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Stephen M. Johnson

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# ARTICLES

## BRINGING DEFERENCE BACK (BUT FOR HOW LONG?): JUSTICE ALITO, *CHEVRON*, *AUER*, AND *CHENERY* IN THE SUPREME COURT'S 2006 TERM

*Stephen M. Johnson*<sup>†</sup>

### I. INTRODUCTION

For most of the past decade, the Supreme Court seemed to be gradually eroding the deference accorded to administrative agencies. In *Christensen v. Harris County*<sup>1</sup> and *United States v. Mead Corp.*<sup>2</sup> the Court refused to accord *Chevron* deference<sup>3</sup> to agencies' interpretations of statutes when the agencies adopted those interpretations through informal procedures.<sup>4</sup> The trend appeared to continue when the Court refused to accord *Chevron* deference to tobacco regulations adopted by the Food and Drug Administration in *FDA v. Brown & Williamson Tobacco Corp.*<sup>5</sup> or to controlled substance regulations adopted by the Attorney General in *Gonzales v. Oregon*.<sup>6</sup> In addition, the Court cited *Chevron* less frequently in recent Terms.<sup>7</sup> Academics suggested that

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<sup>†</sup> Associate Dean and Professor, Walter F. George School of Law, Mercer University. B.S., J.D. Villanova University, LL.M. George Washington University School of Law.

1. 529 U.S. 576 (2000).

2. 533 U.S. 218 (2001).

3. See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.* In *Chevron*, the Supreme Court created a two-step test for judicial review of agency interpretations of statutes. *Id.* at 842-43. At Step One, the reviewing court asks "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, . . . the court must give effect to the unambiguously expressed intent of Congress." *Id.* However, "if the statute is silent or ambiguous with respect to the specific issue," *id.* at 843, the court should defer to the agency's interpretation of the statute as long as it is reasonable, *id.* at 843-44.

4. See *Mead*, 533 U.S. at 226-27; *Christensen*, 529 U.S. at 586-87. Although the Court did not accord *Chevron* deference to the agencies' decisions, in both cases the Court suggested that the decisions were entitled to deference under the Court's ruling in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). See *Mead*, 533 U.S. at 227; *Christensen*, 529 U.S. at 587.

5. 529 U.S. 120 (2000).

6. 546 U.S. 243 (2006).

7. See Linda Jellum, *Chevron's Demise: A Survey of Chevron from Infancy to Senescence*, 59 ADMIN. L. REV. 725, 772-73 (2007).

these factors signaled a trend away from *Chevron's* call for judicial deference to agency interpretations of statutes.<sup>8</sup>

At the same time that the Court seemed to be reducing the deference accorded to agency interpretations of statutes, the Court also seemed to be reducing the deference accorded to an agency's interpretation of its own regulations. The Court's 1997 *Auer v. Robbins* opinion reaffirmed that an agency's interpretation of its own regulations is entitled to substantial deference,<sup>9</sup> but academics expressed concerns about the vitality of *Auer* in the wake of the Court's 2001 opinion in *Mead*.<sup>10</sup> The Court created an exception to *Auer* in *Gonzales*, when it refused to defer to the Attorney General's interpretation of his rules.<sup>11</sup>

To the extent that the Court's opinions over the last decade suggested an erosion of deference, Justice Alito's elevation to the Court and the opinions that the Court issued in the 2006 Term suggest that the pendulum has swung back towards agency deference, at least for the time being. Although the Court did not overturn any major administrative law precedents, it interpreted many of them in a significantly pro-government manner.

The shift is most apparent in the Court's *Chevron* jurisprudence in the 2006 Term. Eight of the Court's opinions either applied *Chevron* or examined whether application of *Chevron* was appropriate in the case.<sup>12</sup> More significant than the number of *Chevron* citations is the manner in which the Court applied *Chevron*. Where in prior Terms the Court seemed to be reducing the situations in which *Chevron* applied in prior Terms, in the 2006 Term the Court expanded the reach of *Chevron* when

8. See *infra* Part III.A.

9. *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (stating that an agency's interpretation of its own regulations is "controlling unless 'plainly erroneous or inconsistent with the regulation.'" (quoting *Roberson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989))).

10. See discussion *infra* Part IV.A.

11. *Gonzales*, 546 U.S. at 256-57.

12. See *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518 (2007); *Long Island Care at Home, Ltd. v. Coke*, 127 S. Ct. 2339 (2007); *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007); *Watters v. Wachovia Bank*, 127 S. Ct. 1559 (2007); *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 127 S. Ct. 1534 (2007); *Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc.*, 127 S. Ct. 1513 (2007); *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007); *Env'tl. Def. v. Duke Energy Corp.*, 127 S. Ct. 1423 (2007). The Court cited *Chevron* in the *Duke Energy* case, but did not cite it for the two-part test. See *Duke Energy*, 127 S. Ct. at 1428. Nevertheless, the Court applied the *Chevron* analysis in the case when it determined that the EPA's regulations could be upheld despite the ambiguous language in the Clean Air Act as long as the agency's interpretation of the statute was reasonable. *Id.* at 1434. In addition to the eight cases cited above, two other cases cited *Chevron* on tangential matters. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2781 n.18 (2007); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2515 (2007) (Scalia, J., concurring).

it applied the test to review an agency's denial of a petition for rulemaking in *Massachusetts v. EPA*.<sup>13</sup> Furthermore, in two of the cases, *Watters v. Wachovia Bank*<sup>14</sup> and *National Ass'n of Home Builders v. Defenders of Wildlife*,<sup>15</sup> the Court deferred to agencies' statutory interpretations on issues—federalism and conflicting statutes—that seemed to be within the province of the Court, rather than that of the agencies.<sup>16</sup>

Another subtle shift towards agency deference is apparent in the manner in which several of the Court's opinions have blurred the steps of the *Chevron* analysis.<sup>17</sup> For more than a decade, courts have focused increasingly on a textualist approach to answer the question posed at *Chevron* Step One—"whether Congress has directly spoken to the precise question at issue."<sup>18</sup> Many academics argue that judges who apply a textualist approach at *Chevron* Step One may be more likely to invalidate agency interpretations of statutes.<sup>19</sup> While the Supreme Court's opinions in the 2006 Term continued to adopt a textualist approach at Step One, the opinions seem to be reducing both the importance of the traditional order of analysis in the *Chevron* test and the importance of Step One by blurring the steps and considering legislative history and purpose more directly in evaluating the validity of agency interpretations.<sup>20</sup>

The shift toward greater deference to agencies in the Court's recent Term was also apparent in cases involving the application of *Auer v. Robbins*. While *Gonzales* seemed to signal a shift away from *Auer* deference for an agency's interpretations of its regulations, the Court applied *Auer* in two cases in the 2006 Term to uphold agencies' interpretations of their rules.<sup>21</sup> Arguably, the Court even strengthened the *Auer* standard in those cases because, in both cases, the Court

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13. See *Massachusetts v. EPA*, 127 S. Ct. at 1459.

14. 127 S. Ct. 1559 (2007).

15. 127 S. Ct. 2518 (2007).

16. See *infra* notes 196-98 and accompanying text.

17. See *infra* notes 201-08 and accompanying text.

18. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984); see also *infra* notes 162-63 and accompanying text.

19. See, e.g., Robert A. Schapiro, *Judicial Deference and Interpretive Coordinacy in State and Federal Constitutional Law*, 85 CORNELL L. REV. 656, 681-82 & n.151 (2000); see also Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 828 (2006); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L. J. 511, 521.

20. See *infra* notes 201-08 and accompanying text.

21. See *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518 (2007); *Long Island Care at Home, Ltd. v. Coke*, 127 S. Ct. 2339 (2007).

deferred to agency interpretations that had changed over time.<sup>22</sup> In *Gonzales*, the Court had implied that *Auer* deference should not be accorded to agency interpretations that change over time.<sup>23</sup>

The deferential treatment that the Court accorded agencies in the 2006 Term was apparent outside of the *Chevron* and *Auer* arena as well. In *National Ass'n of Home Builders v. Defenders of Wildlife*, the Court appeared to ignore—or at least stretch—the “hoary” administrative law precedent, *SEC v. Chenery Corp.*,<sup>24</sup> when it upheld the EPA’s decision to transfer water pollution permitting authority to the State of Arizona on grounds other than those the EPA articulated when it approved the transfer.<sup>25</sup> Finally, in *Environmental Defense v. Duke Energy Corp.*, the Court strongly suggested that the EPA could interpret, by regulation, the identical term that was used in two different sections of the Clean Air Act differently for each section.<sup>26</sup>

The Court accorded greater deference to agencies on many issues and doctrines, and ultimately upheld the agencies’ decisions in six of the eight *Chevron* cases mentioned above.<sup>27</sup> An analysis of the voting records of individual Justices in these cases demonstrates that Justices Alito and Kennedy had the greatest impact on the development of administrative law in the 2006 Term.<sup>28</sup> Justice Alito voted to uphold the government’s actions more than any other Justice; he only voted against the

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22. See *infra* notes 225-29 and accompanying text.

23. *Gonzales v. Oregon*, 546 U.S. 243, 257-58 (2006).

24. 318 U.S. 80 (1943).

25. *Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2544 (Stevens, J., dissenting) (citing *Chenery*, 318 U.S. at 87).

26. *Env'tl. Def. v. Duke Energy Corp.*, 127 S. Ct. 1423, 1433-34 (2007).

27. The six cases in which the Court upheld positions advanced by the government were *National Ass'n of Home Builders*, 127 S. Ct. at 2524-25 (majority opinion), *Long Island Care at Home, Ltd. v. Coke*, 127 S. Ct. 2339, 2344 (2007), *Watters v. Wachovia Bank*, 127 S. Ct. 1559, 1564-65 (2007), *Zuni Public School Dist. No. 89 v. Dep't. of Education*, 127 S. Ct. 1534, 1537-38 (2007), *Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc.*, 127 S. Ct. 1513, 1516 (2007), and *Duke Energy*, 127 S. Ct. at 1428. The two cases in which the Court did not uphold positions advanced by the government were *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2165-66 (2007), and *Massachusetts v. EPA*, 127 S. Ct. 1438, 1463 (2007).

28. While Justice Breyer is *Chevron*’s strongest critic on the Court and Justice Scalia is *Chevron*’s strongest proponent, these two Justices often counterbalance each other in voting. In the eight cases discussed above, Justices Breyer and Scalia voted on opposite sides in six of them. The only cases in which they voted on the same side were *Long Island Care at Home* and *Duke Energy*, both of which were unanimous opinions. *Long Island Care at Home*, 127 S. Ct. at 2343; *Duke Energy*, 127 S. Ct. at 1427. While Justices Breyer and Scalia have had the most to say about *Chevron* in their opinions, Justices Alito and Kennedy have had the most say about *Chevron*’s application and in the development of administrative law in the 2006 Term. See *infra* notes 29-32 and accompanying text.

government in one of the eight cases.<sup>29</sup> Justice O'Connor, whom he replaced, had voted to validate agency actions far less frequently.<sup>30</sup> Thus, Justice Alito's addition to the Court appears to be the greatest impetus for the increased deference to agencies. While Justice Alito was the most pro-government Justice, Justice Kennedy's influence must also be acknowledged. Justice Kennedy voted with the majority in every one of the eight cases discussed above. His vote was especially crucial because five of those eight cases were decided by a five-Justice majority.<sup>31</sup> As in many areas outside of administrative law these days, as goes Justice Kennedy, so goes the Court.<sup>32</sup>

While the Court seemed to accord greater deference to agencies in the 2006 Term, there is reason to believe that the increased deference may be transitory. A recent study by Professors Thomas Miles and Cass Sunstein found that while the conservative Justices on the Supreme Court are less likely to validate agency decisions than the liberal Justices on the Court, the most conservative members of the Court have been much more willing to validate agency decisions since President George W. Bush took office than they were when President Clinton was in office.<sup>33</sup> In that study, the voting patterns of Justice O'Connor did not appear to be significantly affected by the identity of the administration in power.<sup>34</sup> Justice Alito's replacement of Justice O'Connor, combined with his significantly higher rate of validation for agency decisions, seems to have tipped the balance in favor of deference for agencies for the time being. However, if the premise of the Miles and Sunstein study is correct, the conservative Justices who are deferring to agency decisions by the current administration may be less likely to defer to decisions of a different administration. Because the Court in the 2006 Term did not overrule any significant administrative law precedent or purport to make any significant changes to *Chevron*, *Auer*, or *Chenery*, the Court could

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29. *Ledbetter* was the only case in which Justice Alito took a position that opposed the government's. See *Ledbetter*, 127 S. Ct. at 2165-66.

30. In a study of the voting records of Supreme Court Justices in *Chevron* cases, Professors Thomas Miles and Cass Sunstein found that Justice O'Connor validated agency actions in 67% of the *Chevron* cases in which she participated. Miles & Sunstein, *supra* note 19, at 832 tbl.1. By contrast, Justice Alito validated agency actions in only 12.5% (1/8) of the *Chevron* decisions in which he participated. See *supra* note 30.

31. See *Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2524 (5-4 decision); *Ledbetter*, 127 S. Ct. at 2165 (same); *Watters*, 127 S. Ct. at 1563-64 (5-3 decision); *Zuni*, 127 S. Ct. at 1537 (5-4 decision); *Massachusetts v. EPA*, 127 S. Ct. at 1444 (same).

32. In the 2006 Term, the Supreme Court decided 24 of the 68 cases by 5-4 votes, and Justice Kennedy was in the majority in every one of those cases. Stewart M. Jay, *Middle Man*, SEATTLE POST-INTELLIGENCER, July 22, 2007, at I1.

33. Miles & Sunstein, *supra* note 19, at 823.

34. *Id.* at 832 tbl.1, 833.

reduce the deference it accords to agency decisions as quickly as it has seemingly increased it.

There is an alternative, less cynical explanation for the Court's resolution of *Chevron* cases in the 2006 Term. In a recent article attempting to explain the Court's reluctance to accord *Chevron* deference to agency decisions in the *Brown & Williamson* and *Gonzales* cases, Professor Lisa Schultz Bressman posits that courts will overturn agency decisions, despite *Chevron* deference, when agencies "act[] undemocratically either by disregarding likely congressional preferences or public engagement on an issue of social concern."<sup>35</sup> Bressman's theory seems to be supported by the Court's resolution of the *Chevron* cases in the 2006 Term.<sup>36</sup>

This Article explores the eight major *Chevron*-related opinions of the 2006 Term and the general trend toward increased deference for administrative agencies in those decisions. Part II of this Article briefly describes the disputes and holdings of the cases. Part III examines the apparent trend away from *Chevron* in prior years and the revitalization of *Chevron* in the 2006 Term. Part IV explores the other ways that the Court increased the deference accorded to agencies, including the rejuvenation of *Auer* and the strained application of *Chenery*. Finally, Part V explores some of the reasons for the shift towards increased deference for agencies and examines the potentially transitory nature of the shift.

## II. THE *CHEVRON* EIGHT

The Supreme Court either applied *Chevron* or examined whether *Chevron* was applicable in eight cases during the 2006 Term.<sup>37</sup> The Court ruled in favor of the government in six of those cases.<sup>38</sup> The cases are described in the following sections.

### A. Cases Decided in Favor of the Government

#### I. National Ass'n of Home Builders v. Defenders of Wildlife

The most fractured and convoluted of the *Chevron* opinions was authored by Justice Alito, for a 5-4 Court, in *National Ass'n of Home Builders v. Defenders of Wildlife*.<sup>39</sup> The case involved a challenge to the

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35. Lisa Schultz Bressman, *Deference and Democracy*, 75 GEO. WASH. L. REV. 761, 798 (2007).

36. See *infra* notes 279-83 and accompanying text.

37. See cases cited *supra* note 12.

38. See cases cited *supra* note 27.

39. 127 S. Ct. 2518, 2524 (2007).

Environmental Protection Agency's (EPA) decision to transfer water pollution permitting authority under the Clean Water Act (CWA) to the State of Arizona.<sup>40</sup> Section 402(b) of the Clean Water Act identifies nine criteria that state permitting programs must meet in order for a state to obtain permitting authority under the CWA. The statute provides that the EPA "shall approve each submitted program" for transfer of permitting authority "unless [it] determines that adequate authority does not exist" to ensure that the criteria are met.<sup>41</sup> A separate federal statute, the Endangered Species Act (ESA), provides in section 7(a)(2) that federal agencies must consult with agencies within the Department of the Interior or the Department of Commerce to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species."<sup>42</sup> The EPA consulted with the Fish and Wildlife Service (FWS) of the Department of the Interior as required by section 7 of the ESA, and the FWS concluded that the transfer of permitting authority to Arizona would not jeopardize endangered or threatened species.<sup>43</sup> The EPA concluded that Arizona's application for permitting authority met the nine criteria of the CWA and transferred permitting authority to the State.<sup>44</sup>

Defenders of Wildlife challenged the EPA's decision to transfer permitting authority to Arizona.<sup>45</sup> Although the EPA, when it approved the transfer of permitting authority to Arizona, had suggested that the transfer complied with section 7 of the ESA,<sup>46</sup> the EPA changed its position during the course of litigation and argued that section 7 did not apply to the agency's determination of whether it was appropriate to transfer permitting authority under the CWA.<sup>47</sup> Following the commencement of the litigation in the lower court, in the context of reviewing an application from the State of Alaska for transfer of CWA permitting authority, the EPA, FWS, and National Marine Fisheries Service (NMFS) issued memoranda concluding that the consultation process required by section 7(a)(2) of the ESA did not apply to a request for a transfer of permitting authority under section 402(b) of the CWA.<sup>48</sup> While the U.S. Court of Appeals for the Ninth Circuit held that the

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40. *Id.* at 2525.

41. *Id.* (quoting 33 U.S.C. § 1342(b) (2000)) (alteration in original).

42. *Id.* at 2526 (quoting 16 U.S.C. § 1536(a)(2) (2000)).

43. *Id.* at 2527.

44. *Id.*

45. *Id.* at 2528.

46. *Id.* at 2527-28.

47. *Id.* at 2529-31.

48. *Id.* at 2530 & n.5.



EPA's reliance on the new interpretation of section 7(a)(2) was arbitrary and capricious, the Supreme Court was not troubled by the EPA's change in position. The majority noted that its administrative law precedent required that it "'uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned.'"<sup>49</sup> The Court then concluded that the EPA had not acted arbitrarily and capriciously by retreating from its earlier statements that the transfer complied with section 7 of the ESA.<sup>50</sup> Writing for the dissent, Justice Stevens pointed out that:

We have long held . . . that courts may not affirm an agency action on grounds other than those adopted by the agency in the administrative proceedings. *See SEC v. Chenery Corp.* . . . The majority ignores this hoary principle of administrative law and substitutes a post-hoc interpretation of [the ESA and a key regulatory provision] . . . for that of the relevant agency.<sup>51</sup>

After the Court determined that the EPA did not act arbitrarily and capriciously by taking a position in litigation that was contrary to the position that it took at the time of its decision to transfer permitting authority, the Court reviewed the EPA's interpretation of the conflicting statutes. Justice Alito, for the majority, framed the issue as "a clash of seemingly categorical—and, at first glance, irreconcilable—legislative commands."<sup>52</sup> He noted that CWA section 402(b) "provides, without qualification, that the EPA 'shall approve' a transfer application unless it determines that the State lacks adequate authority to perform the nine functions specified" therein.<sup>53</sup> Moreover, Justice Alito found the language of ESA section 7(a)(2) to be "similarly imperative."<sup>54</sup> Whereas section 7(a)(2), on its face, seemed to apply to *all* agency actions, including the EPA's decision to approve a transfer of permitting authority under the CWA, Justice Alito argued that such an interpretation of the ESA would "implicit[ly] repeal" the CWA by adding a "tenth criterion" to the standards for approving transfers of permitting authority under section 402(b).<sup>55</sup>

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49. *Id.* at 2530 (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

50. *Id.* at 2530-31.

51. *Id.* at 2544 (Stevens, J., dissenting) (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943)).

52. *Id.* at 2531 (majority opinion).

53. *Id.* (quoting 33 U.S.C. § 1342(b) (2000)).

54. *Id.* at 2532.

55. *Id.* at 2532-33.

While Justice Stevens, in dissent, argued that the Court could interpret the two statutes in a manner that would give full effect to both,<sup>56</sup> the majority decided instead to review the Agency's action under *Chevron*.<sup>57</sup> The majority determined, at *Chevron* Step One, that the statutory conflict rendered the language of the ESA ambiguous.<sup>58</sup> Consequently, the majority examined a regulation adopted by the FWS and the NMFS, the agencies responsible for administering ESA section 7, which provided that "[s]ection 7 and the requirements of this part apply to all actions in which there is *discretionary* Federal involvement or control."<sup>59</sup> Although the regulation, on its face, did not provide that section 7 *only* applies to actions where there is discretionary federal involvement or control, the majority read the regulation to be so limited, and concluded that the regulation was reasonable and therefore entitled to *Chevron* deference.<sup>60</sup> On that reading, because the EPA did not have discretion to deny a request to transfer the water pollution permitting program to Arizona under section 402(b) if the nine criteria in that section were met, the EPA would not be required to comply with section 7 in making the transfer determination.

The Court bolstered its holding by noting that the EPA, FWS, and NMFS had each interpreted the regulations of the ESA to exclude decisions regarding the transfer of permitting authority under the CWA section 402(b) from the requirements of ESA section 7.<sup>61</sup> Even though the agencies had previously interpreted the regulations to require consultation under section 7 for transfers of permitting authority under the CWA, and had changed their interpretations in a different proceeding than the one under review by the Court—subsequent to the commencement of the litigation before the Court—the majority, relying on *Auer v. Robbins*, held that “[a]n agency’s interpretation of the meaning of its own regulations is entitled to deference ‘unless plainly erroneous or inconsistent with the regulation, and that deferential standard is plainly met here.’”<sup>62</sup>

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56. *Id.* at 2538 (Stevens, J., dissenting).

57. *Id.* at 2534-35 (majority opinion).

58. *Id.* at 2534.

59. *Id.* at 2533 (quoting 50 C.F.R. § 402.03 (2000)).

60. *Id.* at 2534-35. The dissent argued, on the other hand, that the regulation merely confirmed that section 7 applied to discretionary agency actions as well as non-discretionary actions. *Id.* at 2542 (Stevens, J., dissenting).

61. *Id.* at 2537 (majority opinion).

62. *Id.* at 2537-38 (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997)).

## 2. Long Island Care at Home, Ltd., et al v. Coke

A few weeks prior to the Court's *National Ass'n of Home Builders* decision, a unanimous Court upheld Department of Labor (DOL) regulations in *Long Island Care at Home, Ltd., et al v. Coke*.<sup>63</sup> The case involved the DOL's interpretation of a provision of the Fair Labor Standards Act (FLSA) that exempts certain "domestic service" employees who provide "companionship services" from the statute's minimum wage and maximum hours rules.<sup>64</sup> The DOL issued two potentially conflicting regulations through notice and comment rulemaking. The first regulation, which was included in a subpart of the rulemaking entitled "General Regulations" defined "domestic service employment" as "services of a household nature performed by an employee in or about a private home . . . of the person by whom he or she is employed."<sup>65</sup> The second regulation, referred to by the Court as the "third-party regulation," was included in a different subpart of the rulemaking entitled "Interpretations" and provided that "exempt companionship workers include those 'who are employed by an employer or agency other than the family or household using their services . . . [whether or not] such an employee [is assigned] to more than one household or family in the same workweek.'"<sup>66</sup>

Evelyn Coke, a domestic worker, provided companionship services to the elderly; she sued her former employer, Long Island Care at Home, Ltd., to recover unpaid wages, alleging that her employer failed to comply with the minimum wage and maximum hour provisions of the FLSA.<sup>67</sup> The employer claimed, however, that the third-party regulation exempted employees like Coke from coverage under the Act.<sup>68</sup>

As in the *National Ass'n of Home Builders* case, the Court analyzed the statutory interpretation issue through the *Chevron* framework. Justice Breyer wrote that *Chevron* deference was appropriate because "[t]he subject matter of the regulation in question concerns a matter in respect to which the agency is expert, and it concerns an interstitial matter, *i.e.*, a portion of a broader definition, the details of which . . . Congress entrusted the agency to work out."<sup>69</sup> The Court determined that neither the text nor the statute's legislative history clearly answered

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63. 127 S. Ct. 2339 (2007).

64. *Id.* at 2344 (quoting 29 U.S.C. § 213(a)(15) (2000)).

65. *Id.* at 2344-45 (quoting 40 Fed. Reg. 7405 (1975) (codified at 29 C.F.R. § 552.3 (2006))) (emphasis omitted) (alteration in original).

66. *Id.* at 2345 (quoting 40 Fed. Reg. at 7407 (codified at 29 C.F.R. § 552.109(a) (2006))) (alterations in original).

67. *Id.* at 2345.

68. *Id.* at 2345-46.

69. *Id.* at 2346.

the question of whether domestic service workers employed by a third party were exempt from the FLSA.<sup>70</sup> Consequently, the Court examined the agency's regulations. Although the DOL's third-party regulation conflicted with its own general rule that defined domestic service employees, the Court determined that the third-party regulation should control over the general regulation because the Agency had issued an "Advisory Memorandum" to internal agency personnel, in which the agency took the position that the third-party regulation should control.<sup>71</sup> The Court noted that the Agency's interpretation of its regulations had changed over time and that the most recent interpretation appeared to be prepared in response to the litigation, but the Court nevertheless held:

We have "no reason" . . . "to suspect that [this] interpretation" is merely a "*post hoc* rationalizatio[n]" of past agency action, or that it "does not reflect the agency's fair and considered judgment on the matter in question." Where, as here, an agency's course of action indicates that the interpretation of its own regulation reflects its considered views . . . we have accepted that interpretation as the agency's own, even if the agency set those views forth in a legal brief.

For all these reasons, we conclude that the Department's interpretation of the two regulations falls well within the principle that an agency's interpretation of its own regulations is "controlling" unless "plainly erroneous or inconsistent with" the regulations being interpreted.<sup>72</sup>

The Court also addressed Coke's claim that the third-party regulation was not entitled to *Chevron* deference because it was an interpretive rule.<sup>73</sup> While the Court did not ultimately determine whether the regulation was or was not an interpretive rule,<sup>74</sup> the Court reasoned that the regulation was entitled to *Chevron* deference because (1) it "directly govern[ed] the conduct of members of the public, 'affecting individual rights and obligations'"; (2) in rulemaking, the DOL "used full public notice-and-comment procedures"; and (3) the DOL had "treated the third-party regulation as a binding exercise of its rulemaking authority."<sup>75</sup> The Court explained that:

Where an agency rule sets forth important individual rights and duties, where the agency focuses fully and directly upon the issue, where the agency uses full notice-and-comment

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70. *Id.* at 2347.

71. *Id.* at 2349.

72. *Id.* (citations omitted) (first alteration in original).

73. *Id.* at 2349-50.

74. *See id.* at 2349-51.

75. *Id.* at 2350.

procedures to promulgate a rule, where the resulting rule falls within the statutory grant of authority, and where the rule itself is reasonable, then a court ordinarily assumes that Congress intended it to defer to the agency's determination.<sup>76</sup>

### 3. Zuni Public School District No. 89 v. Department of Education

*Zuni Public School District No. 89 v. Department of Education* centered on an interpretation of education funding provisions in the Federal Impact Aid Act (IAA).<sup>77</sup> The statute "provides financial assistance to local school districts whose ability to finance public school education is adversely affected by a federal presence," such as a military base, which would not be subject to local property taxes.<sup>78</sup> The statute prohibits states from reducing their aid to local school districts that receive federal aid, but includes an exemption allowing states to reduce their aid to those districts if the state implements a program to equalize expenditures for public schools in the state.<sup>79</sup> The Secretary of Education must follow a statutory formula that compares the per-pupil expenditures of the local school districts to determine whether the state program equalizes expenditures.<sup>80</sup> In making the comparison of expenditures among school districts, the statute requires the Secretary to "disregard [school districts] with per pupil expenditures . . . above the 95th percentile or below the 5th percentile of such expenditures."<sup>81</sup>

Over thirty years ago, the Department of Education adopted regulations to implement the statute, including the "disregard" provision.<sup>82</sup> The regulations that the Agency adopted to identify the school districts to disregard provide that the Agency should make the determination based on the student population of each districts.<sup>83</sup> The Secretary relied on that regulation to conclude that the State of New Mexico equalized expenditures among school districts and could, therefore, reduce state aid to several districts to offset the aid provided to them under the IAA.<sup>84</sup> Two of the school districts impacted by that decision challenged it, arguing that the Agency's regulations were inconsistent with the IAA, and that in deciding which school districts to

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76. *Id.* at 2350-51.

77. 127 S. Ct. 1534, 1538 (2007).

78. *Id.* (citing 20 U.S.C. § 7701 (Supp. IV 2000)).

79. *Id.* (citing 20 U.S.C. § 7709(b)(1)).

80. *Id.* (citing 20 U.S.C. § 7709(b)(2)(A)).

81. *Id.* (quoting 20 U.S.C. § 7709(b)(2)(B)(i)) (emphasis added) (alterations in original).

82. *Id.* at 1538-39 (quoting 34 C.F.R. pt. 222, subpt. K, app. at para. 1 (2006)).

83. *Id.* at 1539 (quoting 34 C.F.R. pt. 222, subpt. K, app. at para. 1 (2006)).

84. *Id.* at 1540.

disregard, the Secretary of Education should focus on the number of school districts rather than the student population of those districts.<sup>85</sup>

Justice Breyer began his opinion for the 5-4 Court by citing *Chevron* for the proposition 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.”<sup>86</sup> Although Justice Breyer seemed to frame the *Chevron* Step One analysis as a textual analysis, he did not begin his *Chevron* analysis with Step One. Instead, he wrote:

For purposes of exposition, we depart from a normal order of discussion, namely an order that first considers *Zuni*’s statutory language argument. Instead, because of the technical nature of the language in question, we shall first examine the provision’s background and basic purposes. That discussion will illuminate our subsequent analysis [of the statutory text] . . . .<sup>87</sup>

He proceeded to conclude that the Agency’s interpretation of the statute was consistent with its legislative history and purpose,<sup>88</sup> and that the issue to be resolved in *Zuni* was an appropriate issue for deference because it was “the kind of highly technical, specialized interstitial matter that Congress often does not decide itself, but delegates to specialized agencies to decide.”<sup>89</sup> Justice Breyer then examined the text of the statute itself and concluded that the text alone did not clearly answer the question before the Court.<sup>90</sup> Ultimately, he wrote that “the language of the statute is broad enough to permit the secretary’s reading. That fact requires us to look beyond the language to determine whether the Secretary’s interpretation is a reasonable, hence permissible

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85. *Id.* Pursuant to the regulation, the Secretary excluded seventeen schools that had the highest per-pupil expenditure and six schools that had the lowest per-pupil expenditure from the calculations in determining whether the State program equalized expenditures. *Id.* This was because the two groups of schools each cumulatively constituted five percent or less of the total student population. *Id.* The challengers argued that since there were eighty-nine school districts in the State, the Secretary should have excluded only ten schools from the calculations—the five schools with the highest per-pupil expenditure and the five schools with the lowest per-pupil expenditure. *Id.* Were the Secretary to have applied the formula in the manner suggested by the challengers, the Secretary would have concluded that New Mexico did not have a funding program that equalizes expenditures, and New Mexico would not have been permitted to reduce State aid to the school districts to offset the federal aid that they were receiving. *Id.*

86. *Id.* (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984)).

87. *Id.* at 1541 (citation omitted).

88. *Id.* at 1541-43.

89. *Id.* at 1541.

90. *Id.* at 1543-46.

implementation of the statute. . . . [W]e conclude that the Secretary's reading is a reasonable reading."<sup>91</sup>

While Justices Kennedy and Alito joined in the majority opinion, Justice Kennedy wrote a concurring opinion for the pair that criticized Justice Breyer's inversion of the order of the *Chevron* analysis. Justice Kennedy admonished that "[t]he district courts and courts of appeals, as well as this Court, should follow the framework set forth in *Chevron* . . . even when departure from that framework might serve purposes of exposition."<sup>92</sup> After reciting the *Chevron* two-step framework, Justice Kennedy concluded that:

In this case, the 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. The opinion of the Court, however, inverts *Chevron's* logical progression. Were 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.<sup>93</sup>

Justice Scalia was much more concerned about the implications of Justice Breyer's method of analysis as a potential erosion of the textualist approach to *Chevron* Step One. In his dissenting opinion, Justice Scalia discussed the Supreme Court's landmark *Church of the Holy Trinity v. United States* decision, in which the Court broadly interpreted a federal labor statute to achieve the statute's purpose, even though such an interpretation stepped beyond the text of the statute.<sup>94</sup> He noted that the decision was

a judge-empowering proposition if there ever was one, and in the century since, the Court has wisely retreated from it, in words if not always in actions. But today *Church of the Holy Trinity* arises, Phoenix-like, from the ashes. The Court's contrary assertions aside, today's decision is nothing other than the elevation of judge-supposed legislative intent over clear statutory text.<sup>95</sup>

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91. *Id.* at 1546 (citation omitted).

92. *Id.* at 1550 (Kennedy, J., concurring).

93. *Id.* at 1551.

94. *See id.* at 1551 (Scalia, J., dissenting) (citing *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892)).

95. *Id.*

#### 4. Global Crossing Telecommunications v. Metrophones Telecommunications

In *Global Crossing Telecommunications v. Metrophones Telecommunications*, a payphone operator, Metrophones, sought compensation from a long distance carrier, Global Crossing, for calls made by payphone users to access Global Crossing's long distance services.<sup>96</sup> The case focused on the interpretation of several provisions of the federal telecommunications laws and regulations of the Federal Communications Commission (FCC).<sup>97</sup>

The Telephone Operator Consumer Services Improvement Act of 1990, which amended the Communications Act of 1934, required payphone operators to allow payphone users to access long distance service providers through payphones without depositing coins.<sup>98</sup> In order to ensure that payphone operators were compensated for the use of their phones for those services, Congress also enacted legislation that directed the FCC to prescribe regulations “‘establish[ing] a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call.’”<sup>99</sup> Pursuant to that legislation, the FCC issued an order mandating that long distance carriers reimburse payphone operators twenty-four cents for each “free” (coinless) call placed by a payphone user to the long distance carrier.<sup>100</sup> Under separate statutory authority, the FCC determined that a long distance carrier's failure to reimburse a payphone operator for the free calls was an “unreasonable practice” under section 201(b) of the Communications Act of 1934.<sup>101</sup> When Global Crossing refused to reimburse Metrophone for free calls placed from Metrophone payphones, Metrophone sued Global Crossing for damages under section 207 of the Act.<sup>102</sup>

Writing for a 7-2 majority, Justice Breyer began his analysis by noting that a litigant may bring an action under section 207 for unreasonable practices that are properly defined as unlawful in FCC rules.<sup>103</sup> The question for the Court, therefore, was whether the FCC's regulatory

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96. 127 S. Ct. 1513, 1516 (2007).

97. *Id.*

98. *Id.* at 1518 (citing Telephone Operator Consumer Services Improvement Act of 1990 § 3, 47 U.S.C. § 226(c) (2000)).

99. *Id.* (quoting Telecommunications Act of 1996, 47 U.S.C. § 276(b)(1)(A) (2000)).

100. *Id.* (citing 47 C.F.R. § 64.1300(d) (2005)). The current rate is \$0.494 per call. 47 C.F.R. § 64.1300(d) (2006).

101. *Global Crossing*, 127 S. Ct. at 1517-18 (citing Communications Act of 1934, 47 U.S.C. § 201(b) (2000)).

102. *Id.* at 1518-19 (citing Communications Act of 1934, 47 U.S.C. § 207).

103. *Id.* at 1515, 1519-20.



determination that a long distance carrier's failure to reimburse a payphone operator was an unreasonable practice under section 201(b) itself was valid.<sup>104</sup>

Immediately turning to *Chevron* to resolve the question, Justice Breyer focused both on the language of section 201(b) and on the nature of the issue to be resolved in the case.<sup>105</sup> Specifically, he noted that "the underlying regulated activity at issue here resembles activity that . . . communications agencies have long regulated" under the authority of section 201(b).<sup>106</sup> While he acknowledged that the statutes governing telecommunications regulation have changed over the years, increasing the role of competition and decreasing the importance of tariffs, Justice Breyer noted that "when Congress rewrote the law to bring about these changes, it nonetheless left § 201(b) in place. That fact indicates . . . that Congress likely expected . . . the FCC to pour new substantive wine into its old regulatory bottles."<sup>107</sup> He then summarized the standard of review:

[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 Congress has not previously spoken to the point at issue and the agency's interpretation" . . . is "reasonable."<sup>108</sup>

Applying that standard, Justice Breyer concluded that:

Congress, in § 201(b), delegated to the agency authority to "fill" a "gap," *i.e.*, to apply § 201 through regulations and orders with the force of law. The circumstances mentioned above make clear the absence of any relevant congressional prohibition. And, in light of the traditional regulatory similarities that we have discussed, we can find nothing unreasonable about the FCC's § 201(b) determination.<sup>109</sup>

##### 5. *Watters v. Wachovia Bank*

On the same day that the Supreme Court decided the *Zuni* and *Global Crossing* cases, the Court issued its ruling in *Watters v. Wachovia Bank*, a case that focused on whether the National Bank Act (NBA) preempted

104. *Id.* at 1520.

105. *Id.* at 1520-22.

106. *Id.* at 1520 (emphasis omitted).

107. *Id.* at 1521.

108. *Id.* at 1522 (quoting in turn *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001); *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005); *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843-44 (1984)).

109. *Id.* (citing *Brand X*, 545 U.S. at 980-81).

state regulation of subsidiaries of national banks.<sup>110</sup> The dispute in the case arose when Linda Watters, the commissioner of Michigan's Office of Insurance and Financial Services, required Wachovia Mortgage to comply with various licensing, inspection, and reporting requirements of Michigan's laws governing mortgage lenders, even though Wachovia Mortgage had recently become a wholly owned subsidiary of Wachovia Bank, a national banking association.<sup>111</sup> Wachovia Mortgage and Wachovia Bank argued that the NBA preempted the application of the State's requirements to the subsidiary company.<sup>112</sup>

The NBA governs business activities of national banks and authorizes them to engage in a variety of activities, including real estate lending.<sup>113</sup> It preempts state licensing and registration requirements for national banks and gives the federal Office of the Comptroller of the Currency (OCC) exclusive authority to inspect and examine national banks.<sup>114</sup> The law also authorizes national banks to engage in some activities through their operating subsidiaries.<sup>115</sup> In 2001, the OCC promulgated regulations providing that operating subsidiaries of national banks are subject to state laws only to the extent that national banks are subject to state laws.<sup>116</sup> In the litigation that led to the Supreme Court's review, the federal district court applied the *Chevron* test and deferred to the OCC's regulation as a reasonable interpretation of the NBA.<sup>117</sup> The Supreme Court, in an opinion written by Justice Ginsburg, concluded that the OCC correctly interpreted the NBA to preempt state laws that require inspection and examination of operating subsidiaries of national banks, but the Court suggested that because the statute clearly preempted state law, it was not necessary to examine the level of deference owed to the Agency's regulation.<sup>118</sup>

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110. 127 S. Ct. 1559, 1564 (2007). The three cases were decided on April 17, 2007. *Id.* at 1559; *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 127 S. Ct. 1534, 1534 (2007); *Global Crossing*, 127 S. Ct. at 1513.

111. *Watters*, 127 S. Ct. at 1565-66.

112. *Id.* at 1565.

113. *Id.* at 1564 (citing National Bank Act, 12 U.S.C. § 371 (2000)); *see also id.* at 1566 & n.3 (describing Congress' creation of the national banking system).

114. *Id.* at 1564 (citing National Bank Act, 12 U.S.C. § 484(a)).

115. *Id.* (citing National Bank Act, 12 U.S.C. § 24a(g)(3)(A)).

116. *Id.* at 1572 (citing 12 C.F.R. § 7.4006 (2006)).

117. *Wachovia Bank v. Watters*, 334 F. Supp. 2d 957, 963-65 (W.D. Mich. 2004).

118. *Watters*, 127 S. Ct. at 1572-73. The Court explained that the regulation "merely clarifies and confirms what the NBA already conveys: A national bank has the power to engage in real estate lending through an operating subsidiary, subject to the same Terms and conditions that govern the national bank itself; that power cannot be significantly impaired or impeded by state law." *Id.* at 1572.

Although the Court claimed that it was not according the OCC's interpretation *Chevron* deference, the dissenting Justices were not convinced. "Whatever the Court says," Justice Stevens wrote, "this is a case about an administrative agency's power to preempt state laws."<sup>119</sup> The dissenters argued that the NBA did not clearly address the preemption issue and that the Court should not accord *Chevron* deference to an agency's determination that a federal law does or does not preempt state law.<sup>120</sup>

#### 6. Environmental Defense v. Duke Energy Corp.

In *Environmental Defense v. Duke Energy Corp.*, the Court reviewed regulations issued by the Environmental Protection Agency (EPA) issued under the Clean Air Act (CAA).<sup>121</sup> The statute's "New Source Performance Standards" (NSPS) provisions require operators of certain types of air pollution sources to comply with technology-based standards established under the statute.<sup>122</sup> The standards apply to new sources and to the modification of older sources. For purposes of the NSPS program, modification is defined as "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted."<sup>123</sup>

A separate section of the CAA creates a program that is designed for the "Prevention of Significant Deterioration" (PSD) of the air quality in areas of the country that are meeting national air quality standards.<sup>124</sup> The statute requires permits for construction of certain major air pollution sources in those areas of the country that are covered by the PSD program.<sup>125</sup> It defines construction, for purposes of the PSD program, as "the modification (as defined in section 7411(a) of this title) of any source or facility[.]" thus explicitly cross-referencing the statutory

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119. *Id.* at 1585 (Stevens, J., dissenting).

120. *Id.* at 1582-85; *id.* at 1584 ("No case from this Court has ever applied such a deferential standard to an agency decision that could so easily disrupt the federal-state balance.").

121. 127 S. Ct. 1423, 1428 (2007).

122. *Id.* (citing Clean Air Act Amendments of 1970 § 111(a), 42 U.S.C. § 7411(a)(2) (2000)).

123. *Id.* (quoting Clean Air Act Amendments of 1970 § 111(a), 42 U.S.C. § 7411(a)(4)).

124. *Id.* at 1428-29 (citing Clean Air Act Amendments of 1977 § 127(a), 42 U.S.C. § 7470(1) (2000)).

125. *Id.* (citing Clean Air Act Amendments of 1977 § 127(a), 42 U.S.C. § 7475(a)).

term “modification” that is used in the section of the statute that addresses the NSPS program.<sup>126</sup>

The EPA adopted a different regulatory definition for the term “modification” as used in the PSD program<sup>127</sup> than it adopted for the term as used in the NSPS program.<sup>128</sup> The Court succinctly described the differences between the two regulatory regimes as follows:

(a) The Act defines modification of a stationary source of a pollutant as a physical change to it, or a change in the method of its operation, that increases the amount of a pollutant discharged or emits a new one.

(b) EPA’s NSPS regulations require a source to use the best available pollution-limiting technology only when a modification would increase the rate of discharge of pollutants measured in kilograms per hour.

(c) EPA’s 1980 PSD regulations require a permit for a modification (with the same statutory definition) only when it is a major one and only when it would increase the actual annual emission of a pollutant above the actual average for the two prior years.<sup>129</sup>

The dispute arose when the EPA sued the owners of several coal-fired power plants, alleging that the changes that the owner made to the plants were modifications of the plants that triggered the technology and permitting requirements of the PSD program in the CAA.<sup>130</sup> While the changes made to the plants would not be modifications under the NSPS program because they did not increase the plants’ hourly emission rates, the changes met the regulatory definition of modifications under the PSD program because they increased the actual annual emissions of pollutants from each plant.<sup>131</sup> The owner of the power plants thus built its defense on a challenge to the validity of the EPA’s PSD regulations.<sup>132</sup>

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126. Clean Air Act Amendments of 1977 § 127(a), 42 U.S.C. § 7479(2)(C), *discussed in Duke Energy*, 127 S. Ct. at 1429.

127. *Duke Energy*, 127 S. Ct. at 1429 (citing 40 C.F.R. § 51.166(b)(2)(i) (1987)). The Court acknowledged that the EPA had since amended the regulation, but assumed that the earlier version would control. *Id.* at 1430 n.4. Compare 40 C.F.R. § 51.166(b)(2)(i) (2006), with 40 C.F.R. § 51.166(b)(2)(i) (1987).

128. *Duke Energy*, 127 S. Ct. at 1428 n.1 (citing § 40 C.F.R. § 60.2(h) (1977)); *see also* 40 C.F.R. § 60.14(a) (2006).

129. *Duke Energy*, 127 S. Ct. at 1430.

130. *Id.* at 1430-31.

131. *Id.*

132. *Id.* at 1430-32.

Although the Court did not explicitly cite the *Chevron* two-step analysis,<sup>133</sup> it appeared to apply that analysis to the dispute. Justice Souter, for the majority, began with an analysis of the text of the statute in light of canons of statutory interpretation.<sup>134</sup> He noted that:

[W]e presume that the same term has the same meaning when it occurs here and there in a single statute . . . . We also understand that “most words have different shades of meaning and consequently may be variously construed, not only when they occur in different statutes, but when used more than once in the same statute or even in the same section.” Thus, the “natural presumption that identical words used in different parts of the same act are intended to have the same meaning . . . is not rigid and readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent.” . . .

The point is the same even when the terms share a common statutory definition, if it is general enough . . . .<sup>135</sup>

After holding that there was no bright line rule that required the EPA to interpret modification consistently for purposes of PSD and NSPS, the Court, in *Chevron*-esque language, wrote: “Absent any iron rule to ignore the reasons for regulating PSD and NSPS ‘modifications’ differently, EPA’s construction need do no more than fall within the limits of what is reasonable, as set by the Act’s common definition.”<sup>136</sup> The Court never determined whether the agency’s rule was reasonable, however. Instead, the Court remanded the case to the U.S. Court of Appeals for the Fourth Circuit. The majority noted that section 307(b) of the CAA prohibits judicial review of agency regulations in an enforcement proceeding, like this one brought by the EPA against the power plant owner, when the challenge could have been brought within sixty days after the rules were first promulgated, and implied that challenges to the PSD rules in an enforcement action would be barred.<sup>137</sup>

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133. The Court did, however, cite *Chevron* in its discussion of the structure of the CAA. *Id.* at 1428.

134. *Id.* at 1432-33.

135. *Id.* at 1432 (quoting *Atl. Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932)) (second and third alterations in original). The Court emphasized that the presumption that a term has the same meaning within a single statute is not irrebuttable. *Id.*

136. *Id.* at 1433-34 (footnote omitted).

137. *See id.* at 1436 (citing Clean Air Act § 307(b), 42 U.S.C. § 7607(b) (2000)).

## B. Cases Decided Against the Government

### 1. Ledbetter v. Goodyear Tire & Rubber Co.

In *Ledbetter v. Goodyear Tire & Rubber Co.*, the Court focused on the pay discrimination provisions of Title VII of the Civil Rights Act of 1964.<sup>138</sup> Title VII provides that “it [is] an ‘unlawful employment practice’ to discriminate ‘against any individual with respect to his compensation . . . because of such individual’s . . . sex.’”<sup>139</sup> However, before an individual can challenge an employer’s actions in court as unlawful employment practices, the individual must file a charge with the Equal Employment Opportunity Commission (EEOC).<sup>140</sup> The charge must be filed within a specified period after the alleged unlawful employment practice occurred, which was 180 days in this case.<sup>141</sup>

In November 1998, Lilly Ledbetter filed a lawsuit against her employer, Goodyear, alleging that Goodyear discriminated against her in setting her salary while she worked there from 1979 until 1998.<sup>142</sup> Prior to bringing the lawsuit, in July 1998, she made similar allegations when she filed an unlawful employment practice charge with the EEOC.<sup>143</sup> Although Ledbetter filed a charge with the EEOC prior to bringing suit, as required by Title VII, she did not allege that any of Goodyear’s actions in the 180 days before she filed her unlawful employment practice charge with the EEOC were intentionally discriminatory.<sup>144</sup> The Court noted that, in essence, she argued that the statute should be interpreted to allow a court to review discriminatory acts that occurred outside of the requisite 180 day period if those acts had “continuing effects” during the 180 day period.<sup>145</sup> The Court rejected her argument, relying on several precedents of the Court, and held that “current effects alone cannot breathe life into prior, uncharged discrimination . . . . Ledbetter should have filed an EEOC charge within 180 days after each allegedly discriminatory pay decision was made and communicated to her.”<sup>146</sup> The Court reached its conclusion despite the fact that the EEOC’s Compliance Manual provided that “‘repeated occurrences of the same discriminatory employment action, such as discriminatory paychecks, can

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138. 127 S. Ct. 2162, 2165 (2007).

139. *Id.* at 2166 (quoting Civil Rights Act of 1964 § 703, 42 U.S.C. § 2000e-2(a)(1) (2000)).

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

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

142. *Id.* at 2165.

143. *Id.*

144. *Id.* at 2167.

145. *Id.*

146. *Id.* at 2169.

be challenged as long as one discriminatory act occurred within the charge filing period,”<sup>147</sup> and despite the fact that the EEOC had taken that position in other adjudications, including before the U.S. Court of Appeals for the Eleventh Circuit in an earlier stage of this case.<sup>148</sup> Regarding the Agency’s position, the Court noted that it had “previously declined to extend *Chevron* deference to the Compliance Manual, and similarly decline to defer to the EEOC’s adjudicatory positions. The EEOC’s views in question are based on its misreading of [our prior decision in] *Bazemore*. Agencies have no special claim to deference in their interpretation of our decisions.”<sup>149</sup>

## 2. Massachusetts v. EPA

In *Massachusetts v. EPA*, the Court reviewed the EPA’s refusal to regulate greenhouse gas emissions from automobiles under the Clean Air Act (CAA).<sup>150</sup> Section 202 of the CAA provides that the administrator of the EPA “shall by regulation prescribe . . . standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.”<sup>151</sup> Under the Act, an air pollutant is “any air pollution agent or combination of such agents, including any physical, chemical, biological, [or] radioactive . . . substance or matter which is emitted into or otherwise enters the ambient air.”<sup>152</sup> In October 1999, nineteen private organizations filed a rulemaking petition with the EPA, asking the Agency “to regulate ‘greenhouse gas emissions from new motor vehicles under § 202 of the Clean Air Act.’”<sup>153</sup> Four years later, the Agency denied the rulemaking petition, on the grounds that it

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147. *Id.* at 2185 (Ginsburg, J., dissenting) (quoting 2 EEOC COMPLIANCE MANUAL § 2-IV C.1.a, at 605:0024 & n.183 (2006)).

148. *Id.*

149. *Id.* at 2177 n.11 (majority opinion). The dissenting Justices did not suggest that the EEOC’s position was entitled to *Chevron* deference, but Justice Ginsburg, for the dissent, 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 mirror workplace realities and merit at least respectful attention. 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 . . . .

*Id.* at 2185 n.6 (Ginsburg, J., dissenting) (citations omitted).

150. 127 S. Ct. 1438, 1446 (2007).

151. *Id.* at 1447 (quoting Clean Air Act § 202(a)(1), 42 U.S.C. § 7521(a)(1) (2000)).

152. *Id.* at 1447 (quoting Clean Air Act § 302(g), 42 U.S.C. § 7602(g)) (second alteration in original).

153. *Id.* at 1449 (citation omitted).

lacked the authority “to issue mandatory regulations to address global climate change,” and that it would be unwise to exercise such authority even if the EPA were so authorized.<sup>154</sup> The EPA concluded that greenhouse gases were not air pollutants under the statutory definition.<sup>155</sup>

Even though the agency action being challenged was a denial of a rulemaking petition, the Court cited *Chevron* as the appropriate standard for reviewing the EPA’s decision.<sup>156</sup> The Court distinguished an agency’s denial of a rulemaking petition, which it held is reviewable under a “highly deferential” standard, from an agency’s refusal to bring an enforcement action, which it held is generally not reviewable.<sup>157</sup> Applying the *Chevron* analysis and stopping at Step One, Justice Stevens, for a 5-4 majority, reasoned:

On its face, the definition [of air pollutant] embraces all airborne compounds of whatever stripe, and underscores that intent through the repeated use of the word “any.” Carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons are without a doubt “physical [and] chemical . . . substance[s] which [are] emitted into . . . the ambient air.” The statute is unambiguous.<sup>158</sup>

After the Court concluded, under *Chevron*, that the EPA could regulate greenhouse gas emissions from new motor vehicles under section 202 of the CAA, it held that the explanation that the EPA gave for its refusal to make a finding on the impact of greenhouse gases was arbitrary and capricious.<sup>159</sup>

### III. CHEVRON AND THE 2006 TERM

#### A. The “Demise” of Chevron - Greatly Exaggerated

At the time that the Court issued its decision in *Chevron U.S.A. Inc. v. Natural Res. Def. Council* in 1984, many believed that it would usher in an era of strong deference to agency policymaking.<sup>160</sup> Indeed, a few years after the Court’s decision, Professors Peter Schuck and Donald Elliott published a study finding that the rate at which courts rejected agencies’

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154. *Id.* at 1450.

155. *Id.*

156. *Id.* at 1459 (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-45 (1984)).

157. *Id.*

158. *Id.* at 1460 (footnote omitted) (alterations in original).

159. *Id.* at 1462-63.

160. *See, e.g.*, Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283, 284, 312 (1986).



statutory interpretations declined by 39% in the year after *Chevron*.<sup>161</sup> However, within a decade after the decision, many academics expressed skepticism about whether courts were truly according agencies increased deference under *Chevron*.<sup>162</sup> By the mid-1990s, some commentators were convinced that judges were less likely to find statutes ambiguous at *Chevron* Step One because judges were increasingly adopting a textualist approach to statutory interpretation.<sup>163</sup> Under *Chevron*, if a statute is not ambiguous, there is no need to defer to the agency's interpretation of the statute.<sup>164</sup> Thus, many academics suggested that the rise in textualism led to a decline in *Chevron* deference.<sup>165</sup>

The Court's decisions in several cases since the beginning of the twenty-first century have fueled increased skepticism over the vitality of *Chevron* deference. In *Christensen v. Harris County*<sup>166</sup> and *United States v. Mead Corp.*,<sup>167</sup> the Court appeared to be reducing the situations in which the *Chevron* test should be used to review agency decisions. The analysis regarding whether courts should apply the *Chevron* test to review an agency's decision has been dubbed *Chevron* Step Zero by academics.<sup>168</sup> In both *Christensen* and *Mead*, the Court concluded that it was inappropriate to use the *Chevron* analysis to review decisions made by agencies in informal proceedings.<sup>169</sup> While the Court did not establish

161. Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L. J. 984, 1032-34 & tbl.5.

162. See, e.g., John F. Belcaster, *The D.C. Circuit's Use of the Chevron Test: Constructing a Positive Theory of Judicial Obedience and Disobedience*, 44 ADMIN. L. REV. 745, 754, 764 (1992); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 980-93 (1992); Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 359-63 (1994); Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749, 750 (1995); Theodore L. Garrett, *Judicial Review After Chevron: The Courts Reassert Their Role*, NAT. RESOURCES & ENV'T, Fall 1995, at 59, 78-79.

163. See Schapiro, *supra* note 19, at 681-82 & n.151 (citing sources supporting the proposition that "the plain-language focus of the new textualism reduces the instances in which the courts will find a gap that administrative construction must fill").

164. See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

165. Schapiro, *supra* note 19, at 681 n.149 (collecting sources).

166. 529 U.S. 576 (2000).

167. 533 U.S. 218 (2001).

168. See Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 836 (2001); see also Melissa M. Berry, *Beyond Chevron's Domain: Agency Interpretations of Statutory Procedural Provisions*, 30 SEATTLE U. L. REV. 541, 572 (2007) (stating that recent commentary focuses on *Chevron* Step Zero); Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 191 (2006) (noting that judicial and academic attention is now paid to Step Zero decisions).

169. In *Christensen*, the Court refused to apply *Chevron* to review an opinion letter issued by the Department of Labor. *Christensen*, 529 U.S. at 587 ("Interpretations such as

any bright line tests to define when it was appropriate to use the *Chevron* analysis, the Court suggested in *Mead* that the *Chevron* analysis should be used “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.”<sup>170</sup> According to the Court, the delegation of interpretive power “may be shown in a variety of ways, as by an agency’s power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent.”<sup>171</sup> Not surprisingly, some academics saw the *Mead* decision as further erosion of *Chevron* deference.<sup>172</sup> In many of the recent cases where the Court did not accord *Chevron* deference to the agency’s interpretations, the Court suggested that the agency decisions could be accorded deference under the *Skidmore v. Swift & Co.*<sup>173</sup> standard.<sup>174</sup> According to the Court’s decision in *Skidmore*, the degree of deference to which an agency’s interpretation is entitled “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.”<sup>175</sup> Most commentators agree, though, that courts are much more likely to uphold agency decisions under the *Chevron* analysis than under *Skidmore*.<sup>176</sup>

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those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference.”). In *Mead*, the Court refused to apply *Chevron* to review a tariff classification ruling that the U.S. Customs Service issued regarding day planners. *Mead*, 533 U.S. at 226-27; see also *infra* note 170 and accompanying text.

170. *Mead*, 533 U.S. at 226-27.

171. *Id.* at 227.

172. See, e.g., Eric R. Womack, *Into the Third Era of Administrative Law: An Empirical Study of the Supreme Court’s Retreat from Chevron Principles in United States v. Mead*, 107 DICK. L. REV. 289, 289-90 (2002) (suggesting that *Mead* could be a “fault line” in administrative law and as dramatic a shift as *Chevron*).

173. 323 U.S. 134 (1944).

174. See, e.g., *Gonzales v. Oregon*, 546 U.S. 243, 268-69 (2006); *Mead*, 533 U.S. at 234-35. For a concise discussion of the differences between *Chevron* deference and *Skidmore* deference, see Merrill & Hickman, *supra* note 168, at 852-56.

175. *Skidmore*, 323 U.S. at 140.

176. After *Chevron*, commentators generally recognized an “increased level of judicial deference to agency interpretations.” Elizabeth Garrett, *Legislating Chevron*, 101 MICH. L. REV. 2637, 2645 & n.35 (2003) (collecting sources); see, e.g., Schuck & Elliott, *supra* note 161, at 1030-31, 1060. Cf. Orin S. Kerr, *Shedding Light on Chevron: An Empirical Study of the Chevron Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REG. 1, 59 (1998) (“[T]he presence of pre-*Chevron* traditional factors does not exert a strong influence on results; their impact is weak, and perhaps nonexistent.”). A few recent studies have found that courts uphold agency interpretations under the *Skidmore* test only about one-third of the time. In an empirical study of federal cases decided in the four months after the Supreme Court issued the *Mead* decision, Eric Womack found that

In addition to *Christensen* and *Mead*, the Court refused to accord *Chevron* deference to agencies in *FDA v. Brown & Williamson Tobacco Corp.*<sup>177</sup> and *Gonzales v. Oregon*.<sup>178</sup> In *Brown & Williamson*, the Court reviewed the FDA's regulations governing smokeless tobacco and cigarettes.<sup>179</sup> Although the Court applied the *Chevron* analysis, the Court interpreted the statute, at Step One, to clearly preclude the FDA from regulating tobacco products.<sup>180</sup> In *Gonzales*, the Court examined an interpretive rule issued by the Attorney General that concluded that prescribing drugs for assisted suicide was not a legitimate medical purpose and therefore violated the Controlled Substances Act.<sup>181</sup> Finding that the Controlled Substances Act did not grant the Attorney General the authority to prohibit a medical practice otherwise permissible under state law, the Court refused to accord *Chevron* deference to the Attorney General's rule.<sup>182</sup>

While some commentators suggested that the Court's opinions in *Christensen*, *Mead*, *Brown & Williamson*, and *Gonzales* signaled an erosion of *Chevron* deference,<sup>183</sup> the Supreme Court issued another opinion during that time period that limited the reach of *Christensen* and *Mead*. In *Barnhart v. Walton*, the Court suggested that agency letters, manuals, and other informal agency decisions could be entitled to *Chevron* deference.<sup>184</sup> The Court suggested factors to consider in determining whether to apply the *Chevron* analysis, including the "interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the

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courts upheld the agency's decision when applying the *Skidmore* test only 31% of the time. See Womack, *supra* note 172, at 327-28. In contrast, Womack found that in the cases he examined that were decided prior to the Supreme Court's *Christensen* decision, courts upheld the agency's decision when applying the *Skidmore* test 75% of the time. *Id.* at 327. In a recent article, Professor Amy Wildermuth suggested that the post-*Mead* gap between *Chevron* deference and *Skidmore* deference may be less pronounced than Womack found, but that the gap does exist. Amy J. Wildermuth, *Solving the Puzzle of Mead and Christensen: What Would Justice Stevens Do?*, 74 *FORDHAM L. REV.* 1877, 1899 (2006). In the cases she examined arising after the cases Womack analyzed, the courts upheld the agency's decision under the *Skidmore* test only 39% of the time. *Id.*

177. 529 U.S. 120 (2000).

178. 546 U.S. 243 (2006).

179. *Brown & Williamson*, 529 U.S. at 131.

180. *Id.* at 132-33.

181. *Gonzales*, 546 U.S. at 252-55.

182. *Id.* at 258-61; *id.* at 268 ("[T]he CSA does not give the Attorney General authority to issue the Interpretive Rule as a statement with the force of law.").

183. See, e.g., Bressman, *supra* note 35, at 762-64; *supra* note 172 and accompanying text.

184. *Barnhart v. Walton*, 535 U.S. 212, 219-20 (2002) (Breyer, J.).

Agency has given the question over a long period of time.”<sup>185</sup> Justice Breyer’s articulation of the factors to be considered at *Chevron* Step Zero seemed to reduce the importance to the deference analysis of the formality of the procedures used by the agency to make its decision.

While the Supreme Court refused to accord *Chevron* deference to agencies in a few high profile cases at the beginning of this century, commentators also noted that the Court seemed to be citing *Chevron* less frequently in its opinions.<sup>186</sup> For instance, comparing her own review of the Supreme Court’s decisions in the 2005-2006 Term to the findings of a 1992 study by Professor Thomas Merrill, Professor Linda Jellum concluded that “the Court has reduced its citations from ten to twenty per year to approximately three to five.”<sup>187</sup>

Despite those forecasts of doom for *Chevron* deference, there are many reasons to believe that the reports of its demise, like Mark Twain’s, have been “greatly exaggerated.”<sup>188</sup> Regarding the number of Supreme Court citations, Professor Jellum herself recognizes that the total number of opinions that the Court has been issuing in the decade since Professor Merrill’s study has declined sharply.<sup>189</sup> In addition, as Professor Richard Pierce has noted, the increased deference accorded agencies by courts in the wake of *Chevron* has likely influenced litigants in their decisions regarding whether to challenge agency actions and what arguments to raise if they challenge those decisions.<sup>190</sup> Accordingly, it is difficult to say that a reduction in the number of times that *Chevron* is cited by courts necessarily means that courts are according agencies less deference. Nevertheless, if the number of citations to *Chevron* has any significance in determining the level of deference accorded to agencies, it should be noted that the number of citations is actually increasing. In a much broader study not limited to Supreme Court opinions, Professors Thomas Miles and Cass Sunstein found that *Chevron* was cited over two thousand times in the first *five* years of this century, which is almost as many times as it was cited in the first *ten* years after the Court issued the

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185. *Id.* at 222.

186. *See, e.g.*, Jellum, *supra* note 7, at 772-73.

187. *Id.*

188. *See* THE OXFORD DICTIONARY OF QUOTATIONS 786 (Elizabeth Knowles ed., 5th ed. 1999) (citing Mark Twain quote regarding reports of his death made to the *New York Journal* on June 2, 1897).

189. *See* Jellum, *supra* note 7, at 772-73.

190. *See* Richard J. Pierce, Jr., *Chevron Should Not Be Converted into a Voting Rule: A Response to Gersen and Vermeule’s Proposal*, 116 YALE L.J. POCKET PART 248, 249-50 (2006), <http://thepocketpart.org/2007/01/25/pierce.html>.

decision.<sup>191</sup> The Supreme Court itself cited the decision ten times in 2006.<sup>192</sup>

Although commentators have forecast the demise of *Chevron* for decades, many agree with Professor Sunstein that “the decision has become foundational . . .—the undisputed starting point for any assessment of the allocation of authority between federal courts and administrative agencies.”<sup>193</sup> Several developments in the 2006 Term suggest that *Chevron* retains, and has even increased, that influence.

### B. Developments in the 2006 Term

While the Supreme Court may have narrowed the scope of agency actions subject to *Chevron* analysis in recent Terms, the Court expanded *Chevron*'s reach in the 2006 Term when it applied the analysis to review an agency's denial of a petition for rulemaking in *Massachusetts v. EPA*.<sup>194</sup> This was not a major expansion, as the Court routinely applies *Chevron* to the review of an agency's legislative rules, but it was an expansion nonetheless. Similarly, in *Long Island Care at Home*, the Court applied *Chevron* to uphold a rule that was labeled by the agency as an “interpretation.”<sup>195</sup>

The Court also deferred to agency interpretations of statutes on issues that seemed to be within the province of the courts, rather than within the specialized expertise of the agency. As noted above, in *National Ass'n of Home Builders*, the Court reconciled a conflict between two federal statutes by deferring to agency regulations, rather than relying on traditional tools of statutory construction to resolve the conflict.<sup>196</sup> Similarly, in *Watters*, the Court decided that the agency's regulatory determination that a federal statute preempted a state law was valid, although the Court reached that conclusion without moving to *Chevron* Step Two.<sup>197</sup> As commentators have noted, in prior Terms, the Court was much more willing to defer to an agency's interpretation of a statute

191. Miles & Sunstein, *supra* note 19, at 824 n.2.

192. See cases cited *supra* note 12.

193. Sunstein, *supra* note 168, at 188.

194. 127 S. Ct. 1438 (2007).

195. *Long Island Care at Home, Ltd. v. Coke*, 127 S. Ct. 2339 (2007). Admittedly, although the challenger claimed that the rule was an interpretive rule, the Court did not label the rule as legislative or interpretive, and there is a decent argument that the rule at issue in the case was a legislative rule.

196. *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518 (2007); see also *supra* notes 56-62 and accompanying text.

197. *Watters v. Wachovia Bank*, 127 S. Ct. 1559 (2007); see also *supra* notes 113-20 and accompanying text. While the majority did not claim to be deferring to the agency's regulations, the dissent charged that the Court's ruling “affects the allocation of powers among sovereigns.” *Watters*, 127 S. Ct. at 1585 (Stevens, J., dissenting).

when the interpretation involved a question of agency expertise rather than when the interpretation turned on a “[m]ajor [q]uestion.”<sup>198</sup> However, the statutory interpretation issues in *National Ass’n of Home Builders* and *Watters* and seemed to focus more on major questions than on matters of agency expertise.

The Court did not profess to change the analysis to be used at *Chevron* Step Zero in the 2006 Term. In three of the opinions, the Court cited factors identified by Justice Breyer in *Barnhart* as appropriate factors to use when determining whether *Chevron* applies.<sup>199</sup> In each of the cases, the Court noted that the statutory interpretation question involved an issue of agency expertise.<sup>200</sup> However, the Court seemed more willing this Term than in other recent Terms to apply the *Chevron* analysis to issues that involved something other than agency expertise. The multi-factor *Barnhart* analysis has provided the Court with significant flexibility to apply *Chevron* even to major questions of statutory interpretation.

Another subtle shift toward deference to agencies was apparent in the blurring of the steps of the *Chevron* analysis in many of the decisions handed down by the Court in the 2006 Term. As noted earlier, an increase in the use of textualism at *Chevron* Step One will often reduce the likelihood that a court will find a statute ambiguous and move to *Chevron* Step Two.<sup>201</sup> It will also reduce the likelihood that a court will examine the purpose and legislative history of statutes, because that analysis would only occur at Step Two in determining whether an agency’s interpretation of a statute is reasonable. Although the Court did not move away from a textualist approach to statutory interpretation in *Chevron* Step One in the 2006 Term, several of the Court’s opinions reduced the impact of the textualist approach and opened the door to increased consideration of a statute’s purpose and legislative history by blurring or blending the steps of *Chevron*.<sup>202</sup>

The clearest example of the blurring is apparent in *Zuni*. In that case, Justice Breyer began the *Chevron* analysis with Step Two instead of Step One and focused heavily on the statute’s purpose and legislative history.<sup>203</sup> He stressed that his determination at *Chevron* Step One

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198. Sunstein, *supra* note 168, at 193-94; *see also* Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1459-62 (2005).

199. *See Nat’l Ass’n of Home Builders*, 127 S. Ct. at 2354; *Long Island Care at Home*, 127 S. Ct. at 2346; *Zuni Pub. Sch. Dist. No. 89 v. Dep’t of Educ.*, 127 S. Ct. 1534, 1541 (2007).

200. *See supra* note 199.

201. *See supra* notes 162-65 and accompanying text.

202. The Court actually has been blurring the *Chevron* steps together for several Terms. *See Bressman, supra* note 35, at 787-88.

203. *Zuni*, 127 S. Ct. at 1541-43. Justice Kennedy, with Justice Alito, wrote separately to express concern about the inversion of the *Chevron* analysis. They feared the inversion

regarding whether the statute's language was ambiguous, was "illuminate[d]" by the analysis of the statute's purpose and legislative history at Step Two.<sup>204</sup> Justice Scalia, in his dissenting opinion, clearly viewed the Court's decision as having dodged a textualist *Chevron* Step One analysis, and accused the Court of resurrecting the landmark *Church of the Holy Trinity* decision.<sup>205</sup>

*Global Crossing* was another case in which the Court focused on the legislative history, regulatory history, and purpose of the statute in upholding the agency's regulations.<sup>206</sup> The Court relied on these factors to determine that Congress left a "gap" for the agency to fill in interpreting the statute.<sup>207</sup> The blurring of the steps is quite evident in this case, as it is not clear whether the Court examined the history and purpose of the statute at Step Two to illuminate whether the statute was ambiguous at Step One, or whether the Court examined them to determine, at *Chevron* Step Zero, that it was appropriate to use the *Chevron* analysis to uphold the agency's regulations.<sup>208</sup>

Finally, in *Duke Energy*, the Court relied, in part, on the different purposes of the two programs at issue to determine, at *Chevron* Step One, that the statute was ambiguous, and that it was appropriate to uphold the agency's conflicting regulatory definitions of a statutory term as it applied to the different programs.<sup>209</sup> In *Duke Energy*, *Global Crossing*, and *Zuni*, therefore, the Court found ways to give important weight to legislative history and statutory purposes, despite adherence to a textualist *Chevron* Step One.

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could lead people to conclude that the Court was interpreting statutes based on policy concerns. *Id.* at 1551 (Kennedy, J., concurring); *see also supra* note 93 and accompanying text. However, they did not believe that the ordering of the analysis affected the outcome of the Court's decision, and gave "deference to the author of an opinion in matters of exposition." *Id.*

204. *Id.* at 1541 (majority opinion). Even in *Zuni*, the Court adhered to a textualist approach to Step One. As Justice Breyer wrote, "neither the legislative history nor the reasonableness of the Secretary's method would be determinative if the plain language of the statute unambiguously indicated that Congress sought to foreclose the Secretary's interpretation." *Id.* at 1543.

205. *Id.* at 1551 (Scalia, J., dissenting).

206. *Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc.*, 127 S. Ct. 1513, 1516-17 (2007).

207. *Id.* at 1522.

208. *See id.* at 1520-22.

209. *Env'tl. Def. v. Duke Energy Corp.*, 127 S. Ct. 1423, 1428, 1433-34 (2007).

## IV. AUER AND CHENERY IN THE 2006 TERM

A. *Developments Regarding Auer v. Robbins*

Just as the Court appeared to accord greater deference to agencies in their interpretations of statutes in the 2006 Term, the Court appeared to revitalize *Auer* deference to agencies' interpretations of their own regulations. In 1997, in *Auer v. Robbins*, the Supreme Court held that an agency's interpretation of its own regulations is "controlling unless plainly erroneous or inconsistent with the regulation."<sup>210</sup> This standard, which is even more deferential than *Chevron* deference, was initially set forth by the Court in 1945 in *Bowles v. Seminole Rock & Sand Co.*<sup>211</sup> Courts have accorded deference to agency interpretations of their own regulations under *Auer* even when the agencies have initially advanced those interpretations in the course of litigation.<sup>212</sup>

However, academic criticism of *Auer* deference rose dramatically after the Court's decision in *United States v. Mead*.<sup>213</sup> As noted above, the *Mead* court refused to accord *Chevron* deference to an agency decision through informal adjudication, and suggested that *Skidmore* deference might be appropriate instead.<sup>214</sup> Justice Scalia, in dissent, suggested that application of the less deferential *Skidmore* standard of review for informal agency decisions, coupled with the vitality of *Auer* deference to agency interpretations of their own regulations, would encourage agencies to promulgate broadly worded legislative rules that they could subsequently "clarify" through interpretive rules that are entitled to *Auer* deference.<sup>215</sup> Some academics have suggested that *Auer* deference should be limited to interpretations in formats that would be entitled to *Chevron*

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210. *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (citations and internal quotation marks omitted).

211. 325 U.S. 410, 414 (1945).

212. *See, e.g.*, *Cathedral Candle Co. v. U.S. Int'l Trade Comm'n*, 400 F.3d 1352, 1364 (Fed. Cir. 2005); *In re New Times Sec. Servs., Inc.*, 371 F.3d 68, 81-82 (2d Cir. 2004). *Cf.* *Alliance to Prot. Nantucket Sound, Inc. v. U.S. Dep't of the Army*, 398 F.3d 105, 112 (1st Cir. 2005); *Soltane v. U.S. Dep't of Justice*, 381 F.3d 143, 148 (3d Cir. 2004). *Auer* itself upheld an agency interpretation first articulated in that case. *Auer*, 519 U.S. at 462.

213. *See, e.g.*, Bressman, *supra* note 198, at 1491-92; William Funk, *Legislating for Nonlegislative Rules*, 56 ADMIN. L. REV. 1023, 1034 (2004); John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 943-44 (2004).

214. *United States v. Mead Corp.*, 533 U.S. 218, 221 (2001).

215. *Id.* at 246 (Scalia, J., dissenting). Justice Scalia argued that "[a]gencies will now have high incentive to rush out barebones, ambiguous rules construing statutory ambiguities, which they can then in turn further clarify through informal rulings entitled to judicial respect." *Id.*



deference,<sup>216</sup> or that courts should accord the same degree of deference to agencies' interpretations of regulations and statutes.<sup>217</sup> Most commentators have agreed, though, that the continuing vitality of *Auer* after *Mead* creates an incentive for agencies to avoid diminished *Skidmore* deference by adopting broad, ambiguous legislative rules.<sup>218</sup>

The Court appeared to narrow the scope of *Auer* deference somewhat in 2006 in *Gonzales v. Oregon*.<sup>219</sup> First, the Court reaffirmed the basic principle of *Auer* that an agency's interpretation of its own regulations is entitled to substantial deference.<sup>220</sup> However, *Gonzales* then created an exception to *Auer* by holding that the Court will not accord such deference to an agency interpretation of a regulation that merely restates or paraphrases the statutory language.<sup>221</sup> The Court stressed that "the question here is not the meaning of the regulation but the meaning of the statute. An agency does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language."<sup>222</sup> The exception that the *Gonzales* Court created thus addresses some of the concerns raised by critics after the *Mead* decision.<sup>223</sup> Furthermore, in *Gonzales* the Court also described another, longer-standing limit to *Auer* deference. The Court suggested that the Attorney General's interpretation of his regulation was also not entitled to *Auer* deference because "the current interpretation runs counter to the 'intent at the time of the regulation's promulgation.'"<sup>224</sup>

While *Gonzales* seemed to impose restrictions on *Auer* deference, the Court issued two opinions that sent a clear message that *Auer* remains vital. First, in *Long Island Care at Home*, the Court accorded *Auer* deference to an agency's interpretation of a rule that it had labeled merely an "interpretation" and that the challenger asserted was an interpretive rule.<sup>225</sup> The Court accorded *Auer* deference to the agency's

216. Cf. Merrill & Hickman, *supra* note 168, at 899-900 (discussing the *Seminole Rock* & *Sand Co.* articulation of deference).

217. See Funk, *supra* note 213, at 1026.

218. See *supra* note 213.

219. 126 S. Ct. 904 (2006).

220. *Id.* at 914.

221. *Id.* at 915.

222. *Id.* at 916.

223. After *Gonzales*, although an agency might still adopt a broadly-worded, ambiguous regulation to be fleshed out in interpretive rules, the broad wording of the regulation cannot simply restate or paraphrase the statutory language or the agency's subsequent interpretations will not be accorded *Auer* deference. See *id.* at 915-16.

224. *Id.* at 916 (quoting *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994)).

225. *Long Island Care at Home, Ltd. v. Coke*, 127 S. Ct. 2339, 2349-50 (2007). Although the Court did not ultimately label the rule as an interpretive rule or legislative

interpretation of the third party regulation even though the agency's interpretation of the rule had changed over time and even though the new interpretation was adopted in an advisory memorandum to internal agency personnel as part of the litigation.<sup>226</sup> While the Court frequently accorded *Auer* deference to informal agency statements, including litigation positions, in the past, the Court's decision to defer to the agency despite the agency's reversal of prior interpretations of the regulation in question seemed to conflict with the precedent cited by the Court in *Gonzales*.<sup>227</sup>

Later in the Term, the Supreme Court decided *National Ass'n of Home Builders*. On review, the Court accorded *Auer* deference to the agency's new interpretation of the requirement of its own act even though the new interpretation was adopted in a different administrative proceeding *after* the agency's action in the case before the Court, and even though the new interpretation conflicted with the interpretation that the agency adopted in forty-four proceedings.<sup>228</sup> The Court's decision was routine in the respect that it involved an agency's interpretation of a legislative rule, rather than an interpretive rule, and in that, as noted above, it was consistent with the Court's (and lower courts') practice of according *Auer* deference to agencies' litigation positions.<sup>229</sup> However, it was an important decision in that, as in the *Long Island Care at Home* case, the Court accorded *Auer* deference to an agency's interpretations despite the change from its long-standing interpretations.

### B. *Chenery* and National Ass'n of Home Builders

The Court's opinion in the *National Ass'n of Home Builders* case was significant not only for the manner in which the Court applied *Chevron* and *Auer* deference, but for the manner in which it failed to apply *SEC v. Chenery Corp.* *Chenery*, the Court's landmark decision from 1943, involved review of a Securities and Exchange Commission order approving a reorganization of a public utility holding company.<sup>230</sup> Although the Court determined that the agency's order might have been valid if the agency had issued the order based on the agency's expertise

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rule, the Court's focus on the adoption of the rule through notice-and-comment procedures and the binding nature of the rule suggest that it was more likely a legislative rule than an interpretive rule.

226. *Id.*

227. See *supra* note 224 and accompanying text.

228. Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 127 S. Ct. 2518, 2530-32, 2537-38 (2007).

229. See cases cited *supra* note 212.

230. SEC v. Chenery Corp., 318 U.S. 80, 81 (1943).

in administering and interpreting the statute, the agency claimed, at the time it issued its order, that it based the order on its interpretation of the prior judicial precedent.<sup>231</sup> The *Chenery* Court, concluding that the agency had misinterpreted the prior precedent, held that “an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained.”<sup>232</sup> For over six decades since the case was decided, courts have routinely held that agency actions will not be upheld unless they are supported by the basis articulated by the agency at the time of its decision, rather than post hoc rationalizations.<sup>233</sup>

However, the Court seemed to ignore that precedent in *National Ass’n of Home Builders*. As noted above, while the EPA was in the process of reviewing Arizona’s application to administer the CWA permitting program, the EPA appeared to interpret the ESA to require the EPA to first consult with the FWS before approving the application.<sup>234</sup> The EPA approved the transfer of the permitting program after it had in fact consulted with the FWS.<sup>235</sup> After the EPA was sued for approving the transfer, it changed its interpretation of the ESA by arguing that the Act did not mandate that the EPA consult with the FWS prior to approving the transfer of CWA permitting authority.<sup>236</sup> Regardless of whether the change in interpretation was permissible or entitled to deference, the interpretation was not articulated by the Agency as the basis for its decision to transfer permitting authority to Arizona at the time that it approved the transfer. In fact, that interpretation conflicted with the position taken by the Agency at the time that it approved the transfer. Nevertheless, instead of finding that the Agency’s decision could not be supported by the Agency’s post hoc interpretation of the ESA, the Court invoked the rule that it would “uphold a decision of less than ideal clarity if the agency’s path may reasonably be discerned.”<sup>237</sup> The Court ultimately upheld the EPA’s decision to transfer permitting authority to Arizona based on this new interpretation of the requirements of the

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231. *Id.* at 92-93.

232. *Id.* at 95.

233. *See, e.g.,* Motor Vehicle Mfrs. Ass’n. of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 50 (1983); Am. Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490, 539 (1981); Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 419 (1971).

234. Nat’l Ass’n of Home Builders v. Defenders of Wildlife, 127 S. Ct. 2518, 2526-28 (2007).

235. *Id.* at 2527-28.

236. *Id.* at 2530. The EPA adopted that interpretation of the statute in reviewing a subsequent request by the State of Alaska for the transfer of CWA permitting authority. *Id.* at 2530 n.5.

237. *Id.* at 2530 (quoting *State Farm*, 463 U.S. at 43).

ESA, a basis that was not articulated by the Agency at the time of its decision.<sup>238</sup>

## V. RATIONALES FOR THE SHIFT TOWARDS DEFERENCE

To the extent that the Court, in the 2006 Term, accorded federal agencies more deference, there are a few explanations for the shift. The most obvious explanation for the shift is the elevation of Justice Alito to the Court to replace Justice O'Connor. Justice Alito voted much more consistently in favor of the government in the 2006 Term than Justice O'Connor had in the past.<sup>239</sup> After only one Term, it is hard to forecast whether Justice Alito will continue to support the government as strongly in the future, but his votes clearly made a difference in the 2006 Term.

The shift could also be explained by research conducted by Professors Miles and Sunstein, among others, which suggests that political ideology plays an important role in judicial decisionmaking.<sup>240</sup> While that research could explain the shift in deference in the 2006 Term, it also suggests that the shift could be transitory and that the Court might accord less deference to agency decisions when control of the White House is passed on to another administration.<sup>241</sup> Significantly, since none of the Court's opinions purported to overturn important administrative law precedents or change important tests, the Court can easily re-interpret the precedent in a manner that is less deferential to the government in future years.

There may be, of course, a more benign explanation for the apparent shift in judicial deference to agency decisionmaking, at least with regard to *Chevron* deference. Professor Lisa Schultz Bressman suggests that a court will overturn an agency's decisions, despite *Chevron*, when the agency "act[s] undemocratically either by disregarding likely congressional preferences or public engagement on an issue of social concern."<sup>242</sup> Viewed in that light, the Court's opinions in the 2006 Term are fairly consistent with the body of prior precedent.<sup>243</sup>

### A. The Impact of Justice Alito

While Justice Kennedy may have wielded the most power on the Court this past Term,<sup>244</sup> Justice Alito's elevation to the Court to replace Justice

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238. *Id.* at 2538.

239. *See infra* Part V.A.

240. *See infra* Part V.B.

241. *See infra* Part V.B.

242. Bressman, *supra* note 35, at 798.

243. *See infra* notes 279-83 and accompanying text.

244. *See supra* note 32.

O'Connor may have had the greatest impact on the Court's administrative law jurisprudence. Justice O'Connor was a moderate voice on the Court. According to a study of the Justices' voting records prepared by Professors Miles and Sunstein, Justice O'Connor voted to validate agency actions in *Chevron* cases about 67% of the time,<sup>245</sup> while Justices Scalia and Thomas voted to validate agency actions only about 50% of the time,<sup>246</sup> and Justices Souter and Breyer voted to validate agency actions almost 80% of the time.<sup>247</sup> Professors Miles and Sunstein also found that Justice O'Connor's voting record was not significantly different when the Court reviewed the actions of a Democratic administration rather than those of a Republican administration.<sup>248</sup>

While Justice O'Connor voted to validate agency actions in 67% of the *Chevron* cases in prior Terms, Justice Alito supported the government's position in seven of the eight *Chevron* cases in the 2006 Term (87.5%), more than any other Justice on the Court.<sup>249</sup>

A closer look at some of Justice O'Connor's prior opinions in *Chevron* and *Auer* cases demonstrates that Justice Alito's appointment had important repercussions for the eight cases of the 2006 Term. First, Justice O'Connor was an ardent advocate of states' rights and wrote a strong opinion about *Chevron* and preemption in *Medtronic, Inc. v. Lohr*.<sup>250</sup> A majority of the Court in *Medtronic* relied heavily on the FDA's interpretation of a federal law to conclude that the plaintiff's state common law tort claims against the manufacturer of a pacemaker were not preempted.<sup>251</sup> Justice O'Connor wrote a concurring and dissenting opinion, in which she cautioned that "[i]t is not certain that an agency regulation determining the pre-emptive effect of *any* federal statute is entitled to deference."<sup>252</sup> Accordingly, if she had been on the Court this past Term, it is unlikely that she would have joined the majority in *Watters* in interpreting a federal law, per the regulations of a federal agency, to necessarily preempt state regulation of national bank subsidiaries.<sup>253</sup> Justice Alito joined the 5-3 majority in *Watters*; thus

245. Miles & Sunstein, *supra* note 19, at 832 tbl.1.

246. *Id.* Justice Scalia voted to validate the decisions in 52.2% of the cases, while Justice Thomas voted to validate agency decisions in 53.6% of the cases. *Id.*

247. *Id.* Justice Souter voted to validate agency decisions in 77% of the cases, while Justice Breyer voted to validate the decisions in 81.8% of the cases. *Id.*

248. *Id.* Justice O'Connor voted to validate agency actions in 65.5% of the cases for Democratic Administrations and in 69.4% of the cases for Republican Administrations. *Id.*

249. *See supra* note 29 and accompanying text.

250. 518 U.S. 470, 509 (1996) (O'Connor, J., concurring in part and dissenting in part).

251. *Id.* at 496-97 (majority opinion).

252. *Id.* at 512 (O'Connor, J., concurring in part and dissenting in part).

253. *See Watters v. Wachovia Bank*, 127 S. Ct. 1559, 1572-73 (2007).

*Watters* would likely have been a 4-4 decision had Justice Alito not replaced Justice O'Connor.<sup>254</sup>

Justice Alito's replacement of Justice O'Connor may also have had an impact in the cases involving the application of *Auer* this past Term. In 2006, Justice O'Connor joined the Court's majority in *Gonzales*, which limited *Auer* deference by creating an exception for certain regulations and by stressing that less deference is due when the agency has changed its interpretation of a regulation over time.<sup>255</sup> While Justice O'Connor joined in the majority in *Gonzales*, Justice Alito joined the majority in both cases that reinvigorated *Auer*, and authored the Court's opinion in *National Ass'n of Home Builders*, a 5-4 decision.<sup>256</sup>

### B. Political Ideology

While Justice Alito's elevation to the Supreme Court seems to have swung the pendulum toward increased deference for agencies during the 2006 Term, research by Professors Miles and Sunstein, among others, suggests that the shift may be transitory if the Justices' decisionmaking is motivated by political ideology.

Theoretically, the Court's *Chevron* decision should have reduced the role of policy judgments in judicial review of agency decisionmaking.<sup>257</sup> Under the two part *Chevron* test, if a statute is ambiguous, it is the agency, rather than the court, that is charged with making policy, and the court should defer to the agency's interpretation of the statute as long as it is reasonable. While early studies indicated that *Chevron* significantly increased the rate of judicial deference to agency decisions,<sup>258</sup> recent observers are more skeptical.<sup>259</sup>

For instance, Professors Miles and Sunstein reviewed the decisionmaking of Supreme Court Justices and federal appellate court judges in *Chevron* cases to determine whether application of the test has

254. See *id.* at 1563-64. Justice Thomas did not take part in consideration of the case. *Id.* at 1564.

255. *Gonzales v. Oregon*, 546 U.S. 243, 256-58 (2006); see also *supra* notes 221 & 224 and accompanying text.

256. *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2524 (2007); *Long Island Care at Home, Ltd. v. Coke*, 127 S. Ct. 2339, 2343 (2007) (unanimous decision).

257. See Miles & Sunstein, *supra* note 19, at 823.

258. See Schuck & Elliott, *supra* note 161, at 1032-34; see also Miles & Sunstein, *supra* note 19, at 824-25.

259. See *infra* notes 260-68 and accompanying text. Dissenting in *Massachusetts v. EPA*, Justice Scalia expressed his displeasure with the manner in which he viewed the Court to be misapplying *Chevron*, writing that "[e]vidently, the Court defers only to those reasonable interpretations that it favors." 127 S. Ct. 1438, 1476 (2007) (Scalia, J., dissenting).

truly reduced judicial policymaking. The two-step analysis should, in theory, “eliminate systematic differences [in decisionmaking] among judges along political lines,” so that the rate at which judges validate agency actions should be fairly uniform, and should not correlate to the ideology of the judges.<sup>260</sup> However, in reviewing the decisionmaking of Supreme Court Justices, Professors Miles and Sunstein found that the rate of validation of agency actions varied by almost 30% across the Justices.<sup>261</sup>

More importantly, Professors Miles and Sunstein found that at the Supreme Court level political ideology played an important role in decisionmaking.<sup>262</sup> Significantly, they concluded that (1) “liberal” Justices<sup>263</sup> voted to validate agency decisions more often than “conservative” Justices in general;<sup>264</sup> (2) the rate at which the Justices validated agency decisions seemed to be significantly influenced by whether the agency interpretation was liberal or conservative;<sup>265</sup> and (3) the rate at which the Justices validated agency decisions seemed to be significantly influenced by the political party of the administration whose

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260. Miles & Sunstein, *supra* note 19, at 827-28. Similarly, application of the *Chevron* test should reduce variation in statutory interpretation within the federal appellate courts. *Id.* at 824 & n.8 (citing Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Actions*, 87 COLUM. L. REV. 1093, 1121-22 (1987)). Miles and Sunstein refer to this hypothesis as the “doctrinal hypothesis” and contrast it with the “realist” and “formalist” hypotheses regarding the application of *Chevron*. *Id.* at 828-29 (emphasis omitted). The realist hypothesis suggests that “judges are more likely to validate [agency actions] when the agency’s conclusion conforms with their policy judgments, regardless of whether the statutory text is clear or ambiguous.” *Id.* at 828. The formalist hypothesis suggests that judges who adopt a “plain meaning” approach to statutory interpretation are more likely to invalidate agency decisions than judges who do not take that approach. *Id.* The study ultimately found support for the “realist” hypothesis, rather than the “doctrinal” hypothesis. *See id.* at 870.

261. *Id.* at 831; *see supra* notes 246-47.

262. Miles & Sunstein, *supra* note 19, at 825-26.

263. Miles & Sunstein identified Justices Stevens, Souter, Breyer, and Ginsburg as “liberal” Justices in their study, and they identified Justices Scalia and Thomas as “conservative.” *Id.* at 832-33. Justices Kennedy and O’Connor were not labeled either way, and the study did not examine the voting records of Chief Justice Roberts or Justice Alito. *See id.*

264. *Id.* at 823, 826, 832 & tbl.1. Miles and Sunstein noted that “Justice Breyer, the Court’s most vocal critic of a strong reading of *Chevron*, is the most deferential justice in practice, while Justice Scalia, the Court’s most vocal *Chevron* enthusiast, is the least deferential.” *Id.* at 826 (footnotes omitted).

265. *Id.* at 823, 826-27. Miles and Sunstein labeled agency decisions as “liberal” or “conservative” for purposes of the study “by reference to the identity of the party challenging” them. *Id.* at 830. For instance, if an agency decision were challenged by an industry group, Miles and Sunstein labeled the decision as liberal. *Id.*

decisions were being reviewed.<sup>266</sup> Miles and Sunstein ultimately concluded that “the most conservative members of the Supreme Court show significantly *increased* validation of agency interpretations after President Bush succeeded President Clinton.”<sup>267</sup>

In a study of *Chevron* decisions in the federal appellate courts in 1995 and 1996, Professor Orin Kerr also concluded that there was “a tendency for Republican and Democratic judges to reach results consistent with their political ideologies” in cases with clear political ramifications.<sup>268</sup>

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266. *Id.* at 823, 826. In analyzing data for this portion of the study, Miles and Sunstein focused on the identity of the political party in power at the time of the Court’s decision. *Id.* at 830. While they recognized that in some cases the agency decisions under review could have been made by a prior administration, they thought it was appropriate to identify those cases with the administration in power at the time of the Court’s decision, because the new administration could change the agency’s substantive and/or litigation position. *Id.*

267. *Id.* at 823. While Miles and Sunstein also noted that liberal Justices voted to validate agency decisions less frequently when reviewing decisions of a Republican administration than a Democratic administration, the difference was much less dramatic than for the most conservative Justices. *Id.* at 826. Miles and Sunstein noted that “the validation rates of the conservative justices appear more sensitive to the presidential administration,” *id.* at 833, but also noted that an alternative classification of Court decisions would show the same sensitivity in the liberal Justices, *id.* at 834.

268. See Kerr, *supra* note 176, at 39. Kerr examined 250 applications of the *Chevron* doctrine in more than 200 cases of the U.S. Courts of Appeals. *Id.* at 4. In his research, Kerr sought to discover whether courts continued to apply the pre-*Chevron* factors in determining whether to defer to agency decisions; whether courts were motivated by political factors; or whether courts’ deference to agencies depended on whether judges adopted a “plain meaning” approach to statutory interpretation. *Id.* at 3-4. Regarding the “political” theory, Kerr noted that in cases involving denials of entitlement benefits, Republican judges upheld the denials in every case, while Democratic judges upheld the denials in only 40% of the cases. *Id.* at 38-39. He also found that in immigration appeals, “Republican judges sided with the government against the individual 71% of the time, while Democratic judges did so only 42% of the time.” *Id.* at 39. Further, he found that in cases involving commerce, trade, and taxes, where “deferral to the executive branch would further liberal policies,” Democratic judges upheld agency actions in 92% of the cases, while Republican judges upheld agency actions in only 68% of the cases. *Id.* at 39-40. Although Kerr found that many judges reached conclusions consistent with their political ideologies in cases with clear political ramifications, *id.*, he did *not* find, as he had hypothesized, see *id.* at 35-36, that “the strength of a judge’s inclination to apply and defer [to an agency] under *Chevron* depends on how much the judge agrees with the politics of the administration whose interpretations are being reviewed,” *id.* at 11, 36.

Not all commentators agree, however, that the courts’ application of *Chevron* is driven by political ideology. In a recent article, Professor Richard Pierce pointed out that, in a 1997 study of 250 environmental decisions in the U.S. Court of Appeals for the D.C. Circuit, Professor Richard Revesz found “no statistically significant difference” in the application of *Chevron* to those cases by Republican or Democratic judges. See Pierce, *supra* note 190, at 250 (discussing Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1748 & tbl.7 (1997)). Pierce asserted that Revesz’s study showed that *Chevron*’s framework is “relatively objective and determinate.” *Id.* Pierce acknowledged, though, that the Miles and Sunstein study



In light of the findings of those studies, the results in the 2006 Term of the Supreme Court are not surprising. According to Miles and Sunstein's data, although the identity of the administration in power has some effect on the decisionmaking of liberal judges, most of the liberal Justices on the Supreme Court validate agency decisions more than 75% of the time even when the decisions are made by a Republican administration.<sup>269</sup> At the same time, the most conservative Justices, who validate agency decisions less than 50% of the time when they are made by a Democratic administration, validate agency decisions at least 60% of the time when they are made by a Republican administration.<sup>270</sup> The convergence of the traditionally high validation rate for liberal Justices, and the increased validation rate for conservative Justices when reviewing decisions of a Republican administration, combined with the elevation of Justice Alito, who supported the government's position in 87.5% of the cases in 2006,<sup>271</sup> seems to explain the increased deference for agency decisions.

Based on the foregoing, if there is a change in the political power of the administration whose policies are under review, it is reasonable to conclude that the validation rate for the Court's conservative Justices will decline. If Justice Alito's validation rate also declines, the Court may, once again, reduce the deference accorded to agency decisionmaking.

### C. Democratic Decisionmaking

As noted above, there may be a more benign explanation for the apparent shift in judicial deference to agency decisionmaking, at least with regard to *Chevron* deference. In a recent article, Professor Bressman explored the Court's decisions in *Brown & Williamson* and *Gonzales*.<sup>272</sup> While some commentators suggested that the cases signaled an erosion in *Chevron* deference by the Court, she searched for other explanations for the Court's reluctance to accord *Chevron* deference to

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demonstrated that *Chevron* has less effectively de-politicized judicial review of agency decisions in the Supreme Court than it has in the lower courts. *Id.* at 251.

269. See Miles & Sunstein, *supra* note 19, at 832 & tbl.1. Justices Ginsburg, Souter, and Breyer voted to validate agency decisions 76.2%, 76.7%, and 80% of the time, respectively. *Id.* at 832 tbl.1.

270. *Id.* at 832-33. Justice Scalia voted to validate agency decisions in 41.9% of the cases involving a Democratic administration, but in 60.5% of the cases involving a Republican administration. *Id.* at 832 tbl.1. Similarly, Justice Thomas' validation rate was 48.4% for Democratic administrations and 60% for Republican administrations. *Id.*

271. See *supra* note 29 and accompanying text. As noted above, Justice O'Connor, whom Justice Alito replaced, validated agency decisions in about 67% of the cases, regardless of whether the administration in power was Democratic or Republican. See *supra* note 30.

272. See generally Bressman, *supra* note 35 ("This Article seeks to reconcile the *Chevron* framework with *Brown & Williamson* and *Gonzales*.").

agencies in those cases. While noting that *Chevron* deference is based, in part, on the political accountability of administrative agencies, Professor Bressman asserted that other factors must be playing a more significant role in influencing the Court's determinations of whether or not to accord *Chevron* deference to agency decisions.<sup>273</sup>

On close examination of the cases, Professor Bressman concluded that the Court, in *Brown & Williamson* and *Gonzales*, withheld deference from agencies in those cases because the Democratic and Republican administrations, "although electorally accountable, had interpreted broad delegations in ways that were undemocratic when viewed in the larger legal and social contexts."<sup>274</sup> Regarding *Brown & Williamson*, she asserted that "the administration had . . . take[n] an action that the current Congress likely opposed," while in *Gonzales*, she asserted that "the administration had . . . take[n] a position on an issue that the people actively were debating, without involving or ascertaining the views of the public."<sup>275</sup> In both cases, she concluded that "[p]olitical accountability was not functioning as an adequate check on the administrations' conduct."<sup>276</sup> Consequently, she speculated that:

The Supreme Court may be driving at a rule of statutory construction that pursues a goal different from and counter to traditional notions of political accountability. That rule asks whether the administration has acted undemocratically either by disregarding likely congressional preferences or public engagement on an issue of social concern.<sup>277</sup>

Ultimately, she concluded that "*Chevron* might be premised on judicially recognized values, including formal accountability and expertise, [but] it may not be limited to those values. Rather, *Chevron* might also include both procedural regularity, as in *Mead*, and functional accountability, as in *Brown & Williamson* and *Gonzales*."<sup>278</sup>

The approach taken by the Court in its resolution of the *Chevron* cases in the 2006 Term seems to be consistent with the approach suggested by Professor Bressman. In the six cases where the Court upheld the position taken by an agency,<sup>279</sup> the disputes did not seem to center on issues where the administration was making a decision that ignored

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273. *Id.* at 762-64.

274. *Id.* at 764.

275. *Id.*

276. *Id.*

277. *Id.* at 798.

278. *Id.* at 786-87 (footnote omitted).

279. *See supra* note 27.

public input, or that Congress likely opposed.<sup>280</sup> At the same time, *Massachusetts v. EPA*, the most significant case in which the Court refused to defer to an agency during the 2006 Term, could easily be seen as a case where the administration was making a decision that disregarded public engagement on an issue of social concern or likely congressional preferences. While the administration was deciding that it was inappropriate to regulate greenhouse gas emissions from new motor vehicles under the Clean Air Act, Congress was debating ways to amend the Clean Air Act to increase regulation of greenhouse gasses.<sup>281</sup>

Professor Bressman's approach can also explain the Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.* Professor Bressman recognized that procedural regularity—in addition to functional accountability—is an important factor for courts in deciding whether to accord *Chevron* deference to an agency's decision.<sup>282</sup> The Court's decision to refuse to accord deference to the EEOC's policy manual in *Ledbetter* is, thus, fully consistent with the Court's precedent in *Mead*, *Christensen*, and other cases that focused on the procedural regularity of agency decisions.<sup>283</sup>

## VI. CONCLUSION

In recent years, academics have frequently chronicled the decline of *Chevron* deference and criticized the co-existence of *Auer* and *Mead*. While the Supreme Court created exceptions to *Chevron* and *Auer* over the past decade, the Court seemed to reverse the trend in the 2006 Term. The Court accorded administrative agencies more deference in the past year, issuing several opinions that reinvigorated *Chevron* and *Auer* and issuing an opinion that appeared to ignore *Chenery*. An examination of the Justices' voting records suggests that Justice Alito's elevation to the

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280. Although the issue that sparked the debate in *Duke Energy*, 127 S. Ct. 1423 (2007), spurred some legislative activity, many of the Congressional proposals, other than the Bush administration's proposal, supported broader application of the new technology and permitting requirements to modifications of power plants. See U.S. GEN. ACCOUNTING OFFICE, CLEAN AIR ACT: KEY STAKEHOLDERS' VIEWS ON REVISIONS TO THE NEW SOURCE REVIEW PROGRAM 12 & n.13 (2004) (listing two Republican-introduced bills and two Democrat-introduced Congressional bills designed to "further regulate emissions from industrial facilities"). Thus, it would be inappropriate to suggest that Congress likely opposed the agency's position in the case. See Part II.A.6 (discussing the dispute and the agency's litigation position in the case).

281. See, e.g., Safe Climate Act of 2006, H.R. 5642, 109th Cong. (2006); Climate Stewardship Act of 2005, H.R. 759, 109th Cong. (2005); Climate Stewardship Act of 2005, S. 342, 109th Cong. (2005); Climate Stewardship Act of 2004, H.R. 4067, 108th Cong. (2004); Climate Stewardship Act of 2003, S. 139, 108th Cong. (2003); Global Climate Security Act of 2003, S. 17, 108th Cong. (2003).

282. Bressman, *supra* note 35, at 787.

283. See *supra* notes 166-76 and accompanying text.

Court was the most significant impetus for the shift in the Court's attitude toward agencies.

Although the Court applied *Chevron*, *Auer*, and other administrative law precedents in a deferential manner in the 2006 Term, the Court did not overturn any major precedent and did not claim to be establishing any important new rules during the Term. The decisions were evolutionary, rather than revolutionary. Instead of adopting bright line rules, the Court continued to rely on multi-factor tests that can be manipulated to reach the outcome that the Court desires. To the extent that political ideology motivates the Justices in their decisionmaking, the manner in which the Court accorded more deference to agencies in the 2006 Term is significant because it preserves, for the Court, the power to accord less deference to agencies in the future, without overturning precedent or establishing new bright line rules. Professors Miles and Sunstein's research suggests that there is a correlation between the political party in the White House and the rate at which members of the Court validate agency decisions. Thus, the increased deference accorded to agencies in the past year could easily disappear with a change in the political party in power, especially on a Court where more than one third of the cases were decided by a 5-4 vote. For now, though, Justice Alito seems to be bringing deference back.

