RECENT DEVELOPMENTS

SEARCHING FOR *CHEVRON* IN MUDDY *WATTERS*: THE ROBERTS COURT AND JUDICIAL REVIEW OF AGENCY REGULATIONS

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PREFACE

During Chief Justice John Roberts's first two terms at the helm, the Supreme Court decided eleven cases involving judicial review of agency interpretations of federal statutes. These cases presented golden opportunities to clarify the *Chevron* Doctrine,[1] which has been the foundation for determining judicial deference to agency rulings and regulations for more than twenty years.[2] Two Justices, Antonin Scalia and Stephen Breyer, have analyzed judicial deference to agency regulations from an academic perspective[3] in addition to their current focused involvement with the limited number of cases that reach the Supreme Court.[4]

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1. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984). The 1984 decision in *Chevron* marks a watershed in the Supreme Court's approach to judicial review of agency constructions of agency-administered statutes. "*Chevron* is one of the most important decisions in the history of administrative law. It has been cited and applied in more cases than any other Supreme Court decision in history." RICHARD J. PIERCE, JR., ADMININISTRATIVE LAW TREATISE 140 (4th ed. 2002). Innumerable law review articles and cases discuss the *Chevron* doctrine. *See, e.g.*, Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989) (examining *Chevron* from an early perspective). Farina starts from the premise, as I do, that "[f]or those who study the interaction of courts and agencies, one of the most persistently intriguing puzzles has been to define the appropriate judicial and administrative roles in the interpretation of regulatory statutes." *Id.* at 452.

2. *Chevron* is "the undisputed starting point for any assessment of the allocation of authority between federal courts and administrative agencies." Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 188 (2006).

3. *See generally* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511 (1989); Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363 (1986).

4. During the 2006-2007 term, the Supreme Court accepted seventy-two cases and decided only sixty-eight cases after oral argument. Jonathan H. Adler, *How Conservative Is This Court?*, NAT'L REV. ONLINE, July 5, 2007, http://article.nationalreview.com/print/?q=Y2Y3NjNkM2ZkYTcxNzQwYTBhZWZkNzEyZGYyMWExMjE.

The Roberts Court[5] seemed perfectly positioned to articulate a clear, predictable framework. However, in ten of the eleven decisions discussed in this Article, the Court did not invoke the classic administrative law analysis prescribed by the two-step *Chevron* Doctrine. The minority opinions, on the other hand, frequently railed about the need to apply *Chevron*. This Article reviews each of the eleven cases, searching for a coherent standard to distinguish a case of appropriate exercise of federal administrative authority to interpret a statute from a case in which the courts should strike down an agency's statutory interpretation.

The Introduction to this Article highlights *Watters v. Wachovia Bank, N.A.*[6]—a striking example of the Roberts Court's result-oriented approach to potential *Chevron* cases. Part I lays the groundwork for analyzing *Watters* as well as the other agency interpretation cases reviewed. To provide context, the section includes a brief outline of the *Chevron* Doctrine as generally understood at the end of the Rehnquist Court and the beginning of the Roberts Court, marking disputed areas of the doctrine that could benefit from Supreme Court clarification. Part II reviews individual cases in which the Roberts Court examined a federal agency interpretation of a statute. Based on this case review, Part III provides a detailed composite analysis derived from case categorizations. In this section, trends and predictions can be discerned from the Roberts Court track record. Part IV addresses potential implications for federal government agencies and their interaction with the courts in the future. Legal outcomes frequently depend on the analytical framework selected; therefore, the critical need to identify and apply the appropriate framework in future cases drives this search for the current Supreme Court model used to analyze whether agency interpretations of statutes will stand or fall.

INTRODUCTION: SEARCHING FOR *CHEVRON* IN MUDDY *WATTERS*

Watters v. Wachovia Bank, N.A.,[7] a high-stakes case from the financial institutions arena with worthy opponents on each side, initially motivated this search for a Roberts Court standard. This Article uses *Watters,* for *Chevron* purposes, as an intriguing lens through which to examine and compare administrative law decisions rendered by the Roberts Court. The

5. Chief Justice John G. Roberts, Jr. assumed office Sept. 29, 2005, succeeding the late Chief Justice William H. Rehnquist, for whom Roberts served as a law clerk. Justice Sandra Day O'Connor retired in January 2006 and was replaced by Samuel A. Alito, Jr. on Jan. 31, 2006. The Roberts Court also includes Justices John Paul Stevens, Antonin Scalia (former law professor), Anthony M. Kennedy (former law professor), David H. Souter, Ruth Bader Ginsburg (former law professor), Stephen G. Breyer (former law professor), and Clarence Thomas. *See* The Justices of the Supreme Court, http://www.supremecourtus.gov/about/biographiescurrent.pdf (last visited Jan. 31, 2008).

6. 127 S. Ct. 1559 (2007).

7. *Id.*

impact of these eleven cases, analyzed together, affects all federal agencies and their constituencies.

Back to the spring of 2007: For financial institution lawyers and administrative law scholars, the *Watters* case had it all—competition between the dual state and national bank systems, consumer protection concerns, preemption of state law and states rights issues, the benefits of nationwide banking operations, and most importantly, the potential for clarifying to what extent the courts should defer to federal agency interpretation of statutes, especially when the interpretation is one of federal preemption that increases that same agency's sphere of authority. The Court's decision in this hotly contested case has troubling ramifications for our dual banking system,[8] but the fact that the majority ruled in favor of a federal agency's statutory interpretation is not surprising—until we realize that the majority opinion bypassed *Chevron* altogether. To discover that *Chevron*, the administrative law touchstone of cases involving judicial review of agency interpretation, is somehow "missing in action," is more than enough to trigger a search operation.

I. PARSING THE *CHEVRON* DOCTRINE

A. Chevron*—A Simple Framework for a Complicated Question*

To establish a starting point for this expedition into currently developing Supreme Court doctrine, a short recapitulation of the *Chevron* Doctrine is in order. In 1984, the Supreme Court announced a two-step model for determining when the courts should defer to agency interpretations of statutes.[9] *Chevron* involved judicial review of the Environmental Protection Agency's (EPA) interpretation of a statutory term from the Clean Air Act (CAA).[10] Justice Stevens, writing for a unanimous Court, articulated the key test as:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously

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8. *Id.* at 1566-69. *See generally* Arthur E. Wilmarth, Jr., *The OCC's Preemption Rules Exceed the Agency's Authority and Present a Serious Threat to the Dual Banking System and Consumer Protection*, 23 ANN. REV. BANKING & FIN. L. 225 (2004) (providing extensive discussion of dual banking system issues).

9. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984). This section of the article is not intended to be an exhaustive explication of the *Chevron* doctrine. It briefly sets the stage for the Roberts Court cases.

10. *See id.* at 840-42 (describing EPA's interpretation of the term "stationary source," as compared to that of the reviewing courts).

> expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[11]

There have been many twists and turns in the more than twenty years since the Rehnquist Court formulated the *Chevron* standard.[12] My purpose is to determine how the Roberts Court has applied, modified, and avoided that standard.

B. Justice Scalia and Justice Breyer

Early *Chevron* scholarship set up two camps that continue to provide a useful contrast: the "strong" reading of *Chevron* vs. the "weak" version.[13] Justice Scalia promotes the "simple," or "strong," reading of *Chevron*.[14] He has been called "the Court's most vocal *Chevron* enthusiast."[15] Justice Breyer, on the other hand, urges a more flexible approach.

As a member of the Roberts Court, Justice Scalia is an articulate force with which to be reckoned in any case that could trigger questions of *Chevron* deference. Although he was not a member of the Court when the *Chevron* case was decided, his 1989 Duke Law Journal article, *Judicial Deference to Administrative Interpretations of Law*,[16] provides excellent insight. In that early analysis, Justice Scalia saw *Chevron* as "a highly important decision—perhaps the most important in the field of administrative law . . . ."[17] Justice Scalia signaled his position with respect to *Chevron* deference from the outset, finding:

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11. *Id.* at 842-43 (1984) (internal footnotes omitted).

12. Administrative law scholars recognized the Court's inconsistency in applying *Chevron* before the 2005-2006 Supreme Court term. *See, e.g.*, PIERCE, *supra* note 1, at 175-91 (focusing on how *Chevron*'s analytical framework has fared prior to the Roberts Court cases discussed here).

13. *See* Richard J. Pierce, Jr., Chevron *and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301, 302-03 (1988) (discussing the "strong" and "weak" forms of *Chevron* analysis—a dichotomy apparent as early as 1988).

14. *See* United States v. Mead Corp., 533 U.S. 218, 236-38 (2001) (characterizing the majority's disagreement with Justice Scalia's dissenting position in the case). Justice Souter wrote the Court's opinion in *Mead*. *Id.* at 220. Justice Souter noted that "Justice Scalia would pose the question of deference as an either-or choice" and opposed "Justice Scalia's efforts to simplify." *Id.* at 237-38. In dissent, Justice Scalia said flatly, "To decide the present case, I would adhere to the original formulation of *Chevron*." *Id.* at 256.

15. Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of* Chevron, 73 U. CHI. L. REV. 823, 826 (2006) (suggesting that while Scalia is the least deferential justice, Breyer is the most deferential).

16. Scalia, *supra* note 3.

17. *Id.* at 512.

> [A] fairly close correlation between the degree to which a person is . . . a "strict constructionist" of statutes, and the degree to which that person favors *Chevron* and is willing to give it broad scope . . . . One who finds *more* often (as I do) that the meaning of a statute is apparent from its text and from its relationship with other laws, thereby finds *less* often that the triggering requirement for *Chevron* deference exists.[18]

Justice Scalia is still a "strict constructionist" and he argues vociferously for application of the *Chevron* analysis—even when he has no intention of granting *Chevron* deference because he has settled the question by the only plausible reading of the statute: his own.

Justice Breyer also wrote about *Chevron* soon after the Court announced its decision, and well before he became a Supreme Court Justice. In his 1986 article, *Judicial Review of Questions of Law and Policy*,[19] he addressed what he called "The Problem of the *Chevron* Case."[20] Then-Judge Breyer[21] noted that the *Chevron* opinion may be read to embody a "complex approach,"[22] giving lower courts leeway to determine whether an agency interpretation is a "permissible"[23] construction by allowing them to include "a range of relevant factors."[24] Then and now, Justice Breyer opposes a simple approach to *Chevron* analysis because:

> [T]here are too many different types of circumstances, including different statutes, different kinds of application, different substantive regulatory or administrative problems, and different legal postures in which cases arrive, to allow "proper" judicial attitudes about questions of law to be reduced to any single simple verbal formula . . . . To read *Chevron* as laying down a blanket rule, applicable to all agency interpretations of law, such as "always defer to the agency when the statute is silent," would be seriously overbroad, counterproductive and sometimes senseless.[25]

Justice Breyer continues to advocate for this more flexible reading of *Chevron*. He has been described as "the Court's most vocal critic of a strong reading of *Chevron.*"[26] His approach does not immediately defer to

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18. *Id.* at 521.
19. Breyer, *supra* note 3.
20. *See id.* at 372 (discussing the conflicting interpretations that courts may derive from the *Chevron* language).
21. *See id.* at 363 (naming Justice Breyer's position at the time of the article's publication as Judge for the United States Court of Appeals for the First Circuit).
22. *See id.* at 373 (noting that the wording used in the decision is general and therefore open to different judicial readings).
23. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).
24. Breyer, *supra* note 3, at 373.
25. *Id.*
26. *See* Miles & Sunstein, *supra* note 15, at 826 (comparing how Justice Breyer and Justice Scalia's opinions differ as well as their practical levels of deference).

the agency's position; however, when the votes are in, he has been "the most deferential in . . . practice"[27]—at least until the end of the Rehnquist Court era.

C. Skidmore*,* Chevron*,* Mead*, and Back Again*

Before the 1984 *Chevron* opinion became the standard for judicial deference to agency interpretation, *Skidmore v. Swift & Co*.[28] provided the following test:

> [T]he rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.[29]

The *Chevron* standard is much more deferential, at least in its strong form, to agency interpretations than is *Skidmore*. The current Justices have not resolved their ongoing debate about whether *Chevron* abrogated *Skidmore*, although on balance, *Skidmore* remains a viable alternative theory.[30] Justice Breyer uses *Skidmore*; Justice Scalia, however, rejects it as too indeterminate, saying that, "totality-of-the-circumstances *Skidmore* deference is a recipe for uncertainty, unpredictability, and endless litigation."[31]

If *Chevron*, which can be read to require judicial deference to agency interpretations, is no longer a reliable analytical model, we are left with the *Skidmore* standard. *Skidmore* does no more than state the obvious: (1) courts will approve agency interpretations if persuaded by a wide-open accumulation of supporting evidence; and (2) they will reject agency interpretations that do not coincide with their own background analysis and conclusions of law.

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27. *Id.* (presenting a quantitative analysis of the Justices' voting records on agency interpretations).

28. 323 U.S. 134 (1944).

29. *Id.* at 140.

30. *See, e.g.*, United States v. Mead, 533 U.S. 218, 234 (2001). In *Mead* the majority opinion states explicitly that "*Chevron* did nothing to eliminate *Skidmore*'s holding . . . ." The decision to remand the case in *Mead* turned on "the possibility that [the Customs ruling] deserves some deference under *Skidmore*" even though it did not, in the Court's opinion, qualify for *Chevron* deference. *Id.* at 227.

31. *Id.* at 250 (Scalia, J., dissenting).

United States v. Mead Corp. is frequently used to modify or explain *Chevron*.[32] *Mead* itself involved a challenge to a U.S. Customs Service's tariff classification made through a letter ruling. One of the significant facts in this case was "the reality that 46 different Customs offices issue 10,000 to 15,000 [letter rulings about tariff classifications] each year."[33] Thus, at a minimum, we would expect this case to clarify the issue of whether *Chevron* deference requires agency interpretation to be established by notice and comment rulemaking or by another standard of formality. Justice Souter, writing for the Court, claimed much more, saying, "We granted certiorari in order to consider the limits of *Chevron* deference owed to administrative practice in applying a statute."[34]

Despite Justice Souter's initial buildup, the *Mead* opinion did not draw any bright lines. The Court gave very flexible guidance about the form of agency interpretation that can warrant deference. In the *Mead* Court's search for congressional intent to delegate authority to grant the type of ruling at issue, the range of acceptable indicia of delegation was broad and open-ended: Congress can show its intent by giving the agency power to engage in adjudication or notice and comment rulemaking, "or by some other indication of a comparable congressional intent."[35]

The *Mead* opinion also drew on language from *Chevron* supporting implicit rather than explicit delegation to the agency.[36] The opinion referred to past Supreme Court decisions in which the court had "sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded."[37]

The bottom line in *Mead* is that, although acceptable agency interpretations assume many forms, the Court knows the type of agency ruling that would merit *Chevron* deference when it sees one—and this Customs ruling was not it.[38] Although the letter ruling was not entitled to

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32. *See infra* Part III. Many of the Roberts Court cases analyzed here include discussion of *Mead* and the composite case analysis that examines trends, including the interaction between *Mead* and *Chevron*.

33. *See Mead*, 533 U.S. at 233.

34. *Id.* at 226 (citation omitted).

35. *Id.* at 227.

36. *Id*. at 229 (expanding on the original language in *Chevron* and emphasizing that agencies can have authority in particular legal areas through implicit congressional authorization).

37. *Id*. at 231. The *Mead* opinion cited *Christensen v. Harris County*, 529 U.S. 576, 587 (2000), for the proposition that some agency interpretations, including policy statements, agency manuals, and enforcement guidelines, are viewed like this Customs letter ruling: "beyond the *Chevron* pale." *Id.* at 220.

38. This paraphrases Justice Stewart's reasoning about "pornography" in which he wrote, "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

Chevron deference, the *Mead* Court awarded a consolation prize: the Customs interpretation might be upheld on remand by application of the *Skidmore* standard.[39]

As the Roberts Court case reviews in Part II demonstrate, Justice Breyer supports the *Chevron*-as-limited-by-*Mead* approach, but Justice Scalia does not. If the Roberts Court cannot agree on a coherent application of *Chevron*, with or without the *Mead* gloss, we may have come full circle to a vague and variable standard for when a court will approve or reject an agency interpretation—such as *Skidmore*.

D. Open Questions

Definitive Supreme Court answers to the following questions in the *Chevron* arena could yield a much higher degree of consistency and predictability in litigation involving federal interpretations of statutes. If these answers were known in advance of agency action, the effect could be greater congruence with a standard known to all parties and therefore, reduced litigation.

1. How is judicial deference to federal agency interpretation of statute affected by the procedure the agency chose to assert its interpretation?[40]

2. How does an agency's statutory interpretation that expands its jurisdiction affect judicial deference?[41]

3. Is a federal agency entitled to deference when it makes a determination that state law is preempted—an interpretation that goes beyond its own substantive, technical expertise?[42] How does the

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39. *Mead*, 533 U.S. at 238 (remanding the case because "the *Skidmore* assessment called for here ought to be made in the first instance by the Court of Appeals").

40. *See* Lisa Schultz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443 (2005) (analyzing opinions from the courts of appeals indicating confusing inconsistencies regarding whether *Chevron* deference extends only to agency interpretations promulgated through notice and comment rulemaking or whether interpretations issued through informal procedures can also be entitled to judicial deference). However, *Long Island Care at Home, Ltd. v. Coke*, a unanimous decision by the Roberts Court at the very end of the 2006-2007 term, may indicate that the current Supreme Court will favorably consider any form of agency interpretation. 127 S. Ct. 2339, 2349 (2007). That case gave deference to an Advisory Memorandum explaining and defending the agency interpretation, even though the Memorandum was "issued only to [agency] personnel . . . and written in response to this litigation." *Id.*

41. For a discussion of the Supreme Court's failure to resolve whether *Chevron* deference applies to jurisdictional questions, see Bressman, *supra* note 40; Elizabeth Garrett, *Legislating* Chevron, 101 MICH. L. REV. 2637, 2674 (2003).

42. *See* Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 68 (2007) (arguing that "courts would be well advised to leave state law unpreempted, secure in the knowledge that congresspersons will have strong incentives to strengthen the statutes' preemptive force if this is the wish of their constituents").

presumption against preemption interact with deference to agency interpretation?[43]

4. Will the Supreme Court require explicit congressional delegation of interpretive authority to a federal agency? Should courts infer congressional intent for agency authority from silence or from the court's own analysis of legislative and regulatory history?

5. Is the Supreme Court's own reading of the "plain meaning" of the statute the actual rationale applied most often in agency interpretation cases? If so, does this rationale have any predictive value about future case outcomes?

The Roberts Court has had ample opportunity to resolve these questions. Unfortunately, the Court has not answered any of them directly. They remain fair game for future law review articles and inconsistent lower court rulings.[44] With regard to the question of requiring explicit versus implicit delegation, we can draw some conclusions even without a clear holding, by placing the Justices and the cases showing support for one view or the other into an array of categories. After discussing the individual cases in Part II, I have grouped and categorized the eleven cases identified in order to discern trends. Using that approach, it is also possible to posit some present and future directions regarding the "plain language" approach. Given the lineup of Roberts Court cases reviewed, it is not possible—even indirectly—to distill definitive answers to questions about the required formal or informal nature of agency interpretations, about territory-enlarging interpretations, or about agency determinations of preemption. These questions await another case with the requisite fact situation and a Supreme Court willing and able to reach a clear ruling.

II. *CHEVRON* DEFERENCE AND THE ROBERTS COURT

The Court's opinion in *Watters*, considered here as a starting point for evaluating the Roberts Court's views on *Chevron* deference, is inconsistent with the expectation of most administrative lawyers—not for its result, which supported the agency, but for its failure to follow the classic *Chevron* analysis. My analysis of eleven Roberts Court cases involving potential application of *Chevron* yields several conclusions that are critical

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43. *See* Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) (making a clear statement of presumption *against* preemption). *But see* Erwin Chemerinsky, *Empowering States When It Matters: A Different Approach to Preemption*, 69 BROOK. L. REV. 1313, 1318-24 (2004) (advocating presumption *in favor of* preemption); Mary J. Davis, *Unmasking the Presumption in Favor of Preemption*, 53 S.C. L. REV. 968 (2002) (suggesting presumption *in favor of* preemption).

44. *See* Bressman, *supra* note 40, at 1445 (reviewing courts of appeals' opinions after *Mead* was decided by the Supreme Court in 2001 and concluding that they have been inconsistent).

to the practice of administrative law in the future: the *Watters* approach is not an aberration. Classic *Chevron* analysis is dead. In place of *Chevron*, the older *Skidmore* approach is a better predictor of whether courts will uphold or overrule federal agency interpretations of statute. We can also expect courts generally to follow a model like *Watters*, which bypasses any consideration of agency regulations and goes right to the court's own reading of the statute.

Research yields three agency interpretation cases from the 2005-2006 Supreme Court term and eight cases, including *Watters*, from 2006-2007, the second year of the Roberts Court. No opinions in these cases from the second year had been released prior to oral argument in the *Watters* case. There was a breathing space after the November 29, 2006 oral arguments in *Watters* and *Massachusetts v. EPA* (another agency interpretation case argued on the same day) then the Court published the eight second-year cases in the next three months, between April 2, 2007 and June 25, 2007.[45] Following is a discussion of each of the eleven Roberts Court cases, including *Watters*, that involved judicial review of agency interpretation. At the beginning of each case analysis, I characterize each decision as: For or Against the Agency; For or Against the State; For or Against Public Interest Groups; For or Against Business Interests; and "Liberal" or "Conservative."[46] Following the case review is an analysis of trends and predictions that can be derived from these eleven Roberts Court cases.

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45. Of the eight second-year cases, the first two opinions were announced on Apr. 2, 2007. Another three were published on Apr. 17, 2007. Because these opinions were so tightly clustered in time, we have reason to expect consistency. In Part III of this Article, I examine how this expectation played out.

46. Miles & Sunstein, *supra* note 15. This thought-provoking article used similar case categorizations in analyzing the Rehnquist Court approach to *Chevron* deference. Miles and Sunstein analyzed eighty-four Supreme Court cases from 1989 through 2005 that reviewed agency interpretations of law. Sixty-nine of those decisions applied *Chevron* analysis and fifteen did not expressly apply *Chevron*. By comparison, my analysis of Roberts Court cases identified ten cases that did not follow a strict *Chevron* analysis and only one that did. Miles and Sunstein concluded that their "Realist Hypothesis" (that Supreme Court Justices will vote to affirm a federal agency's conclusion when it conforms with their policy judgments, regardless of whether the statutory text is clear or ambiguous) best explains the Rehnquist Court decisions. The Roberts Court decisions examined in Parts II and III of my Article support this Realist Hypothesis to an even greater degree. Miles and Sunstein found that the "justices enjoy wide discretion in deciding whether to apply *Chevron* and that they employ *Chevron* deference strategically." *Id.* at 842. My analysis here shows this finding to be true of the Roberts Court as well.

Categorizing the Justices as "liberal" or "conservative" may be somewhat artificial, but it establishes a means to determine whether the decisions analyzed follow ideological lines. I have used Miles and Sunstein's categorization of Justices Stevens, Souter, Breyer, and Ginsburg as "liberal" and Justices Scalia and Thomas as "conservative," with Justices O'Connor (no longer on the Court) and Kennedy as "moderate" or "swing" votes. *Id.* at 834. I have assigned Chief Justice Roberts and Justice Alito to the "conservative" group. I have also categorized the case decisions as "conservative" or "liberal" using the criteria employed by Miles and Sunstein, based chiefly on the identity of the party challenging the agency regulation, e.g., "Conservative" if the decision favors the agency when challenged

A. Gonzales v. Oregon[47]

The Supreme Court heard arguments for *Gonzales v. Oregon* on October 5, 2005, during the first week of Chief Justice Roberts's tenure and decided the case on January 17, 2006. The decision was 6-3, with Justice Kennedy writing the Court's opinion, joined by Justices Stevens, O'Connor (a member of the Roberts Court only during the first three months of the first term), Souter, Ginsburg, and Breyer. Justice Scalia filed a dissenting opinion in which Chief Justice Roberts and Justice Thomas joined. Justice Thomas also filed a dissenting opinion. This decision can be categorized as: Against the Agency (U.S. Attorney General); For the State; For Public Interest Groups (patients seeking to use physician assisted suicide); and "Liberal."[48]

The *Gonzales* case involved a conflict between state law and a federal agency's interpretive rule. The U.S. Attorney General issued a rule interpreting the federal Controlled Substances Act (CSA)[49] to prohibit doctors from prescribing regulated drugs for use in physician-assisted suicide, notwithstanding the fact that the Oregon Death With Dignity Act [50] permits the practice.

Although the *Gonzales* case rejected the application of any deference and declared the federal interpretive rule invalid, it provides clear insight into how the Roberts Court viewed agency deference at the beginning of the term. As a benchmark, the majority opinion laid out in simple terms, three types of deference that the courts might afford to a federal agency: (1) *Auer* deference;[51] (2) *Chevron* deference;[52] and (3) *Skidmore* deference.[53]

Substantial deference under the *Auer* standard is appropriate for an "administrative rule . . . interpret[ing] the issuing agency's own ambiguous regulation,"[54] and calls for treating the agency's interpretation as "controlling unless plainly erroneous or inconsistent with the regulation."[55] Justice Kennedy, writing for the Court, distinguished *Auer* deference from

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by a public interest group and "Liberal" if the decision favors the agency when challenged by a business interest. *Id.* at 830-31.

47. 546 U.S. 243 (2006).

48. *See* discussion *supra* note 46.

49. 21 U.S.C. § 801 (2000).

50. OR. REV. STAT. §§ 127.800-127.897 (1994) (holding that deference is due to an agency's interpretation of its own rule).

51. *See* Auer v. Robbins, 519 U.S. 452 (1997).

52. *See supra* Part I.A.

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

54. Gonzales v. Oregon, 546 U.S. 243, 255 (2006).

55. *Id.* at 256 (quoting *Auer*, 519 U.S. at 461).

Chevron deference. In his view, courts apply *Auer* deference when a case involves interpreting an agency regulation, and *Chevron* deference when the case involves interpretation of an ambiguous statute.[56]

Justice Kennedy used *Mead*[57] to explain and limit *Chevron* deference which, he said, should be used 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."[58] The *Mead* catch phrase is: *Chevron* deference "is not accorded merely because the statute is ambiguous and an administrative official is involved."[59]

According to the *Gonzales v. Oregon* opinion, *Skidmore* deference was not displaced by *Chevron*, but remains a third, very limited deference standard. Under *Skidmore* analysis, "the [federal agency] interpretation is 'entitled to respect' only to the extent it has the 'power to persuade.'"[60] Justice Kennedy relied on *Christensen v. Harris County*[61] to bolster this post-*Chevron* application of *Skidmore* deference.[62]

Interestingly, after presenting a tutorial on the law of agency deference, the majority opinion in *Gonzales* did not defer to the agency under any theory because "the underlying regulation does little more than restate the terms of the statute itself."[63] The Court went on to note that, "[s]imply put, the existence of a parroting regulation [did] not change the fact that the question here is not the meaning of the regulation but the meaning of the statute."[64] In his dissent, Justice Scalia questioned this "newly invented" parroting exemption from agency deference.[65] Justice Kennedy, writing for the Court, expressly rejected both *Auer* and *Chevron* deference.[66] In accordance with *Skidmore* analysis, he concluded that the Attorney General's interpretation was not persuasive and thus, not entitled to deference.[67]

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56. *Id.* at 255.
57. 533 U.S. 218, 226-27 (2001).
58. *Gonzales*, 546 U.S. at 255-56 (quoting *Mead*, 533 U.S. at 226-27).
59. *Id.* at 258.
60. *Id.* at 256 (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).
61. *See* 529 U.S. 576, 587 (2000) (relying on *Skidmore* for deference to opinion letters only when the letters were persuasive).
62. *Gonzales*, 546 U.S. at 269.
63. *Id.* at 257.
64. *Id.*
65. *Id.* at 280 (Scalia, J., dissenting) (suggesting that the agency's interpretation might still survive).
66. *Id.* at 258 (majority opinion) (refusing to defer to the Interpretive Rule on either *Auer* or *Chevron* grounds).
67. *Id.* at 268-69.

Unlike the *Watters* decision, in this balancing of state and federal authority, the Roberts Court ruled in the state's favor. Unquestionably, this case differs from *Watters* in that the federal statute in question contained an explicit rejection of congressional intent to "occupy the field" to the exclusion of any state law on the same subject matter unless there was positive conflict.[68] Nevertheless, the opinion contains strong philosophical statements that contrast sharply with the *Watters* majority opinion. For example, the Court found in *Gonzales* that congressional silence regarding federal agency authority to override state law "is understandable given the structure and limitations of federalism, which allow the States 'great latitude under their police powers to legislate . . . .'"[69]

Another contrast with *Watters* is the majority opinion's focus on explicit delegation provisions. The Court in *Gonzales* concluded that:

> Congress is unlikely to alter a statute's obvious scope and division of authority through muffled hints, the background principles of our federal system also belie the notion that Congress would use such an obscure grant of authority to regulate areas traditionally supervised by the States' police power. It is unnecessary even to consider the application of clear statement requirements, or presumptions against preemption, to reach this commonsense conclusion.[70]

Justice Scalia, on the other hand, opined in his *Gonzales* dissent that:

> The Court's exclusive focus on the *explicit* delegation provisions is, at best, a fossil of our pre-*Chevron* era; at least since *Chevron*, we have not conditioned our deferral to agency interpretations upon the existence of explicit delegation provisions. *United States v. Mead Corp*. left this principle of implicit delegation intact.[71]

Both Justice Scalia and Justice Kennedy seem to have flip-flopped on the issue of explicit delegation, taking the opposite of their positions articulated in *Gonzales* by the time of *Watters*.[72] In *Gonzales*, Justice Scalia strongly opposed a requirement for explicit delegation, as demonstrated by the language quoted above, but in *Watters*, discussed earlier in the Introduction, Justice Scalia agreed with the dissenting opinion requiring explicit delegation before a court will grant deference to an agency interpretation.

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68. 21 U.S.C. § 903 (2000) (rejecting "field preemption" but recognizing the potential for "conflict preemption").

69. *Gonzalez*, 546 U.S. at 270 (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 475 (1996)).

70. *Id.* at 274 (citations omitted).

71. *Id.* at 294 (Scalia, J., dissenting) (citation omitted).

72. *See* discussion *infra* Part II.F.

Although Justice Kennedy later voted with the majority in *Watters*, finding explicit delegation unnecessary, in *Gonzales* he favored explicit delegation:

> The idea that Congress gave the Attorney General such broad and unusual authority through an implicit delegation in the [statute] is not sustainable. "Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."[73]

In both *Gonzales* and *Watters*, the Supreme Court skipped over the agency's statutory interpretation and conducted its own statutory analysis, making its decision on a *de novo* reading of the statute. While this could be viewed as *Chevron* step one (is congressional intent clear from the statute's language?), the Court appears to bypass any consideration of congressional intent and decide these cases based on its own independent thinking.

B. S.D. Warren Co. v. Maine Board of Environmental Protection[74]

The Supreme Court heard arguments for *S.D. Warren Co. v. Maine Board of Environmental Protection* on February 21, 2006, and decided the case on May 15, 2006. Justice Souter authored this unanimous opinion. However, Justice Scalia chose not to join the portion of the opinion discussing legislative history.

This decision can be characterized as: For the Agency (Federal Energy Regulatory Commission); Against Business Interests (hydroelectric dam operator); For the State; For Public Interest Groups; and "Liberal."[75] The Court made an initial determination that the *Chevron* framework did not apply.[76]

S.D. Warren sought authorization from the Federal Energy Regulatory Commission (FERC) to renew federal licenses for its hydroelectric dams in Maine.[77] The Clean Water Act (CWA) provides that if a dam may result in "discharge" into navigable waters, a federal license may not be issued without state certification, and in this case, FERC required state certification.[78] The CWA does not define "discharge"; therefore, the Supreme Court found that the courts are "left to construe [the statutory language] 'in accordance with its ordinary or natural meaning.'"[79] Although the Supreme Court affirmed FERC's decision, the Court read the

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73. *Gonzalez*, 546 U.S. at 267 (quoting Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 468 (2001)).
74. 126 S. Ct. 1843 (2006).
75. *See supra* note 46.
76. *S.D. Warren Co*., 126 S. Ct. at 1848-49.
77. *Id.* at 1847.
78. *Id.* at 1846-47.
79. *Id.* at 1847 (quoting FDIC v. Meyer, 510 U.S. 471, 476 (1994)).

statute and arrived at its own definition of the word "discharge," in the "common sense" meaning of the term, to support the determination that "a dam does raise a potential for a discharge and state approval is needed."[80]

The Supreme Court offered a weak explanation for not utilizing *Chevron* analysis: that FERC had not formally settled the definition and had not adequately set forth its reasoning. The Court said that "expressions of agency understanding" in recent adjudication "do not command [*Chevron*] deference,"[81] but it failed to acknowledge contrary pronouncements in its own cases.[82] This case strongly suggests that Justice Breyer's preference for a case-by-case approach is gaining ground over Justince Scalia's preference for the simple application of *Chevron*.[83]

C. Rapanos v. United States[84]

The Supreme Court heard arguments for *Rapanos v. United States* on February 21, 2006, and decided the case on June 19, 2006. The Court reached a decision categorized as: Against the Agency (Army Corps of Engineers); For the State (because the decision favors states' rights); For Business Interests (developers); Against Public Interest Groups (environmental protectionists); and "Conservative."[85] This opinion supports states' rights by limiting federal agency intrusion, although in this case, thirty-three states filed amicus briefs which favored ceding their traditional jurisdiction and responsibility to the Army Corps of Engineers. The plurality opinion did not discuss *Chevron* deference at all, instead it relied on its own plain reading of the statute to contradict the federal agency's interpretation.

Justice Scalia wrote the plurality opinion, joined by Chief Justice Roberts and Justices Thomas and Alito. The Chief Justice wrote a separate concurring opinion. Justice Kennedy concurred in the judgment. Justice Stevens authored a dissenting opinion that Justices Souter, Ginsburg, and Breyer joined. Justice Breyer also submitted a separate dissenting opinion.

Justice Scalia, writing for the plurality, found that the CWA term "navigable waters" did not have the expansive meaning that the Army Corps of Engineers gave it in a regulation, in administrative enforcement

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80. *Id.* at 1846.
81. *Id.* at 1848.
82. *See generally* United States v. Mead, 533 U.S. 218, 231 n.12 (2001) (listing cases in which the Court reviewed agency adjudications and applied *Chevron* deference).
83. *See* Sunstein, Chevron *Step Zero*, *supra* note 2, at 192-93 (discussing the "intense and longstanding disagreement between the Court's two administrative law specialists" and suggesting that while Justice Scalia has historically triumphed, Justice Breyer has recently celebrated significant victories).
84. 126 S. Ct. 2208 (2006).
85. *See* discussion *supra* note 46.

proceedings, and in judicial litigation.[86] This decision presents an interesting comparison with *Watters*. What is not surprising about the two decisions is that Justices Scalia and Breyer were on opposite sides in both cases. What is surprising is the degree of inconsistency throughout the Court with respect to whether a particular Justice supported or opposed allowing an agency to expand its jurisdiction through statutory interpretation.

Rapanos was a pro-business decision limiting a federal agency's jurisdictional reach. Justice Scalia and the Court's other "conservative" Justices constituted the plurality in *Rapanos*; Justice Kennedy was the swing vote.

Watters was also a pro-business decision, but it upheld an aggressive federal agency's expansion of its own jurisdiction. In *Watters*, Justice Kennedy again joined the majority, this time including "liberal" Justices Ginsburg, Souter, and Breyer and "conservative" Justice Alito.

Justice Stevens, author of a dissent in *Rapanos*, in which he argued in favor of expanding an agency's jurisdiction by means of its own statutory interpretation, also authored the dissent in *Watters* in which he took an inconsistent position, opposing an agency's jurisdictional expansion through its own regulation. Chief Justice Roberts and Justice Scalia joined Justice Stevens's *Watters* dissent; however, their positions in these two cases remained consistent in opposing a federal agency's efforts to bootstrap its way into expanded jurisdiction by broadly construing a statutory term.

Justices Alito and Kennedy moved from a restrictive statutory interpretation in *Rapanos* to an expansive statutory analysis supporting the federal agency in *Watters*. Justices Ginsburg, Souter, and Breyer also changed from voting against a jurisdiction-expanding agency interpretation in *Rapanos* to voting for a jurisdiction-expanding agency interpretation in *Watters*.

The plurality opinion in *Rapanos* considered prior Supreme Court CWA cases and reacted adversely to the Army Corps of Engineers's incremental expansion of its jurisdiction. The plurality found that because the Court did not rein in the agency sooner, "the Corps adopted increasingly broad interpretations of its own regulations under the [Clean Water] Act"[87] and used subsequent agency rules to "clarify" the reach of its expanding jurisdiction.[88]

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86. *Rapanos*, 126 S. Ct. at 2225.
87. *Id.* at 2216.
88. *Id. Compare id.*, *with* Watters v. Wachovia Bank, N.A., 127 S. Ct. 1559, 1577-78 (2007) (describing how the OCC's "clarifying" regulation broadened its jurisdiction to cover operating subsidiaries of national banks).

In *Rapanos*, Justice Scalia conducted his own analysis of the "plain language of the statute" and the "commonsense understanding of the term."[89] He concluded that his interpretation was the "only natural definition of the term"[90] and the "only plausible interpretation."[91] He found that even if the statutory phrase at issue was ambiguous, the Court would "ordinarily expect a 'clear and manifest' statement from Congress to authorize an unprecedented intrusion into traditional state authority."[92] Justice Scalia gave no weight to the theory of longstanding agency interpretation as an indication of congressional delegation by deliberate acquiescence. In characteristically colorful metaphor, he criticized it as "a sort of [thirty]-year adverse possession that insulates disregard of statutory text from judicial review."[93] He reminded the dissenters that "Congress takes no governmental action except by legislation."[94]

Justice Scalia did not discuss *Chevron* deference, but instead relied on his own "plain meaning" interpretation of the statute. Chief Justice Roberts's concurrence did acknowledge *Chevron*, recognizing that "[a]gencies delegated rulemaking authority under a statute such as the [CWA] are afforded generous leeway by the courts in interpreting the statute they are entrusted to administer."[95] He opined that the Army Corps of Engineers "would have enjoyed plenty of room to operate in developing *some* notion of an outer bound to the reach of their authority"[96] by rulemaking; however, "the Corps chose to adhere to its essentially boundless view of the scope of its power. The upshot [of the matter] is another defeat for the agency."[97] Clearly, this federal agency's efforts to expand its own jurisdiction represented a strong negative factor for the Chief Justice. However, the Chief Justice concurred in the judgment, not because he agreed with the plurality's reasoning, but rather because he found that neither the agency nor the lower courts had properly considered various issues; therefore, both he and the plurality favored remand.

Justice Stevens, writing for the dissent, found this case to be "a quintessential example of the Executive's reasonable interpretation of a statutory provision."[98] The focus on *Chevron* deference is consistent with Justice Stevens's dissent in *Watters*. Another remarkable aspect of Justice

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89. *Rapanos*, 126 S. Ct. at 2222.
90. *Id.* at 2220.
91. *Id.* at 2225.
92. *Id.* at 2224 (quoting BFP v. Resolution Trust Corp., 511 U.S. 531, 544 (1994)).
93. *Id.* at 2232.
94. *Id.* at 2231.
95. *Id.* at 2235-36 (Roberts, C.J., concurring) (citing Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-45 (1984)).
96. *Id.* at 2236.
97. *Id.*
98. *Id.* at 2252 (Stevens, J., dissenting) (citing *Chevron*, 467 U.S. at 842-45).

Stevens's dissenting opinion in *Rapanos* is his less than collegial characterization of the plurality Justices' viewpoint as "antagonism to environmentalism."[99] In turn, the plurality Justices criticized Justice Stevens's rationale as "policy-laden."[100]

Like Justice Stevens's dissent, Justice Breyer's separate dissenting opinion called for resolution of these cases through the application of *Chevron* deference to agency regulations. To head off any confusion upon remand, Justice Breyer called for the Army Corps of Engineers "to write new regulations, and speedily so."[101]

D. Massachusetts v. EPA[102]

The Supreme Court heard arguments for *Massachusetts v. EPA* on November 29, 2006, and decided the case on April 2, 2007. It presents the mirror image of the *Watters* case, which was argued the same day. *Massachusetts v. EPA* is characterized as: Against the Agency (EPA); Against Business Interests (automobile manufacturers); For Public Interest Groups (environmentalists); For the States; and "Liberal."[103] Compare this with the *Watters* case characterization: For the Agency; For Business Interests; Against Public Interest Groups; Against the States; and "Conservative."[104]

In this case, the Commonwealth of Massachusetts sought to compel the EPA to conduct a rulemaking, while the agency argued that it lacked statutory authority to extend its jurisdictional reach by regulation.[105] In *Watters*, the federal agency (Office of the Comptroller of the Currency) did issue a regulation "clarifying" and extending its jurisdiction over state objection.[106] Justice Stevens wrote the majority opinion in *Massachusetts v. EPA* and the dissenting opinion in *Watters*.

The majority did not apply *Chevron* analysis in its review of EPA's denial of a rulemaking petition that the Commonwealth of Massachusetts and nineteen public interest groups had filed requesting EPA to regulate greenhouse gas emissions from new motor vehicles pursuant to the CAA.

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99. *Id.* at 2259 n.8.
100. *Id.* at 2229 (plurality opinion).
101. *Id.* at 2266 (Breyer, J., dissenting).
102. 127 S. Ct. 1438 (2007).
103. *See* discussion *supra* note 46.
104. *See* discussion *supra* note 46.
105. Massachusetts v. EPA, 127 S. Ct. at 1450.
106. The named petitioner in *Watters* was the Michigan Commissioner of the Michigan Office of Insurance and Financial Services. Forty-four states and the District of Columbia filed an amicus brief supporting Watters and opposing both Wachovia Bank, N.A., and its primary federal regulator, the OCC. Watters v. Wachovia Bank, N.A., 127 S. Ct. 1559 (2007).

Instead, the Court conducted its own reading of the statute and ruled against the agency on general Administrative Procedure Act grounds.[107]

EPA offered two reasons for its denial of the rulemaking petition. First, EPA argued that the CAA did not authorize it to issue mandatory regulations to address global warming—climate change being so important that unless Congress spoke with "exacting specificity," it could not have intended for the agency to address it. Second, EPA asserted that even if the agency had authority to set greenhouse gas emission standards, it would have been unwise to do so at that time.[108] The Court found that EPA had refused to comply with a clear statutory command, that it had offered no reasoned explanation for its refusal, and that EPA's denial of the rulemaking petition was "arbitrary, capricious, . . . or otherwise not in accordance with law."[109]

Chief Justice Roberts's dissenting opinion addressed only the question of standing. He argued that the Commonwealth of Massachusetts lacked standing to challenge the federal agency's refusal to conduct rulemaking proceedings.[110] Justice Scalia, on the other hand, based his dissenting opinion squarely on *Chevron*:

> EPA's interpretation of the discretion conferred by the statutory reference to "its judgment" is not only reasonable, it is the most natural reading of the text. The Court [in its majority opinion] nowhere explains why this interpretation is incorrect, let alone why it is not entitled to deference under *Chevron* . . . ."[111]

E. Environmental Defense v. Duke Energy Corp.[112]

The Supreme Court heard arguments for *Environmental Defense v. Duke Energy Corp.* on November 1, 2006, and decided the case on April 2, 2007. This is another case involving EPA and the CAA. This decision is categorized as: For the Agency (EPA); For Public Interest Groups (environmentalists); Against Business Interests (generator plant owner); and "Liberal."[113] In this case, the United States sued the owner of coal-

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107. Massachusetts v. EPA, 127 S. Ct. at 1460 (rejecting EPA's interpretation that the Clean Air Act did not authorize EPA to regulate greenhouse emissions by new motor vehicles).

108. *Id.* at 1462-63 (discussing EPA's policy reasons to delay agency response to global warming issues).

109. *Id.* at 1463; *cf.* 42 U.S.C. § 7607(d)(9)(A) (2000) (authorizing courts to overturn actions judged to be arbitrary and capricious).

110. Chief Justice Roberts recited the elements of the standing requirement: (1) a personal injury; (2) that is fairly traceable to the allegedly unlawful conduct; and (3) that is likely to be redressed by the requested relief. Massachusetts v. EPA, 127 S. Ct. at 1464 (Roberts, C.J., dissenting) (quoting DaimlerChrysler v. Cuno, 126 S. Ct. 1854, 1861 (2006)).

111. Massachusetts v. EPA, 127 S. Ct. at 1473 (Scalia, J., dissenting).

112. 127 S. Ct. 1423 (2007).

113. *See* discussion *supra* note 46.

fired electricity generating plants for violations of the CAA, and environmental groups intervened as plaintiffs.[114] The Fourth Circuit Court of Appeals affirmed a District Court grant of summary judgment in favor of the plant owner, which claimed that EPA was inconsistent in its statutory interpretations and had retroactively targeted twenty years of accepted practice.[115] The Supreme Court vacated the judgment and remanded the case to the District Court.[116]

Justice Souter penned the Court's opinion joined by all the Justices except Justice Thomas, who concurred in part and filed a separate opinion. The Court held that EPA was not required to interpret a statutory term congruently in its regulations promulgated pursuant to two separate sections of the CAA.[117] Rather than basing its decision on *Chevron* deference, the Court relied on *United States v. Cleveland Indians Baseball Co.*[118] In that case, the Court rejected a categorical rule that would have required the resolution of ambiguities in identical statutory terms by ascribing the same meaning to both (i.e., treating the terms identically).[119] Justice Souter, again with no reference to *Chevron*, pointed out that in *Cleveland Indians*, "we gave 'substantial judicial deference' to the 'longstanding,' 'reasonable,' and differing interpretations adopted by [the agency] . . . in its regulations . . . ."[120] Articulating a new non-*Chevron* standard for judging agency discretion, Justice Souter wrote, "EPA's construction need do no more than fall *within the limits of what is reasonable*, as set by the Act's common definition."[121]

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114. *Duke Energy Corp.*, 127 S. Ct. at 1430 (alleging that the respondent's modifications to its coal burning plants violated the Act).

115. *Id.* at 1436-37.

116. *Id.* at 1437.

117. *Id.* at 1433-34.

118. 532 U.S. 200 (2001).

119. *See id.* at 217-18 ("It is, of course, true that statutory construction 'is a holistic endeavor' and that the meaning of a provision is 'clarified by the remainder of the statutory scheme . . . [when] only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.'"). The *Cleveland Indians* case could, in some respects, be read as foreshadowing the majority's analysis in *Watters*. Justice Ginsburg authored both opinions. Neither *Cleveland Indians* nor *Watters* applied *Chevron* analysis, but rather involved the Court's own reading of statute and a "holistic" statutory scheme to find in favor of the federal agency. Both cases found that Congress, though providing no express language, had given approval to the agencies' interpretations because it did not affirmatively overrule them. *See also infra* Part II.F.

120. *Duke Energy Corp.*, 127 S. Ct. at 1433 (discussing the Court's willingness, where appropriate, to ascribe different meanings to identical terms within the same statute).

121. *Id.* at 1434 (emphasis added).

F. Watters v. Wachovia Bank, N.A.[122]

The Supreme Court heard arguments for *Watters v. Wachovia Bank, N.A.* on November 29, 2006, and decided the case on April 17, 2007. The case can be characterized as: For the Agency (Office of the Comptroller of the Currency); For Business Interests (national banks and their operating subsidiaries); Against Public Interest Groups (consumer protection advocates); Against the States; and "Conservative."[123]

1. The Majority Opinion

Justice Ginsburg delivered the opinion of the Court, joined by Justices Kennedy, Souter, Breyer, and Alito. Justice Stevens (author of the *Chevron* opinion) wrote a dissenting opinion, joined by Justice Scalia and Chief Justice Roberts. Justice Thomas took no part in the case. The *Watters* case came to the Supreme Court on appeal from a Sixth Circuit Court of Appeals decision, which held that "the Comptroller's regulations preempt conflicting Michigan laws."[124]

Wachovia Mortgage Corporation held a corporate charter from the State of Michigan. Under a Michigan consumer protection statute, state-chartered corporations engaged in mortgage lending were required to register with the Michigan Office of Insurance and Financial Services. Wachovia Mortgage Corporation originally registered in Michigan but terminated its registration when it became a wholly-owned "operating subsidiary" of the national bank.[125]

Michigan Financial Services Commissioner Linda Watters advised the mortgage corporation that, without a Michigan registration, it could no longer make mortgage loans in Michigan. Wachovia Bank, N.A., and Wachovia Mortgage Corporation filed suit, arguing that a regulation promulgated by the federal regulator of national banks preempted the Michigan law.[126]

The regulation at issue provided that "State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank."[127] The Comptroller of the Currency (OCC), as federal regulator, has exclusive "visitorial powers" over national banks,[128] meaning that no other entity can examine or supervise a national bank. By adopting the regulation cited above, the OCC "clarified" its exclusive visitorial

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122. 127 S. Ct. 1559 (2007).
123. *See* discussion *supra* note 46.
124. *See* Wachovia Bank, N.A. v. Watters, 431 F.3d 556, 563 (6th Cir. 2005).
125. *Id.* at 558.
126. *Id.*
127. 12 C.F.R. § 7.4006 (2007).
128. *See* 12 U.S.C. § 484(a) (Supp. V 2005).

power over "operating subsidiaries" as well as national banks. Wachovia prevailed at the district court level and again before the Sixth Circuit. Commissioner Watters appealed to the Supreme Court.

Perhaps the most striking aspect of the Supreme Court's majority opinion was the fact that it did not turn on judicial deference to agency interpretation at all. In addition to the Sixth Circuit opinion in the *Watters* case, the Second,[129] Fourth,[130] and Ninth Circuit[131] Courts of Appeals had all ruled in favor of national banks and their federal regulator—the OCC. Each of these decisions, as well as briefs and arguments in the *Watters* case, asserted preemption of state laws by OCC regulation. The Supreme Court, however, based its finding of preemption directly on the National Bank Act (NBA),[132] despite the fact that the NBA does not use the term "operating subsidiary" nor does it expressly declare state laws impacting "operating subsidiaries" preempted.

The Court in *Watters* inferred congressional intent from its own interpretation of legislative and regulatory history and from the fact that Congress had not overruled applicable OCC regulations.[133] This opinion said nothing about whether a federal agency should receive deference when it expands its own jurisdiction by regulation. It cavalierly dismissed any need to deal with the question of whether an agency's determination of preemption is entitled to deference.[134] It did not satisfactorily explain why it did not follow the presumption against preemption,[135] especially with regard to a state consumer protection statute—traditionally an area reserved to the states. It completely rejected any Tenth Amendment claim.[136] In short, the *Watters* opinion represents a troubling departure from the expected *Chevron* framework. It may be possible, however to limit the scope of *Watters* to the banking arena. The majority opinion referred to a

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129. Wachovia Bank, N.A. v. Burke, 414 F.3d 305, 321 (2d Cir. 2005).
130. Nat'l City Bank of Indiana v. Turnbaugh, 463 F.3d 325 (4th Cir. 2006).
131. Wells Fargo Bank, N.A. v. Boutris, 419 F.3d 949, 966-67 (9th Cir. 2005).
132. *See* Watters v. Wachovia Bank, N.A, 127 S. Ct. 1559, 1567-69 (2007) ("[W]hen state prescriptions significantly impair the exercise of authority, enumerated or incidental under the NBA, the State's regulations must give way.").
133. I credit a colleague, who remains nameless for his or her own protection, for calling this the "stop me before I regulate again" school of federal agency assumption of congressional delegation.
134. "Because we hold that the NBA itself—independent of OCC's regulation—preempts the application of the pertinent Michigan laws . . ., we need not consider the dissent's lengthy discourse on the dangers of vesting preemptive authority in administrative agencies." *Watters*, 127 S. Ct. at 1572 n.13.
135. See *supra* notes 42-43 for an explanation of the presumption against preemption.
136. *Watters*, 127 S. Ct. at 1573 (concluding briefly that the Tenth Amendment argument is "unavailing").

string of prior Supreme Court decisions supporting the OCC,[137] which may indicate that the *Watters* decision turned more on the OCC's favored status than on any other reasoned rationale.

2. The Minority Opinion

Justice Stevens's dissenting opinion in *Watters* opened with the following cannon shot:

> Congress has enacted no legislation immunizing national bank subsidiaries from compliance with nondiscriminatory state laws regulating the business activities of mortgage brokers and lenders. Nor has it authorized an executive agency to preempt such state laws whenever it concludes that they interfere with national bank activities. Notwithstanding the absence of relevant statutory authority, today the Court endorses an agency's incorrect determination that the laws of a sovereign State must yield to federal power.[138]

The dissent called for application of the *Chevron* analysis, but rejected *Chevron* deference. Although the minority Justices would have given "some weight" to expert agency opinions regarding which state laws conflict with a federal statute, they found that "when an agency purports to decide the scope of federal preemption, a healthy respect for state sovereignty calls for something less than *Chevron* deference."[139]

According to Justice Stevens, the majority engaged in its own reading of the NBA, relying on their own interpretation of congressional intent through a patching together of various statutes and congressional silence in the face of an agency regulation.[140] The dissenting Justices found no support for that reading. This is not the *Chevron* way—and it is not the way the dissent would have adopted.[141]

Justice Stevens did not use the term "*Chevron* step one," but he unmistakably found that that Congress had expressed no intent to preempt

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137. Beneficial Nat'l Bank v. Anderson, 539 U.S. 1 (2003); Barnett Bank of Marion County, N.A. v. Nelson, 517 U.S. 25 (1996); NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251 (1995); Franklin Nat'l Bank of Franklin Square v. New York, 347 U.S. 373 (1954).

138. *Watters*, 127 S. Ct. at 1573 (Stevens, J., dissenting).

139. *Id.* at 1584.

140. *Id.* at 1578 (arguing that the majority's reading of the National Bank Act (NBA) reaches an untenable and unsupported conclusion).

141. Justice Stevens expressed amazement at the majority's determination that the NBA settled all questions at issue, noting that each of the four Circuit Courts of Appeals which had ruled on similar cases had considered agency preemption claims to turn on whether the courts would extend *Chevron* deference to agency regulation, saying:

> I must consider (as did the four Circuits to have addressed this issue) whether an administrative agency can assume the power to displace the duly enacted laws of a state legislature.
>
> To begin with, Congress knows how to authorize executive agencies to preempt state laws. It has not done so here.

Id. at 1582 (citations omitted).

state consumer protection laws nor had it spoken to the OCC's authority to decide preemption.[142] The dissent also found that Congress had not spoken directly to the issue of the existence of "operating subsidiaries," much less their ability to avoid state consumer protection laws.[143] Again, without using the term "*Chevron* step two," the dissenting opinion clearly found the agency interpretation "impermissible."

G. Zuni Public School District No. 89 v. Department of Education[144]

The Supreme Court heard arguments for *Zuni Public School District No. 89* on January 10, 2007, and decided the case on April 17, 2007. This case involved local school districts challenging the Department of Education's interpretation of the federal Impact Aid Act's statutory formula, which affects federal financial assistance to local school districts. This case is categorized as: For the Agency; For the State. Other categorizations, including whether the case is for or against a business interest or a public interest group, or whether this case is "Liberal" or "Conservative" are inapplicable.[145]

Justice Breyer delivered the opinion of the Court, in which Justices Stevens, Kennedy, Ginsburg, and Alito joined. Justice Stevens filed a concurring opinion. Justice Kennedy also filed a concurring opinion, joined by Justice Alito. Justice Scalia filed a dissenting opinion joined by Chief Justice Roberts and Justices Thomas and Souter (in part). Justice Souter filed a separate dissenting opinion.

The Court recognized that the Zuni Public School District's strongest argument was based on a literal reading of the statute.[146] Acknowledging *Chevron*, the Court invoked the classic standard that "if the language of the statute is open or ambiguous—that is, if Congress left a 'gap' for the agency to fill—then we must uphold the Secretary's interpretation as long as it is reasonable."[147] Having said that, Justice Breyer then departed from *Chevron* analysis to conduct his own evaluation of congressional intent: "Considerations *other than language* provide us with unusually strong

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142. *Id.* at 1581-82 (discussing Gramm-Leach-Bliley Act provisions that protect state insurance laws from preemption).

143. *Id.* at 1578.

> Congress itself has never authorized national banks to use subsidiaries incorporated under state law to perform traditional banking functions. Nor has it authorized OCC to "license" any state-chartered entity to do so. The fact that [Congress] may have acquiesced in the OCC's expansive interpretation of its authority is a plainly insufficient basis for finding preemption.

Id.

144. 127 S. Ct. 1534 (2007).

145. *See* discussion *supra* note 46.

146. *Zuni*, 127 S. Ct. at 1540.

147. *Id.*

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."[148]

The School District conceded that the calculations were correct under the agency's regulations, but argued that the regulations themselves were inconsistent with the statutory authorization.[149] In rejecting the School District's claims, Justice Breyer placed great weight on the fact that the interpretation at issue was contained in regulations first promulgated thirty years ago.[150] This alleged discrepancy between law and regulation went undisputed until the *Zuni* case. The *Zuni* opinion suggests that the Roberts Court may be more likely to defer to a longstanding federal interpretation than to a recent one.[151]

Relying more heavily on *Mead* than on *Chevron*, Justice Breyer emphasized that in a "highly technical, specialized interstitial matter [such as this] Congress often does not decide itself, but delegates to specialized agencies to decide" how best to implement federal statutory provisions.[152] Looking to the history and purpose of the statutory provision, as well as the fact that Congress did not step in and correct the agency, the Court ultimately favored the Department of Education's interpretation to support the holding in *Zuni*. In this case, the Court specifically asked the critical question, "But why is Congress' silence in respect to these matters significant?"[153] Unfortunately, the answer we discern from the holding is unsatisfactory: congressional silence equals both delegation of authority and ratification of agency interpretation.

Zuni is a remarkable opinion because the Supreme Court upheld the federal agency regulation even though the literal language of the statute, in its plain meaning, says something different.[154] Throughout the *Zuni* opinion, Justice Breyer struggled with the statute's literal language and his conclusion that the agency interpretation could be made fit, through some Procrustean logic, is both disingenuous and troubling. The nods to *Chevron* cannot disguise the fact that the majority has flatly rejected *Chevron* step one. Is the statutory language ambiguous? If not, under *Chevron*, that should be the end of the inquiry. This case indicates that Justice Breyer has swayed the Court to his view that strict *Chevron* analysis

148. *Id.* at 1541 (emphasis added).
149. *Id.* at 1540.
150. *Id.* at 1541.
151. *But see supra* note 93 and accompanying text (discussing the *Rapanos* case).
152. *Id.*
153. *Id.* at 1544.
154. *Id.* at 1540-41. The opinion specifically asks, "But what of the provision's literal language?" *Id*. at 1543.

is "out," and a case-by-case analysis of what the courts determine to be the intent of Congress, coupled with a general reasonableness standard for agency regulation, is "in."

Justice Kennedy's concurring opinion, joined by Justice Alito, stated simply that the courts should follow the framework set forth in *Chevron*, "even when departure from that framework might serve purposes of exposition."[155] Quoting *Chevron*, these Justices said:

> When considering an administrative agency's interpretation of a statute, a court first determines "whether Congress has directly spoken to the precise question at issue." If so, "that is the end of the matter." Only if "Congress has not directly addressed the precise question at issue" should a court consider "whether the agency's answer is based on a permissible construction of the statute."[156]

In another remarkable display of stretching to uphold this agency's statutory interpretation, concurring Justices Kennedy and Alito not only quoted *Chevron*, they structured their very brief opinion to follow the *Chevron* framework. Without analysis or explanation, they found the language of the statute ambiguous and invoked *Chevron* deference.[157] They found fault with Justice Breyer's opinion not because of its conclusion, but because it "inverts *Chevron*'s logical progression [and] [w]ere the inversion to become systemic, it would create the impression that agency policy concerns, rather than the traditional tools of statutory construction are shaping the judicial interpretation of statutes."[158] Their complaint is that the majority opinion failed to march through the *Chevron* steps in the expected order. That is, the majority first examined the intent of Congress and then the language of the statute, which the Court found ambiguous only in light of the intent as they discerned it.

Based on the majority opinion, I categorize this as a case in which the Court did not find traditional *Chevron* analysis applicable. At best, the majority opinion shows confusion about the proper analytical framework for future agency deference cases. At worst, this case supports the pragmatic conclusion that the Supreme Court "reverse-engineers"[159] agency cases, deciding the result and backing into the analysis.

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155. *Id.* at 1550 (Kennedy, J., concurring) (advocating a strict application of the *Chevron* rule).

156. *Id.* at 1550-51 (citations omitted).

157. *Id.* at 1551 ("[T]he Court is correct to find that the plain language of the statute is ambiguous. It is proper, therefore, to invoke *Chevron*'s rule of deference.").

158. *Id.* After reading both the majority and concurring opinions, one is indeed left with the overwhelming conclusion that agency policy concerns were the driving force behind the *Zuni* decision.

159. This is Justice Scalia's criticism in *Gonzales v. Oregon*, 546 U.S. 243, 287 (2006) (Scalia, J., dissenting).

As expected, Justice Scalia's dissenting opinion in *Zuni*, joined by Chief Justice Roberts, Justice Thomas, and Justice Souter (in part), took the Court to task.[160] In Justice Scalia's view, the Court resurrected the "judge-empowering"[161] standard set forth in an 1892 case, *Church of the Holy Trinity v. United States*.[162] In that case, the Supreme Court adopted an interpretation contrary to the language of the statute, opining that "a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers."[163] Justice Scalia vehemently disagreed with such "elevation of judge-supposed legislative intent over clear statutory text"[164] in *Zuni*, finding that "[t]he plain language of the federal Impact Aid statute clearly and unambiguously forecloses the Secretary of Education's preferred methodology . . . Her selection of that methodology is therefore entitled to zero deference under *Chevron*."[165]

Justice Scalia insisted that the proper analytical starting point must always be the text of the statute.[166] In this case, he probed,

> How then, if the text is so clear, are respondents managing to win this case? . . . In order to contort the statute's language beyond recognition, the Court must believe Congress's intent so crystalline, the spirit of its legislation so glowingly bright, that the statutory text should simply not be read to say what it says.[167]

In closing, he reminded us that "[t]he only sure indication of what Congress intended is what Congress enacted; and even if there is a difference between the two, the rule of law demands that the latter prevail."[168]

What are the merits of Justice Scalia's expressed concern that the Court has moved to a blatant substitution of the Justices' own policy judgment for the plain language of the statute? This dark assessment certainly appears to be gaining validity as we trace the progression of cases decided by the Roberts Court. In fairness, however, Justice Scalia himself is not immune to the risk of deciding an agency interpretation case on the basis of his own policy conclusions. He merely takes a different path to that pitfall in that he usually identifies his own reading of the statute as both unambiguous and the only plausible construction.

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160. Justice Scalia calls the statutory interpretation adopted by the Secretary of Education and the Court "sheer applesauce." *Zuni*, 127 S. Ct. at 1554 (Scalia, J., dissenting).
161. *Id*. at 1551.
162. 143 U.S. 457 (1892).
163. *Id.* at 459.
164. *Zuni*, 127 S. Ct. at 1551 (Scalia, J., dissenting) (citing *Church of the Holy Trinity*, 143 U.S. at 459).
165. *Id.*
166. *Id.* at 1552 ("We must begin, as we always do, with the text.").
167. *Id*. at 1555.
168. *Id*. at 1559.

H. Global Crossing Telecommunications, Inc. v. Metrophones Telecommunications, Inc.[169]

The Supreme Court heard arguments for *Global Crossing Telecommunications, Inc. v. Metrophones Telecommunications, Inc.* on October 10, 2006, and decided the case on April 17, 2007. This case involved a payphone service provider suing a long distance carrier to recover compensation authorized by the Communications Act and Federal Communications Commission (FCC) regulations. I have categorized the case as: For the Agency (FCC); other categories are inapplicable.[170] I characterize this case as a modified, rather than classic *Chevron* deference case because, as in *Zuni*, the majority opinion expressly began with regulatory history rather than beginning with the language of the statute.[171]

Justice Breyer delivered the opinion of the Court, joined by Chief Justice Roberts and Justices Stevens, Kennedy, Souter, Ginsburg, and Alito. Justices Scalia and Thomas each filed dissenting opinions. After discussing the history of Congress's enactment of the Communications Act in 1934 and the FCC's subsequent regulation of interstate telephone communications, Justice Breyer turned to the statutory language at issue. He relied on classic *Chevron* deference to uphold the agency's "reasonable" interpretation of statute.[172] Unfortunately, however, he clouded an otherwise straightforward analysis by adding the following remark about Congress's revision of the statute that left one of the sections at issue untouched: "[T]his circumstance, by indicating that Congress did not *forbid* the agency to apply [the statute] differently in the changed regulatory environment, is sufficient to convince us that the FCC's determination is lawful."[173] If the Supreme Court truly intends to give strong weight to congressional failure to override federal agency interpretations, that would be a troubling direction indeed.

In addition to *Chevron* deference and an endorsement-by-inaction justification (the agency is right simply because Congress did not say it is wrong), Justice Breyer expressly relied on *Mead* for the proposition that:

> [W]here "Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law," a court "is obliged to accept the agency's position if

169. 127 S. Ct. 1513 (2007).
170. *See* discussion *supra* note 46.
171. *See* discussion *supra* Part II.G.
172. *Global Crossing*, 127 S. Ct. at 1520 ("In our view the FCC's . . . determination is a reasonable one" in light of Congress's broad delegation of authority to FCC).
173. *Id.* at 1521-22.

> Congress has not previously spoken to the point at issue and the agency's interpretation" (or the manner in which it fills the "gap") is "reasonable."[174]

Neither Justice Scalia's dissent, nor that of Justice Thomas, provides much meat in terms of a consistent, intellectually congruent system pursuant to which we can predict how the Supreme Court will analyze and decide future federal agency interpretation cases. Interestingly, Justice Thomas objects to the Court's application of *Chevron* deference because, in his words,

> [A] court may not, in the name of deference, abdicate its responsibility to interpret a statute. Under *Chevron*, an agency is due no deference until the court analyzes the statute and determines that Congress did not speak directly to the issue under consideration:
>
> > "The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. . . . If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."[175]

Justice Scalia bases his dissent on his own interpretation of what constitutes "just and reasonable" practices pursuant to § 201(b) of the Communications Act of 1934. He disagrees with the FCC's determination that Global Crossing violated the requirement for "just and reasonable" practices. He says that absent the FCC's regulation implementing the Communications Act, Global Crossing's action would be neither unjust nor unreasonable;[176] therefore, the only unjustness or unreasonableness lies in violating an FCC regulation which is incorrect. This led the Court to a "departure from ordinary usage,"[177] which is inconsistent with Justice Scalia's view of congressional intent[178]and the public good.[179]

This case highlights a trend that appears to be gaining momentum. Justice Scalia is most likely to begin his case analysis with his own reading of the statutory terms at issue. If the agency interpretation matches his view, he discusses *Chevron* deference. If not, he follows a "plain language" analysis, concluding that the agency interpretation violates congressional intent as expressed in the statute.[180] Justice Breyer and his

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174. *Id.* at 1522 (citing United States v. Mead Corp., 533 U.S. 218, 229 (2001)).
175. *Id.* at 1533 (Thomas, J., dissenting) (quoting Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984)).
176. *Id*. at 1527 (Scalia, J., dissenting).
177. *Id*. at 1529 n.3.
178. *Id.* at 1529.
179. *Id*. at 1530.
180. An interesting tiff involving this issue of "plain language" interpretation of statutes occurred among the Supreme Court Justices at the very end of the 2006-2007 term in

adherents are also pushing away from classic *Chevron* deference to a framework that calls for the Court first to make its own historical analysis of the regulatory scheme evidencing congressional intent. If the agency interpretation matches the court's view of congressional intent—whether or not supported by the language of the statute—then the agency will be affirmed, perhaps mentioning *Chevron* and usually relying on *Mead*'s reasoning that Congress intended agencies to fill statutory "gaps."

I. Ledbetter v. Goodyear Tire & Rubber Co., Inc.[181]

The Supreme Court heard arguments for *Ledbetter v. Goodyear Tire & Rubber Co., Inc.* on November 27, 2006, and decided the case on May 29, 2007. The case is categorized as: For Business Interests; Against the Agency (Equal Employment Opportunity Commission (EEOC)); and "Conservative."[182] The Court did not apply *Chevron* analysis in this case.

This decision severely limited gender-based discrimination claims, holding that a claimant must file a complaint within 180 days from the initial alleged unlawful employment practice and that a new statutory filing period does not begin with each paycheck that incorporates past discrimination.[183] Justice Alito wrote the majority opinion, joined by the Chief Justice and Justices Scalia, Thomas, and Kennedy. Justice Ginsburg filed a dissenting opinion, joined by Justices Stevens, Souter, and Breyer. This is another 5-4 decision, split along conservative-liberal lines, in which Justice Kennedy is the swing vote.

The *Ledbetter* decision interpreted Title VII of the Civil Rights Act of 1964.[184] Justice Alito did not analyze this case in terms of agency deference, but rather on the basis of stare decisis, relying on five prior Supreme Court cases. The plaintiff argued for judicial deference to the EEOC's Compliance Manual and prior administrative adjudications, but the Court declined to extend *Chevron* deference to the EEOC's Compliance

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Tellabs, Inc. v. Makor Issues & Rights, Ltd., 127 S. Ct. 2499 (2007). Though this case is not an agency deference case—*Tellabs* involved the Court's analysis of the Private Securities Litigation Act—Justice Scalia, in his concurring opinion, reminded the other Justices that "just weeks ago . . . the author of the dissent [Justice Stevens], joined by the author of today's opinion for the Court [Justice Ginsburg], concluded that a statute's meaning was 'plain'. . . . Was plain meaning then . . . 'in the eye of the beholder'?" *Id.* at 2515 (Scalia, J., concurring). Justice Stevens, in turn, scolded Justice Scalia for his conclusion that the statute is susceptible to only one reading—Scalia's own. *See id.* at 2517 n.1 (Stevens, J., dissenting).

181. 127 S. Ct. 2162 (2007).

182. *See* discussion *supra* note 46.

183. *Ledbetter*, 127 S. Ct. at 2177 ("We apply the statute as written, and this means that any unlawful employment practice, including those involving compensation, must be presented to the EEOC within the period prescribed by statute.").

184. Civil Rights Act of 1964, § 706(e)(1), 42 U.S.C. § 2000e-5(e)(1) (2000).

Manual or to the EEOC's adjudicatory positions.[185] Because the opinion relied on case law analysis, Justice Alito made it clear that "[a]gencies have no special claim to deference in their interpretation of our decisions."[186]

Nor did the dissenting opinion rely on *Chevron* deference. In a footnote, without specifically naming the *Skidmore* doctrine, Justice Ginsburg wrote, "The Court dismisses the EEOC's considerable 'experience and informed judgment,' as unworthy of any deference in this case. But the EEOC's interpretations . . . merit at least respectful attention."[187] Nevertheless, the dissenting Justices in this case were willing to forego agency deference analysis and engage in their own reading of the statute, which of course, was at odds with that of the majority Justices.[188]

J. Long Island Care at Home, Ltd. v. Coke[189]

The Supreme Court heard arguments for *Long Island Care at Home, Ltd. v. Coke* on April 16, 2007, and decided the case on June 11, 2007. This opinion is unanimous and upholds the agency interpretation of the Fair Labor Standards Act (FLSA) by the Department of Labor (DOL).[190] The case is categorized as: For the Agency (DOL); For Business Interests (employers); and "Conservative."[191]

Justice Breyer, writing for the Court, phrased the question at issue as, "whether, in light of the statute's text and history, and a different (apparently conflicting) regulation [in addition to the regulation at issue in this case], the Department's regulation is valid and binding."[192] In this opening statement, Justice Breyer began with Justice Scalia's analytical preference for starting with the text of the statute. In the same breath, however, he asserted his own analytical order (exemplified in *Zuni* and *Global Crossing Telecommunications, Inc.*[193]), which determines congressional intent by beginning with legislative and regulatory history. He then signaled, right up front, that the case would turn on *Chevron* deference, which it, in fact, did with a few new wrinkles.

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185. *See Ledbetter*, 127 S. Ct. at 2177 n.11 (pointing out that the Court has refused to extend *Chevron* deference to the Compliance Manual in the past and again refuses to do so here in regard to the EEOC's prior adjudications).
186. *Id.*
187. *Id.* at 2185 n.6 (Ginsburg, J., dissenting) (citations omitted).
188. *Id.* ("In any event, the level of deference due the EEOC here is an academic question, for the agency's conclusion that Ledbetter's claim is not time barred is the best reading of the statute even if the Court 'were interpreting [Title VII] from scratch.'" (quoting Edelman v. Lynchburg College, 535 U.S. 106, 114 (2002))).
189. 127 S. Ct. 2339 (2007).
190. *See id.* at 2344 (finding that the DOL's regulation was "valid and binding").
191. *See* discussion *supra* note 46.
192. *Long Island Care at Home*, 127 S. Ct. at 2344.
193. *See supra* Parts II.G and II.H.

First, the Court again placed substantial reliance on *Mead*'s language that Congress may impliedly delegate authority to an agency to fill "gaps," especially with regard to "interstitial matters."[194] This seems to indicate a shift away from a clear *Chevron* template towards a more flexible deference analysis, giving agencies more room to find and fill statutory "gaps."

Second, the Court "inferred" that Congress intended to grant broad authority to the agency, including the authority to answer policy questions.[195] Finding congressional intent in silence once again gives agencies more unbridled authority.

Third, the Court agreed that the literal language of two regulations promulgated by the same agency conflicted with each other. Nevertheless, it acceded to the agency's authority to choose which one applied.[196] Past cases have indicated that an agency does not lose judicial deference merely because it changes its statutory interpretation;[197] however, this extension of the limits of deference seems to grant the agency even more power.[198]

Fourth, prior cases have turned, in part, on the form of the agency interpretation, with differing results depending on whether the Justices view the interpretation as a regulation adopted through formal rulemaking,

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194. *See Long Island Care at Home*, 127 S. Ct. at 2346 (noting that the FLSA gives the DOL the authority to "fill . . . gaps through rules and regulations" and that the regulation at issue in this case involves an "interstitial matter, *i.e.*, a portion of a broader definition, the details of which . . . Congress entrusted the agency to work out").

195. *Id.* at 2347 ("[I]t is consequently reasonable to infer (and we do infer) that Congress intended its broad grant of definitional authority to the Department to include the authority to answer these kinds of questions.").

196. *See id.* at 2349 (concluding that the Department of Labor's interpretation of the two regulations was controlling because it was not plainly erroneous and was not inconsistent with the regulations it was interpreting).

197. *See, e.g.*, Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005) (addressing the question of what weight should be given to the fact that an agency changes its interpretation of the same statutory provision). This case was one of the last involving judicial review of agency regulation to come before the Rehnquist Court, with this opinion being reported on June 27, 2005. Justice Thomas, writing for the majority, emphasized the strict application of *Chevron*'s analytical framework. *Id.* This decision overruled the Ninth Circuit's ruling on the basis of that court's interpretation of the Communications Act, which contradicted the FCC's interpretation. *Id.* at 982. Responding to the argument that the FCC's present interpretation is inconsistent with its past practice, the majority wrote, "We reject this argument. Agency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework." *Id.* at 981. As long as the agency provides a reasonable explanation for the change, which overcomes a finding of arbitrary and capricious agency action under Administrative Procedure Act standards, courts are required to accept the agency's current interpretation if it is "permissible" under *Chevron*. *Id.*

198. *See, e.g.*, *id.* at 980 (supporting the proposition that "*Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation").

an interpretive letter, or a position taken in litigation.[199] Here, DOL had two conflicting regulations, both adopted through formal rulemaking.[200] Subsequently, DOL "set forth its most recent interpretation of these regulations in an 'Advisory Memorandum' issued only to internal Department personnel and which the Department appears to have written in response to this litigation."[201] Surprisingly, the Court did not seem bothered at all by the restricted distribution of the agency interpretation in question, indicating in the very next sentence: "We have 'no reason,' however, 'to suspect that [this] interpretation' is merely a '*post hoc* rationalization[n]' of past agency action . . . ."[202] *Long Island Care* thus seems to end the debate about whether the agency's interpretation must follow any formalities—or even be available to the public at all—in order to receive judicial deference, a troubling result to apply generally.

Fifth, the unanimous Court concluded its analysis with the following statement:

> Finally, 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. [1.] Where an agency rule sets forth important individual rights and duties, [2.] where the agency focuses fully and directly upon the issue, [3.] where the agency uses full notice-and-comment procedures to promulgate a rule, [4.] where the resulting rule falls within the statutory grant of authority, and [5.] where the rule itself is reasonable, then a court ordinarily assumes that Congress intended it to defer to the agency's determination.[203]

This five-part test, asserted for the first time in *Long Island Care*, could be either the new framework for analyzing cases involving judicial deference to agency interpretation or simply one more in a confusing muddle of decisions which turn on internecine disputes, back-filling from the desired result, and flavor-of-the-week analytical models.

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199. For pro and con opinions about the various forms agency interpretation may take—formal rulemaking, interpretive letters, positions taken in litigation—and discussing whether the degree of formality of any of those should matter when courts review agency interpretations, see *United States v. Mead Corp.*, 533 U.S. 218 (2001). Justice Souter, writing for the majority, and Justice Scalia, in his dissent, go toe to toe on this issue.

200. *See* Long Island Care at Home v. Coke, 127 S. Ct. 2339, 2344-45 (2007) (describing both regulations as being promulgated as part of the same set of proposed regulations—one as a "General Regulation," the other as an "Interpretation").

201. *Id.* at 2349.

202. *Id.*

203. *Id.* at 2350-51.

K. National Ass'n of Home Builders v. Defenders of Wildlife[204]

The Supreme Court heard arguments for *National Ass'n of Home Builders v. Defenders of Wildlife* on April 17, 2007, and decided the case on June 25, 2007. This is another environmental case in which public interest groups challenged EPA's decision to transfer permitting power to Arizona agency officials. I have categorized the case as: For the Agency (EPA); For the State; For Business Interests (homebuilders); Against Public Interest Groups; and "Conservative."[205]

This is another 5-4 opinion, split along ideological lines, with Justice Kennedy as the deciding fifth vote. Justice Alito wrote the majority opinion, joined by the Chief Justice and Justices Scalia, Thomas, and Kennedy. Justice Stevens authored a dissenting opinion, joined by Justices Ginsburg, Souter, and Breyer. Justice Breyer also wrote a dissenting opinion.

In the last of this series of cases involving judicial review of federal agency interpretation, Justice Alito reverted to a classic *Chevron* analysis, clearly restating the two steps: (1) Has Congress spoken directly to the precise question at issue? If so, and the statutory language is clear, that is the end of the inquiry.[206] (2) If not, and the statute is silent or ambiguous, is the agency's answer based on a permissible construction of the statute? If so, the court gives *Chevron* deference to the agency's interpretation.[207] With this simple analysis, Justice Alito, writing for the Court concludes that "[a]pplying *Chevron*, we defer to the agency's reasonable interpretation of [the statute]."[208]

Although this case adopted the straightforward framework described above, the majority opinion also included a brief reference to the Court's independent review of statutory language and legislative history, finding that the agency "interpretation is reasonable in light of the statute's text and the overall statutory scheme."[209] Either of these grounds—the Court's reading of statutory terms or its view of legislative history—has stood alone without recourse to *Chevron* as a basis for upholding or rejecting agency interpretation in other Roberts Court cases.

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204. 127 S. Ct. 2518 (2007).
205. *See* discussion *supra* note 46.
206. *See Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2534 (noting that deference to agency interpretation is "appropriate only where 'Congress has not directly addressed the precise question at issue' through the statutory text" (quoting Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984))).
207. *See id.* ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." (quoting *Chevron*, 467 U.S. at 842-43)).
208. *Id.* at 2538.
209. *Id.* at 2534.

Justice Stevens, in his dissenting opinion, made his own determination of legislative history and plain language of the statute.[210] He concluded that Congress has not charged the EPA with administering the Endangered Species Act and, for that reason, determined that the EPA was not entitled to deference.[211] Another ground for his opinion was his determination that this case is contrary to the Supreme Court's prior statutory interpretation in *Tennessee Valley Ass'n v. Hill*.[212] Thus, instead of relying on the *Chevron* analytical model, Justice Stevens would rely on: (1) the Court's independent determination of legislative history; (2) the Court's own reading of the "plain language" of the statute; (3) an examination of the agency's limited jurisdiction and expertise; and (4) prior judicial precedent, of which the agency is not the final arbiter. Justice Breyer also filed a dissenting opinion, which he based in large part on his own analysis of the statute and the regulatory scheme.[213]

III. THE ROBERTS COURT TRACK RECORD

The eleven Roberts Court cases reviewed above indicate that challenges to agency interpretation face an uphill battle, without regard to the analytical framework applied to reach this result. Of the eleven cases, seven were rulings in favor of the agency—in fact, six different federal agencies.[214] Only four cases did not support the agency interpretation of a statute.[215]

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210. *See id*. at 2541-42 (Stevens, J., dissenting) (finding that the plain language of the section in question does not limit the section's coverage to discretionary actions and that nothing in the legislative history of the section leads to the conclusion that the "pre-existing understanding of the scope of [the section's] coverage" should be limited).

211. *See id*. at 2543-44.

212. *See id.* at 2541 ("[O]ur opinion in *Hill* compel[s] the contrary determination that Congress intended the [statute] to apply to 'all federal agencies' and to all 'actions authorized, funded, or carried out by them.'" (quoting Tenn. Valley Auth. v. Hill, 437 U.S. 153, 173 (1978))).

213. *See id.* at 2552 (Breyer, J., dissenting) ("My own understanding of agency action leads me to believe that the majority cannot possibly be correct in concluding that the" agency interpretation is proper).

214. *See id.* at 2518 (finding for the EPA); Long Island Care at Home, Ltd. v. Coke, 127 S. Ct. 2339 (2007) (finding in favor of the DOL); Global Crossing Telecomms., Inc. v. Metrophones Telecomms. Inc., 127 S. Ct. 1513 (2007) (finding in favor of the FCC); Watters v. Wachovia Bank, N.A., 127 S. Ct. 1559 (2007) (finding in favor of the OCC); Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 127 S. Ct. 1534 (2007) (finding in favor of the Department of Education); Envtl. Def. v. Duke Energy Corp., 127 S. Ct. 1423 (2007) (finding in favor of EPA); S.D. Warren Co. v. Me. Bd. of Envtl. Prot., 126 S. Ct. 1843 (2006) (finding in favor of the FERC).

215. *See* Ledbetter v. Goodyear Tire & Rubber Co., Inc., 127 S. Ct. 2162 (2007) (denying deference to the EEOC's Compliance Manual); Massachusetts v. EPA, 127 S. Ct. 1438 (2007) (finding against the EPA); Rapanos v. United States, 126 S. Ct. 2208 (2006) (finding against the Army Corps of Engineers); Gonzales v. Oregon, 546 U.S. 243 (2006) (finding against the U.S. Attorney General).

Five of the eleven cases reviewed involved environmental issues,[216] as did *Chevron*. In the environmental cases, the federal agency won in three of the cases[217] and lost in two.[218] In those same cases, business interests prevailed in two cases[219] and lost in three.[220] Public interest groups prevailed in three cases[221] and lost in two.[222] These cases, therefore, demonstrate that money does not always talk. Nor do they indicate that the agencies have an overwhelming edge in cases involving their interpretation of environmental laws.

Turning next to the entire selection of eleven cases, rather than limiting our consideration to environmental cases, five of the cases supported business interests[223] and three did not.[224] Public interest groups won four cases[225] and lost three.[226] However, not all cases dealt exclusively with business or public interest group perspectives. Six of the cases favored the state interest.[227] Only one, the *Watters* decision, takes power away from the states.[228] In four cases, no clear state issue was at stake.[229]

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216. *See Nat'l Ass'n of Home Builders*, 127 S. Ct. 2518 (examining the Endangered Species Act); *Duke Energy Corp.*, 127 S. Ct. 1423 (reviewing the Clean Air Act); Massachusetts v. EPA, 127 S. Ct. 1438 (involving the Clean Air Act); *Rapanos*, 126 S. Ct. 2208 (interpreting the Clean Water Act); *S.D. Warren Co.*, 126 S. Ct. 1843 (addressing the Clean Air Act).

217. *See Nat'l Ass'n of Home Builders*, 127 S. Ct. 2518 (holding for EPA); *Duke Energy Corp.*, 127 S. Ct. 1423 (holding for EPA); *S.D. Warren Co*, 126 S. Ct. 1843 (ruling in favor of FERC).

218. *See* Massachusetts v. EPA, 127 S. Ct. 1438 (holding against EPA); *Rapanos*, 126 S. Ct. 2208 (holding against Army Corps of Engineers).

219. *See Nat'l Ass'n of Home Builders*, 127 S. Ct. 2518 (ruling in favor of home builders); *Rapanos*, 126 S. Ct. 2208 (ruling for landowner and developer).

220. *See Duke Energy Corp.*, 127 S. Ct. 1423 (holding against electricity plant); Massachusetts v. EPA, 127 S. Ct. 1438 (ruling against automobile manufacturers); *S.D. Warren Co.*, 126 S. Ct. 1843 (holding against hydroelectric dam operator).

221. *See Duke Energy Corp.*, 127 S. Ct. 1423 (holding in favor of environmental groups); Massachusetts v. EPA, 127 S. Ct. 1438 (ruling in favor of environmental groups); *S.D. Warren Co*., 126 S. Ct. 1843 (ruling in favor of environmental groups).

222. *See Nat'l Ass'n of Home Builders*, 127 S. Ct. 2518 (holding against public interest groups); *Rapanos*, 126 S. Ct. 2208 (ruling against environmental protectionists).

223. *See Nat'l Ass'n of Home Builders*, 127 S. Ct. 2518 (holding in favor of developers); Long Island Care at Home, Ltd. v. Coke, 127 S. Ct. 2339 (2007) (holding for employers); Ledbetter v. Goodyear Tire & Rubber Co., Inc., 127 S. Ct. 2162 (2007) (holding for employers); Watters v. Wachovia Bank, N.A., 127 S. Ct. 1559 (2007) (holding in favor national banks); *Rapanos*, 126 S. Ct. 2208 (holding for developer).

224. *See Duke Energy Corp.*, 127 S. Ct. 1423 (holding against electricity plant); Massachusetts v. EPA, 127 S. Ct. 1438 (holding against automobile manufacturers); *S.D. Warren Co.*, 126 S. Ct. 1843 (holding against hydroelectric dam operator).

225. *See Envtl. Def.*, 127 S. Ct. 1423 (ruling in favor of environmentalists); Massachusetts v. EPA, 127 S. Ct. 1438 (ruling in favor of environmental groups); *S.D. Warren Co*., 126 S. Ct. 1843 (ruling in favor of the Maine Board of Environmental Protection); Gonzales v. Oregon, 546 U.S. 243 (2006) (ruling in favor of patients seeking right to physician-assisted suicide).

226. *See Nat'l Ass'n of Home Builders*, 127 S. Ct. 2518 (holding against public interest groups); *Watters*, 127 S. Ct. 1559 (ruling against consumer protection advocates); *Rapanos*, 126 S. Ct. 2208 (ruling against environmental protectionists).

227. *See Nat'l Ass'n of Home Builders*, 127 S. Ct. 2518 (upholding transfer of permit authority to the State); Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 127 S. Ct. 1534

The Court decided four of these agency interpretation cases by a vote of 5-4,[230] with Justice Kennedy providing the swing vote in each. These close cases split along ideological lines. The conservative Justices prevailed in three,[231] while the "liberal" Justices claimed the majority in one of the 5-4 cases.[232] Of all eleven cases, I have categorized five as conservative[233] and five as "liberal";[234] in one, neither category is applicable.[235] Three of the decisions were unanimous: *S.D. Warren Co.*; *Duke Energy Corp.*; and *Long Island Care*.

Moving to the substance of these Roberts Court decisions, in the first ten cases reviewed here, the majority opinion did not employ a simple *Chevron* analysis. In *Long Island Care* (the penultimate case considered with a unanimous opinion authored by Justice Breyer, a "liberal" Justice), the Court employed what I call "*Chevron* Plus," a new five-part test for when a court may assume that Congress intended judicial deference to agency interpretation.[236] Only in the last of these cases, *National Ass'n of Homebuilders* (a 5-4 decision written by Justice Alito, a "conservative" Justice), did the majority opinion return to a classic *Chevron* framework.

(2007) (ruling in favor of New Mexico and the Department of Education); Massachusetts v. EPA, 127 S. Ct. 1438 (holding in favor of Massachusetts); *Rapanos*, 126 S. Ct. 2208 (holding that the waters in question were not federal waters, thereby limiting federal intrusion); *S.D. Warren Co.*, 126 S. Ct. 1843 (upholding a requirement for state certification); *Gonzales*, 546 U.S. 243 (finding for the state of Oregon).

228. *See Watters*, 127 S. Ct. 1559 (holding against the Michigan Financial Services Commissioner and against the interests of state financial services regulators and state attorneys general who filed amicus briefs).

229. *See* Long Island Care at Home, Ltd. v. Coke, 127 S. Ct. 2339 (2007) (involving a private employer being sued by an employee); Ledbetter v. Goodyear Tire & Rubber Co., Inc., 127 S. Ct. 2162 (2007) (involving a private citizen and her non governmental employer); Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc., 127 S. Ct. 1513 (2007) (involving two private telecommunications companies); *Duke Energy Corp.*, 127 S. Ct. 1423 (involving the United States, private generating plant owners, and environmental groups, but no states and no states' rights issues).

230. *See Nat'l Ass'n of Home Builders*, 127 S. Ct. 2518; Massachusetts v. EPA, 127 S. Ct. 1438; *Ledbetter*, 127 S. Ct. 2162; *Rapanos*, 126 S. Ct. 2208. *See generally supra* Part III.

231. *See Nat'l Ass'n of Home Builders*, 127 S. Ct. 2518; *Ledbetter*, 127 S. Ct. 2162; *Rapanos*, 126 S. Ct. 2208.

232. *See* Massachusetts v. EPA, 127 S. Ct. 1438.

233. *See Nat'l Ass'n of Home Builders*, 127 S. Ct. 2518; *Long Island Care at Home*, 127 S. Ct. 2339; *Ledbetter*, 127 S. Ct. 2162; *Watters*, 127 S. Ct. 1559 (providing a pro-business result by "liberal" Justices); *Rapanos*, 126 S. Ct. 2208.

234. *See Global Crossing Telecomms., Inc.*, 127 S. Ct. 1513 (involving a case between two corporations categorized as liberal because it upholds a federal cause of action to redress injuries); *Duke Energy Corp.*, 127 S. Ct. 1423; Massachusetts v. EPA, 127 S. Ct. 1438; S.D. Warren Co. v. Me. Bd. of Envtl. Prot., 126 S. Ct. 1843 (2006); Gonzales v. Oregon, 546 U.S. 243 (2006).

235. *See* Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 127 S. Ct. 1534 (2007).

236. *See* discussion *supra* Part II.J.

Of the ten cases that did not adopt a classic *Chevron* analysis, the "liberal" Justices,[237] who tend to vote with Justice Breyer, wrote seven of them.[238] Justice Kennedy, often noted as the "swing vote", authored another one of the opinions[239] in which he was joined by the "liberal" Justices, bringing the total number of the "Breyer influence group" opinions to eight out of ten. Justice Breyer himself authored three of the ten opinions: *Zuni*, *Global Crossing*, and *Long Island Care*. This analysis clearly demonstrates the strength of Justice Breyer's voice in cases involving judicial review of a federal agency's statutory interpretation and explains, at least in part, the Roberts Court's movement away from a strict *Chevron* analysis and towards a more flexible framework.

When the "conservative" Justices formed the majority, however, they did not consistently apply the *Chevron* framework either. Justice Scalia wrote the majority opinion in *Rapanos* and relied not on *Chevron* deference, but on his own statutory analysis.[240] Interestingly, Justice Breyer's separate dissent in *Rapanos* squared off with the majority by calling for the application of the *Chevron* model.[241] Justice Alito wrote for the majority in *Ledbetter*. This case is one of "dueling footnotes" in terms of applying *Chevron* as Justice Alito and Justice Ginsburg, for the dissent, discussed *Chevron* only in footnotes.[242] Justice Alito also wrote the opinion in *National Ass'n of Home Builders*, which was the only decision to follow a simple *Chevron* analysis—and that was a 5-4 opinion, split along ideological lines.

If neither the "conservative" Justices nor the "liberal" Justices grounded their majority opinions in *Chevron*, the reverse is true when we review the dissenting opinions. Both "conservatives" and "liberals" played the *Chevron* card if their group had lost the case vote. Seven of the minority

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237. *See* discussion *supra* note 46.

238. *See Global Crossing Telecomms., Inc.*, 127 S. Ct. 1513 (written by Justice Breyer); *Zuni*, 127 S. Ct. 1534 (written by Justice Breyer); *Long Island Care at Home*, 127 S. Ct. 2339 (written by Justice Breyer); *Duke Energy Corp.*, 127 S. Ct. 1423 (written by Justice Souter); *S.D. Warren Co.*, 126 S. Ct. 1843 (written by Justice Souter); Massachusetts v. EPA, 127 S. Ct. 1438 (written by Justice Stevens); *Watters*, 127 S. Ct. 1559 (written by Justice Ginsburg).

239. *See Gonzales*, 546 U.S. 243 (written by Justice Kennedy and joined by "liberal" Justices Stevens, Souter, Ginsburg, and Breyer, together with O'Connor (also characterized as a "swing vote")).

240. *See* Rapanos v. United States, 126 S. Ct. 2208, 2225 (2006) (basing the decision on what Scalia considers the "only plausible interpretation" of the statute).

241. *See id.* at 2252-53 (Breyer, J., dissenting) (stating that the proper analysis is "straightforward" under *Chevron*).

242. *See, e.g.*, Ledbetter v. Goodyear Tire & Rubber Co., Inc., 127 S. Ct. 2162, 2177 n.11 (2007) (discussing Alito's reasons for refusing to apply *Chevron* deference to the EEOC's Compliance Manual); *id.* at 2185 n.6 (Ginsburg, J., dissenting) (noting that the EEOC's interpretations require "at least respectful attention").

opinions argued that the case should have received *Chevron* analysis.[243] Justice Scalia wrote four of these dissenting opinions calling for the *Chevron* approach.[244] Three of the cases analyzed were unanimous.[245] It was only in the last case, *National Ass'n of Home Builders*, that the "liberal" dissenting Justices did not argue for *Chevron* analysis but preferred their own view of congressional intent.

"Plain language" of the statute is a ground for deciding agency interpretation cases most often associated with Justice Scalia.[246] "Plain language" analysis may seem to follow the classic *Chevron* step one inquiry, which would focus on congressional intent embodied in the words of the statute. However, under the "plain language" framework, the Court imposes its own independent analysis of statutory terms. As expected, Justice Scalia called upon the Court to apply the "plain meaning" of the statute in his dissenting opinions in *Gonzales*, *Massachusetts v. EPA*, and *Zuni*, as well as in the plurality opinion in *Rapanos*.[247] Justice Scalia's dissent in *Global Crossing* turned on his own reading of congressional intent based on the regulatory scheme rather than *Chevron* analysis, although he did not use "plain meaning" language.[248]

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243. *See Ledbetter*, 127 S. Ct. at 2185 n.6 (claiming *Chevron* deference only in footnotes); *Global Crossing Telecomms., Inc.*, 127 S. Ct. at 1529 (Scalia, J., dissenting) (finding that *Chevron* deference is warranted in reviewing the FCC's decision); *Zuni*, 127 S. Ct. at 1551 (Kennedy, J., dissenting) (using *Chevron* to find no entitlement to deference because the language of the statute is not ambiguous); Massachusetts v. EPA, 127 S. Ct. at 1473-74 (Scalia, J., dissenting) (criticizing the majority for not explaining why the EPA's interpretation of the statute does not deserve *Chevron* deference); *Rapanos*, 126 S. Ct. at 2252-53 (Stevens, J., dissenting) (arguing that the Army Corps of Engineers' decision was a "quintessential example" of a reasonable interpretation of a statute under *Chevron*); *Gonzales*, 546 U.S. at 276 (Scalia, J., dissenting) (arguing that the attorney general's interpretation of the statute should be awarded *Chevron* deference); *Watters*, 127 S. Ct. at 1584 (Stevens, J., dissenting) (contending that the OCC's regulation cannot withstand *Chevron* analysis).

244. *See Global Crossing Telecomms.*, *Inc*., 127 U.S. 1513; *Zuni*, 127 U.S. 1534; Massachusetts v. EPA, 127 U.S. 1438; *Gonzales,* 546 U.S. 243.

245. *See* Long Island Care at Home, Ltd. v. Coke, 127 S. Ct. 2339, 2343 (2007); Envtl. Def. v. Duke Energy Corp., 127 S. Ct. 1423, 1427 (2007); S.D. Warren Co. v. Me. Bd. of Envtl. Prot., 126 S. Ct. 1843, 1845 (2006).

246. *See generally* William N. Eskridge, Jr., *No Frills Textualism*, 119 HARV. L. REV. 2041 (2006) (reviewing ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY (2005)).

247. *See Gonzales*, 546 U.S at 283 (Scalia, J., dissenting) (looking to the "ordinary meaning" of words used in the statute); Massachusetts v. EPA, 127 S. Ct. at 1473 (Scalia, J., dissenting) (referring to the "most natural reading of the statute"); *Zuni*, 127 S. Ct. at 1551 (Scalia, J., dissenting) (finding the plain language of the statute clear and unambiguous); *Rapanos*, 126 S. Ct. at 2225 (Scalia, J., dissenting) (basing his decision on the "only plausible interpretation" of the statutory language).

248. *See Global Crossing Telecomms.*, *Inc.*, 127 S. Ct. at 1529-30 (Scalia, J., dissenting) (criticizing the majority's interpretation of congressional intent).

Other Justices have also relied on the plain meaning of a statute, including Justice Kennedy, writing for the majority in *Gonzales*;[249] Justice Stevens, basing the majority opinion in *Massachusetts v. EPA* on the Court's own reading of a statute and finding the agency's reading "arbitrary, capricious . . . or otherwise not in accordance with law;"[250] and Justice Thomas, in his separate dissenting opinion in *Global Crossing*.[251] Justice Souter, author of the unanimous opinion in *S.D. Warren*, also relied on his own analysis of statutory language.[252]

The Roberts Court has applied the "plain meaning" paradigm instead of *Chevron* analysis in some cases and in conjunction with *Chevron* deference in others. This model—using the Court's own reading of a statute—appears more vibrant across the spectrum of the Roberts Court than does a classic *Chevron* analysis.

Four of the eleven cases reviewed expressed more reliance in the majority opinion on *Mead* than on *Chevron*. In *Gonzales*, Justice Kennedy used *Mead* to modify *Chevron*.[253] Justice Breyer also wrote three majority opinions—*Zuni*, *Global Crossing*, and *Long Island Care*—that rely on *Mead* to explain his flexible standard for reviewing agency interpretation.[254] In light of the fact that simple *Chevron* analysis carried the day only in *National Ass'n of Home Builders*, we must recognize the strong influence of Justice Breyer and the continued importance of the *Mead* rationale.

Another issue bubbling under the surface of these eleven cases is the question of whether the Court will require explicit congressional delegation of authority to the agency to interpret statutes or whether these Justices will

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249. *See Gonzales*, 546 U.S. at 250 (using the text of the statute as the starting point for his analysis).

250. *See* Massachusetts v. EPA, 127 S. Ct. at 1463 (quoting 42 U.S.C. § 7607(d)(9)(A)).

251. *See Global Crossing Telecomms., Inc.*, 127 S. Ct. at 1531 (Thomas, J., dissenting) (finding the meaning of the statute to be clear).

252. *See* S.D. Warren Co. v. Me. Bd. of Envtl. Prot., 126 S. Ct. 1843, 1847 (2006) (finding that since certain language in the statute is neither defined nor a term of art, the court must interpret the language based on its "ordinary or natural meaning").

253. *See Gonzales*, 546 U.S. at 258 (emphasizing that *Chevron* deference is warranted only when an agency interpretation is promulgated pursuant to authority delegated by Congress to the agency (citing United States v. Mead Corp., 533 U.S. 218, 226-27 (2001)).

254. *See* Long Island Care at Home, Ltd. v. Coke, 127 S. Ct. 2339, 2345-46 (2007) (finding that where agencies fill statutory gaps in a reasonable manner and in accordance with any other requirements, courts will uphold the result as legally binding (citing *Mead*, 533 U.S. at 227)); Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 127 S. Ct. 1534, 1541 (2007) (relying on *Mead* for the proposition that the issue being decided by the court is "the kind of highly technical, specialized interstitial matter that Congress often does not decide itself, but delegates to specialized agencies to decide" (quoting *Mead*, 533 U.S. at 234)); *Global Crossing Telecomms., Inc.*, 127 S. Ct. at 1522 (holding that "where 'Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law,' a court 'is obliged to accept the agency's position if Congress has not previously spoken to the point at issue and the agency's interpretation' . . . is 'reasonable'" (quoting *Mead*, 533 U.S. at 229)).

find implicit congressional delegation of authority. Explicit statutory delegation was required in *Gonzales* (with Justice Kennedy writing the majority opinion) and *Rapanos* (with Justice Scalia writing the plurality opinion).[255] Supporting the proposition that the Court may infer congressional intent to delegate authority to the agency, we have the majority opinion in *Watters* (authored by Justice Ginsburg), Justice Scalia's dissent in *Gonzales*, and Justice Breyer's majority opinion in *Long Island Care*.[256] The Roberts Court cases demonstrate that the explicit-versus-implicit-delegation issue remains unsettled.

In light of these case reviews, I conclude that the *Watters* case was not an aberration in its failure to employ *Chevron* analysis. Unfortunately, no clear standard has replaced *Chevron*. Instead, we can expect the Roberts Court to follow a flexible, case-by-case analysis much like the *Skidmore* standard. Justice Breyer appears to have the most influence on the cadre of Justices who most often make up the majority in these agency interpretation cases. Justice Scalia serves most often as the colorful, critical voice of the dissent.

CONCLUSION: SHOWDOWN AT THE *CHEVRON* CORRAL

As *Chevron* approaches its twenty-fifth anniversary in 2009, and the Roberts Court enters its third full year, I have identified a total of eleven Roberts Court cases which have considered the question of how much deference courts should give to federal agency interpretation of a statute. In these opinions, sparks have flown between two contingents within the Court. Given the fact that two of the current Justices, Antonin Scalia and Stephen Breyer, have analyzed judicial deference to agency regulations from an academic perspective in addition to their current Supreme Court vantage point, we expect vigorous discussions of administrative law theory and have not been disappointed. Because these two administrative law scholars espoused clearly different views of the *Chevron* doctrine before

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255. *See Gonzales*, 546 U.S. at 255-56 (stating that an agency decision is only entitled to *Chevron* deference when Congress has delegated the authority to make rules carrying the force of law to that agency (citing *Mead*, 533 U.S. at 226-27)); *see also* Rapanos v. United States, 126 S. Ct. 2208, 2224 (2006) (noting that in order to authorize an intrusion into an area traditionally relegated to the states, a "clear and manifest statement" is needed) (citations omitted).

256. *See Long Island Care at Home*, 127 S. Ct. at 2346 (finding that the Fair Labor Standards Amendments give the DOL the implied authority to fill any gaps that may exist in the statute with rules and regulations); Watters v. Wachovia Bank, N.A., 127 S. Ct. 1559, 1567-70 (2007) (relying on the NBA's incidental powers clause to indicate an implicit congressional intent to allow the OCC to grant "operating subsidiaries" the same exemptions from state law that would be available to national banks themselves); *Gonzales,* 546 U.S. at 259 (determining that the Attorney General can create rules relating to "registration" and "control" and "for the efficient execution of his functions" based on implied authority under the Controlled Substances Act).

they ascended to the highest bench, the division within the Court is not surprising. But are the verbal bullets exchanged merely a sideshow or does one viewpoint within the Roberts Court hit the target with a coherent theory, based on *Chevron* or otherwise, that administrative lawyers can use to analyze cases involving the question of judicial review of agency interpretations?

Analysis of the Roberts Court cases shows that classic *Chevron* analysis is dead—or at least critically wounded. Unfortunately, it appears that stray bullets, in the form of inconsistent applications of the doctrine, may have done it in.[257] Close reading of the majority opinions in these eleven Roberts Court cases shows that only *National Ass'n of Home Builders*, the last of the series, relied on the "strong form" *Chevron* analytical framework.

So what is an administrative lawyer to do? *Chevron* may be dead, but my recommendation is to retain its framework on Ockham's Razor[258] grounds alone: All things being equal, the simplest solution tends to be the best one. It is imperative, however, to recognize that none of the current Supreme Court Justices blindly apply a simple *Chevron* analysis. In any case involving agency interpretation of a statute, a well-prepared lawyer—whether arguing for the agency or against the agency—must also address "plain reading" of the statute as well as legislative and regulatory history, which can demonstrate or disprove congressional intent in the teeth of arguably contrary statutory language.

Justice Scalia's arguments for a classic *Chevron* framework may be cleaner and more predictable. Realistically, however, the current Court has been much more likely to adopt Justice Breyer's case-by-case evaluation of agency interpretation. In an unmistakable pattern, *Chevron* has become the argument for the losing side, with failure by the majority to adhere to a straightforward *Chevron* analysis emerging as a recurring criticism in

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257. Furthering the theory that there are country western song lyrics that cover every situation, one can almost hear *Chevron* singing:

> Well I ain't afraid of dyin', it's the thought of being dead
> I wanna go on being me once my eulogy's been read
> Don't spread my ashes out to sea, don't lay me down to rest
> You can put my mind at ease if you fulfill my last request
> Prop me up beside the jukebox if I die

JOE DIFFIE, PROP ME UP BESIDE THE JUKE BOX (IF I DIE) (Epic Records 1993).

Apparently, the Supreme Court is doing just that for the *Chevron* doctrine—propping up a popular but unreliable doctrine, reciting it when the Justices would otherwise agree with the agency, and ignoring it when it might dictate an inconvenient result.

258. *See* REGA WOOD, OCKHAM ON THE VIRTUES 20 (1997) (explaining the principle attributed to the fourteenth century English logician and Franciscan friar William of Ockham, sometimes expressed in Latin as the lex parsimoniae, "law of parsimony" or "law of succinctness").

dissenting opinions. Although the Roberts Court still quotes *Chevron*, the older *Skidmore* analysis appears to be the one the Court actually applies: A federal agency's statutory interpretation is entitled to judicial deference only to the extent it is persuasive to at least five Justices.