active cost–benefit analysis, comparing the costs of various kinds of technological retrofitting to the environmental benefits produced—in general, the prevention of entrainment and impingement of aquatic organisms in and against the intake pipes and screens. As a result, the EPA refused to require existing facilities subject to the rule—about 500 facilities representing about 53% of the nation's power generation—to use closed-cycle cooling systems, which had been the BTA requirement for new facilities. Instead, the EPA required most existing facilities to reduce "impingement mortality for all life stages of fish and shellfish by 80 to 95 percent from [a] calculated baseline," using a mix of technologies that the EPA considered to be "commercially available and economically practicable."[765]

Environmental groups challenged these Phase II regulations on the grounds that the EPA could not engage in cost–benefit analyses when setting BTA standards. The U.S. Court of Appeals for the Second Circuit agreed, concluding that the EPA could consider only what costs could be reasonably be borne by the industry and which technologies were most cost effective.[766]

The Supreme Court, however, concluded in *Entergy Corp. v. Riverkeeper, Inc.*[767] that the EPA reasonably determined that it *could* use cost–benefit analysis to establish BTA for existing sources. In a 5–1–3 decision authored by Justice Scalia, the majority concluded that § 1326(b) is not clear regarding the applicability of cost–benefit analysis and hence that it would defer to the EPA's interpretation pursuant to *Chevron*.[768] The majority emphasized that Congress used a bewildering panoply of technology-based standards in the Clean Water Act, some of which clearly require the "elimination" of certain kinds of discharges of pollutants,[769] some of which clearly contemplate cost–benefit analysis,[770] and some of which are intermediate.[771]

As a result, § 1326(b)'s silence regarding costs was uninstructive, especially in light of the fact that while "two of the other tests authorize

765. 40 C.F.R. § 125.94(b)(1) (2008); National Pollutant Discharge Elimination System—Final Regulations to Establish Requirements for Cooling Water Intake Structures at Phase II Existing Facilities, 69 Fed. Reg. 41,576, 41,602 (July 9, 2004) (codified in scattered sections of 40 C.F.R.).

766. *See* Riverkeeper, Inc. v. EPA, 475 F.3d 83, 99–100 (2d Cir. 2007) (establishing two permissible ways EPA may consider costs).

767. 129 S. Ct. 1498 (2009).

768. *Id.* at 1505, 1510.

769. 33 U.S.C. § 1311(b)(2)(A) (2006).

770. *Id.* § 1314(b)(1)(B).

771. *Id.* §§ 1314(b)(4)(B), 1314(b)(2)(B), 1316(b)(1)(B).

cost–benefit analysis, . . . *all four* of the other tests expressly authorize *some* consideration of costs."[772] Moreover,

> The inference that respondents and the dissent would draw from the silence is . . . implausible, as § 1326(b) is silent not only with respect to cost–benefit analysis but with respect to all potentially relevant factors. If silence here implies prohibition, then the EPA could not consider *any* factors in implementing § 1326(b)—an obvious logical impossibility.[773]

Thus, "it was well within the bounds of reasonable interpretation for the EPA to conclude that cost–benefit analysis is not categorically forbidden."[774]

The majority also considered the EPA's application of its cost–benefit analysis reasonable because "the EPA sought only to avoid extreme disparities between costs and benefits."[775] Moreover, the EPA's regulation actually imposed costs of $389 million, while producing "annualized use-benefits of $83 million and non-use benefits of indeterminate value, . . . demonstrat[ing] quite clearly that the agency did not select the Phase II regulatory requirements because their benefits equaled their costs."[776]

Justice Breyer viewed § 1326(b) as being one of those statutory provisions where legislative history is crucial to constructing statutory meaning. Specifically, he agreed with the majority that "the relevant statutory language authorizes the Environmental Protection Agency (EPA) to compare costs and benefits," but he dissented from their final conclusion because "the drafting history and legislative history of related provisions makes clear that those who sponsored the legislation intended the law's text to be read as restricting, though not forbidding, the use of cost–benefit comparisons."[777]

Justices Stevens dissented, joined by Justices Souter and Ginsburg. They would have agreed with the Second Circuit that Congress's silence in § 1326(b) was a prohibition against using cost–benefit analysis to set BTA, noting that "[e]vidence that Congress confronted an issue in some parts of a statute, while leaving it unaddressed in others, can demonstrate that Congress meant its silence to be decisive."[778] In their interpretation, "Unless costs are so high that the best technology is not 'available,' Congress has decided that they are outweighed by the benefits of minimizing adverse environmental impact."[779] The need for congressional

772. *Entergy Corp*, 129 S. Ct. at 1508.
773. *Id*.
774. *Id*.
775. *Id*. at 1509.
776. *Id*. (citations omitted).
777. *Id*. at 1512 (Breyer, J., concurring in part and dissenting in part) (citation omitted).
778. *Id*. at 1517 (Stevens, J., dissenting).
779. *Id*. at 1516.

control and concern was made obvious by the EPA's actual assessment of environmental benefits in the Phase II regulations, which ended up giving short shrift to the environment.[780]

Cost–benefit analysis was therefore an issue of congressional concern. Specifically, "Because benefits can be more accurately monetized in some industries than in others, Congress typically decides whether it is appropriate for an agency to use cost–benefit analysis in crafting regulations."[781] Like Justice Breyer, Justice Stevens argued, "The appropriate analysis requires full consideration of the CWA's structure and legislative history to determine whether Congress contemplated cost–benefit analysis and, if so, under what circumstances it directed the EPA to utilize it."[782] Going further than Justice Breyer, however, the dissenters concluded that this approach to interpretation was determinative and that § 1326(b)'s silence on the issue was in fact instructive. According to Justice Stevens, "Congress granted the EPA authority to use cost–benefit analysis in some contexts but not others," indicating "that Congress intend[ed] to control, not delegate, when cost–benefit analysis should be used."[783] As a result, there was no gap for the EPA to fill and it was entitled to no *Chevron* deference.[784]

4. The Roberts Court and Chevron *Deference in the Absence of Court Precedents: A Summary*

The Roberts Court's track record to date indicates that it will generally accord far less deference to a federal agency when the agency is determining the scope of its own jurisdictional authority. This inclination is particularly strong when the agency is expanding its authority into realms that the Court perceives as the states'—for example, regulation of doctors, retention of legal authority over land, and land-use planning.

The Court did defer to an agency interpretation of jurisdictional authority in *Coeur Alaska*, but the circumstances were notably different in that case. First, the issue was not *whether* a federal agency had authority to act, but rather which one—the EPA or the Army Corps. No one argued that the Clean Water Act did not apply to Coeur Alaska's discharge. Second, the two federal agencies involved were in agreement that § 404 of the Clean Water Act governed the discharge, so the Supreme Court did not have to decide a dispute between two federal agencies competing for

780. *See id.* at 1516–17 (describing the drop in benefits' dollar value depending on the EPA's decision of whether to value fish not recreationally or commercially harvested).
781. *Id.* at 1517.
782. *Id.* at 1518.
783. *Id.*
784. *See id.*

jurisdiction. As a result, the essential competition in the case was between environmental preservation and development, and in the absence of any strong federalism concerns, development won.

In contrast, the Roberts Court deferred to the agency's interpretation in all six of the nonjurisdictional decisions that also did not involve federalism or Supreme Court precedent. Thus, in the absence of any countervailing considerations, the Court consistently defers to federal agencies, occasionally stretching its statutory interpretation principles to do so.

F. The Supreme Court and Federal Agencies: Chevron *Deference and the Problem of Precedent*

1. Brand X *and the Nonbinding Nature of Most Federal Court Precedent*

The Supreme Court's deference to the Executive and to administrative agencies becomes even more obvious when federal court decisions on the same topic as agency regulations already exist. Immediately prior to the start of the Roberts Court, the Rehnquist Court decided *National Cable & Telecommunications Ass'n v. Brand X Internet Services*,[785] in which it reviewed the FCC's declaratory ruling that cable companies providing broadband Internet access were exempt from mandatory regulation under Title II of the Telecommunications Act.[786] The Telecommunications Act subjects all providers of "telecommunications service" to mandatory common-carrier regulation. In March 2000, the FCC concluded that broadband Internet service provided by cable companies is an "information service" but not a "telecommunications service," "[b]ecause Internet access provides a capability for manipulating and storing information" and because of "[t]he integrated nature of Internet access and high-speed wire used to provide Internet access."[787]

Ultimately, on the merits, the Court, in a 6–3 decision by Justice Thomas, upheld the FCC's decision under both *Chevron*[788] and "arbitrary and capricious" analyses.[789] However, before reaching the merits, eight Justices agreed that federal agencies are free to "overrule" federal court constructions of the statutes that the agencies administer, unless the federal court finds that the statute is unambiguous.[790]

785. 545 U.S. 967 (2005).
786. 47 U.S.C. §§ 151–615b (2006).
787. *Brand X*, 545 U.S. at 977–78.
788. *Id*. at 989.
789. *See id.* at 1000–02 (finding the Commission provided adequate rational justification for its conclusions).
790. *See id.* at 982–83 ("Only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction.").

When numerous parties petitioned for judicial review of the FCC's declaratory ruling, a judicial lottery sent the case to the U.S. Court of Appeals for the Ninth Circuit. Rather than use the *Chevron* analysis to review the FCC's construction of the Communications Act, the Ninth Circuit invalidated the ruling based on its own precedent in *AT&T Corp. v. City of Portland*.[791]

The Supreme Court held that the Ninth Circuit should have used the *Chevron* analysis, not its own precedent, to evaluate the FCC's construction of the Act. First, the *Chevron* analysis applied because Congress delegated authority to execute and enforce the Telecommunications Act to the FCC and "the Commission issued the order under review in the exercise of that authority."[792] Second, with regard to the role of federal courts' constructions in the first step of the *Chevron* analysis, "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."[793] The Court reasoned that "allowing a judicial precedent to foreclose an agency from interpreting an ambiguous statute, as the Court of Appeals assumed it could, would allow a court's interpretation to override an agency's. *Chevron*'s premise is that it is for agencies, not courts, to fill statutory gaps."[794] The Court distinguished its own prior precedent in *Neal v. United States*,[795] in which a prior Court construction resulted in no deference to the agency, on the grounds that the judicial precedent at issue in *Neal* "had held the relevant statute to be unambiguous."[796] Third, the Supreme Court indicated that a federal court will not be found to have held that a statute is unambiguous unless the court's decision clearly indicated that its reading is "the *only permissible* reading of the statute."[797] The Ninth Circuit's decision in *AT&T Corp. v. Portland* did not achieve this level of exclusiveness because the Ninth Circuit made no explicit holding that the Telecommunications Act was unambiguous regarding whether cable Internet providers were "telecommunications carriers."[798]

Brand X thus signaled that the Supreme Court is willing to subjugate federal courts' interpretations of statutes to federal agencies' interpretations of statutes. The theory behind this result is that Congress delegates to

791. 216 F.3d 871, 880 (9th Cir. 2000).
792. *Brand X*, 545 U.S. at 980–81.
793. *Id*. at 982.
794. *Id*.
795. 516 U.S. 284 (1996).
796. *Brand X*, 545 U.S. at 984.
797. *Id*.
798. *Id*. at 984–85.

federal agencies the authority to implement and interpret the statutes at issue, and hence, out of respect for Congress, the agencies' interpretations are to be preferred to those of the courts.[799] While the Roberts Court is still wrestling with the implications of this view of the federal courts' role, especially in connection with its own prior decisions, *Brand X* caused much consternation in the lower courts.[800]

The Roberts Court addressed the role and value of the Supreme Court's own precedent and stare decisis in several decisions. Taken together, these decisions indicate that a majority of the Roberts Court is willing to assert authority to determine whether the Court's own precedents are binding, even on federal agencies, but that agency decisions on how to implement statutes are still to be preferred.

2. Agency-Administered Statutes, Applicable Court Precedent, and Stare Decisis

Despite the *Brand X* decision, the Supreme Court appears unwilling to discard its existing precedent when that precedent seems directly applicable to agency-administered regimes. Three decisions illustrate this impulse—although the last was deeply divided and suggests that *Brand X* may play a more important role in the future.

In the first case, a unanimous Court indicated in November 2005 that stare decisis—at least with respect to the Supreme Court's own interpretive precedents—is still important to statutory interpretation, even in federal-agency-administered regulatory programs. In *IBP, Inc. v. Alvarez*,[801] the Court addressed the issues of whether the FLSA,[802] as amended by § 4 of the Portal-to-Portal Act of 1947,[803] required employers in meat and poultry

799. *Id*. at 982.

800. *See* Hernandez-Carrera v. Carlson, 547 F.3d 1237, 1242–43 (10th Cir. 2008) (concluding that under *Brand X*, "a subsequent, reasonable agency interpretation of an ambiguous statute, which avoids raising serious constitutional doubts, is due deference notwithstanding" any "prior Supreme Court construction of the statute applying the canon of constitutional avoidance"); Levy v. Sterling Holding Co., 544 F.3d 493, 502–03 (3d Cir. 2008) (citing *Brand X* for the proposition that if a court interprets an ambiguous statute one way, and an agency subsequently interprets the same statute another way, even the same court cannot ignore the agency's interpretation); Gonzales v. Dep't of Homeland Sec., 508 F.3d 1227, 1235–36 (9th Cir. 2007) (noting the proviso that a court must accord *Chevron* deference to an agency's subsequent interpretation only if the "court's earlier precedent was an interpretation of a statutory ambiguity"); Fernandez v. Keisler, 502 F.3d 337, 347–48 (4th Cir. 2007) (applying *Brand X* but noting that that decision did nothing to alter the effect of a finding that Congress spoke clearly to the issue under *Chevron* step one); Dominion Energy Brayton Point, LLC v. Johnson, 443 F.3d 12, 16–17 (1st Cir. 2006) (noting the Supreme Court's intent in *Brand X* was to eliminate the possibility that *Chevron* applicability would turn on the order in which judicial and agency interpretations issue).

801. 546 U.S. 21 (2005).

802. 29 U.S.C. §§ 201–219 (2006).

803. *See id.* § 254 (describing certain activities not compensable under the FLSA).

processing plants to pay workers for the time that (1) meat and poultry workers spent walking from the locker rooms to the production areas after donning special protective gear and clothing, (2) poultry workers spent waiting to take off such protective gear at the end of the work day, or (3) poultry workers spent waiting at the beginning of the work day to don protective clothing.[804]

On the merits, the unanimous Court held that walking time for the meat processors and end-of-the-day waiting time for the poultry workers were not "preliminary or postliminary" activities excluded from FLSA coverage but instead were "integral and indispensable" to the "principal activit[ies]" for which the workers were paid, and hence were included in the workday under the "continuous workday" rule.[805] In contrast, the time that the poultry workers spent waiting to don special clothing at the beginning of the workday *was* "preliminary or postliminary," and hence the Portal-to-Portal Act *did* exclude that time from the FLSA's coverage.[806]

In interpreting the FLSA and the Portal-to-Portal Act, the Supreme Court focused almost entirely on its own prior interpretations of the FLSA and Congress's reactions to those interpretations; the Department of Labor's regulations implementing the FLSA and its amendments played a confirming but not determinative role.[807] The Court noted that its "early cases" interpreted the FLSA "broadly,"[808] but that Congress designed the 1947 Portal-to-Portal Act to scale back those judicial interpretations.[809] Nevertheless, that Court noted that "consistent with *our prior decisions* interpreting the FLSA, the Department of Labor has adopted the continuous workday rule . . . . These regulations have remained in effect since 1947."[810] Finally, in 1956, the Court interpreted the FLSA to hold that activities are part of the paid continuous work day if they are an "'integral and indispensable part of the principal activities.'"[811]

While the Department of Labor's continuous workday regulation thus

804. *IBP, Inc.*, 546 U.S. at 24, 30.

805. *Id*. at 30, 39–40.

806. *See id*. at 39–40 (noting that such waiting time occurs before the principal activity).

807. *See id*. at 25–26 (discussing the Supreme Court's early FLSA decisions defining compensable work and Congress's reaction to those decisions in the Portal-to-Portal Act); *see also id.* at 29–30 (discussing the Supreme Court's prior interpretation of compensable work time in *Steiner v. Mitchell*, 350 U.S. 247, 248, 252–53, 256 (1956)).

808. *Id*. at 25–26 (discussing Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123, 321 U.S. 590, 598 (1944); Armour & Co. v. Wantock, 323 U.S. 126, 133 (1944); Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 690–92 (1946)).

809. *See id*. at 26–27 (explaining that the Portal-to-Portal Act limited employer liability for failure to pay minimum wages or overtime compensation, as well as the employer obligation to compensate for certain activities previously considered preliminary or postliminary to a principal activity).

810. *Id*. at 29 (emphasis added).

811. *Id*. at 29–30 (quoting Steiner v. Mitchell, 350 U.S. 247, 252–53 (1956)).

applied in the case, it did not specifically resolve the interpretive issue at hand. However, the regulation did "support respondents' view that when donning and doffing of protective gear are compensable activities, they may also define the outer limits of the workday."[812]

In this context, Supreme Court precedent was still relevant. "Considerations of *stare decisis* are particularly forceful in the area of statutory construction, especially when a unanimous interpretation of a statute has been accepted as settled law for several decades."[813] Indeed, facing the employer's argument that some of the Department of Labor's regulations suggested a different result, the Court first noted "that the Secretary assumed that there would be some cases" where its exclusionary regulations would not apply.[814] However, the Court also characterized those potentially contradictory regulatory provisions as "ambiguous (and apparently ambivalent)," diminishing their force and applicability so that they were "not sufficient to overcome the statute itself, whose meaning is definitively resolved by" the Supreme Court's 1956 decision in *Steiner*.[815]

The Supreme Court was similarly unwilling to discard its own precedent toward the end of its 2007–2008 Term when it examined FERC's justifications for a rate decision in *Morgan Stanley Capital Group Inc. v. Public Utility District No. 1 of Snohomish County*.[816] Under the Federal Power Act,[817] FERC regulates the sale of electricity in interstate commerce, including overseeing rate schedules, or "tariffs." The Act requires that all wholesale electricity rates be "just and reasonable."[818]

In *Morgan Stanley*, in a 5–2 decision by Justice Scalia (Chief Justice Roberts and Justice Breyer took no part in the decision; Justices Stevens and Souter dissented), the Supreme Court acknowledged that "[t]he statutory requirement that rates be 'just and reasonable' is obviously incapable of precise judicial definition, and we afford great deference to the Commission in its rate decisions."[819] However, in two cases in 1956, the Supreme Court also determined that utilities cannot freely abrogate rates set in bilateral contracts by unilaterally filing a new tariff with FERC.[820] Thus, when FERC reviews a tariff notification where relevant bilateral rate contracts exist, FERC is generally bound under this "*Mobile–Sierra* doctrine" to uphold the contract rates because the doctrine creates a

812. *Id*. at 35.
813. *Id*. at 32.
814. *Id*. at 37.
815. *Id*.
816. 128 S. Ct. 2733 (2008).
817. 16 U.S.C. §§ 824–824v (2006).
818. *Id*. § 824d(a).
819. *Morgan Stanley*, 128 S. Ct. at 2738.
820. *See id*. at 2738–39 (describing the so-called *Mobile–Sierra* doctrine).

presumption that the contract rate is itself "just and reasonable" and not in need of amendment.[821]

Morgan Stanley, however, involved long-term contracts that western utilities entered into in 2000 and 2001, when electricity rates were "very high by historical standards," especially in California.[822] When that energy crisis passed, the utilities wished to purchase power at much cheaper rates and asked FERC to approve new tariffs.[823] The utilities argued first that the *Mobile–Sierra* doctrine should not apply because FERC had never approved the contract without the presumption and therefore had never independently determined that the contract rates were just and reasonable.[824] They also argued that, even considering the *Mobile–Sierra* presumption, the contract rates were so high that they violated the public interest, rendering those contracts unjust and unreasonable.[825] The administrative law judge (ALJ) reviewing the case "concluded that the *Mobile–Sierra* presumption should apply to the contracts and that the contracts did not seriously harm the public interest."[826] FERC affirmed the ALJ's determination, but the U.S. Court of Appeals for the Ninth Circuit reversed and remanded.[827]

FERC's order "agreed with the Ninth Circuit's premise that the Commission must have an initial opportunity to review a contract without the *Mobile–Sierra* presumption, but maintained that the authorization for market-based rate authority qualified as that initial review."[828] Before the Supreme Court, however, FERC attempted to change the rationale for its decision, "arguing that there is no such prerequisite—or at least that FERC could reasonably conclude so and therefore that *Chevron* deference is in order."[829]

The Supreme Court disagreed, although it avoided the *Brand X* issue. Instead, it invoked its reasoning in *SEC v. Chenery Corp.*:[830] "We will not uphold a discretionary agency decision where the agency has offered a justification in court different from what it provided in its opinion."[831]

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821. *See id.* at 2739–40 (noting that although private parties may contract around *Mobile–Sierra*, the "*Mobile–Sierra* presumption remains the default rule").
822. *Id*. at 2743.
823. *Id.*
824. *Id*.
825. *Id*.
826. *Id*.
827. *Id*. at 2744.
828. *Id*. at 2745.
829. *Id*.
830. *See* SEC v. Chenery Corp., 318 U.S. 80, 94–95 (1943) (holding that an "administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained").
831. *Morgan Stanley*, 128 S. Ct. at 2745.

Nevertheless, the Supreme Court did not invalidate FERC's decision or remand on the basis of the *Chenery* doctrine. Instead, having concluded that FERC was *required* under the Supreme Court's decision in *Sierra* to apply the *Mobile–Sierra* presumption, it upheld FERC's decision.[832] The fact that FERC "provided a different rationale for the necessary result is no cause for upsetting its ruling. 'To remand would be an idle and useless formality. *Chenery* does not require that we convert judicial review of agency action into a ping-pong game.'"[833]

In dissent, Justice Stevens, joined by Justice Souter, questioned the validity and import of the *Mobile–Sierra* doctrine itself, concluding that the presumption distorted the statutory "just and reasonable" standard.[834] However, they also criticized the majority for misapplying the *Chenery* doctrine, emphasizing that reviewing courts cannot accept an agency's post hoc rationalizations as grounds for upholding its decision.[835] Moreover, "even assuming FERC subjectively believed that it was applying the just-and-reasonable standard despite its repeated declarations to the contrary," the orders would be too ambiguous to uphold.[836]

In addition, the net effect of the majority's decision to require the *Mobile–Sierra* presumption, according to the dissenters, was to inappropriately cabin FERC's discretion in rate review in violation of *Chevron* deference. Congress "used the general words 'just and reasonable' because it wanted to give FERC, not the courts, wide latitude in setting policy."[837] The dissenters emphasized that the Court traditionally upholds FERC's ratemaking authority when the rates fall within a "zone of reasonableness" and argued that no statutory basis for the *Mobile–Sierra* doctrine existed.[838] By concluding that FERC was required to apply the *Mobile–Sierra* presumption, the dissenters argued that

> [t]he Court has curtailed the agency's authority to interpret the terms "just and reasonable" and thereby substantially narrowed FERC's discretion to protect the public interest by the means it thinks best. Contrary to congressional intent, FERC no longer has the flexibility to adjust its review of contractual rates to account for changing conditions in the energy markets or among consumers.[839]

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832. *Id*.
833. *Id*. (quoting NLRB v. Wyman–Gordon Co., 394 U.S. 759, 766 n.6 (1969) (plurality opinion)).
834. *See id.* at 2752–54 (Stevens, J., dissenting) (arguing that Congress used the general terms just and reasonable because "it wanted to give FERC, not the courts, wide latitude in setting policy").
835. *Id.* at 2758.
836. *Id*.
837. *Id*. at 2752.
838. *Id*. at 2753.
839. *Id*. at 2759.

The Supreme Court issued its third *Brand X*-related decision, *Cuomo v. Clearing House Ass'n*,[840] in June 2009, at the very end of the Roberts Court's first phase. That decision split 5–4 and resulted in an opinion by Justice Scalia for the unusual majority of Justices Scalia, Stevens, Souter, Ginsburg, and Breyer. The case should have raised the *Brand X* issue regarding the Supreme Court's own precedent, but the majority again ducked the issue, relegating the *Brand X* argument to the dissent. Notably, however, the four dissenters indicated that they were willing to apply *Brand X* to the Supreme Court's own decisions, and all four are still on the Court.

In *Clearing House*, the attorney general for the State of New York sent letters to several national banks in the state, "in lieu of subpoena," asking for certain nonpublic information in order to ascertain whether the banks were complying with the state's fair lending laws.[841] The federal OCC and the Clearing House Association brought suit to enjoin the request, claiming that the National Bank Act (NBA) regulations preempt enforcement of state law against national banks.[842]

The NBA states,

> No national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress or either House thereof or by any committee of Congress or of either House duly authorized.[843]

The OCC's regulation implementing this provision, adopted through notice-and-comment rulemaking, states that "visitorial powers" include, inter alia, "[i]nspection of a bank's books and records" and "[e]nforcing compliance with any applicable federal or state laws concerning" activities authorized or permitted pursuant to federal banking law.[844]

The question for the Supreme Court was whether the OCC regulation preempted enforcement of nonbanking state laws against national banks. The majority stated both that the *Chevron* doctrine provided the framework for evaluating the OCC's regulation and that "[t]here is necessarily some ambiguity as to the meaning of the statutory term 'visitorial powers,' especially since we are working in an era when the prerogative writs—through which visitorial powers were traditionally enforced—are not in vogue."[845] Thus, the case seemed ripe for deference to the OCC's interpretation that state enforcement was preempted.

840. 129 S. Ct. 2710 (2009).
841. *Id*. at 2714.
842. *Id*.
843. 12 U.S.C. § 484(a) (2006).
844. 12 C.F.R. § 7.4000(a)(2)(ii), (iv) (2009).
845. *Clearing House Ass'n*, 129 S. Ct. at 2715.

> Nevertheless, the majority was unwilling to defer, noting that
>
> > the presence of some uncertainty does not expand *Chevron* deference to cover virtually any interpretation of the National Bank Act. We can discern the outer limits of the term "visitorial powers" even through the clouded lens of history. They do not include, as the Comptroller's expansive regulation would provide, ordinary enforcement of the law.[846]

Instead the Court stated that, historically, visitorial powers referred to the state-as-sovereign's supervisory role over corporations and charitable institutions.[847] According to the majority, "No one denies that the National Bank Act leaves in place some state substantive laws affecting banks, . . . [and] reading 'visitorial powers' as limiting only sovereign oversight and supervision would produce an entirely commonplace result" that allowed states to enforce their laws against national banks.[848]

As a result, "The Comptroller's regulation . . . does not comport with the statute."[849] Moreover, "Neither does the Comptroller's *interpretation* of its regulation, which differs from the text and must be discussed separately."[850] In the statement of basis and purpose in the *Federal Register* announcement of its regulation, the OCC attempted to limit the regulation's scope to state enforcement of state laws directly related to banking and to exempt states' enforcement of their laws related to, for example, "contracts, debt collection, acquisition and transfer of property, and taxation, zoning, criminal, and tort law."[851] This interpretation did not square with the regulation's text, and "[a]nyway, the National Bank Act *does* specifically authorize and permit activities that fall within what the statement of basis and purpose calls 'the legal infrastructure that surrounds and supports the ability of national banks . . . to do business.'"[852] Therefore, the OCC's regulatory interpretation could not save the regulation.

Nevertheless, the Court noted, state enforcement must proceed in court in order for the state power to be "vested in the courts of justice," as the NBA requires.[853] Because the New York attorney general relied on his *executive* enforcement authority—not the power of the state courts—the NBA preempted his attempted enforcement action.[854]

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846. *Id*.
847. *See id.* at 2716–17 (noting that the Court's precedents confirm "that a sovereign's 'visitorial powers' and its power to enforce the law are two different things").
848. *Id*. at 2717–18.
849. *Id*. at 2719.
850. *Id*.
851. Bank Activities and Operations, 69 Fed. Reg. 1895, 1896 (Jan. 13, 2004) (to be codified at 12 C.F.R. pt. 7).
852. *Clearing House Ass'n*, 129 S. Ct. at 2719–20.
853. *Id.* at 2721–22.
854. *Id*.

The OCC's regulation was key to the majority's decision. Nevertheless, as in *IBP, Inc. v. Alvarez* and *Morgan Stanley*, the majority also assumed the continued vitality of the Court's own applicable precedents and relied on the Court's prior interpretations of the NBA. According to the majority, "Our cases have always understood 'visitation' as this right to oversee corporate affairs, quite separate from the power to enforce the law."[855] As a result,

> the unmistakable and utterly consistent teaching of our jurisprudence, both before and after the enactment of the National Bank Act, is that a sovereign's "visitorial powers" and its power to enforce the law are two different things. There is not a credible argument to the contrary. And contrary to what the [OCC]'s regulation says, the National Bank Act preempts only the former.[856]

Thus, in the majority's interpretation, "'Visitorial powers' in the National Bank Act refers to a sovereign's supervisory powers over corporations."[857]

> When, however, a state attorney general brings suit to enforce state law against a national bank, he is not acting in the role of sovereign-as-supervisor, but rather in the role of sovereign-as-law-enforcer. Such a lawsuit is not an exercise of "visitorial powers" and thus the Comptroller erred by extending the definition of "visitorial powers" to include "prosecuting enforcement actions" in state courts.[858]

The majority could have easily cast its decision into the *Brand X* framework by holding that its prior decisions construed the NBA to be unambiguous regarding the interpretive point at issue—the relationship between visitorial powers and state enforcement. However, the Court did not do so. Instead, it acknowledged the NBA's ambiguity and relied on traditional evaluations of the OCC's reasonableness, such as pragmatic considerations of what the OCC's interpretation would mean.[859] It therefore skirted the *Brand X* decision.

The dissenters—Justice Thomas, joined by Chief Justice Roberts and Justices Kennedy and Alito—did not avoid *Brand X*. They agreed with the majority that the term *visitorial powers* was ambiguous. However, in light of historical ambiguities in the common law governing corporations, they would have upheld the OCC's regulatory interpretation as reasonable due to those historical and statutory ambiguities.[860]

Importantly, the dissenters specifically disagreed with the majority's

855. *Id*. at 2716; *see also id*. at 2716–17 (discussing Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 676, 681 (1819) (Washington, J., concurring)).
856. *Id*. at 2717.
857. *Id*. at 2721.
858. *Id*. (citing 12 C.F.R. § 7.4000 (2009)).
859. *See id*. at 2717–18 (discussing the consequences of the OCC's interpretation).
860. *Id*. at 2722–27 (Thomas, J., concurring in part and dissenting in part).

conclusion that the OCC's interpretation "is unreasonable because it conflicts with several of this Court's decisions."[861] They instead noted that under *Brand X*, the New York attorney general

> cannot prevail by simply showing that this Court previously adopted a construction of § 484 that differs from the interpretation later chosen by the agency. "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."[862]

Even Supreme Court precedent "is insufficient to deny *Chevron* deference to OCC's construction of § 484(a)."[863]

The dissenters were also unconvinced by the petitioners' arguments that federalism concerns and the possibility of federal preemption were sufficient to deprive the OCC of *Chevron* deference.[864] Specifically,

> Petitioner's federalism-based objections to *Chevron* deference ultimately turn on a single proposition: It is doubtful that Congress preempted state enforcement of state laws but not the underlying state laws themselves. But it is not this Court's task to decide whether the statutory scheme established by Congress is unusual or even "[b]izarre." The Court must decide only whether the construction adopted by the agency is unambiguously foreclosed by the statute's text.[865]

Thus, the dissenters expressed great willingness to defer to the OCC's view of the NBA's preemption, despite the Court's own precedent, federalism concerns, and the potential impact of the OCC's interpretation on the overall structure of the NBA.

3. Agency-Administered Statutes, Nonapplicable Precedent, and the Importance of Remand

While the Supreme Court has not yet been willing to overturn its own directly applicable precedents in favor of agency interpretations, it *has* displayed, despite *Morgan Stanley*, a *Brand X*-like preference for agency decisions that has limited its willingness to let federal courts—including itself—resolve cases. In particular, when the Court determined that its own precedent did not determine the interpretive outcome, it insisted on remand to the administrative agency, even for pure legal issues of statutory interpretation.

For example, in the April 2006 per curiam decision in *Gonzales v.*

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861. *Id*. at 2728.
862. *Id.* at 2728–29 (quoting Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005)).
863. *Id*. at 2730.
864. *Id*. at 2731–33.
865. *Id*. at 2733 (citation omitted) (alteration in original).

Thomas,[866] the Roberts Court vacated the U.S. Court of Appeals for the Ninth Circuit's en banc decision to grant asylum to South African immigrants on the basis of persecution as members of a family group, in favor of a remand to the Immigration and Naturalization Service (INS).[867] Legally, the Ninth Circuit decision held that a family group may constitute a "social group" for the purposes of refugee status under the Immigration and Nationality Act (INA).[868] Nevertheless, because the Ninth Circuit also decided that the facts of the immigrants' case met this standard without the benefit of a prior agency decision on the issue, the Supreme Court held that it committed "obvious" legal error in light of the "ordinary remand" rule announced in *INS v. Ventura*.[869]

Quoting extensively from *Ventura*, the *Thomas* Court emphasized that "'[w]ithin broad limits the law entrusts the agency to make the basic asylum eligibility decision,'"[870] and that "'judicial judgment cannot be made to do service for an administrative judgment.'"[871] As a result, "A court of appeals is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry"; instead, "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation."[872] Thus, because "[t]he agency has not yet considered whether Boss Ronnie's family presents the kind of 'kinship ties' that constitute a 'particular social group,'" or brought its expertise to bear on the facts of the case, remand was required.[873]

Similarly, in March 2009, the Supreme Court remanded a case to the Board of Immigration Appeals (BIA) after concluding that the BIA had mistakenly relied on the Supreme Court's own precedent in interpreting the INA's "persecutor bar." The persecutor bar denies refugee status and asylum to "any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion."[874] The petitioner, Daniel Girmai Negusie, had been conscripted against his will by the Eritrean government to act as a prison guard for

866. 547 U.S. 183 (2006) (per curiam).
867. *Id*. at 187.
868. Thomas v. Ashcroft, 409 F.3d 1177, 1187 (9th Cir. 2005) (en banc) (overruling Estrada-Posadas v. INS, 924 F.2d 916 (9th Cir. 1991)), *vacated sub nom.* Gonzales v. Thomas, 547 U.S. 183 (2006) (per curiam).
869. *Thomas*, 547 U.S. at 185–86 (discussing the applicability of INS v. Ventura, 537 U.S. 12, 18 (2002) (per curiam)).
870. *Id.* at 186 (quoting *Ventura*, 537 U.S. at 16).
871. *Id*. (quoting *Ventura*, 537 U.S. at 16) (internal quotation marks omitted).
872. *Id*. (quoting *Ventura*, 537 U.S. at 16) (internal quotation marks omitted).
873. *Id*.
874. 8 U.S.C. § 1101(a)(42) (2006).

Ethiopian prisoners, raising the issue of whether the INA's persecutor bar requires voluntary action. The BIA concluded that the Supreme Court's interpretation of the Displaced Persons Act's persecutor bar in *Fedorenko v. United States*[875] controlled and barred Negusie from refugee status.

In the 6–3 decision in *Negusie v. Holder*,[876] in an opinion by Justice Kennedy, the Supreme Court concluded that *Fedorenko* was not controlling because the INA served different purposes than the Displaced Persons Act and remanded the case to the BIA for reconsideration. The Court emphasized that the BIA was entitled to *Chevron* deference in interpreting ambiguous provisions of the INA and that "[j]udicial deference in the immigration context is of special importance, for executive officials 'exercise especially sensitive political functions that implicate questions of foreign relations.'"[877]

In distinguishing the *Fedorenko* decision, the Court discussed the importance of a statute's context and purpose to the construction of specific provisions. Thus, in the Displaced Persons Act, enacted to address persons displaced from World War II and to punish Nazi conduct, Congress required voluntary conduct in some provisions but not in the persecutor bar, supporting the Court's conclusion in *Fedorenko* that voluntary conduct was not required for the persecutor bar to apply.[878] In contrast, Congress enacted the INA as part of the Refugee Act to create a general rule for refugees and displaced persons, and the INA does not contain provisions that emphasize voluntary conduct. As a result, *Fedorenko* did not control the interpretation of the INA's "persecutor bar."[879] Instead, unlike in the Displaced Persons Act, the statutory silence in the INA "persecutor bar" represented a gap for the BIA to fill rather than a congressional indication that voluntariness was not required,[880] and "[w]hatever weight or relevance these various authorities," including the Supreme Court's own related cases, "may have in interpreting the statute should be considered by the agency in the first instance."[881]

The most interesting debate in *Negusie* was how to proceed from there. According to the majority, because the BIA mistakenly thought *Fedorenko* controlled, BIA had "not exercised its interpretive authority" regarding the issue.[882] As a result, because the agency had not yet exercised its *Chevron*

875. 449 U.S. 490 (1981).
876. 129 S. Ct. 1159, 1161 (2009).
877. *Id*. at 1163–64 (quoting INS v. Abudu, 485 U.S. 94, 110 (1988)).
878. *Id*. at 1164–65.
879. *Id*. at 1165–66.
880. *Id*.
881. *Id*. at 1166.
882. *Id*. at 1167.

discretion, the proper remedy was to remand without interpreting the statute because Congress delegated gap-filling authority to the BIA and the BIA should therefore, in light of difficult policy choices, be the first to exercise that authority.[883]

In contrast, Justices Stevens and Breyer concurred in part and dissented in part specifically to argue that *the Court* should have determined whether the INA's "persecutor bar" included or rejected a voluntariness requirement.[884] Arguing that the case involved a "narrow question of statutory construction," they concluded that *Chevron* did not require remand to the agency.[885] Noting "that statutory interpretation is a multifaceted enterprise, ranging from a precise construction of statutory language to a determination of what policy best effectuates statutory objectives,"[886] Justice Stevens emphasized that courts are the final authorities on a statute's meaning. "The *Chevron* framework thus accounts for the different institutional competencies of agencies and courts: Courts are expert at statutory construction, while agencies are expert at statutory implementation. That the distinction can be subtle does not lessen its importance."[887] Moreover, "The fact that Congress has left a gap for the agency to fill means that courts should defer to the agency's reasonable gap-filling decisions, not that courts should cease to mark the bounds of delegated agency choice."[888] Drawing parallels to the adjudication context, Justice Stevens distinguished between questions of pure statutory construction and applications of statutes to particular sets of facts, arguing that the former remains well within the courts' expertise.[889] Thus, while "[t]he BIA's formulation of a test to apply the statutory standard in individual cases and its application of that test in respondent's case were precisely the sort of agency actions that merited judicial deference," the question before the Court was a pure and narrow legal question about whether voluntary action was required for the INA "persecutor bar" to apply.[890] The two Justices would have answered that legal question in the negative and then remanded the case to the BIA to apply that definitive interpretation to Negusie's application.

More emphatically, Justice Thomas dissented "[b]ecause the INA unambiguously precludes any inquiry into whether the persecutor acted

883. *Id*.
884. *Id*. at 1170 (Stevens, J., concurring in part and dissenting in part).
885. *Id*. at 1170–71.
886. *Id*. at 1171.
887. *Id*.
888. *Id*.
889. *Id*. at 1172.
890. *Id*. at 1173.

voluntarily."[891] As a result, there was no role for the BIA to play in interpreting the statute, and its denial of asylum should have been affirmed.[892]

4. Brand X*, Supreme Court Precedent, and Agencies: A Mixed-Message Court*

While the *Brand X* rule that federal agencies can overrule federal courts' interpretations of federal statutes remains a viable consideration in the Supreme Court, the Roberts Court has so far declined—although generally without any *Brand X* analysis—to allow federal agencies to override interpretations in its own precedents. Moreover, as *Morgan Stanley*, *Negusie*, and *Clearing House* demonstrate, the Supreme Court also claims authority to determine the scope of its own prior decisions and how determinative they are regarding agency interpretations of statutes.

Thus, just as the Roberts Court is generally unwilling to defer to an agency's interpretation of its own statutory jurisdiction, so too the Court has been reluctant to allow agencies to define (explicitly or by implication) the administrative law import of prior Court interpretations of statutes. However, just as the Roberts Court fairly consistently defers to federal agencies when no jurisdictional or federalism concerns are present, it also consistently carves out and preserves jurisprudential "space" for agencies to exercise their congressionally delegated interpretive authority, insisting in *Negusie* and *Thomas* that agencies be accorded the right to remand regarding the application of law to facts and a first opportunity to interpret statutes within the corrected boundaries of Supreme Court precedent—even when federal courts could have easily and competently resolved the issues at hand.

Finally, *Clearing House* and *Negusie*, both 2009 decisions, reveal a Court that is deeply divided philosophically regarding the "proper" respective roles of courts and agencies in interpreting and applying the law. This divide, moreover, is made more complicated by the Justices' equally divisive approaches to statutory interpretation. Thus, for example, Justice Thomas is generally the champion of strong *Chevron* deference to agencies, as evidenced by his promotion of the *Brand X* doctrine in his *Clearing House* dissent. Rather than join the pro-agency majority in *Negusie*, however, he again dissented because his rather strict approach to statutory interpretation found no ambiguity in the INA's persecutor bar for the agency to work with.

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891. *Id*. at 1176 (Thomas, J., dissenting).
892. *Id*. at 1185.

CONCLUSION

Distilling absolutely consistent jurisprudential principles across the Roberts Court's administrative law decisions to date is difficult. Instead, what one discerns most readily is an ongoing struggle among the Justices themselves to define the Court's "proper" role in both a tripartite federal government and a federalism system. Moreover, the edges of these jurisprudential skirmishes are generally most obvious in split decisions addressing deference to administrative agencies.

A number of factors have become relevant to the Court's decision to grant or withhold deference. Fairly consistently, agencies receive less deference if they provoke federalism concerns, otherwise test constitutional boundaries, or somehow seek to expand their statutory jurisdiction through statutory interpretation. Conversely, the Court routinely and less divisively defers to agency decisions that neither raise these issues nor confront or challenge Supreme Court precedent—that "merely" apply the law to the facts.

The greatest tensions arise when the Court must define its own interpretive authority against an agency's. These often deeply divided opinions reveal a Court that is generally willing to protect an agency's "right" to be the first interpreter of a statute but not yet willing to sacrifice its own precedent to the full implementation of *Brand X* deference—although the *Clearing House* decision suggests how razor thin this majority may in fact be.

Generalizing these observations across all of the Court's decisions, the Roberts Court appears to be pursuing a "spheres of action" approach to administrative law, accepting for itself the roles of constitutional interpreter, constitutional mediator, and interpreter of Supreme Court precedent, but otherwise largely content to defer to Congress and the Executive Branch—sometimes even insisting upon that deference. Under this model, the Roberts Court's primary function is to ensure that the various governmental actors, including itself, remain confined to their "proper" roles and exhibit proper respect for both other governmental actors and the rights of persons subject to government action. Conversely, under this model the Court's role is also to ensure that the various governmental actors' functions, perspectives, and intents remain dominant when such actors operate within their "proper" roles.

The Court's recurring and sometimes dominating attention to federalism concerns illustrate the workings of this "spheres of action" approach. Even during the Rehnquist Court, federalism considerations resurfaced as a check on both Congress's authority, through revived limitations on the Commerce Clause, and on agency authority, through a "constitutional

boundaries" limitation on *Chevron* deference. In the Roberts Court, this role of the Court as constitutional mediator, both among the various branches of the federal government and between the federal government and the states, has manifested in some very traditional federal court functions, such as playing referee for the ever-varying issues of federal preemption of state law. However, the constitutional-mediator role also caused the first iteration of the Roberts Court to reexamine some basic constitutional doctrines, such as the dormant Commerce Clause doctrine. Moreover, in the federalism context, the Court's constitutional-mediator role generally induces the Court to review skeptically agency assertions of jurisdiction when they intrude into traditional state spheres of regulation and agency claims of *Chevron* deference for expansive interpretations of statutes. Finally, federalism concerns induce the Court to examine more carefully the potential ramifications of different statutory constructions in the process of statutory interpretation itself.

As a pragmatic matter, the administrative law jurisprudence in phase I of the Roberts Court resulted in the largely silent, and not yet fully consistent, creation of a hierarchical approach to federal court review of federal agency action and the actions of other governmental actors. Initially, the Court examines whether the challenge is properly before the federal courts, and the Roberts Court's decisions in this area, more often than not, shield federal agencies from federal court review. If the lawsuit can be heard, the Court engages in a second-level inquiry into the basic propriety of the agency's, or other governmental actor's, action, which generally does not defer to that agency's or actor's own view of its jurisdiction. However, if the agency or actor is deemed to be acting within the proper bounds of its authority, the Court engages in a highly deferential review of what the agency or actor actually did or decided, generally upholding that decision.