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Does the Supreme Court Really Not Apply *Chevron* When It Should?

Natalie Salmanowitz♣ & Holger Spamann♠

Abstract: William Eskridge and Lauren Baer's (96 GEO. L. J. 1083 (2008)) "empirical study of all 1014 Supreme Court cases between *Chevron* and *Hamdan* in which an agency interpretation of a statute was at issue" finds that "the Court does *not* apply the *Chevron* framework in nearly three-quarters of the cases where it would appear applicable." Our reexamination of this study finds that the fraction of such cases is far lower, and indeed closer to zero. Our main methodological innovation is to infer *Chevron* applicability from Supreme Court litigants' briefs rather than our own evaluation of the cases' facts, as in Eskridge and Baer's study. In over half the cases flagged by Eskridge and Baer, neither of the parties (nor, where applicable, the Solicitor General as *amicus*) cited *Chevron*, and in almost half of the cases within that subset, no one argued for or against deference of any kind. In most of a sample of the remaining cases, the Supreme Court either did not need to reach the *Chevron* issue, or actually applied it, at least in an abbreviated form.

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This paper was prepared for the 1st Annual Replication Conference of the Society for Empirical Legal Studies in April 2018. We selected Eskridge and Baer's article for our contribution to the conference because according to citation counts in Westlaw and HeinOnline, Eskridge and Baer's study is the most cited empirical article in law reviews and journals since 1988, and the second (Westlaw) or third (HeinOnline) most cited empirical article in law reviews and journals ever; it also fit our research interest in judicial decision-making. For generating the citation rankings, we thank Harvard Law librarian Michelle Pearse, who identified empirical articles by the search string ""my data show*" OR "our data show*""—and we would welcome any replication of this ranking with a better methodology. For excellent research assistance, we thank Claire Horan and David Kimball-Stanley. For very helpful comments, we thank Richard Lazarus, Matt Stephenson, Cass Sunstein, and Adrian Vermeule, as well as the participants of the Conference, especially our commentator Will Hubbard. Any remaining errors are obviously our own.

In its 1984 decision, *Chevron, U.S.A., Inc. v. National Resource Defense Council, Inc.*,[1] the U.S. Supreme Court held that courts must defer to an agency's reasonable interpretation of an ambiguous statute. *Chevron* is one of the most cited Supreme Court opinions of all time, having been cited in over 16,000 court decisions and more than 9,000 law review articles.[2] Nevertheless, a famous empirical study by William Eskridge and Lauren Baer (henceforth, EB)—itself one of the most highly cited legal empirical articles ever published—finds that "the Court does *not* apply the *Chevron* framework in nearly three-quarters of the cases where it would appear applicable."[3] (EB use "apply" to denote an explicit engagement with *Chevron* arguments in the opinion, which is distinct from the question whether the Supreme Court ultimately deferred to, or at least sided with, the agency.[4] We follow EB's terminology throughout this article.[5])

In this article, we build on EB's path-breaking data collection of 1,014 Supreme Court cases by focusing on the subset of 191 cases that form the basis of EB's surprising conclusion cited above: cases in which, according to EB, *Chevron* should have been applied, yet the Supreme Court failed to apply it. This narrower focus allows us to look in more detail than EB could at (1) whether *Chevron* really *should* have been applied in these 191 cases, and (2) whether the Supreme Court *actually failed* to apply *Chevron* in the small subset of cases where we confirm that *Chevron* was possibly applicable. Our main innovation and contribution is a better method to assess point (1) than researcher judgment alone (EB's approach). To be more precise, we filter out cases where *Chevron* could not plausibly apply by consulting the parties' briefs. Supreme Court litigants tend to be represented by highly qualified and specialized counsel, and it would be in the interest of at least one party to raise *Chevron* if it plausibly applied. We find, however, that in 100 of the 191 cases at issue, neither of the litigants cited *Chevron*. In fact, in 46 of those

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[1] 467 U.S. 837 (1984).

[2] These numbers were found by shepardizing "467 U.S. 837" in Lexis.

[3] William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L. J. 1083, 1125 (2008). EB has been cited 438 times according to Westlaw as of August 21, 2018.

[4] *See*, *e.g.*, Eskridge & Baer, *supra* note 3, at 1091 (distinguishing "invoking" *Chevron*—EB's notion of "applying"—from the question whether the agency ultimately wins).

[5] See *infra* Section 3.1.2 for more details and distinctions regarding the notion of "applying" *Chevron*.

cases, neither petitioner nor respondent made *any* argument supporting or opposing deference to the agency's interpretation. Similarly, the Solicitor General (SG), a particularly sophisticated Supreme Court advocate, submitted a brief in almost all of the 191 cases, either for one of the parties or as *amicus*. But the SG only cited *Chevron* in 66 of these briefs, and did not even argue for deference of any form in 71 of them.[6] Taken together, these findings give rise to a strong inference that *Chevron* was in fact inapplicable in most of the 191 cases. For the remaining cases (i.e., those in which at least one party argued for *Chevron* deference), we read a randomly selected subset of the Supreme Court's opinions and find that, for the most part, the Supreme Court either did not need to reach the issue given its holdings on other questions in the case, or did apply *Chevron*, at least in an abbreviated form (by finding—ingenuously or not—that one of *Chevron*'s elements squarely settled the case). In the latter scenario, the Court usually also cited *Chevron*.

In sum, we find that the Supreme Court mostly does apply *Chevron* when it should—in the formal sense of explicitly addressing at least one sufficient element of the *Chevron* framework. We are agnostic about whether the Supreme Court is faithful to *Chevron* in spirit, i.e., whether the Court actually *defers* to agency interpretations—in the sense of letting them stand even though the Court would prefer a different one—in all situations where *Chevron* would seem to mandate deference. All we are concerned about here is EB's more formalistic—yet important!—question whether the Court acknowledges and addresses *Chevron* when doctrinally warranted. Our affirmative answer is reassuring in as much as EB's reported finding—that the Supreme Court blatantly ignores a famous precedent—would have been a major departure from the rule of law even according to the narrowest, most superficial understanding.[7] One would have expected litigants to notice and to complain, and so our findings are consistent with the lack of anecdotal evidence reporting any uproar among Supreme Court litigants. That said, our findings are compatible with the possibility that the Supreme Court only pays lip service to *Chevron* without actually

[6] This number includes the four cases in which the SG did not submit any brief.

[7] As to the need for reassurance, compare EB's conclusion that "our empirical study suggests caution about the Court's collective ability to follow any doctrinal framework consistently." *Id.* at 1091.

deferring to agency interpretations. In fact, in some of the cases we review below, the Supreme Court's insistence that a statute is clear and hence deference not warranted is somewhat disingenuous. This is not altogether unexpected, though, as *Chevron* allows the Court to set aside any agency interpretation by claiming that the statute is clear or that the agency's interpretation is unreasonable—two notoriously vague tests.[8] Ever since *Chevron* was first decided, critics have claimed that this deprives the *Chevron* standard of any but rhetorical relevance. From this perspective, the surprising thing about EB's finding of non-application is not that the Supreme Court would disregard *Chevron*, but that the Court would do it so needlessly openly.

The rest of this paper is structured as follows. Section 1 reviews *Chevron* and EB's study. Section 2 presents our analysis of the briefs, showing that in the majority of cases, neither party nor the SG (as *amicus*) argued for *Chevron* deference. Section 3 looks in more depth at those cases where at least one party argued for *Chevron* deference. Section 4 concludes.

1 Background: *Chevron* and the EB Study

The Supreme Court's landmark decision in *Chevron* lays out a two-step framework for judicial review of an agency's interpretation of a statute.[9] In step one, courts must look at the statute's text to determine whether Congress's intent is unambiguously expressed. Specifically, courts must ask whether "Congress has directly spoken to the precise question at issue."[10] If so, the analysis ends there—agencies may not impose their own interpretations when the statute's plain meaning is clear.[11] However, if the statute is ambiguous, courts must proceed to the second step of *Chevron* and ask whether the agency's interpretation is reasonable.[12] If so, courts must defer to the agency's decision.[13]

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[8] On such "*Chevron* avoidance," see, for example, Asher Steinberg, Esquivel-Quintana *and* Chevron *Avoidance*, THE NARROWEST GROUNDS (May 30, 2017, 3:52 PM), http://narrowestgrounds.blogspot.com/2017/05/esquivel-quintana-and-chevron-avoidance.html.

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

[10] *Id.*

[11] *Id.*

[12] *Id.*

But *Chevron*'s two-step test does not apply to all agency interpretations of a statute. In what has become known as "Chevron Step Zero," courts perform a threshold inquiry. According to *United States v. Mead Corp.*, the *Chevron* test only applies when (1) "it appears Congress delegated authority to the agency generally to make rules carrying the force of law," and (2) "the agency interpretation claiming deference was promulgated in the exercise of that authority."[14] By contrast, "'interpretations contained in policy statements, agency manuals, and enforcement guidelines'"[15] are considered "beyond the *Chevron* pale."[16] Yet this dividing line is notoriously difficult to draw. While "an agency's power to engage in adjudication or notice-and-comment rulemaking" is one way to satisfy *Mead*'s first condition, *Mead* held that "a comparable congressional intent" can also be inferred from other indications in the statute.[17] Courts and scholars have put forward various tests focused on the binding effect of the agency's decision, its use of formal procedures, or both.[18] Arguably, the difficulty of crafting a simple test consistent with Supreme Court precedent stems from the fact that different Justices hold different views of the appropriate test, leading to a patchwork of precedents that defies a simple summary.[19]

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[13] *Id.* at 843.

[14] 533 U.S. 218, 226–27 (2001). When such delegation is absent, courts may still afford agencies a lower degree of deference under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), a test that turns on the persuasiveness of the agency's interpretation. *Mead*, 533 U.S. at 228.

[15] *Mead*, 533 U.S. at 234 (quoting Christensen v. Harris County, 529 U.S. 576, 587 (2000)).

[16] *Id.*

[17] *Id.* at 227.

[18] *See* Kristin E. Hickman, *Unpacking the Force of Law*, 66 VAND. L. REV. 465, 483 (2013) (explaining that lower courts apply a variety of standards to determine whether a rule is legislative and therefore promulgated with the force of law); *cf.* Eskridge & Baer, *supra* note 3, at 1089 ("[U]npacking the implications of *Chevron* for Supreme Court jurisprudence is a complicated affair."); Mary Holper, *The New Moral Turpitude Test: Failing* Chevron *Step Zero*, 76 BROOK. L. REV. 1241, 1270 (2011) (questioning whether a binding effect is singularly dispositive or whether the agency's use of formal procedures can alternatively satisfy the inquiry); Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law*, 116 HARV. L. REV. 467, 493 (2002) (noting that close inspection of the statutory language often fails to clarify ambiguous grants of rulemaking authority); Thomas W. Merrill, *Step Zero After* City of Arlington, 83 FORDHAM L. REV. 753, 765 (2014); Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 191 (2006) ("The Supreme Court has issued several important Step Zero decisions, which clarify a number of questions but also offer complex and conflicting guidance . . . . [T]he entire area is pervaded by legal fictions about congressional understandings . . . [and] the Step Zero inquiry has become far too unruly.").

[19] *See* Sunstein, *supra* note 18, at 192, 198–205 (locating individual cases in this field of tension and noting that "Step Zero has become the central location of an intense and longstanding disagreement between the Court's two administrative law specialists, Justices Stephen Breyer and Antonin Scalia . . .[and] it is impossible to understand the current debates without reference to this disagreement").

To analyze how the Supreme Court actually applies *Chevron*, EB coded every Supreme Court case between 1984 and 2006 involving a federal agency's interpretation of a statute (n = 1014) for 156 factors—including whether the case was eligible for *Chevron* deference, whether the Court cited *Chevron*, and what deference regime the Court ultimately applied.[20] In particular, EB coded for seven possible deference regimes available in Supreme Court precedents, ranging from no deference at all to the most stringent form of deference for executive interpretations of national security matters (a standard called *Curtiss-Wright*).[21] EB's monumental effort yielded several interesting findings. First, in spite of *Chevron*'s dominance in legal discourse, other deference regimes remain in use after *Chevron*.[22] Second, and relatedly, the Supreme Court only applies the *Chevron* test in 8.3% of all cases involving an agency interpretation of a statute.[23] Third, the Supreme Court does not defer to agency interpretations in 53.6% of cases that reach it.[24]

EB's most important finding, however, was the fourth: "the Court does *not* apply the *Chevron* framework in nearly three-quarters [191 in total] of the cases where it would appear applicable under *Mead*."[25] If true, this finding raises serious concerns about the Supreme Court's legitimacy, the precedential value of *Chevron*, and the coherency of the Court's legal reasoning. This is all the more so because EB did not find any pattern explaining the Supreme Court's choice of *Chevron* or any other deference regime, and a follow-up study by Eskridge and Connor Raso using EB's data found that individual Justices were more likely to defer to agency interpretations that fit with their ideological preferences.[26]

[20] Eskridge & Baer, *supra* note 3, at 1094.
[21] *Id.* at 1098–99.
[22] *Id.* at 1098, 1120–21.
[23] *Id.* at 1121.
[24] *Id.* at 1100.
[25] Eskridge & Baer, *supra* note 3, at 1125.
[26] Connor Raso & William Eskridge, *"*Chevron*" as a Canon, not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727, 1734 (2010).

In the present study, we take a closer look at the 191 cases that form the basis of EB's fourth finding.[27] Should the Supreme Court really have applied *Chevron* in these cases, and if so, did it really not do so?

2 The Briefs Indicate That Many Cases Were Not *Chevron* Cases

Our first and most important result is that at least 104 of EB's critical 191 cases are not plausibly ones where the Supreme Court should have applied *Chevron*. The reason is that neither party to the litigation nor the SG as *amicus* even invoked *Chevron* deference in their briefs. Given that none of the briefs in these cases *asked* the Supreme Court to apply *Chevron*, it is implausible that *Chevron* should have applied. At the very least, our findings give EB's non-application result a very different meaning.

We first discuss why and how we perused the briefs, before discussing the results in more detail.

2.1 Methodology

Determining whether the Supreme Court should have applied *Chevron* in a given case is difficult for two reasons. First, as emphasized in our review of *Chevron* Step Zero above, identifying *Chevron*-eligible agency interpretations under *Mead* is a treacherous affair. Second, the agency's interpretation of the statute may not be the point in controversy but merely incidental to the case. For example, the real issue might be whether the underlying statute is constitutional, or whether the *application* of an agency regulation violated a *constitutional* right. In neither case should we expect a court to engage in a *Chevron* analysis, because to do so would be beside the point.

EB appear to have determined *Chevron* eligibility based on their own reading of the opinions in the case.[28] Given EB's legal expertise, this approach is legitimate and quite possibly the only workable

[27] To be more precise, we focus on the 191 cases that EB coded as involving:

1) "Congressional Delegation" = 1 ("Yes"), and
2) "Role of *Chevron*" = 0 ("Not Cited") OR 1 ("Cited but not applied").

As an alternative method, instead of 2), we also filtered according to 2a) "Deference Regime Invoked" ≠ 5 (*Chevron*), which gives the exact same list of cases with the addition of *INS v. Aguirre*, 526 U.S. 415 (1999), which EB coded as involving a deference regime more deferential than *Chevron* (7 ("*Curtiss-Wright*")). EB graciously make their dataset freely available at http://hdl.handle.net/1902.1/16562.

approach for coding all 1,014 cases in a reasonable amount of time. It is, however, an approach prone to coding error given the complexities described in the preceding paragraph.

To minimize the potential for such error, we "outsourced" our initial analysis of *Chevron* applicability to those with the greatest incentive, expertise, and resources to get it right: the parties to the case, and the SG. Specifically, we used the briefs filed in the Supreme Court case by the parties to the litigation or the SG (if not already appearing on behalf of a party) to establish an *upper bound* on the number of cases where the Supreme Court should have applied *Chevron*. If neither party argued for *Chevron* deference, then the case is not plausibly a *Chevron* case. (The inverse is not true, as explained in Section 3.1.1 below.) The reason is that there is always one party that benefits from *Chevron* deference if an agency interpretation is actually at issue, and Supreme Court litigants tend to be represented by highly qualified and specialized counsel that spend considerable time and resources preparing the argument—much more than the most scrupulous researcher-coder ever could.[29] These litigants are therefore unlikely to miss such an advantageous argument, or to not cite the most famous precedent on point.[30] In particular,

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[28] *See* Eskridge & Baer, *supra* note 3, at 1094 & n.42 (explaining that "[c]oding of all 1014 cases was done by one author," and not mentioning any sources other than opinions). Concretely, EB employed two alternative approaches to determine if the agency had promulgated a legislative rule with the force of law. The first approach hinges on whether the authorizing statute contained an explicit sanction provision for noncompliance with the agency's rule. *Id.* at 1124 (calling this the Merrill-Watts test after Merrill & Watts, *supra* note 18, at 493, 495). The second, more lenient approach, hinges on whether the statute confers general rulemaking authority. *Id.* at 112 (calling this the *Petroleum Refiners* approach after *National Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672 (D.C. Cir. 1973)). EB deliberately excluded implicit delegations of rulemaking authority from their coding process, *id.* at 1127 n.159, which might have led them to undercount "some cases, but probably very few, if any," *id.* at 1209, in which *Chevron* should have been applied but was not; we do not revisit this issue.

[29] *See* Richard Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L. J. 1487, 1497-1501 (2008) (describing how, beginning in 1985, a specialized, elite Supreme Court bar rapidly developed).

[30] *See id.* at 1497 ("Because they immerse themselves in the work of the Court, the attorneys of the Solicitor General's Office, unlike many of their opposing counsel, become completely familiar with the Justices and their precedent, including their latest concerns and the inevitable cross-currents between otherwise seemingly unrelated cases that would be largely invisible to those who focus on just one case at a time."). Lazarus goes on to describe how the private Supreme Court bar has developed out of the Office of the Solicitor General and achieved comparable specialization. *Id.* at 1491-1502.

It is true that a savvy litigant might intentionally not cite *Chevron* in *anticipation* of the Court ignoring it. But it would also be true that such omission of *Chevron* would constitute waiver, as we explain in the main text. In any event, according to Richard Lazarus, a leading expert on Supreme Court litigation and an alum of the Office of the SG (OSG), "OSG attorneys are *Chevron* [deference] hawks, to a fault. If there is a plausible *Chevron* argument, it is not one they leave off the table." E-mail from Richard Lazarus, Professor, Harvard Law Sch., to Holger Spamann, author (April 10, 2018, 14:23 EST) (on file with author).

the SG enjoys a superb reputation and, representing the government, generally has an incentive to argue for deference when deference is actually due.[31] In any event, even if one thought that Supreme Court litigants might fail to argue for *Chevron* deference when it should apply, this failure would cast the Supreme Court's own failure to apply *Chevron* in a very different light. In fact, parties' failure to argue *Chevron* at the Supreme Court or in the lower courts technically waives the *Chevron* argument, and it is established doctrine that the Supreme Court may legitimately ignore waived arguments.[32]

We pause to acknowledge that EB implicitly took the view opposite to ours regarding the relative reliability of briefs and researcher judgment.[33] EB do share our view that "the Solicitor General's office does an excellent job . . . arguing cases" and "understands the Court better than any private law firm."[34] EB are also aware that the SG did not argue for deference in many of the cases that EB thought eligible for deference.[35] Unlike us, however, EB do not take the absence of a deference argument in the SG brief as an indication that the case was not eligible for deference after all. Rather, EB merely consider the SG's "failure" the "most important" explanation "why the Court so often *opts* not to invoke a deference regime" (emphasis added).[36] In view of the tremendous challenge of coding over a thousand or even just hundreds of opinions, we are much more skeptical of researcher judgment, be it EB's or our own. To be sure, this is not a question that can be decided a priori—it is ultimately an empirical question, albeit one that is presumably difficult to resolve definitively (for lack of a universally agreed-upon test of "legal

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[31] *See id.* at 1492-97 (describing and explaining the very high reputation and success rate of the Office of the Solicitor General, noting that "one factor that plainly plays a significant role in the Solicitor General's success is the sheer expertise in Supreme Court advocacy of the attorneys in that Office"). In the 186 cases we investigated, the SG filed a brief in 182, and argued against deference in only five (writing for petitioner in *United States v. LaBonte*, 520 U.S. 751 (1997) and *Nixon v. Missouri Municipal League*, 541 U.S. 125 (2004), and writing for respondent in *FLRA v. Aberdeen Proving Ground*, 485 U.S. 409 (1988), *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469 (1992), and *Neal v. United States*, 516 U.S. 284 (1996)).

[32] *See, e.g.*, Granite Rock Co. v. Int'l Bhd. of Teamsters, 561 U.S. 287, 306 (2010); Walters v. Metro. Educ. Enters., 519 U.S. 202, 205 n.1 (1997).

[33] Like us, EB "read[ ] hundreds of briefs filed by the Solicitor General." Eskridge & Baer, *supra* note 3, at 1173.

[34] *Id.* at 1119.

[35] *See id.* ("[T]he Solicitor General in a large minority of cases . . . fails to ask the Court to defer to informal agency interpretations or to the government's views presented in his briefs."). While the quoted passage only refers to "informal agency interpretations or to the government's views presented in his briefs," which are not *Chevron*-eligible under *Mead*, the passage is inscribed in a general discussion of "why the Court so often opts not to invoke a deference regime," including *Chevron*.

[36] *Id.*

correctness") and where reasonable people can have strong priors. We proceed on the assumption that our skepticism is justified, and later report evidence that we believe supports our skepticism.[37]

Accordingly, for each of EB's 191 critical cases, we collected all available briefs on the merits from the petitioners, respondents, and, where applicable, the SG. When cases involved multiple petitioners or respondents, each available brief was included in the analysis, as were petitioners' reply briefs. We were unable to find the complete set of briefs for five cases, bringing the final number of cases in our analysis down to 186. One of us coded all briefs for (1) whether the brief cited *Chevron*, and (2) whether the brief argued for or against any form of deference to the agency interpretation at issue—be it under *Chevron*, a weaker standard such as *Skidmore*,[38] or even without reference to an established standard. We also noted whether the briefs made no deference argument at all.

To verify the reproducibility of our results and to test our method's premise that the briefs best indicate *Chevron* applicability, we had two research assistants (RAs) each independently code and assess a non-overlapping sample of ten cases. The RAs were 3L students at Harvard Law School with summer, journal, and research experience in administrative law and who were blinded to the study's purpose. Within each RA's sample, eight "main" cases were quasi-randomly selected from the 186 cases with available briefs in which no party (according to our coding) had either cited *Chevron* or argued for or against deference.[39] The remaining two cases in each sample, "audit" cases, were quasi-randomly selected from the ones that EB had coded as *Chevron*-eligible and as applying *Chevron*.[40] Each RA coded the parties' and SG's briefs in these ten cases for the same variables noted above, and additionally coded whether, in their own judgment, *Chevron* should apply to the issue at hand. The RAs' coding of the briefs

[37] See the discussion of our research assistants' work at the end of this section, and of the cases where one but not all briefs cited *Chevron* in Section 3.

[38] Skidmore v. Swift & Co., 323 U.S. 134 (1944).

[39] Ordering the 192 cases including *Aguirre*, see *supra* note 27, chronologically, starting at the fourth (first RA) and ninth (second RA) case, respectively, and continuing in jumps of 25 from there, we selected the first case that we coded as not having any brief citing *Chevron* or arguing for or against any form of deference. For example, if case 4 was a case where one party did argue for or against deference, the algorithm would jump to case 5 and check there and so on; after finding the first case, the algorithm would then restart at case 29, and so on.

[40] Again arranging the relevant cases chronologically, we selected cases 19 and 44 for the first RA and 29 and 54 for the second (step sizes 25, spacing between RAs 10).

perfectly aligned with our own coding: they did not find *Chevron* citations or deference arguments in the briefs of any of the main cases. The RAs did, however, identify *Chevron* citations and deference arguments in all four audit cases,[41] vindicating our premise that briefs will contain *Chevron* arguments when the case truly is a *Chevron* case.[42] Meanwhile, the RAs' own views on *Chevron* applicability matched neither the briefs, nor EB's coding, nor the Supreme Court's handling of the matter; we view this as confirmation of our methodological concern that researchers have great difficulty determining *Chevron* applicability by a necessarily cursory engagement with the case.[43] By contrast, our method of using briefs leverages information from third parties with the greatest incentive to "code" the cases correctly.

2.2 Result

As summarized by Table 1, in 100 cases, no party cited *Chevron*, and in 57 cases, no party argued *for* deference of any kind (and in 49 of these 57 cases, no party argued for *or* against deference).[44] A similar picture emerges from the SG briefs, which may well be the best indicator in light of the SG's expertise and, usually, alignment with the agency. As summarized in Table 2, the SG filed a brief in all but 4 of the 186 cases within our working dataset, but only cited *Chevron* in 66 of its briefs. In fact, in 65 of these 182 briefs, the SG did not even ask for deference of any sort.

We do not show in the tables, but have verified in our data, that the parties' briefs and the SG's brief generally point in the same direction when the SG appears only as *amicus*. When the parties did not

[41] The SG's amicus brief in one of the main cases made *Chevron* arguments, and the RAs found that too. In the audit cases, the RAs found that all parties and the SG (where applicable) explicitly argued for or against applying *Chevron* in two of the four cases; in the third, one party did; and in the fourth, two of the three parties at least argued for or against deference.

[42] The audit cases also allowed us to exclude the possibility that the RAs were simply unable to spot deference arguments in the briefs.

[43] The RAs believed *Chevron* to be applicable in 4 of the 16 main cases, and *not* to apply in 2 of the 4 audit cases. It is important to note that our RAs' views on *Chevron* applicability deviated from EB's in all 14 cases where the RAs thought *Chevron* did not apply. This means our RAs and EB deviated from one another in 14 out of 20 cases even though they applied essentially the same method (their own judgment). The RAs' findings thus not only confirmed our coding, but also demonstrated the unreliability of EB's method.

[44] In all but 3 of these cases, neither party cited *Chevron*.

cite *Chevron* or argue for deference, neither did the SG as *amicus*, and vice versa.[45] This agreement gives us additional confidence in our method.

Table 1: *Chevron* and Deference in Parties' Briefs			
	At least one party cited *Chevron*	**No party cited *Chevron***	**TOTAL**
No party argued for or against deference	3	46	**49**
The only deference argument made by any party was against deference	3	5	**8**
At least one party argued for deference	80	49	**129**
TOTAL	**86**	**100**	**186**

Table 2: *Chevron* and Deference in SG's Briefs			
	SG cited *Chevron*	**SG did not cite *Chevron***	**TOTAL**
SG neither argued for nor against deference	0	60	**60**
SG argued against deference	4	1	**5**
SG argued for deference	62	55	**117**
TOTAL	**66**	**116**	**182**

Putting together the information from the parties' and the SG's briefs, the complete picture is this: In 96 cases neither party nor the SG (be it for a party or as *amicus*) cited *Chevron* (and in 44 of these cases, neither asked for deference of any kind). In eight more cases, the parties and the SG were aligned, at least in the sense that none of them asked for *Chevron* deference—i.e., one party (not the SG) cited *Chevron*, while (i) no one asked for deference (three cases), or (ii) only the other party or the SG asked for

[45] To the extent the SG argued the case for one of the parties, the two cuts of the data are obviously identical. Where the SG appeared only as *amicus*, the SG's brief matched those of the parties in 16 out of the 19 cases where neither party cited *Chevron* nor argued for deference. Likewise, in the 1 case where both parties cited *Chevron* and argued for deference, the SG brief did so as well.

deference (five cases[46]). In sum, in at least 104 of the critical cases flagged by EB, it seems implausible to say the Supreme Court *should* have applied *Chevron*.

What sort of case did not draw *Chevron* or even deference arguments in the briefs but was classified as *Chevron*-eligible by EB? There is no clear pattern in the 16 randomly chosen cases examined by our RAs. In some cases, there does not seem to have been any agency interpretation of a statute at issue (e.g., *Merck KGaA v. Integra Lifesciences I, Ltd.*[47]). In other cases, arguments involving agency interpretations might have been, but were not, made in the lower courts, and the Supreme Court refused to address them (e.g., *NCAA v. Smith*[48]). In other cases, the interpretation of the statute was clear, but the question was whether the statute *as applied* violated a constitutional right (e.g., *FTC v. Superior Court Trial Lawyers Ass'n*[49]). We cannot even detect clear trends, however, and refer the interested reader to the opinions and briefs themselves.

3 Most Remaining Cases Either Applied *Chevron* or Did Not Need to Reach the Issue

Our second result is that the Supreme Court either did apply, or had good reasons not to apply, *Chevron* in most of the remaining cases from EB's critical set—i.e., those of the 191 cases where at least one brief argued for *Chevron* deference. Or at least this is arguably the case in a randomly selected sample of those cases that we read closely.

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[46] In three of these cases, the party citing *Chevron* argued *against* deference.

[47] 545 U.S. 193 (2005). The issue in the case was the reach of the statutory "FDA exemption" from patent protection (35 U.S.C. § 271(e)(1)) for required submissions to the FDA, who did not seem to have adopted any position addressing the question at issue. *See id.* at 195.

[48] 525 U.S. 459 (1999). The opinion only addressed the 3rd Circuit's interpretation of a federal statute (Title IX) via a federal regulation, and disagreed with the 3rd Circuit's reading of the regulation and, by extension, the statute, *id.* at 467-68. The Supreme Court explicitly refused to rule on an alternative theory raised only at the Supreme Court that might have involved the interpretation of the underlying statute by two HHS letter determinations, remanding the case for further development of this theory, *id.* at 469-70 & n.7.

[49] 493 U.S. 411 (1990). The case involved the boycott of indigent defense by an association of trial lawyers in order to demand higher rates for such defense. According to the Court, "[a]s the ALJ, the FTC, and the Court of Appeals all agreed, respondents' boycott 'constituted a classic restraint of trade within the meaning of Section 1 of the Sherman Act.' As such, it also violated the prohibition against unfair methods of competition in § 5 of the FTC Act." *Id.* at 422 (internal citation omitted). The question was whether the boycott was nevertheless protected by the First Amendment. *Id*. at 425-26.

We begin by explaining why a case might not be a *Chevron* case even if one or more of the briefs argue for *Chevron* deference, and why even determining whether a court "applied" *Chevron* is surprisingly difficult. We then describe our sampling of cases and the details of what we found in the opinions.

3.1 The Complexities of Whether the Court Should and Did Apply *Chevron*

3.1.1 Should

While the absence of citations to *Chevron* or similar deference arguments in the briefs is a good indication that the Supreme Court did not have to address *Chevron*, the reverse is not true. The Court may have had other grounds upon which to decide the case, and therefore did not need to reach the question of *Chevron*. In other words, not every case with a brief arguing for *Chevron* deference is a case that actually requires the Supreme Court to engage in a *Chevron* analysis. Even putting aside opportunistic or defensive briefs, most cases involve multiple issues of law or reasoning, and the relevance of some will depend on the answer given to others.[50] While litigants need to address all issues, the Supreme Court, having the last word, only needs to address those issues that are necessary given its decision on others. For example, if the case involves an attack on (1) the constitutionality of a statute, (2) the legality of the agency regulation under the statute, and (3) the legality of agency action under the regulation, the litigants' briefs will address each one, but the Supreme Court can find against the agency on any of the three grounds, with no need to address the other two. Similarly, the Supreme Court should normally refuse to consider a *Chevron* argument if it was not raised in the lower courts.[51]

[50] Regarding the aside, opportunistic or incompetent litigants might argue for *Chevron* deference even when it does not apply, and opponents might make a defensive argument against *Chevron* deference precisely to guard against an erroneous application of *Chevron*.

[51] *See, e.g.*, Newport v. Fact Concerts, 453 U.S. 247, 275 n.4 (1981) (internal citation omitted) ("This Court has considered issues not raised in the courts below only in 'exceptional cases or particular circumstances . . . where injustice might otherwise result.'"); Schiro v. Farley, 510 U.S. 222, 228 (1994) ("[W]e ordinarily do not review claims made for the first time in this Court."); *see also* Upper Skagit Indian Tribe v. Lundgren, 128 S. Ct. 1649, 1656 (2018) (Thomas, J., dissenting) (internal quotation marks and citation omitted) ("But this Court will resolve arguments raised for the first time in the merits briefs when they are a predicate to an intelligent resolution of the question presented and thus fairly included within the question presented.").

3.1.2 Did

As repeatedly mentioned above, neither we nor EB code whether the Supreme Court is substantively faithful to the spirit of *Chevron*—i.e., whether the Court actually defers to the agency when, according to *Chevron*, it should.[52] For instance, if the Supreme Court avoids deferring to the agency by disingenuously claiming that a statute is clear, both sets of authors would still say that the Court "applied" *Chevron*.

Even in this formalistic view, however, the question of "application" of *Chevron* is much more ambiguous than might at first appear, as conceptions of formalistic fidelity to the *Chevron* test exist along a continuum. On one end, a narrow conception of "apply" would require the Supreme Court's opinion to explicitly address all three steps of the *Chevron* framework. On the other end, a broad conception would account for judicial economy, and count any case in which the Supreme Court addressed the central crux of *Chevron*'s analysis in its opinion, perhaps even without requiring an explicit acknowledgment that the Court was doing so. For example, if the Supreme Court views an agency's interpretation as plainly unreasonable—and therefore not entitled deference—, the broad conception of "applying" *Chevron* is satisfied as long as the Supreme Court addresses Step Two; by contrast, the narrow conception would require the Court's opinion to formulaically address first whether the regulation was promulgated with the force of law (Step Zero) and whether the statute is ambiguous (Step One).

EB were evidently cognizant of this definitional ambiguity, as they acknowledge both broad and narrow approaches in their article. With respect to the former, EB expressly note that "the Court in some *Chevron*-eligible cases did not apply *Chevron* . . . because the statute so clearly supported the agency that invoking a deference regime was unnecessary."[53] As a case in point, EB reference the Supreme Court's analysis in *California Dental Ass'n v. FTC*, in which the Court declared it "ha[d] no occasion to review the [respondent's] call for deference . . . [as] the interpretation urged in respondent's brief [was] clearly the better reading of the statute under ordinary principles of construction."[54] Nevertheless, EB's actual

[52] Eskridge & Baer, *supra* note 3, at 1218.
[53] Eskridge & Baer, *supra* note 3, at 1125–26.
[54] 526 U.S. 756, 766 (1999); Eskridge & Baer, *supra* note 3, at 1215.

coding scheme falls on the narrower side of the spectrum, as they "coded as *not* applying the *Chevron* framework [cases] when the Court cited *Chevron* or a *Chevron* precedent but announced that it need not decide whether *Chevron* applies."[55]

While reasonable minds may differ on the normative value of these approaches, the distinction is highly important for interpreting EB's results. Different definitions of "application" reveal distinct insights about the Supreme Court's behavior. Failing to mechanically apply each element of a test is one thing; failing to apply the test in any capacity is quite another. While we lean towards the broad conception of "applying" *Chevron*, we simply report what the Supreme Court actually did in the sample cases we read, and let readers decide for themselves.

3.2 Cases in Which Both Parties and the SG as *Amicus* Cited *Chevron* (and Asked for Deference)

To address these issues, we first examined all eight of EB's 191 critical cases where both parties' briefs and the SG's *amicus* brief cited *Chevron* (yet the Supreme Court did not apply *Chevron* according to EB). In all of these cases, at least one of the parties or the SG also asked for deference. *Prima facie*, these are the cases that are most likely to warrant application of *Chevron*.

However, in only two cases did the Supreme Court clearly not apply the *Chevron* test even though it should have. These two cases are *Mountain States Telephone & Telegraph Co. v. Pueblo of Santa Ana*[56] and *Olmstead v. L.C.*[57] In both cases, the Court proceeded to its own interpretation of an avowedly ambiguous statute without explaining why the agency's interpretation was not entitled to the deference that the SG and one of the parties had urged.[58] In *Mountain States*, the majority opinion made no

[55] Eskridge & Baer, *supra* note 3, at 1215.
[56] 472 U.S. 237 (1985).
[57] 527 U.S. 581 (1999).
[58] *See Mountain States*, 472 U.S. at 239 (avowing in the first paragraph of the unanimous opinion that the dispute is about the interpretation of § 17 of the Pueblo Lands Act of 1924); *Olmstead*, 527 U.S. at 587 (noting in the first sentence of the majority opinion that "[t]his case concerns the proper construction of the antidiscrimination provision contained in the public services portion (Title II) of the Americans with Disabilities Act of 1990 (ADA).").

reference to *Chevron* at all. It merely noted at the very end of its opinion that its own interpretation comported with "[t]he uniform contemporaneous view of the Executive Officer responsible for administering the statute and the District Court with exclusive jurisdiction over . . . actions brought under the [statute]," which "'is entitled to very great respect.'"[59] Meanwhile, in *Olmstead*, the majority opinion expressly declined to engage with the question of *Chevron*. Instead, the Supreme Court applied *Skidmore* deference and upheld the agency's interpretation, noting that it could "properly resort to [the agency's views] for guidance" and that such deference was sufficient.[60]

By contrast, in two other cases, the Supreme Court did apply *Chevron*, albeit in abbreviated form. In *Ragsdale v. Wolverine World Wide, Inc.*,[61] the 5-4 majority opinion explicitly declined to give *Chevron* deference because it found the agency's regulation patently unreasonable, no matter how much discretion the agency may have had in administering the statute.[62] That is, *Ragsdale* went straight to Step Two. Conversely, in *General Dynamics Land Systems, Inc. v. Cline*, the 6-3 majority opinion stopped its analysis at Step One, holding that deference under *Chevron* or any other test was inappropriate because "regular interpretive method leaves no serious question" and "the Commission [was] clearly wrong."[63] We doubt that a statute can truly be clear when the Supreme Court majority and minority disagree about its "clear" meaning, as they did here. Nevertheless, formally speaking, the Supreme Court did apply *Chevron* in both *Ragsdale* and *General Dynamics*.

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[59] *Mountain States*, 472 U.S. at 254 (quoting Edwards' Lessee v. Darby, 12 Wheat. 206, 210 (1827)). It is worth noting that according to the dissent, any deference to the agency's interpretation may have been inappropriate given canons of constructions that favor "preserving Indian rights and title" when statutes are ambiguous. *Id.* at 270 n.36. *Accord* Cobell v. Norton, 240 F.3d 1081, 1101 (D.C. Cir. 2001) (holding that *Chevron* deference does not apply in Indian law cases).

[60] *Olmstead*, 527 U.S. at 598 (internal citations and quotation marks omitted) (quoting Skidmore v. Swift & Co., 323 U.S. 134, 139-40 (1944)). ("We need not inquire whether the degree of deference described in *Chevron* is in order; [i]t is enough to observe that the well-reasoned views of the agencies implementing a statute constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."). A possible explanation for this position is that the majority could not agree on *Chevron* Step Zero or Step One (see the remark in Justice Stevens's concurrence that coalitions were hard to form, *id*. at 607-08).

[61] 535 U.S. 81 (2002).

[62] *Id.* at 86, 88, 95–96.

[63] 540 U.S. 581, 600 (2004).

In the remaining four cases in which *Chevron* was cited by both parties and the SG, the Supreme Court sidestepped the *Chevron* analysis by deciding the case on grounds that rendered moot the *Chevron* question. In *Murphy v. UPS*[64] and *Albertson's, Inc. v. Kirkingburg*,[65] the Supreme Court assumed that Equal Employment Opportunity Commission (EEOC) regulations were valid without reaching the question of deference.[66] In both cases, the Supreme Court's decisions turned on matters unrelated to the EEOC's interpretations, obviating the need to engage in a deference analysis. In *Wisconsin Department of Health & Family Services v. Blumer*,[67] the Supreme Court did apply some form of deference under *Mead*.[68] But the question presented involved a state statutory provision made pursuant to a cooperative federalism scheme,[69] and even though the agency had promulgated a proposed rule affording states discretion when implementing the federal statute, the Court's decision centered on the adequacy of the state's decision—not that of the agency.

The final case in this group, *Edelman v. Lynchburg College*,[70] was more complex. The opinion of the Court found "the EEOC rule not only a reasonable one, but the position [it] would adopt even if there were no formal rule and [it] were interpreting the statute from scratch."[71] As a result, the majority cited *Chevron* but saw "no occasion to defer and no point in asking what kind of deference, or how much."[72] No Justice dissented in the outcome. Justice O'Connor dissented from the reasoning, favoring *Chevron* deference instead.[73] Her dissenting opinion suggests that Step Zero might have been contentious or required overturning a precedent, since the Supreme Court had "previously held that because the EEOC

[64] 527 U.S. 516 (1999).

[65] 527 U.S. 555 (1999).

[66] *Murphy*, 527 U.S. at 523 ("Assuming without deciding that [the EEOC's] regulations are valid, petitioner has failed to demonstrate that there is a genuine issue of material fact as to whether he is regarded as disabled."); *Albertson's*, 527 U.S. at 563 n.10 ("As the parties have not questioned the regulations and interpretive guidance promulgated by the EEOC . . . , for the purposes of this case, we assume, without deciding, that such regulations are valid, and we have no occasion to decide what level of deference, if any, they are due.").

[67] 534 U.S. 473 (2002).

[68] *Id.* at 497.

[69] *Id.* at 489.

[70] 535 U.S. 106 (2002).

[71] *Id.* at 114.

[72] *Id.*

[73] *Id.* at 120. Justice Thomas filed a concurrence based on the EEOC's rule being "reasonable," but also joined the majority opinion.

was not given rulemaking authority to interpret the substantive provisions of Title VII, its substantive regulations do not receive *Chevron* deference."[74] This might have been the reason the majority sidestepped the issue. If so, we think this is a legitimate exercise of judicial economy, as the question of *Chevron* deference did not need to be resolved in this case and could be left for a future case if the agency were ever to change its interpretation.[75]

3.3 Cases Without an SG *Amicus* Brief in Which Both Parties Cited *Chevron* and One Asked for Deference

We next examined a random sample of 10 cases from the 30 cases without an SG *amicus* brief in which both parties[76] cited *Chevron* and at least one asked for deference (but the Court did not apply *Chevron* according to EB).[77] In 28 of these cases, the SG represented the petitioner or the respondent. *Prima facie*, these cases are again strong candidates for *Chevron* applicability.

Yet under our reading of the opinions, the Court failed to apply *Chevron* in only three of the ten cases: *INS v. National Center for Immigrants' Rights*,[78] *Public Lands Council v. Babbitt*,[79] and *Jama v. ICE*.[80] The first two cases ruled on the legality of agency regulations under the authorizing act. While the Court found for the agency in both cases, it did so based on its own reading of the statute—not by deferring to the agency. Similarly, in the third case (*Jama*), the Court upheld a formal adjudicatory decision by the agency, but again relied on its own reading of the statute.

[74] *Id.* at 122.

[75] An agency's changed interpretation is entitled to *Chevron* deference. *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005) (citing Smiley v. Citibank (S.D.), N. A., 517 U.S. 735, 742 (1996)) ("Agency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework. . . . For if the agency adequately explains the reasons for a reversal of policy, 'change is not invalidating, since the whole point of Chevron is to leave the discretion provided by the ambiguities of a statute with the implementing agency.'"). *See generally* David M. Gossett, Chevron*, Take Two: Deference to Revised Agency Interpretations of Statutes*, 64 U. CHI. L. REV. 681 (1997).

[76] Where multiple respondents or petitioners filed briefs, only those cases in which *all* briefs cited *Chevron* were included in this analysis. There were two cases where only one of multiple respondents or petitioners cited *Chevron*; these cases were thus not included in this group but rather in Section 3.4.

[77] Based on our coding of the briefs, we identified the full list of cases that met these criteria, and then used the "sample" function in R to select ten cases.

[78] 502 U.S. 183 (1991).

[79] 529 U.S. 728 (2000).

[80] 543 U.S. 335 (2005).

One other case could be characterized as failing to apply *Chevron*, but in our view is better understood as a struggle to establish the meaning of *Chevron* shortly after it was decided in 1984. In the 1987 case of *INS v. Cardoza-Fonseca*,[81] Justice Stevens's majority opinion and Justice Scalia's concurrence explicitly agreed that the INS's interpretation was not entitled to *Chevron* deference, but sharply disagreed about the reason. Justice Scalia thought the interpretative question was settled by the statute's "plain meaning" (*Chevron* Step One), obviating the need for further analysis.[82] By contrast, Justice Stevens suggested that even under *Chevron*, "a pure question of statutory construction [is] for the courts to decide."[83] This "explicit" "effort to re-establish judicial supremacy"[84] drew a sharp rebuke from Justice Scalia,[85] while Justice Powell's dissent found the statute ambiguous and advocated deference to the "reasonable" agency interpretation.[86]

In three other cases, the Court was right not to apply *Chevron*. In *FEC v. Akins*,[87] only the second of two certified questions would have been eligible for *Chevron* deference, but the Court remanded the case for further proceedings after answering just the first one.[88] In *Stone v. INS*,[89] the agency had not adopted any interpretation of the issue at hand, so there was nothing to which the Court could defer.[90] Similarly, in *Alexander v. Sandoval*,[91] the agency did not and could not adopt a regulation on the question at issue, which was the existence of a private right of action.[92]

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[81] 480 U.S. 421 (1987).

[82] *Id.* at 452-53; *see also id.* at 450 (Blackmun, J., concurring) (arguing that the "agency's previous interpretation of the statutory term is so strikingly contrary to plain language and legislative history").

[83] *Id.* at 446.

[84] Sunstein, *supra* note 18, at 190 & n.13.

[85] 480 U.S. 421, 454-55.

[86] *Id.* at 459-61.

[87] 524 U.S. 11 (1998).

[88] *Id.* at 28-29. Not even Justice Scalia, one of *Chevron*'s most ardent supporters, took issue with this aspect of the majority's opinion in his dissent. *See id.* at 29-37 (focusing entirely on Scalia's differing reading of the statutory provision at issue in the first question).

[89] 514 U.S. 386 (1995).

[90] *See id.* at 418 (Breyer, J., dissenting) (explaining why the regulation that the INS claimed deserved deference was not pertinent for the statutory interpretation question at hand).

[91] 532 U.S. 275 (2001).

[92] Concretely, "[t]his case present[ed] the question whether private individuals may sue to enforce disparate-impact regulations promulgated under Title VI of the Civil Rights Act of 1964." *Id.* at 278. The majority opinion accepted as given the structure of the Act as laid down by pre-*Chevron* precedents. *Id.* at 281 & n.1. According to

In the three remaining cases, the Court arguably did apply *Chevron*. In *United States v. LaBonte*,[93] the majority opinion found the statute unambiguous and explicitly declined to grant *Chevron* deference—a correct application of *Chevron* Step One, however disingenuous.[94] The same happened in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*,[95] except that the majority also provided an alternative ground "even were [it] to agree with respondents" that the statute was not clear.[96] In *NASA v. Federal Labor Relations Authority*,[97] the Court equivocated between deference and supplying its own interpretation.[98] The likely reason was that the case involved the articulation of two statutes, only one of which the respondent agency was charged to administer, raising the question whether *Chevron* could apply in this circumstance.[99] Since the Court ultimately agreed with the agency, providing alternative grounds may have been a legitimate way of reserving this complex question for another day.

3.4 Remaining Cases in Which at Least One Party or the SG as *Amicus* Cited *Chevron* and Asked for Deference

Finally, we examined a random sample of eighteen of the remaining cases: eight from the set of cases in which some party cited *Chevron* (and argued for deference) while the SG did not (14 cases in

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the majority's reading of those precedents, §§ 601 and 602 of the Act constituted separate regimes, and whereas § 601 had a recognized private right of action, disparate impact regulations had been passed under § 602. *Id.* at 279-84. (The latter regulations did not address private rights of action. Besides, the majority also insisted that "private rights of action to enforce federal law must be created by Congress." *Id.* at 286-91.) The dissent took issue with the majority's reading of the pre-*Chevron* precedents, but seemed to accept that they need not be revisited after *Chevron*. *See id.* at 310-11 ("If we were writing on a blank slate . . .").

[93] 520 U.S. 751 (1997).

[94] *Id.* at 762 & n.6. The dissent explicitly found the statute ambiguous and advocated *Chevron* deference. *See id.* 768-77.

[95] 531 U.S. 159 (2001). Again, the dissent explicitly advocated *Chevron* deference. *See id.* at 191-92.

[96] *Id.* at 172. Eskridge and Baer explain that they coded the case as not applying *Chevron* because the alternative ground—the constitutional avoidance canon—allowed the Court to "reject[] the Corp's construction of the Clean Water Act Amendments without reaching the *Chevron* issue." Eskridge & Baer, *supra* note 3, at 1221.

[97] 527 U.S. 229 (1999).

[98] *See id.* at 231 (resting its conclusion on "the plain text of the two statutes, buttressed by administrative deference and Congress' countervailing policy concerns"); *id.* at 234 ("The Authority's conclusion is certainly consistent with the [statute] and, to the extent the statute and congressional intent are unclear, we may rely on the Authority's reasonable judgment."); *id.* at 237 ("Employing ordinary tools of statutory construction, in combination with the Authority's position on the matter, we have no difficulty concluding that . . .").

[99] *See id.* at 327 ("[Petitioners] add that the [FLRA] has no congressional mandate or expertise with respect to the IGA, and thus we owe the Authority no deference on this score. It is unnecessary for us to defer, however, because a careful review of the relevant IGA provisions plainly favors the Authority's position.").

total[100]), and ten from the set of cases in which the SG cited *Chevron* (and asked for deference) when at least one party did not (30 cases in total).[101] These constellations present less strong signals of *Chevron* applicability than those in Sections 3.2 and 3.3. We were thus not surprised that, at least under our reading, *Chevron* was inapplicable in most of these cases, including cases that were governed by more specific precedent. Only two of the eighteen cases clearly failed to apply *Chevron*.

In eleven cases, a *Chevron* analysis was not appropriate or necessary given the specific facts of the case as construed by the Court. In *Musick, Peeler, & Garrett v. Employers Insurance of Wausau*[102] and *Yates v. Hendon*,[103] the only agency interpretations at issue were an *amicus* brief and an advisory opinion, respectively, which are not eligible for *Chevron* deference under *Mead*.[104] Similarly, in *Estate of Cowart v. Nicklos Drilling Co.*[105] and *Huffman v. West Nuclear*,[106] the agency's interpretation was, in the Court's view, a mere litigating position, which is not entitled to *Chevron* deference either.[107] Meanwhile, in *Gardebring v. Jenkins*,[108] *Melendez v. United States*,[109] and *Norfolk Southern Railway v. Shanklin*,[110] the key issue involved interpreting the agencies' *regulations*, rather than any *statutory* interpretation implicit

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[100] This includes one case, *Smith v. City of Jackson*, 544 U.S. 228 (2005), in which the SG did not file a brief, but only one party cited *Chevron* (and argued for deference); and two cases, *Louisiana Public Service Commission v. FCC*, 476 U.S. 355 (1986) and *City of New York v. FCC*, 486 U.S. 57 (1988), in which the SG—as one of the respondents in the case—did not ask for *Chevron* deference while the non-federal respondent did.

[101] Based on our coding of the briefs, we identified the full list of cases that met these criteria, and then used the "sample" function in R to select eight cases from the first set and ten cases from the second.

[102] 508 U.S. 286 (1993).

[103] 541 U.S. 1, 18 (2004).

[104] In *Yates*, the Court applied *Skidmore*. 541 U.S. at 18. Admittedly, *Musick* was decided long before *Mead*. But briefs and similar documents had explicitly not received *Chevron* deference even before *Musick*. *Cf.*, *e.g.*, Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 326 n.5 (1992) (noting that "[w]hile both Darden and the United States cite a Department of Labor 'Opinion Letter' as support for their separate positions, . . . neither suggests that we owe that letter's legal conclusions any deference under *Chevron*").

[105] 505 U.S. 469 (1992).

[106] 486 U.S. 663 (1988).

[107] *See, e.g.*, Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 213 (1988).

In *Estate of Cowart*, the agency had changed its position during litigation to agree with the court's decision below, and did not ask the Court to defer to its new interpretation. *See* 505 U.S. at 476. As a result, the Court interpreted the statute for itself and found that it unambiguously aligned with the lower court's decision. *Id.* at 476-77.

Huffman was more complicated because the Court expressed confusion as to whether the agency's current position was inconsistent with earlier ones, or whether the agency had adopted "*any* interpretation" prior to litigation. *See* 486 U.S. at 673, n.9. But the Court could explicitly bracket this question and the ensuing degree of appropriate deference because the Court agreed with the agency's position anyway.

[108] 485 U.S. 415 (1988).

[109] 518 U.S. 120 (1996).

[110] 529 U.S. 344 (2000).

in those regulations.[111] And in *O'Connor v. Consolidated Coin Caterers Corp.*[112] and *Meyer v. Holley*,[113] the Court interpreted parts of statutes that were not within the purview of the agency's regulation, such that *Chevron* could not apply: both cases concerned elements of a private right of action, whereas the agencies involved had merely promulgated rules for public enforcement.[114] Similarly, in *Cleveland v. Policy Management Systems Co.*,[115] the Court addressed an estoppel question that was arguably only indirectly tied to the agency's interpretation; in any event, the agency's position was contained in a mere guidance.[116] Lastly, in *INS v. Doherty*,[117] the Court found it unnecessary to consider a third independent

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[111] In *Gardebring*, the majority explicitly noted that "there is no claim in this Court that the regulation violates any constitutional or statutory mandate," and deferred to the agency's interpretation of its regulation. 485 U.S. at 430, 432. In *Melendez*, the majority agreed with the Government's interpretation of the Sentencing Guidelines, 518 U.S. at 129, and in so doing, avoided the question whether under the statute, the Sentencing Commission *could* have interpreted the Guidelines' provisions in an alternative way—a question that the dissent took up, and applied *Chevron* to resolve, *id.* at 135-36. In *Norfolk Southern*, there was no question that the interpretation of the regulation advocated by the agency (the Federal Highway Administration) in its brief would have been compatible with the statute. But the Court refused to defer to the agency's position because it "contradict[ed] the regulation's plain text" and "contradict[ed] the agency's own previous construction that this Court adopted as authoritative in *Easterwood*." 529 U.S. at 356.

[112] 517 U.S. 308 (1996).

[113] 537 U.S. 280 (2003).

[114] *O'Connor* tasked the Court with deciding whether lower courts could impose certain *prima facie* requirements on claims brought under the Age Discrimination in Employment Act (ADEA), and the Court answered this question by simply looking at the plain text of the statute. 517 U.S. at 309. Though the EEOC had passed a regulation that spoke to the underlying ADEA issue (Brief for Petitioner at 10, O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308 (1996) (No. 95-354)), the case was about the burden of production in civil suits, not the EEOC's administration or enforcement of the statute.

Similarly, in *Meyer*, the question before the Court involved vicarious liability in private lawsuits under the Fair Housing Act (FHA), a statute that the Department of Housing and Urban Development (HUD) administers. *See* 537 U.S. at 283, 288. While HUD had passed regulations pertaining to administrative complaints under the FHA—which the Court discussed as a side issue, and considered a reasonable interpretation under *Chevron*—those regulations said nothing about civil actions. *See id.* at 287-88.

[115] 526 U.S. 795 (1999).

[116] *See* Brief for United States & Equal Employment Opportunity Commission as Amici Curiae Supporting Petitioner, at 18-19, *Cleveland*, 526 U.S. 795 (No. 97-1008) (treating as separate questions the EEOC's interpretation of the conditions for ADA claims on the one hand, and estoppel of a private plaintiff for a position taken in Social Security proceedings on the other); Christensen v. Harris County, 529 U.S. 576 (2000) (citing EEOC v. Arabian American Oil Co., 499 U.S. 244, 256-58 (1991)) (noting that "interpretive guidelines do not receive *Chevron* deference"); United States v. Mead Corp., 533 U.S. 218 (2001). To be sure, *Christensen* and *Mead* were both decided after *Cleveland*. In its brief, the SG argued that *EEOC v. Arabian* was predicated on the absence of EEOC rulemaking authority for Title VII of the ADA, whereas the EEOC has rulemaking authority for Title I, Brief for the United States, *supra*, at 18; this position was implicitly rejected by *Christensen*.

[117] 502 U.S. 314 (1992).

ground—the only one implicating *Chevron*—for the Attorney General's decision under review, as the Court had already found the decision justified based on the first two grounds.[118]

Of the remaining seven opinions, two cases—*Cedar Rapids Community School District v. Garret F.*[119] and *Bowen v. Yuckert*[120]—were governed by more specific precedent than *Chevron*. In *Cedar Rapids*, the statutory interpretation question was governed by an earlier case that had applied *Chevron* deference to this very question and upheld the agency's interpretation as reasonable.[121] In *Bowen*, the Court applied a deference framework from a prior case that directly related to the agency and statute at issue.[122]

Next, two cases could be viewed as "applying" *Chevron*, but only if one grants that the Court may dispense with any explicit mention of *Chevron* or its steps if, in the Court's view, "the statute so clearly support[s] the agency that invoking a deference regime [is] unnecessary."[123] In *J.E.M. Agricultural Supply, Inc. v. Pioneer Hi-Bred International, Inc.*[124] and *Metropolitan Stevedore Co. v. Rambo*[125] the Court neither cited *Chevron* nor invoked any deference regime; but the Court decided in favor of the agency anyway, considering Congress's intent to be clear. (As always, we put aside the question whether it could truly be said that the statute was "clear" when the majorities and dissents disagree about its interpretation, as was the case in *J.E.M.*[126])

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[118] *Doherty*, 502 U.S. at 322.

[119] 526 U.S. 66 (1999).

[120] 482 U.S. 137 (1987).

[121] *See* Irving Independent School District v. Tatro, 468 U.S. 883 (1984). In that case, the Court did not explicitly cite *Chevron*, perhaps because *Chevron* was decided just a month before. But the dissent in *Cedar Rapids* makes clear that the Court applied *Chevron* in *Tatro*, even if the case was not referenced by name. 526 U.S. at 80 (Thomas, J., dissenting) (explaining the steps of *Chevron* and arguing that the Court in *Tatro* incorrectly applied them).

[122] Heckler v. Campbell, 461 U.S. 458 (1983). The *Heckler* test provides that when "the statute expressly entrusts the Secretary [of the HHS] with the responsibility for implementing a provision by regulation, [the Court's] review is limited to determining whether the regulations promulgated exceeded the Secretary's statutory authority." *Id.* at 466.

[123] Eskridge & Baer, *supra* note 3, at 1125-26.

[124] 534 U.S. 124 (2001).

[125] 515 U.S. 291 (1995).

[126] *J.E.M.*, 534 U.S. at 143-44, 147.

Similarly, in *Sutton v. United Airlines*,[127] the Court did not explicitly cite *Chevron*. But its holding that "no agency has been delegated authority to interpret the term"[128] in dispute could be read as an implicit application of *Chevron* Step Zero. One may also see an implicit *Chevron* Step Two argument in the Court's holding that the agency's interpretation is "impermissible . . . [b]ecause . . . by its terms, the [statute] cannot be read in this manner."[129]

This leaves two cases in our random sample of eighteen where it seems the Court should clearly have applied *Chevron* but did not: *Louisiana Public Service Commission v. FCC*[130] and *West v. Gibson*.[131] In both cases, the Court acknowledged that the statute was not clear, but nevertheless proceeded to its own interpretation of the statute rather than mentioning, much less applying, *Chevron*, or even mentioning the agency's interpretation.[132] And while the Court ultimately ruled in favor of the agency's interpretation in *West*, in *Louisiana* it did not. The lack of deference was thus consequential.

In sum, only two out of the eighteen sampled cases squarely fit EB's critical finding that the Court fails to apply *Chevron* when it should. Three more might or might not be seen as failing to apply *Chevron*, depending on whether one thinks application must be explicit. In the other thirteen cases, (a) *Chevron* was inapplicable from the outset, (b) the Court decided the case on other legitimate grounds, or (c) it performed at least an abbreviated *Chevron* analysis.

4 Conclusion

Reassuringly, our examination of EB's 191 critical cases has shown that the Court *does* apply the *Chevron* framework in most cases where it appears that it should. Accordingly, the fraction of cases

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[127] 527 U.S. 471 (1999).
[128] *Id.* at 479.
[129] *Id.* at 482.
[130] 476 U.S. 355 (1986).
[131] 527 U.S. 212 (1999).
[132] *See Louisiana*, 476 U.S. at 379 (acknowledging that the statute at issue "contain[ed] some internal inconsistencies, vague language, and areas of uncertainty," yet proceeding to invalidate the FCC's preemption of a state statute without any trace of deference); *West*, 527 U.S. at 217 (interpreting the statute according to its "language, purposes, and history," not even mentioning the agency involved [the EEOC]).

where the Court fails to apply *Chevron* is likely around 20%, rather than 75%.[133] In reaching this result, we were able to build on the foundations that EB laid in assembling their enormous data set of 1,014 cases and sharing it with the world. This allowed us to focus our energies on the 191 cases that EB had isolated as the critical ones. In the future, we hope that more researchers will accept EB's invitation to extend their work, and improve our understanding of courts' deference to agencies.[134]

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[133] The estimate of 20% is based on the following: (1) we take as given EB's estimate that the Court did apply *Chevron* in 76 cases when it should have; (2) we take from Section 2 that *Chevron* was not applicable in at least 104 of the other 191 cases where EB thought that *Chevron* should apply; (3) we extrapolate from the sample described in Section 3 that (a) *Chevron* was applicable in at most half of the remaining 87 of EB's 191 critical cases (4/8, 7/10, and 5/18, respectively, of the cases sampled in Sections 3.2, 3.3, and 3.4), but (b) within that subset, the Court did in fact apply *Chevron* in up to half and at least $\frac{3}{8}$ of the cases (2/4, 4/7, and 0-3/5 cases, respectively), depending on one's view of "implicit application." With these assumptions, the Court's rate of failure to apply *Chevron* is less than $87 \times \frac{1}{2} \times \frac{5}{8} / (76 + 87 \times \frac{1}{2}) = 23\%$. This estimate is biased upwards, however, because Section 3 oversampled the cases with stronger indications of *Chevron* applicability (Sections 3.2 and 3.3), whereas most of the cases that we did not read fall into the category of Section 3.4, where we indeed found only a smaller fraction ($<\frac{1}{3}$) of *Chevron*-eligible cases.

[134] For recent work in this direction, see, for example, Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1 (2017).