

Scholarly Commons @ UNLV Boyd Law

Scholarly Works

Faculty Scholarship

2018

Loud and Soft Anti-Chevron Decisions

Michael Kagan

University of Nevada, Las Vegas -- William S. Boyd School of Law

Follow this and additional works at: <https://scholars.law.unlv.edu/facpub>



Part of the [Administrative Law Commons](#), and the [Supreme Court of the United States Commons](#)

Recommended Citation

Kagan, Michael, "Loud and Soft Anti-Chevron Decisions" (2018). *Scholarly Works*. 1142.

<https://scholars.law.unlv.edu/facpub/1142>

This Article is brought to you by the Scholarly Commons @ UNLV Boyd Law, an institutional repository administered by the Wiener-Rogers Law Library at the William S. Boyd School of Law. For more information, please contact youngwoo.ban@unlv.edu.

LOUD AND SOFT ANTI-CHEVRON DECISIONS

Michael Kagan*

This Article proposes a methodology for interpreting the Supreme Court's long-standing inconsistency in the application of the Chevron doctrine. Developing such an approach is important because this central, canonical doctrine in administrative law is entering a period of uncertainty after long seeming to enjoy consensus support on the Court. In retrospect, it makes sense to view the many cases in which the Court failed to apply Chevron consistently as signals of underlying doctrinal doubt. However, to interpret these soft anti-Chevron decisions requires a careful approach, because sometimes Justices are simply being unpredictable and idiosyncratic. However, where clear patterns can be discerned, and where these patterns can be explained by a coherent doctrinal theory, there is good reason to use them as a foundation for refining the Chevron doctrine.

TABLE OF CONTENTS

I.	INTRODUCTION.....	37
II.	REEXPLAINING <i>CHEVRON</i> 'S INCONSISTENCY	40
III.	LOUD DECISIONS	47
IV.	SOFT DECISIONS—TWO TYPES.....	48
V.	IDENTIFYING PATTERNS AND THEORIES	52
VI.	CONCLUSION	55

I. INTRODUCTION

The *Chevron* doctrine, it seems, is in play.¹ There are now two Justices on the Supreme Court who have published opinions calling the central, canonical doctrine in contemporary administrative law an unconstitutional transfer of judicial authority to the executive

* Michael Kagan (B.A. Northwestern University, J.D. University of Michigan Law School) is a Professor of Law at the University of Nevada, Las Vegas, William S. Boyd School of Law.

1. See Catherine M. Sharkey, In the Wake of *Chevron*'s Retreat 1 (June 2, 2016), https://sls.gmu.edu/csas/wp-content/uploads/sites/29/2016/06/Sharkey_In-the-Wake-of-Chevron_5_20_16.pdf ("It is time to take stock of *Chevron*'s retreat.").

branch.² There are at least three other Justices who have called for limitations on the doctrine's application to agency interpretations of their own jurisdiction.³ Another Justice has advocated a context-specific approach in which *Chevron* would apply with less force in some situations than in others.⁴ In *King v. Burwell*,⁵ a majority of the Justices signed an opinion holding that *Chevron*'s famous two-step analysis is merely something "we often apply," and, in any case, is not appropriate for matters of "deep economic and political significance."⁶

The *Chevron*, U.S.A., Inc. v. *Natural Resources Defense Council, Inc.*⁷ decision famously called for courts to defer to an executive branch agency when it interprets a statute that it administers.⁸ First, a court should ask if congressional intent is clear from the statute.⁹ Second, "if the statute is silent or ambiguous . . . , the question for the court is whether the agency's answer is based on a permissible construction"¹⁰ The power of *Chevron* deference, in theory at least, is that it calls on judges to affirm statutory interpretations against their own best judgment as to how statutes should be understood. Once the *Chevron* doctrine coalesced in the 1980s, it seemed to enjoy consensus support on the Supreme Court.¹¹

But then, in 2015, Justice Thomas published a broadside against *Chevron* in *Michigan v. EPA*.¹² This only represented one vote out of nine, of course, but it was a notable vote. A decade earlier, Justice Thomas had written the majority opinion in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*,¹³ one of the Court's most robust articulations of the commandment for judges to defer to administrative agencies.¹⁴ But in 2015, Justice Thomas derided his own prior majority opinion.¹⁵ Then, in 2017, Justice

2. See *Michigan v. EPA*, 135 S. Ct. 2699, 2712–13 (2015) (Thomas, J., concurring); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1150 (10th Cir. 2016) (Gorsuch, J., concurring).

3. See *City of Arlington v. FCC*, 569 U.S. 290, 318 (2013) (Roberts, C.J., dissenting).

4. See *id.* at 308–09 (Breyer, J., concurring) ("I say that the existence of statutory ambiguity is sometimes not enough to warrant the conclusion that Congress has left a deference-warranting gap for the agency to fill because our cases make clear that other, sometimes context-specific, factors will on occasion prove relevant.").

5. 135 S. Ct. 2480 (2015).

6. *Id.* at 2488–89.

7. 467 U.S. 837 (1984).

8. *Id.* at 842.

9. *Id.*

10. *Id.* at 843.

11. See, e.g., *Astrue v. Capato ex rel. B.N.C.*, 566 U.S. 541, 558 (2012) (considering the Social Security Administration's interpretation of a statute and determining that it was a permissible construction under the *Chevron* doctrine).

12. 135 S. Ct. 2699, 2712–14 (2015) (Thomas, J., concurring).

13. 545 U.S. 967 (2005).

14. *Id.* at 980.

15. *Michigan*, 135 S. Ct. at 2712.

Gorsuch replaced a Justice who had, for a long time, been *Chevron*'s most outspoken supporter on the Court.¹⁶ Just a few months before his elevation to the Supreme Court, then-Judge Gorsuch launched a bold critique of *Chevron*, calling it "no less than a judge-made doctrine for the abdication of the judicial duty."¹⁷

This Article's purpose is to suggest a methodology for understanding the Supreme Court's approaches to *Chevron* now that *Chevron*'s future is more in doubt. To be clear, this Article does not predict *Chevron*'s complete demise. There are still only two Justices on record supporting its reversal. In fact, this Article is based on the assumption that the *Chevron* doctrine will continue but that the consensus period of its history is finished.¹⁸ Assuming that we are now entering a period in which there will be much less certainty about the doctrine's reach, the Court may be more willing to explicitly refine the doctrine, to limit its application in certain ways, and to articulate new exceptions.

To a great extent, the current analytical challenge in administrative law is not new—it is just more out in the open. Since the early days of the doctrine, the trouble with *Chevron* has been in understanding why the Court does one thing in one case but another thing in another case. The problem is not just that the Court has sometimes explicitly indicated that there are exceptions to this doctrine—the so-called "Step Zero," for example.¹⁹ Instead, the problem is that the Court far more frequently fails to follow *Chevron*'s normal two-step analysis in cases to which it seems to apply and then does not explain why.²⁰ Explaining this persistent inconsistency has long been a preoccupation of administrative law scholarship. But prior to 2015, no Justice had announced any desire to formally abandon *Chevron*, and the dominant streams of administrative law scholarship were reluctant to draw doctrinal conclusions from the Justices' failure to practice what they preached.

16. See Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 521 (1989). But see Aaron L. Nielson, Cf. *Auer v. Robbins*, 21 TEX. REV. L. & POL. 303, 303 (2017) (speculating whether Justice Scalia was reconsidering *Chevron* at the end of his career); Adam J. White, *Scalia and Chevron: Not Drawing Lines, But Resolving Tensions*, YALE J. ON REG.: NOTICE & COMMENT (Feb. 23, 2016), <http://yalejreg.com/nc/scalia-and-chevron-not-drawing-lines-but-resolving-tensions-by-adam-j-white/>.

17. Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring).

18. See Sharkey, *supra* note 1, at 5 (observing "[t]wo [f]orms of *Chevron*'s [r]etreat").

19. Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 188, 208 (2006) ("The major locus of the disagreement . . . has become much narrower. It involves the threshold question whether *Chevron* is applicable at all . . .").

20. See *id.* at 199 ("In Judge Breyer's view, judicial review should be specifically tailored to the 'institutional capacities and strengths' of the judiciary. For that endeavor, the simple approach set out in *Chevron* was hopelessly inadequate.").

At least one scholar has recently suggested that the Court's "failure to apply *Chevron* where it would seem to apply" should be seen as a signal of reluctance about "a full-throated *Chevron* doctrine."²¹ This theory has actually been around for quite some time, as it was suggested in a pioneering empirical study of *Chevron* case law in 1992.²² But it did not catch on and was not developed or pursued consistently by most administrative law scholarship. Now that Justices are expressing doubts and criticisms of *Chevron* more openly, it makes sense to see the Court's long-term inconsistency in its application in a different light. This Article aims to expand this thesis into a more structured way of interpreting the many cases in which the Court does not apply *Chevron* in the way that it likely should.

Part II briefly traces the evolution and recent breakdown of the Supreme Court consensus about *Chevron* deference and outlines alternative ways scholars have tried to explain the Justices' inconsistency in applying the doctrine. The prevailing views have generally asserted that the Justices are committed to fundamental principles undergirding deference, even if they are idiosyncratic (and quite possibly biased) in their willingness to defer to agencies in actual cases. However, the Court's inconsistency should also be seen as a potential signal of lurking problems and doubts and thus can provide guidance about how the doctrine might be refined in the future.

The clearest expressions of doctrinal doubts are what can be called "loud" anti-*Chevron* decisions, when judges actually articulate a limitation on or a critique of the doctrine. This type of decision is explained in Part III. The bigger difficulty concerns the many decisions where the Supreme Court failed to apply *Chevron* when it ostensibly should have mattered or applied it in such a way as to render the doctrine irrelevant. These can appropriately be called "soft" anti-*Chevron* cases. Part IV shows that these cases come in several varieties. The degree to which they indicate doctrinal discomfort depends on several factors that can be discerned by close reading of the case law. When there are patterns in these cases that can be explained by a convincing doctrinal theory, scholars and judges should use them to articulate refinements to our understanding of the *Chevron* doctrine.

II. REEXPLAINING *CHEVRON*'S INCONSISTENCY

Chevron has long been the ultimate canonical decision. The doctrinal meaning typically attributed to the case has been much more than anyone would have anticipated from reading the decision

21. Kent Barnett, *Why Bias Challenges to Administrative Adjudication Should Succeed*, 81 MO. L. REV. 1023, 1036 (2016).

22. See *infra* text accompanying note 53 (discussing early *Chevron* research by Thomas Merrill).

itself.²³ The *Chevron* doctrine actually developed through interpretation by lower courts rather than from an immediate understanding that the Supreme Court had issued a watershed decision.²⁴ In fact, it could be said that the *Chevron* doctrine would more appropriately be termed the *General Motors* doctrine, in honor of the D.C. Circuit decision that seems to have been the first to cite and explain *Chevron* as a major change in administrative law.²⁵

The *Chevron* doctrine is often expressed as a rigid algorithm—the two steps—which makes any deviation by the Court quite noticeable.²⁶ Yet, despite all the fanfare, it is now well known that the Supreme Court itself applies *Chevron* inconsistently at best.²⁷ Once this inconsistency became apparent, some leading scholars sought to reframe *Chevron* as a looser set of jurisprudential principles rather than a rigid formula.²⁸ One influential illustration of these efforts was Peter Strauss's conception of "*Chevron* space."²⁹ More than anything, the Court's inconsistency, mixed with its surface-level devotion to the doctrine, turned *Chevron* into a kind of enigma. As Michael Herz summarized the situation in 2015, "Despite all the attention, . . . the 'Chevron revolution' never quite happens. This decision, though seen as transformatively important, is honored in

23. See Ian Bartrum, *The Constitutional Canon as Argumentative Metonymy*, 18 WM. & MARY BILL RTS. J. 327, 329 (2009) ("[A] canonical text takes on its own metonymic meanings—sometimes quite apart from its literal textual meaning—within the practice of constitutional law.").

24. See Gary Lawson & Stephen Kam, *Making Law Out of Nothing at All: The Origins of the Chevron Doctrine*, 65 ADMIN. L. REV. 1, 3–4 (2013).

25. *Id.* at 39–41 (discussing *General Motors Corp. v. Ruckelshaus*, 742 F.2d 1561 (D.C. Cir. 1984)).

26. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

27. See Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1, 12 (2017) (describing a "trilogy of decisions" where the Court sent "inconsistent signals" when applying *Chevron*); William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretation from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1124–25 (2008) (offering statistics showing numerous times the Court did not apply the *Chevron* doctrine even though it appeared applicable); Michael Herz, *Chevron is Dead; Long Live Chevron*, 115 COLUM. L. REV. 1867, 1870 (2015) (observing that members of the Court "do not defer as much as the doctrine seems to require"); Connor N. Raso & William N. Eskridge, Jr., *Chevron as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727, 1805 (2010) (finding that Justices apply *Chevron* differently in different contexts).

28. Raso & Eskridge, Jr., *supra* note 27, at 1766 ("*Chevron* and the other formal deference regimes have the following characteristics in practice: They are flexible rules of thumb or presumptions deployed by the Justices episodically and not entirely predictably, rather than binding rules that the Justices apply more systematically.").

29. See generally Peter L. Strauss, "*Deference*" Is Too Confusing—Let's Call Them "*Chevron* Space" and "*Skidmore* Weight," 112 COLUM. L. REV. 1143 (2012).

the breach, in constant danger of being abandoned, and the subject of perpetual confusion and uncertainty.”³⁰

Even if just for a time, all the Justices were committed to deference at a general level. Even if most remain so today, the details of the doctrine were not fully thought out by the Court at the beginning. *Chevron* was originally just a case about air pollution. As Gary Lawson and Stephen Kam explain in their history of how the *Chevron* decision became the *Chevron* doctrine, “[T]he process by which *Chevron* became law—a series of lower court decisions and then default acceptance in the Supreme Court—prevented . . . ambiguities from being vented and resolved in an authoritative forum; instead, they remain to this day largely submerged and unaddressed.”³¹ This process made *Chevron* unusual for a case of its stature. Typically, when the Court makes a blockbuster decision, such as in *Citizens United v. FEC*³² or *Obergefell v. Hodges*,³³ the big question that the Court has to decide is understood well in advance. The issue is fully briefed in the litigation and has likely been hashed out in the lower courts. But that did not really happen with *Chevron* deference.³⁴ Instead, it might be said that the hashing out has taken place in the three decades since the Supreme Court’s decision.

One of the interesting subtexts with *Chevron*, at least during its heyday, was that Justices on the conservative wing of the Court were powerful proponents for judicial deference to the administrative state.³⁵ If one assumes that, in terms of political ideology, liberals are more likely to favor empowering government regulatory agencies, then the entire conception of *Chevron* deference would seem to be far more appealing to liberals. After all, *Chevron* itself was about deferring to the Environmental Protection Agency (“EPA”), albeit in a Reagan-era case in which the EPA had issued a policy more favorable to the energy company.³⁶ Justice Scalia, who was not on the Court when *Chevron* was decided, played a key role in trumpeting its importance and reexplaining its foundations.³⁷ Justice Thomas

30. Herz, *supra* note 27, at 1867.

31. Lawson & Kam, *supra* note 24, at 6.

32. 558 U.S. 310 (2010).

33. 135 S. Ct. 2584 (2015).

34. See Lawson & Kam, *supra* note 24, at 32–33.

35. See Eskridge, Jr., & Baer, *supra* note 27, at 1154 (showing that conservative Justices who served when *Chevron* was decided in 1984 agreed with agency interpretations between 60.9% and 81.3% of the time).

36. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 837 (1984).

37. 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, 302 (2002).

wrote the *Brand X* decision,³⁸ which represents one of the doctrine's high water marks.

This political dynamic made the apparent consensus around *Chevron* all the more remarkable. One way to understand this is that Justice Scalia was able to reframe deference to government agencies as a form of judicial restraint.³⁹ In his influential 1989 lecture on administrative law, he argued that the best justification for deference was respect for implicit congressional intent.⁴⁰ He argued that when a statute is ambiguous, the interpretation may involve a policy choice.⁴¹ Justice Scalia stated, "Under our democratic system, policy judgments are not for the courts but for the political branches."⁴² In this way, deference is less about the virtues of administrative agencies than it is about judicial modesty. The Court eventually embraced this rationale in *United States v. Mead Corp.*⁴³

The longstanding apparent consensus on the Court meant that understanding the *Chevron* doctrine became a primary obsession of administrative law scholarship. As Michael Herz recently advised, "At this point, it takeschutzpah to write about *Chevron*. Everyone is sick to death of *Chevron*, and four gazillion other people have written about it, creating a huge pile of scholarship and precious little left to say."⁴⁴ Moreover, it seemed that anyone hoping to offer relevant commentary had to accept *Chevron* as a starting point, even though scholars documented early on that the Justices themselves often did not focus on it in routine administrative law cases.⁴⁵

The Court implicitly admitted its own inconsistency in *King v. Burwell*, saying that the two-step *Chevron* analysis was merely a tool that it "often" applies.⁴⁶ That is not a ringing endorsement of the doctrine, and it arguably overstates the Court's actual usage of

38. See *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 968–69, 972 (2005).

39. See *Raso & Eskridge, Jr.*, *supra* note 27, at 1732–33 (speculating that Justice Scalia's willingness to promote deference to the administrative state may have been related to policy preferences that were supported by Republican presidential administrations).

40. Scalia, *supra* note 16, at 516.

41. *Id.* at 515.

42. *Id.*

43. 533 U.S. 218, 226–27, 229 (2001) ("We hold that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law Congress . . . may not have expressly delegated authority or responsibility to implement a particular provision or fill a particular gap.").

44. See Herz, *supra* note 27, at 1867.

45. See Eskridge, Jr., & Baer, *supra* note 27; Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 *YALE L.J.* 969, 970 (1992) ("[T]he *Chevron* framework is used in only about half the cases that the Court perceives as presenting a deference question.").

46. *King v. Burwell*, 135 S. Ct. 2480, 2488 (2015).

Chevron.⁴⁷ Nevertheless, the doctrine remained central to administrative law. The lower courts tended to be more dutiful about citing and applying *Chevron*.⁴⁸ Even at the Supreme Court, lawyers often simply ignored the Court's actual tendencies. The Solicitor General would routinely tell the Justices that *Chevron* applied to a certain agency decision because the Court had said so in previous proceedings but would ignore the sometimes longer list of similar cases where the Court ignored *Chevron*.⁴⁹

In the realm of scholarship, the most influential explanation for the Court's inconsistency stresses the judicial values at the heart of judicial deference while simultaneously lowering expectations for perfect adherence. While the emphasis and nuance differed with other writers, there existed a general skepticism that the doctrine should, in fact, be understood as a rigid two-step algorithm, even though the Court articulated it as such. Instead, *Chevron* should be understood as a canon of interpretation⁵⁰ or as a commitment to loosely give agencies enough "space" to administer public policy.⁵¹ These arguments for a looser approach to deference compliment advisories from other scholars who remind us that judges are human and that "scholars are being unrealistic when they demand that the Supreme Court adopt and consistently apply formal deference regimes"⁵²

However, there was always another broad explanation for the Supreme Court's inconsistency: the Justices were never quite as devoted to *Chevron* as they seemed. This is what Thomas Merrill, one of the earliest scholars to document the Court's inconsistency, wrote during *Chevron*'s first decade: "[T]he failure of *Chevron* to perform as expected can be attributed to the Court's reluctance to embrace the draconian implications of the doctrine for the balance of power among the branches, and to practical problems generated by its all-or-nothing approach to the deference question."⁵³ This thesis fits easily with substantive critiques of the *Chevron* doctrine that are now seen

47. See Barnett & Walker, *supra* note 27, at 1 (summarizing research showing how little impact *Chevron* seems to have at the Supreme Court).

48. *Id.*

49. See, e.g., Brief for the Respondent at 45, *Torres v. Lynch*, 136 S. Ct. 1619 (2016) (No. 14-1096) (arguing that "principles of *Chevron* deference apply when the BIA interprets the immigration laws" but not discussing other immigration cases (arising from the BIA) where the Court had not mentioned *Chevron*, e.g., *Charachuri-Rosendo v. Holder*, 560 U.S. 563 (2010), and *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007), among others (quoting *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 2203 (2014) (plurality opinion))).

50. Raso & Eskridge, Jr., *supra* note 27, at 1727 (finding that Justices apply *Chevron* "episodically" but that such application "reflect[s] deeper judicial commitments").

51. Strauss, *supra* note 29, at 1143.

52. Raso & Eskridge, Jr., *supra* note 27, at 1735.

53. Merrill, *supra* note 45.

expressed openly by some Justices.⁵⁴ The seeds of today's dissension can be seen lurking even in the doctrine's formative days. A less often cited part of that 1989 Scalia lecture acknowledged that there are fundamental reasons to be skeptical of judicial deference:

It is not immediately apparent why a court should ever accept the judgment of an executive agency on a question of law. Indeed, on its face the suggestion seems quite incompatible with Marshall's aphorism that "[i]t is emphatically the province and duty of the judicial department to say what the law is."⁵⁵

More recently, that same reference to Justice Marshall's opinion in *Marbury v. Madison*⁵⁶ was a central feature in Justice Thomas's and Justice Gorsuch's attacks on *Chevron*.⁵⁷

Nevertheless, this thesis had a problem. It took quite some time for any Justice on the Court to actually voice doubts about *Chevron* openly. Moreover, there were cases where the Court had explicitly supported the use of *Chevron*.⁵⁸ One can thus understand lower courts' widespread adoption of the *Chevron* doctrine. But eventually, cracks began to appear. In *City of Arlington v. FCC*,⁵⁹ three Justices dissented from the idea that agencies are owed deference when they interpret the boundaries of their own mandates.⁶⁰ Justice Scalia wrote the majority opinion,⁶¹ leading *Chevron* to another of its peaks. But three years later, Justice Scalia, joined by Justices Alito and Thomas, questioned *Auer* deference,⁶² under which the court should defer to an agency's interpretation of its own regulation as articulated in *Auer v. Robbins*.⁶³

Current doubts about *Chevron* coincide with a general trend toward judicial empowerment vis-à-vis administrative agencies.⁶⁴ While the critiques from Justice Thomas and now Justice Gorsuch are the most far reaching, Christopher J. Walker has suggested that it is

54. Scalia, *supra* note 16, at 513.

55. *Id.* (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

56. 5 U.S. (1 Cranch) 137 (1803).

57. See *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1151 (10th Cir. 2016) (Gorsuch, J., concurring).

58. See, e.g., *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2124 (2016) (describing interpretation deference as being "implemented by the two-step analysis set forth in *Chevron*").

59. 569 U.S. 290 (2013).

60. *Id.* at 312, 318 (Roberts, C.J., dissenting).

61. *Id.* at 292.

62. *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1213 (2015) (Scalia, J., concurring).

63. 519 U.S. 452, 457–58 (1997).

64. See Note, *The Rise of Purposivism and the Fall of Chevron: Major Statutory Cases in the Supreme Court*, 130 HARV. L. REV. 1227, 1243–45 (2017) [hereinafter *The Rise of Purposivism*].

possible that Chief Justice Roberts has his own issues with *Chevron*.⁶⁵ Writing about the major questions exception, which the Chief Justice used in *King v. Burwell*, Walker noted that in 2013, Chief Justice Roberts disagreed with Justice Scalia about whether an administrative agency should receive deference when it is interpreting the boundaries of its own authority.⁶⁶ Sounding much like a critique of *Chevron*, the Chief Justice worried about the “vast power” of the administrative state over everyday life.⁶⁷ He was joined in this critique by Justices Kennedy and Alito. As Walker writes, “Perhaps the narrowing of *Chevron* deference in *King v. Burwell* was . . . the start of a much more systemic narrowing of *Chevron*’s domain and the Chief Justice’s attempt to relitigate the battle he previously lost to Justice Scalia.”⁶⁸ Walker noted that Justice Breyer has also advocated a “context-specific” approach to deference, in which the Court should not always presume that statutory ambiguity warrants deference to an agency.⁶⁹ Walker surmised that Justice Breyer’s context-specific approach might often be compatible with the inclinations of the Chief Justice.⁷⁰

To some extent, this is heavy on speculation. It is not the purpose of this Article to predict exactly how the Court is going to behave with regard to *Chevron* in the future. That would be a dangerous endeavor. But there are some observable facts that cannot be ignored. Open divisions about *Chevron* have appeared among the Justices. If one counts *King v. Burwell*, all nine Justices have, at least once, signed an opinion explicitly holding that *Chevron* should not apply in a situation where the administrative law textbooks would previously have said that it must apply. There also exists decades of Supreme Court precedent in which the Court displayed apparent inconsistency, occasionally opining that *Chevron* should be applied but very often not doing so.⁷¹ For scholars and practitioners, these cases would seem to be a gold mine in terms of material helping us to understand the cracks and doubts embedded in *Chevron* and to build arguments about how the Court should refine the doctrine in the future.

65. See Christopher J. Walker, *Toward a Context-Specific Chevron Deference*, 81 MO. L. REV. 1095, 1097–98 (2016) (exploring Chief Justice Roberts’s more limited approach to *Chevron* deference).

66. See *id.* at 1103–04; see also *City of Arlington*, 569 U.S. at 318 (Roberts, C.J., dissenting).

67. *Id.* at 313.

68. Walker, *supra* note 65, at 1103.

69. *City of Arlington*, 569 U.S. at 307–08 (Breyer, J., concurring).

70. Walker, *supra* note 65, at 1104–05.

71. See generally 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 (1995) (detailing how the Court’s use of textualist tools to the exclusion of other evidence of legislative intent leads to inconsistent applications of the *Chevron* doctrine).

III. LOUD DECISIONS

The first and most important type of *Chevron* case is one in which either the Justices say explicitly that *Chevron* should be applied or they openly criticize it or say that it should not be applied in a particular situation. We can call these “loud” decisions. There is probably no need to name them except to distinguish them from “soft” decisions, which will be described in Part IV.

A short list of famous examples illustrates the category easily. Among loud decisions, there is, first and foremost, the *Chevron* decision itself, where the Court articulated the famous two-step analysis.⁷² In *Mead*, the Court reexplained *Chevron* with a stronger orientation toward congressional intent and delegation of powers.⁷³ Then there is *Brand X*, where the Court extended deference to administrative interpretations that go against prior judicial interpretation of a statute.⁷⁴ In a similar realm, *Auer* applied deference to an agency’s interpretation of its own regulation,⁷⁵ and *City of Arlington* applied it to an agency’s interpretation of its own jurisdiction.⁷⁶ Essentially, these are the cases a law student finds in an administrative law class syllabus because they mark out the extensive potential reach of the *Chevron* doctrine. Loud *Chevron* cases also include the Step Zero decisions, where the Court explicitly articulates situations in which *Chevron* should not apply. The major questions exception in *King v. Burwell* is probably the most recent prominent example of such a decision. In a similar manner, the D.C. Circuit recently issued a decision holding that *Chevron* deference does not apply until the government actually asks for it.⁷⁷

There have also been recent loud dissents and concurring opinions announcing criticisms of *Chevron*, or at least of certain applications of it. The Chief Justice dissented to deference with regard to interpreting agency jurisdiction.⁷⁸ Justice Scalia protested *Auer* deference.⁷⁹ The loudest opinions have come from Justice Thomas and Justice Gorsuch because they set out full-throated, fully developed arguments.⁸⁰ At the same time, it is important to remember that there are some loud decisions that end up being unimportant. For instance, in a 1987 immigration case, the Court offered, as an apparent alternative holding, the theory that *Chevron*

72. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

73. *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001).

74. *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005).

75. *Auer v. Robbins*, 519 U.S. 452, 457 (1997).

76. *City of Arlington v. FCC*, 569 U.S. 290, 296–98 (2013).

77. *See Global Tel*Link v. FCC*, 866 F.3d 397, 407–08 (D.C. Cir. 2017).

78. *City of Arlington*, 569 U.S. at 318 (Roberts, C.J., dissenting).

79. *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1212–13 (2015) (Scalia, J., concurring).

80. *See supra* note 57 and accompanying text.

only applied when an agency applies laws to particular facts, not to a pure question of law.⁸¹ This could have been an important limitation on the doctrine, but the Court moved away from this idea quite quickly.⁸² Thus, even explicit decisions by the Court are sometimes false indicators of the direction in which the doctrine will actually develop.

What is key in these loud decisions is that the Court is doing something explicit about the *Chevron* doctrine, or at least an individual Justice is saying something about the doctrine, and one can begin to understand it by digesting the text of what is written on the page. That does not mean that the rule is always easy to understand. The major questions exception in *King v. Burwell* is hardly spelled out with any real clarity, for example.⁸³ But there is no doubt that the Court announced an explicit limitation to *Chevron* as part of its holding.⁸⁴ But soft decisions, which are discussed in the next part of this Article, require more careful analysis.

IV. SOFT DECISIONS—TWO TYPES

Soft decisions applying—or not applying—*Chevron* are harder to interpret, and while they are numerous, they take more work to identify. These are cases where the textbook version of *Chevron* would call for the doctrine's application, and yet the Court does not do so, or does so in such a way as to render the doctrine irrelevant. As a loose rule of thumb, a reader might ask this question: If a law professor teaching an administrative law course had given students an issue-spotting exam with the same fact pattern to test them on their understanding of *Chevron*, would the professor be correct to deduct points if students failed to mention *Chevron* in their answers? In more doctrinal terms, would the *Chevron* doctrine as it has been articulated in the Court's binding precedent require the application of *Chevron*, and did the Court fail to do so?

The defining characteristic of these soft decisions is that the Court explains neither what it is doing—or not doing—nor why. If the Court had explained its approach, then there would be a loud decision. For example, if the Supreme Court had decided *King v. Burwell* without mentioning *Chevron*, it would have been termed a soft anti-*Chevron* decision. This would not have changed the result, but since the Court explained why it did not apply *Chevron* in that case, it issued a loud decision—although readers can certainly dispute how convincing the Court's explanation actually is.

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

82. See Merrill, *supra* note 45, at 986 ("By the end of the next Term, however, the Court was again applying the *Chevron* doctrine (irregularly, as ever) to questions of law, and *Cardoza-Fonseca* quietly dropped from sight.").

83. See *King v. Burwell*, 135 S. Ct. 2480, 2488–89 (2015).

84. See *id.*

Soft anti-*Chevron* decisions can be further divided into two types, which will be called “silent” *Chevron* and “impotent” *Chevron* decisions. Silent *Chevron* decisions simply do not mention *Chevron* in a case where it would seem to be relevant. They are those cases in which the Supreme Court simply acts like *Chevron* deference does not exist. Because the Court does not even mention *Chevron*, a Westlaw or Lexis search for Supreme Court decisions citing the doctrine will not locate these cases. They can only be identified through subsequent analysis and critique. By contrast, impotent *Chevron* decisions are those where the Court acknowledges *Chevron*’s potential relevance, usually in passing, but renders the doctrine impotent, meaningless, or irrelevant. Two recent immigration law decisions will be used to illustrate both types.

The 2016 immigration decision in *Torres v. Lynch*⁸⁵ illustrates the silent variety of a soft anti-*Chevron* decision. *Torres* concerned the definition of an “aggravated felony” under the Immigration and Nationality Act (“INA”), specifically whether a state crime that lacks a federal jurisdictional element that is required in the federal statutory definition—a connection to interstate commerce—nevertheless categorically qualifies as an aggravated felony.⁸⁶ More specifically, the Court considered whether a New York conviction for arson qualifies as a federal aggravated felony, even though the relevant federal definition required that the damaged property be “used in interstate or foreign commerce,” a qualification absent from the state statute.⁸⁷ The agency—the Board of Immigration Appeals (“BIA”)—said that it was an aggravated felony.⁸⁸ However, normally when a state crime is missing an element explicitly required in the INA, the crime is categorically not a deportable offense.⁸⁹ It was not facially obvious from the statute that the jurisdictional element—connection to interstate commerce—was distinct from the other elements defining the crime. Moreover, there was a circuit split on the question at hand.⁹⁰ This situation—an ambiguous interpretive question which had been answered by the relevant agency—would normally call for the invocation of *Chevron*. However, while the Supreme Court affirmed the BIA’s interpretation, it did not defer to it, and in its opinion mentioned neither *Chevron* nor, for that matter, any other deference standard known to administrative law.⁹¹

Methodologically, there are several factors evident in *Torres* that make the Court’s silence regarding *Chevron* in the case more meaningful. The fact that there was a circuit split is a strong

85. 136 S. Ct. 1619 (2016).

86. *Id.* at 1623.

87. *Id.* at 1624.

88. *Id.*

89. *Mellouli v. Lynch*, 135 S. Ct. 1980, 1990 (2015); *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1697 (2013).

90. *See Torres*, 136 S. Ct. at 1624 n.1 (summarizing the circuit split).

91. *See generally id.*

indicator that reasonable people could come to different conclusions about what the statute should mean, and thus, the statute was objectively ambiguous on the question at hand. But if that were not enough, the Supreme Court actually said, "Congress could have expressed itself more clearly."⁹² Thus, the key triggers for deference under *Chevron* were present. Two more important factors should be noted: the lower court applied *Chevron* deference in the decision under review and the government asked for the Supreme Court to apply *Chevron* deference.⁹³ These factors matter, first, because they reduce the chance that the Court's omission of *Chevron* could have been a simple oversight⁹⁴ and, second, because the government's failure to ask for deference could be itself a reason not to apply it.⁹⁵

In sum, *Torres* is a strong example of a case where it should have been expected that *Chevron* would apply, despite the Court choosing to ignore it. This can be seen first and foremost by independent analysis applying *Chevron*'s two steps. But other factors can certainly be considered: (1) whether the Supreme Court itself acknowledged lack of statutory clarity; (2) whether lower court judges were divided on the statutory meaning, providing an objective indication that the statute's meaning was subject to reasonable disagreement; (3) whether lower courts disagreed with the agency's interpretation, similarly indicating room for reasonable disagreement; (4) whether the lower court decision under review applied *Chevron*; and (5) whether the government asked for deference to the agency's interpretation.

The impotent *Chevron* variety is illustrated by a 2017 immigration case, *Esquivel-Quintana v. Sessions*,⁹⁶ in which the Court again dealt with the statutory definition of an aggravated felony in a deportation case.⁹⁷ In *Esquivel-Quintana*, the specific question concerned whether certain state statutory rape offenses qualified as "sexual abuse of a minor."⁹⁸ The California statutory rape offense at issue required only a three-year age difference when the purported victim was under eighteen years old, thus criminalizing sex between a twenty-one-year-old and a seventeen-year-old.⁹⁹ There was a circuit split on this question.¹⁰⁰ Moreover, the lower court panel

92. *Id.* at 1633.

93. Brief for the Respondent at 7, 45–52, *Torres*, 136 S. Ct. 1619 (No. 14-1096).

94. In *Torres*, the parties argued pointedly about whether deference should apply. Brief for Petitioner at 47–49, *Torres*, 136 S. Ct. 1619 (No. 14-1096).

95. See *Global Tel*Link v. FCC*, 866 F.3d 397, 407–08 (D.C. Cir. 2017) (declining to apply *Chevron* deference when the government did not seek it).

96. 137 S. Ct. 1562 (2017).

97. See *id.* at 1567.

98. *Id.*

99. *Id.*

100. See *id.*

was divided on the question but had upheld the BIA.¹⁰¹ As in *Torres*, the government asked for *Chevron* deference and the parties argued over whether it should apply.¹⁰²

In *Esquivel-Quintana*, the Court ruled for the immigrant, finding that the conviction was not an aggravated felony because a statutory rape offense could not constitute “sexual abuse of a minor” unless the crime required that the victim be under sixteen years of age.¹⁰³ But unlike in *Torres*, the Court actually mentioned *Chevron* in its decision. In *Esquivel-Quintana*, the Court dispensed with *Chevron* as follows:

[P]etitioner and the Government debate whether the Board’s interpretation . . . is entitled to deference under *Chevron*. . . . We have no need to resolve whether the rule of lenity or *Chevron* receives priority in this case because the statute, read in context, unambiguously forecloses the Board’s interpretation. Therefore, neither the rule of lenity nor *Chevron* applies.¹⁰⁴

Because the Court said this, the simplest thing to do would be to say that *Esquivel-Quintana* is a straight-forward *Chevron* Step One decision. The statute was not ambiguous. But if this statute, which caused division between the lower courts and the agency and which hardly offers a self-evident meaning on its face, is not ambiguous, it is difficult to imagine exactly what kind of statute would be considered ambiguous. That is why *Esquivel-Quintana* can be classified as a soft anti-*Chevron* decision.

An impotent *Chevron* case is not as strong an indicator of *Chevron*’s erosion as a silent *Chevron* case, since the Court at least superficially acknowledges *Chevron*’s potential relevance. But examples like these cannot be ignored. Consider that in *Torres*, where the Court did not even mention deference, the government actually won.¹⁰⁵ In *Esquivel-Quintana*, the Court noted *Chevron*’s possible relevance, if only to cast it aside, and the government lost.¹⁰⁶ These cases thus illustrate the well-documented phenomenon that “*Chevron* deference—at least at the Supreme Court—does not seem to matter.”¹⁰⁷

Torres and *Esquivel-Quintana* are consistent with a trend in which the Court uses tools of textual analysis to find definite meanings in facially ambiguous statutes and, in the process, asserts

101. *Id.*

102. Brief for the Respondent at 7, 12, 42, *Esquivel-Quintana*, 137 S. Ct. 1562 (No. 16-54).

103. *Esquivel-Quintana*, 137 S. Ct. at 1572–73.

104. *Id.* at 1572.

105. *Torres v. Lynch*, 136 S. Ct. 1619, 1634 (2016).

106. *Esquivel-Quintana*, 137 S. Ct. at 1572–73.

107. Barnett & Walker, *supra* note 27, at 4.

a stronger judicial role in statutory interpretation.¹⁰⁸ For example, in *Torres*, the Court said that the central question is actually not whether Congress could have written a clearer statute.¹⁰⁹ The Court noted that “[t]he question is instead, and more simply: Is that the right and fair reading of the statute before us?”¹¹⁰ *Torres* and *Esquivel-Quintana* could both be interpreted essentially as *Chevron* Step One decisions. But that would seem to miss the point that *Chevron* is not doing any real work in these cases and, as such, it does not matter if the Court even mentions it. The more pertinent question should be: Why is the *Chevron* doctrine so irrelevant to the Supreme Court in cases that seem tailor made for it?

V. IDENTIFYING PATTERNS AND THEORIES

In administrative law scholarship, the category of cases that can be called soft anti-*Chevron* decisions has long been used as the raw data for empirical studies documenting the Court’s inconsistency with the doctrine.¹¹¹ One of the most well-known of these studies, by Connor Raso and William Eskridge, found that each of the Justices was inconsistent in their application of *Chevron*, leading them to the conclusion that the Justices do not really treat *Chevron* as a precedent they are bound to follow in every case.¹¹² Instead, they treat it as a canon “reflecting values whose weight will vary from case to case, depending on context.”¹¹³ Yet, Raso and Eskridge concluded that it was difficult to predict how the Justices would apply these values.¹¹⁴ They concluded, “Idiosyncrasy in deployment (or not) of deference regimes is tolerated within the Court.”¹¹⁵ This conclusion comes quite close to saying that the Court is simply arbitrary and it sits uncomfortably with the contention that the Justices are actually applying some deeper values to which they genuinely committed. This cynicism is buttressed by empirical evidence that the Justices’ policy preferences predict their willingness to extend deference to different agencies.¹¹⁶

108. See *The Rise of Purposivism*, *supra* note 64 (observing a trend toward judicial empowerment).

109. *Torres*, 136 S. Ct. at 1634.

110. *Id.*

111. See generally Merrill, *supra* note 45; Raso & Eskridge, Jr., *supra* note 27.

112. Raso & Eskridge, Jr., *supra* note 27, at 1765–66.

113. *Id.* at 1765.

114. *Id.* at 1766 (“They are flexible rules of thumb or presumptions deployed by the Justices episodically and not entirely predictably, rather than binding rules that the Justices apply more systematically.”).

115. *Id.*

116. *Id.* at 1784 (“Justices systematically support less deferential regimes for policies with which they disagree.”); see also Kent Barnett et al., *The Politics of Invoking Chevron Deference* 3–4 (Ohio State Pub. Law Working Paper No. 400, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2984302 (“When courts reviewed liberal agency interpretations, all panels—liberal, moderate, and conservative—were equally likely to apply *Chevron*. . . . But when reviewing

Judges are, of course, human. They will not be perfect paragons of consistency. But their fallibility and susceptibility to ideological favoritism does not mean that there are no principled explanations for their decisions to be discerned and no patterns to be found. Rather, empirical studies on their own can only take us so far, in part because they are only as good as the categories that they count. For example, in a 2008 study, William Eskridge and Lauren Baer found that the Supreme Court was more likely to defer to an agency in some subject matter areas and less likely to defer to an agency in others.¹¹⁷ As it turns out, the Court seemed, on the whole, to be less likely to defer in immigration than in many other areas of administrative law.¹¹⁸ But Eskridge and Baer simply counted “immigration” cases, a category that can raise many different kinds of legal problems.

To understand why this type of broad categorizing might hide an important pattern, consider that in 2014, one year before ruling in *Torres*, the Supreme Court decided another immigration case, *Scialabba v. Cuellar de Osorio*.¹¹⁹ In that case, the plurality decision by Justice Kagan relied extensively on *Chevron* to deny family-based visas under the Child Status Protection Act, affirming an agency interpretation that led certain children to “age out” of eligibility.¹²⁰ *Cuellar de Osorio* seems like a strong application of deference; Kagan’s opinion might be read to imply that she actually disliked the policy outcome, because she made a point to remind the agency that it could change course.¹²¹ Thus, in *Cuellar de Osorio*, the *Chevron* doctrine really seemed to matter to the Supreme Court. In Eskridge and Baer’s study, *Cuellar de Osorio* would be lumped into one category along with *Torres* and *Esquivel-Quintana*, and the Court would appear to be irredeemably inconsistent in how it applies *Chevron* in immigration cases.

To a great extent, this is a result of sloppiness by the Justices in explaining their own behavior. The plurality opinion in *Cuellar de Osorio* wrote, “Principles of *Chevron* deference apply when the BIA interprets the immigration laws.”¹²² And yet, one year later in *Torres*, the same Justices completely ignored *Chevron* in a case concerning a BIA interpretation of immigration law.¹²³ The Court’s broad statement does not help to explain the different results of cases like *Torres* and *Esquivel-Quintana*. But that does not rule out the

conservative agency interpretations, liberal panels applied *Chevron* significantly less frequently than conservative panels.”).

117. Eskridge, Jr., & Baer, *supra* note 27, at 1144.

118. *Id.* at 1145.

119. 134 S. Ct. 2191 (2014).

120. *Id.* at 2196–97.

121. *Id.* at 2207 (“All that said, we hold only that § 1153(h)(3) permits—not that it requires—the Board’s decision to so distinguish among aged-out beneficiaries.”).

122. *Id.* at 2203.

123. See generally *Torres v. Lynch*, 136 S. Ct. 1619 (2016).

possibility that there were important differences between these cases that explain and possibly justify the Justices' apparent inconsistency.

To put this another way, what if these cases really do not all belong in the same category, even though they are each broadly about immigration law? These are actually very different kinds of immigration cases. *Torres* and *Esquivel-Quintana* were deportation cases, involving interpretation of criminal grounds for deportation.¹²⁴ *Cuellar de Osorio* was about denying a visa to a person who had not yet immigrated to the United States.¹²⁵ Perhaps these differences made the Justices more comfortable with deference in one context and less comfortable in the other. Whether these distinctions matter in the application of *Chevron* in different kinds of immigration cases can be saved for a future study.¹²⁶ My purpose here is simply to stress that it is important to look for these patterns.

To do this, a methodology is needed. The first step is to identify the loud and soft anti-*Chevron* decisions. The loud decisions are typically self-evident, and the soft cases require an assessment of a number of factors, as explained in Part IV. But identifying the cases is only the beginning. A single anti-*Chevron* decision might not mean much; it may simply show idiosyncratic behavior by a few Justices in a particular case. But if a coherent doctrinal rationale that explains a longer list of decisions can be discerned, it should be taken as a sign that the Court is moving in a coherent doctrinal direction. The Justices may not feel confident enough yet to articulate a refinement of the doctrine, and they may yet reverse course, but that does not mean they are just ignoring doctrinal concerns when they ignore *Chevron*. Rather, they may be using their soft avoidance of *Chevron* as a means of testing the doctrine's limits. They may be avoiding applying deference when it does not seem to work well but when they are not quite ready to explain why. It is important for scholars and attorneys to recognize these patterns and explore the strengths and weaknesses of theoretical explanations for them.

The methodology suggested is essentially an application of the standard scientific method. The Court's decisions applying and not

124. See *supra* notes 86, 97 and accompanying text.

125. See *supra* note 120 and accompanying text.

126. See Patrick Glen, *Response to Walker on Chevron Deference and Mellouli v. Lynch*, YALE J. ON REG.: NOTICE & COMMENT (June 20, 2015), <http://yalejreg.com/nc/response-to-walker-on-chevron-deference-and-mellouli-v-lynch-by-patrick-glen/> (discussing the possibility of a "deportation-is-different" explanation for the Court's reluctance with regard to *Chevron*); Michael Kagan, *Chevron's Immigration Exception, Revisited*, YALE J. ON REG.: NOTICE & COMMENT (June 10, 2016), <http://yalejreg.com/nc/chevron-s-immigration-exception-revisited-by-michael-kagan/>; Chris Walker, *The "Scant Sense" Exception to Chevron Deference in Mellouli v. Lynch*, YALE J. ON REG.: NOTICE & COMMENT (June 2, 2015), <http://yalejreg.com/nc/the-scant-sense-exception-to-chevron-deference-in-mellouli-v-lynch-by-chris-walker/> (discussing the possibility that the Roberts Court may be reluctant to give deference in certain deportation cases).

applying *Chevron* can be understood as an observed natural phenomenon that may initially appear to be random. To make sense of this data, researchers need to develop theories as to why the Court might be less willing to apply *Chevron* in certain types of cases. Legal scholars can argue whether these normative theories make sense. But to understand what Supreme Court Justices are doing, these theories need to be translated into predictive hypotheses: If a case involves *X*, the Supreme Court will not rely on *Chevron* to decide the case. If a case involves *Y*, *Chevron* deference will be highly important to the Court's analysis. One can then turn to the Court's actual body of decisions to see if the hypotheses are correct. If the actual results are consistent with a hypothesis, and if the normative theory is coherent, there will be a compelling case that a doctrinal shift is emerging.

VI. CONCLUSION

When the Supreme Court explicitly announces an exception to *Chevron* doctrine, as it did in *King v. Burwell*,¹²⁷ it is obvious to anyone who pays attention to administrative law that it has done something important. It is possible that a decade from now will prove the major questions exception to have been a huge change in the application of deference to administrative agencies. It is also possible that, in the long run, it will look like an anomaly that has little enduring impact, like Justice Stevens's forgotten alternative holding in *INS v. Cardoza-Fonseca* in 1987.¹²⁸ But because the Court was explicit that it was not applying *Chevron*, one knows to pay attention.¹²⁹ It was loud.

When the Court speaks more softly about *Chevron*, by stripping deference of any real force or by simply ignoring it, it is harder to know what to think. Such cases are numerous and have been extensively counted in empirical studies. But they have not been parsed and analyzed for their doctrinal implications to quite the same extent. This is only natural. The Court in these cases does not give us much to analyze. Since, until recently, the Court seemed superficially devoted to *Chevron*, it was perhaps sensible for administrative law scholars to roll our collective eyes. Supreme Court Justices are unpredictable and maybe a little unprincipled, and perhaps that is all there is to it.

But now that the *Chevron* doctrine is entering a new phase of doubt, there needs to be a closer look at the fact that this is a doctrine that emerged in somewhat odd fashion and that the Supreme Court

127. See *supra* notes 5–6 and accompanying text.

128. See *supra* note 81 and accompanying text.

129. See Walker, *supra* note 65, at 1100–01 (“The major questions doctrine is not new. . . . But what distinguishes *King* from the prior cases is *how* the Chief Justice invoked the major questions doctrine.”); Sharkey, *supra* note 1, at 10 (noting that *King v. Burwell* enlarges Step Zero).

never really applied as expected. Some of the Court's apparent unpredictability in applying deference may actually follow patterns to which spectators have not been adequately sensitive. The Court's well-documented inconsistency in applying the *Chevron* doctrine may be seen in retrospect as a means by which the Justices quietly have worked through operational problems and doubts, which thus could form the foundation for refinements to the doctrine.

There are many cases where the Court has ignored or minimized *Chevron*. But to make too much out of any isolated instance of this phenomenon can be dangerous. Sometimes Supreme Court inconsistency is just inconsistency. The key is finding patterns. When there is a strong pattern that can be explained by a coherent and compelling normative or doctrinal theory, it may be time to urge the Justices to make a louder statement. It may be, as administrative law scholarship has long documented, that the importance of deference doctrines at the Supreme Court level can be easily overstated.¹³⁰ But it has also long been clear that the lower courts do seem to try more consistently to follow the Supreme Court's instructions on deference. For this reason alone, it is important to refine the *Chevron* doctrine so that lawyers and judges understand if and how they are supposed to apply deference in different contexts.

Key to this endeavor is the realization that a rigid, one-size-fits-all version of deference defined by a rigid, two-step algorithm may never have been realistic or appropriate for the myriad contexts in which courts review legal interpretations by the administrative state. That does not mean we should throw up our hands. It means we need to look much more closely. Sometimes there may be a good deal of wisdom hidden in the Court's apparent inconsistency. The large body of administrative cases in which the Court had the opportunity to apply deference should be understood as the Court's testing ground for the *Chevron* doctrine. Scholars and practitioners should pay attention to the test results.

130. See Richard J. Pierce, Jr., *What Do the Studies of Judicial Review of Agency Actions Mean?*, 63 ADMIN. L. REV. 77, 93 (2011).