THE CHIEF JUSTICE AND STATUTORY CONSTRUCTION: HOLDING THE GOVERNMENT'S FEET TO THE FIRE

Pratik A. Shah†

TABLE OF CONTENTS

INTRODUCTION

During his confirmation hearings, Chief Justice Roberts famously remarked that "[j]udges are like umpires," whose "job [is] to call balls and strikes, and not to pitch or bat."[1] The much-debated merits of that analogy aside, this Essay examines the ways in which the Chief Justice's approach to statutory construction—and, to a certain extent, that of the Roberts Court more generally—reflects his sentiment that judges, like

† Partner and co-head of Supreme Court and Appellate practice, Akin Gump Strauss Hauer & Feld L.L.P. Mr. Shah extends special thanks to Matthew Scarola for his excellent research assistance.

1 *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55–56 (2005) (statement of John G. Roberts, Nominee to be Chief Justice of the United States).

umpires, "make sure everybody [*read: the Government*] plays by the rules."[2]

This Essay, based on my Symposium panel remarks,[3] observes that the Chief Justice has not been reluctant to cabin perceived overreach by the federal government on matters of statutory construction. That has been most evident in cases involving questions of federal criminal law and agency deference. In both of those contexts, the Chief Justice has construed statutes in ways that limit the power of the government, particularly the prosecutors and agencies charged with enforcing federal law. Even in cases where the Chief Justice has ultimately sided with the government, he has employed oral argument—an especially effective medium for getting the Solicitor General's attention—to urge greater transparency and restraint in the exercise of federal authority.

I. FEDERAL CRIMINAL CASES

The Chief Justice has voted to limit the substantive scope of federal criminal offenses on multiple occasions, writing for the majority in several high-profile cases. Although the Chief Justice's pro-defendant votes might seem surprising to some at first blush, they can be understood as efforts to constrain executive power—and, in particular, to rein in prosecutorial overreach.

A. Bond v. United States

So far as Supreme Court cases go, the facts of *Bond v. United States*[4] are unusually intriguing. Carol Anne Bond was a microbiologist.[5] Myrlinda Haynes was Bond's "closest friend."[6] Their friendship soured, to say the least, when Haynes became pregnant by Bond's husband.[7] Bond stole a chemical from work, ordered another online, and schemed to have Haynes "touch the chemicals and develop

---

2 *Id.* at 55. *Cf.* Kiel Brennan-Marquez, *The Philosophy and Jurisprudence of Chief Justice Roberts*, 2014 UTAH L. REV. 137, 167 (2014) ("The [umpire] metaphor focuses, instead, on the crucial role that judges play in safeguarding the rule of law, the organizing principle that ensures legitimacy in government, just as the rules of baseball ensure the game's coherence.").

3 *See* Pratik A. Shah, Address at the *Cardozo Law Review* Symposium: Ten Years the Chief: Examining a Decade of John Roberts on the Supreme Court (Oct. 15, 2015), https://cardozolaw.hosted.panopto.com/Panopto/Pages/Viewer.aspx?id=bdfbbd11-5351-4f34-8bb5-787f10f11cb2.

4 134 S. Ct. 2077 (2014).

5 *Id.* at 2085.

6 *Id.*

7 *Id.*

an uncomfortable rash."[8] The scheme was not terribly effective. "The chemicals that Bond used are easy to see, and Haynes was able to avoid them all but once. On that occasion, Haynes suffered a minor chemical burn on her thumb, which she treated by rinsing with water."[9]

Unfortunately for Bond, a federal law authorizes harsh sentences for those who "use . . . any chemical weapon."[10] As relevant here, the law broadly defines "chemical weapon" as including a "toxic chemical," which is broadly defined to include "any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals."[11] Though there was no dispute that Bond did not intend to kill Haynes, both of the chemicals that Bond used can be lethal.[12]

For federal prosecutors, that was apparently enough. They charged Bond with two counts of possessing and using a chemical weapon; Bond moved to dismiss.[13] Among other things, Bond argued that the federal law at issue "exceeded Congress's enumerated powers and invaded powers reserved to the States by the Tenth Amendment."[14] The district court denied Bond's motion, and, after Bond pled guilty, her case eventually reached the Supreme Court.[15]

Chief Justice Roberts delivered the Court's opinion.[16] He explained that the statute under which Bond was charged—the Chemical Weapons Convention Implementation Act of 1998[17]—was enacted to fulfill the United States' obligations under a multinational treaty.[18] The treaty was made in response to the "horrors of chemical warfare," as suffered most acutely during World War I and at least as recently as the mid-1990s.[19]

The Chief Justice's opinion leaves little doubt about the stark contrast between the warfare that prompted the international treaty and

---

8 *Id.*

9 *Id.*

10 18 U.S.C. § 229(a)(1) (2012); *id.* § 229A(a) (discussing punishment).

11 *Id.* § 229F(8) (defining "toxic chemical"); *see also id.* § 229F(1)(A) (defining "chemical weapon"); *id.* § 229A(a) (discussing punishment).

12 *Bond*, 134 S. Ct. at 2085.

13 *Id.* at 2085.

14 *Id.*

15 *Id.* at 2085–86. In an earlier round of litigation, the Court held that an "individual, in a proper case, can assert injury from governmental action taken in excess of the authority that federalism defines." Bond v. United States, 564 U.S. 211, 220 (2011) (rejecting contention that "to argue that the National Government has interfered with state sovereignty in violation of the Tenth Amendment is to assert the legal rights and interests of States and States alone").

16 *Bond*, 134 S. Ct. at 2083.

17 Chemical Weapons Convention Implementation Act of 1988, Pub. L. No. 105-277, 112 Stat. 2681-856 (codified as amended in scattered sections of 18 and 22 U.S.C.).

18 *Bond*, 134 S. Ct. at 2083.

19 *Id.* at 2083–84.

the tiff that prompted Bond's convictions. His discussion of chemical warfare invokes a painting that "depicts two lines of soldiers, blinded by mustard gas, clinging single file to orderlies guiding them to an improvised aid station."[20] "There [the soldiers] would receive little treatment and no relief; many suffered for weeks only to have the gas claim their lives."[21] Contrast the horrors of mustard gas with the question presented in this case: to quote the Chief Justice, "whether the Implementation Act also reaches a purely local crime: an amateur attempt by a jilted wife to injure her husband's lover, which ended up causing only a minor thumb burn readily treated by rinsing with water."[22]

To state the question in those terms, and with that context, is to leave little doubt about the Court's answer. The Court held that Bond's conduct was not covered by the Act, relying on purported ambiguity in the meaning of the phrase "chemical weapon"—even though "chemical weapon" was a broadly defined term that seemed, on its face, to cover the chemical deployed by Bond.[23] The Court's holding was motivated by concerns about the scope of the federal government's treaty power; namely, whether Congress, simply because it was implementing a treaty, could intrude on states' authority to address purely local crime.[24] By construing the statute to be inapplicable, the Court avoided a thorny constitutional question. Indeed, *Bond* is not the only case in which the Court's narrow construction of a federal criminal statute—in an opinion authored or joined by Chief Justice Roberts—has avoided a constitutional concern.[25]

But *Bond* is, quite plainly, about more than avoiding constitutional questions: it is about prosecutorial overreach. The Chief Justice evinced surprise about the prosecutor's charging decision[26] in this "unusual" case.[27] He noted the rarity of prosecutions under the section used to charge Bond, and that "[m]ost of those involved either terrorist plots or

---

20 *Id.* at 2083.

21 *Id.*

22 *Id.*

23 *Id.* at 2090.

24 *See id.* at 2087–93; *see also id.* at 2098–103 (Scalia, J., concurring) (concluding that statute was unconstitutional as applied to Bond).

25 *See, e.g.*, Elonis v. United States, 135 S. Ct. 2001, 2012–13 (2015) (holding that conviction under threats statute required proof of more than negligence, thereby avoiding First Amendment issue); Skilling v. United States, 561 U.S. 358, 402–09 (2010) (narrowly construing honest services fraud statute to avoid due process issue); Carr v. United States, 560 U.S. 438, 445–58, 450 n.6 (2010) (construing provision of Sex Offender Registration and Notification Act in manner that avoided ex post facto question).

26 *Bond*, 134 S. Ct. at 2085 ("Federal prosecutors naturally charged Bond with two counts of mail theft . . . . More surprising, they also charged her with two counts of possessing and using a chemical weapon.").

27 *Id.* at 2093.

the possession of extremely dangerous substances with the potential to cause severe harm to many people."[28] He then chided the federal government for its "zeal to prosecute" her.[29] The case thus comports with the view that the Chief Justice tends to interpret statutes in a manner that curbs "curious" exercises of federal governmental power.[30]

So does the next case: *Yates v. United States*.[31]

B. Yates v. United States

Fishing boat captain John Yates caught undersized fish—a civil offense punishable by fine or license suspension.[32] A Florida officer, "deputized as a federal agent," boarded Yates's ship at sea and cited Yates for possessing them.[33] The officer also directed Yates to keep the undersized fish on board, segregated in certain crates, until Yates's ship returned to port.[34] Upon the officer's departure, Yates directed a crew member to throw the fish overboard and replace them with bigger fish.[35] The crew member obliged, but ultimately confessed to the officer upon the ship's return.[36]

The United States eventually charged Yates with violating 18 U.S.C. § 1519, a provision of the Sarbanes-Oxley Act that authorizes imprisonment for up to twenty years for anyone who "knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction" of a U.S. agency.[37] The Act was enacted in response to Enron Corporation's "massive accounting fraud and revelations that the company's outside auditor, Arthur Andersen L.L.P., had systematically destroyed potentially incriminating documents."[38] The federal prosecutors took the view that Yates's fish were "tangible object[s]" within the meaning of the Act.[39]

---

28 *Id.* at 2092.
29 *Id.* at 2093.
30 *Id.* at 2090.
31 135 S. Ct. 1074 (2015) (plurality opinion).
32 *Id.* at 1079.
33 *Id.*
34 *Id.*
35 *Id.* at 1080.
36 *Id.*
37 18 U.S.C. § 1519 (2012); *see also Yates*, 135 S. Ct. at 1078.
38 *Yates*, 135 S. Ct. at 1081.
39 *Id.* at 1080.

Yates went to trial—and lost.[40] He appealed, and lost again.[41] The appeals court concluded that the text of § 1519 was "plain," and that a fish was a "tangible object" because it had "or possess[ed] physical form."[42]

The Supreme Court's grant of certiorari is itself remarkable. Yates' petition did not purport to identify a circuit split involving the Act or its interpretation—a near prerequisite for certiorari when sought by defendants in federal criminal cases.[43] Indeed, the government initially waived its response.[44] The Court's interest in the dispute is not readily explained but for its discomfort with the government's charging decision.

The Court reversed on unusual 4-1-4 lines: Justice Ginsburg penned a plurality opinion joined by the Chief Justice and Justices Breyer and Sotomayor; Justice Alito, concurring in the judgment, cast the deciding vote in Yates's favor; and Justice Kagan authored a dissent joined by Justices Scalia, Kennedy, and Thomas.[45] The opinions in Yates's favor rely on the title of § 1519;[46] the section's position in the broader statutory scheme;[47] legislative history;[48] and several canons of statutory construction.[49] The dissent concludes, through a more direct textualist route, that "[a] 'tangible object' is an object that's tangible," including a fish.[50]

Whether or not the dissent had the better of the argument, the Chief Justice had ample basis to vote to affirm Yates's conviction. Yet, he provided the fifth vote in favor of a narrower statutory construction that invalidated a federal criminal conviction—one that again appeared grossly ill-suited to the conduct.

While the Chief Justice's vote in the next case was not outcome determinative, as it was in *Yates*, he refused to "construe a criminal

---

40 *Id.*

41 *Id.* at 1081.

42 *Id.* (citations omitted).

43 *See* SUP. CT. R. 10 (discussing criteria for certiorari); *see also* Petition for Writ of Certiorari, *Yates*, 135 S. Ct. 1074 (No. 13-7451); Brief for the United States in Opposition at 9, *Yates*, 135 S. Ct. 1074 (No. 13-7451) ("[P]etitioner does not contend that [the Eleventh Circuit's] decision conflicts with the decision of any other court of appeals.").

44 *See* Waiver of Right of Respondent United States to Respond, *Yates*, 135 S. Ct. 1074 (No. 13-7451).

45 *Yates*, 135 S. Ct. at 1078 (plurality opinion); *id.* at 1089 (Alito, J., concurring); *id.* at 1090 (Kagan, J., dissenting).

46 *Id.* at 1083 (plurality opinion); *id.* at 1089–90 (Alito, J., concurring).

47 *Id.* at 1083–84 (plurality opinion).

48 *Id.* at 1084–85.

49 *Id.* at 1085–89; *id.* at 1089 (Alito, J., concurring).

50 *Id.* at 1091 (Kagan, J., dissenting).

statute on the assumption that the Government will use [that statute] responsibly."[51]

C. McDonnell v. United States

In 2009, Virginia voters chose Robert McDonnell to be their next Governor.[52] Within a few years of McDonnell's election, his family had received more than "$175,000 in gifts and loans" from Virginia businessman Jonnie Williams.[53] Williams's company marketed a nutritional supplement, and hoped that Virginia's public universities would help the supplement win Food and Drug Administration approval "as an anti-inflammatory drug."[54]

Federal prosecutors caught wind, and McDonnell was indicted.[55] Though McDonnell was charged under a variety of statutes,[56] the Government was ultimately "required to prove that Governor McDonnell committed or agreed to commit an 'official act' in exchange for the loans and gifts from Williams."[57] Among other things, McDonnell was accused of arranging for Williams to meet with pertinent Virginia government officials, and of hosting events at the Governor's Mansion to promote Williams's supplement.[58] A jury convicted McDonnell on several counts, and the Fourth Circuit affirmed the judgment of conviction.[59] Citing *Yates* and *Bond*, McDonnell petitioned for a writ of certiorari,[60] which the Supreme Court granted just in time for the case to be heard last Term.

Chief Justice Roberts wrote the opinion reversing for a unanimous Court. The Court narrowly construed the phrase "official act";[61] determined that the jury was instructed under an overly broad definition of that term;[62] and concluded that the error was not harmless

---

51 McDonnell v. United States, 136 S. Ct. 2355, 2372–73 (2016) (citation and internal quotation marks omitted).

52 *Id.* at 2361.

53 *Id.* at 2362–64.

54 *Id.* at 2362.

55 *Id.* at 2364–65.

56 *See id.* at 2365 ("The charges against him comprised one count of conspiracy to commit honest services fraud, three counts of honest services fraud, one count of conspiracy to commit Hobbs Act extortion, six counts of Hobbs Act extortion, and two counts of making a false statement.").

57 *Id.* at 2365.

58 *Id.*

59 *Id.* at 2366–67.

60 Petition for a Writ of Certiorari at 15, *McDonnell*, 136 S. Ct. 2355 (No. 15-474),

61 18 U.S.C. § 201(a)(3) (2012).

62 *McDonnell*, 136 S. Ct. at 2373–74.

beyond a reasonable doubt.[63] In rejecting the government's broader statutory construction, the Court explained:

> Section 201 prohibits *quid pro quo* corruption—the exchange of a thing of value for an "official act." In the Government's view, nearly anything a public official accepts—from a campaign contribution to lunch—counts as a *quid*; and nearly anything a public official does—from arranging a meeting to inviting a guest to an event—counts as a *quo*.
>
> * * *
>
> But conscientious public officials arrange meetings for constituents, contact other officials on their behalf, and include them in events all the time. The basic compact underlying representative government *assumes* that public officials will hear from their constituents and act appropriately on their concerns—whether it is the union official worried about a plant closing or the homeowners who wonder why it took five days to restore power to their neighborhood after a storm.[64]

The Court's concern, the Chief Justice explained, was "not with tawdry tales of Ferraris, Rolexes, and ball gowns. It [wa]s instead with the broader legal implications of the Government's boundless interpretation of the federal bribery statute."[65] Thus, while there was "no doubt that this case [wa]s distasteful," and "may be worse than that,"[66] the Court vacated McDonnell's convictions and remanded for further proceedings.[67]

* * * * *

One interesting feature of all three criminal cases is that the sentences imposed on the defendants were, by federal standards, not all that long. Bond could have been imprisoned "for any term of years";[68] she pleaded guilty and got six years.[69] Yates was facing twenty years in prison, but even after a trial, received only thirty days.[70] McDonnell was sentenced to two years in prison, over the Government's request for "at least ten."[71]

But as the Chief Justice remarked during oral argument in *Yates*, "every time you get somebody who is throwing fish overboard, you can

---

63 *Id.* at 2375.

64 *Id.* at 2372.

65 *Id.* at 2375.

66 *Id.*

67 *Id.*

68 Bond v. United States, 134 S. Ct. 2077, 2085 (2014) (citation omitted).

69 *Id.* at 2085–86.

70 Yates v. United States, 135 S. Ct. 1074, 1078 (2015) (maximum sentence of twenty years); *id.* at 1080–81 ("[T]he court sentenced Yates to imprisonment for 30 days . . . .").

71 *McDonnell*, 136 S. Ct. at 2367.

go to him and say: Look, if we prosecute you you're facing 20 years, so why don't you plead to a year, or something like that."[72] The problem, in short, is not the sentence imposed; it is the "extraordinary leverage that the broadest interpretation of [the] statute would give Federal prosecutors."[73] And from the Chief Justice's perspective, simply trusting the government not to abuse that leverage is not enough.[74]

To be sure, *Bond, Yates,* and *McDonnell* are unusual cases. The Chief Justice's willingness to cabin the construction of federal criminal statutes, however, has manifested itself even in cases more ordinary.[75] Further, in at least three other criminal cases, the Chief Justice has dissented to urge a construction narrower than the one embraced by the Court.[76] And in a fourth, he concurred to emphasize that prosecutor-friendly statements—in the Court's opinion—were "not necessary" for the Court's conclusion, and "should therefore not be regarded as controlling" if a particular issue "arises in a future case."[77]

Of course, this is not to say that the Chief Justice *always* votes in favor of federal criminal defendants on cert-worthy questions of statutory construction.[78] Nor is it to suggest that the cases in which the

---

72 Transcript of Oral Argument at 31, *Yates*, 135 S. Ct. 1074 (No. 13-7451).

73 *Id.*; *see also Yates*, 135 S. Ct. at 1100–01 (Kagan, J., dissenting) ("If none of the traditional tools of statutory interpretation can produce today's result, then what accounts for it? . . . [T]he real issue [is] overcriminalization and excessive punishment in the U.S. Code. . . . [Section 1519] give[s] prosecutors too much leverage and sentencers too much discretion."); *cf. Bond*, 134 S. Ct. at 2091 ("We are reluctant to ignore the ordinary meaning of 'chemical weapon' when doing so would transform a statute passed to implement the international Convention on Chemical Weapons into one that also makes it a federal offense to poison goldfish."). Some have criticized the Court for not being more candid in *Yates* about its evident concerns. *See Sarbanes-Oxley Act—Destruction of Evidence*—Yates v. United States, 129 HARV. L. REV. 361, 370 (2015) ("[B]eing candid about the . . . broader problem of overcriminalization could have had the added benefit of organizing public resistance to an ever-expanding federal code.").

74 *Cf.* United States v. Stevens, 559 U.S. 460, 480 (2010) (Roberts, C.J.) ("This prosecution is itself evidence of the danger in putting faith in government representations of prosecutorial restraint.").

75 *See, e.g.*, Rosemond v. United States, 134 S. Ct. 1240 (2014) (addressing aiding and abetting liability for violations of 18 U.S.C. § 924(c)).

76 *See, e.g.*, Ocasio v. United States, 136 S. Ct. 1423, 1440–41 (2016) (Sotomayor, J., dissenting) (dissenting from holding "that a group of conspirators can agree to obtain property 'from another' in violation of the [Hobbs] Act even if they agree only to transfer property among themselves") (Chief Justice Roberts joined in the dissent); Abramski v. United States, 134 S. Ct. 2259, 2275 (2014) (Scalia, J., dissenting) (construing the Gun Control Act of 1968) (Chief Justice Roberts joined in the dissent); United States v. Hayes, 555 U.S. 415, 430 (2009) (Roberts, C.J., dissenting) (construing "misdemeanor crime of domestic violence" in 18 U.S.C. § 922(g)(9)).

77 McFadden v. United States, 135 S. Ct. 2298, 2308 (2015) (Roberts, C.J., concurring in part and concurring in the judgment).

78 *See, e.g.*, Voisine v. United States, 136 S. Ct. 2272, 2276 (2016) (holding, over a two-Justice dissent, that defendants' prior convictions for certain reckless conduct, "as contrasted to knowing or intentional conduct[,] trigger[ed] the statutory firearms ban" that the defendants were convicted of violating); Whitfield v. United States, 135 S. Ct. 785, 789 (2015) ("We hold

Chief Justice has voted for defendants were all close ones; criminal defendants (including in *McDonnell*) have won unanimous victories.[79] But the Chief Justice's votes convey a clear message to the federal government that, at least when it comes to criminal law, it should not overplay its statutory hand.

II. AGENCY DEFERENCE

The Chief Justice's careful scrutiny of executive action has not been limited to the realm of federal criminal law. His body of work indicates a skepticism of the "vast power" of the administrative state and an unwillingness to defer reflexively to federal agencies.[80] This is not to say that the Chief Justice rejects longstanding principles of administrative law, which call for courts to afford varying levels of deference to agency decisions in matters of statutory interpretation. Instead, the Chief Justice has sought (selectively) to narrow the circumstances in which deference is appropriate and to encourage the government to act more fairly within the confines of its broad discretion.

Let's start by examining two significant cases in which the Chief Justice authored opinions—one dissenting and one majority—urging limits on *Chevron* deference.[81] (For the unfamiliar reader, *Chevron* basically stands for the proposition that "[s]tatutory ambiguities will be

---

that a bank robber 'forces [a] person to accompany him,' for purposes of [18 U.S.C.] § 2113(e), when he forces that person to go somewhere with him, even if the movement occurs entirely within a single building or over a short distance." (alteration in original)); Loughrin v. United States, 134 S. Ct. 2384, 2387 (2014) (violation of bank fraud statute did not require proof that defendant intended to defraud a bank); United States v. Apel, 134 S. Ct. 1144, 1147 (2014) (Roberts, C.J.) (holding that "a portion of an Air Force base that contains a designated protest area and an easement for a public road qualifie[d] as part of a 'military installation'" within the meaning of 18 U.S.C. § 1382).

79 *See, e.g.*, Nichols v. United States, 136 S. Ct. 1113 (2016) (discussing registration requirement under Sex Offender Registration and Notification Act); Burrage v. United States, 134 S. Ct. 881, 885, 892 (2014) (holding that a mandatory minimum sentence provision, applicable when a person unlawfully distributes certain drugs and "death or serious bodily injury results from the use of such" drugs, required proof that the use was "a but-for cause of the death or injury," "at least where use of the drug distributed by the defendant is not an independently sufficient cause of the victim's death or serious bodily injury"); Abuelhawa v. United States, 556 U.S. 816, 818 (2009) (holding that provision making it a felony "'to use any communication facility in committing or in causing or facilitating' certain felonies" was not violated by someone "making a misdemeanor drug purchase" simply "because his phone call to the dealer [could] be said to facilitate the felony of drug distribution").

80 Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 499 (2010) (Roberts, C.J.).

81 King v. Burwell, 135 S. Ct. 2480 (2015) (Roberts, C.J.); City of Arlington v. FCC, 133 S. Ct. 1863, 1877 (2013) (Roberts, C.J., dissenting).

resolved, within the bounds of reasonable interpretation, not by the courts but by the administering agency."[82]

A. City of Arlington v. FCC

In *City of Arlington v. FCC*, the Court took up the important question "whether an agency's interpretation of a statutory ambiguity that concerns the scope of its regulatory authority (that is, its jurisdiction) is entitled to" *Chevron* deference.[83] The Court thought deference appropriate; Chief Justice Roberts did not.[84]

Joined in dissent by Justices Kennedy and Alito, the Chief Justice concluded that "[a] court should not defer to an agency until the court decides, on its own, that the agency is entitled to deference."[85] Deference is appropriate "when and because Congress has conferred on the agency interpretive authority over the question at issue."[86] "An agency," he continued, "cannot exercise interpretive authority until it has it; the question whether an agency enjoys that authority must be decided by a court, without deference to the agency."[87]

The Chief Justice's opinion was animated by concern over the enormous power that administrative agencies wield.[88] Or, as the Chief Justice put it, "[i]t would be a bit much to describe the" scope of agencies' authority as "'the very definition of tyranny,' but the danger posed by the growing power of the administrative state cannot be dismissed."[89] In light of that danger, the Chief Justice concluded that "even when Congress provides interpretive authority to a single agency, a court must decide if the ambiguity the agency has purported to interpret with the force of law is one to which the congressional delegation extends."[90]

---

82 *City of Arlington*, 133 S. Ct. at 1868.

83 *Id.* at 1866.

84 Note that the Chief Justice's dissenting opinion also resisted the "jurisdiction" terminology. *See id.* at 1879–80 (Roberts, C.J., dissenting).

85 *Id.* at 1877.

86 *Id.*

87 *Id.*

88 *See id.* at 1877–79.

89 *Id.* at 1879 (referring to an earlier quotation of THE FEDERALIST NO. 47, at 324 (James Madison) (Jacob E. Cooke ed., 1961).

90 *Id.* at 1884.

B. King v. Burwell

That same principle would reemerge in one of the most consequential decisions of the Roberts Court to date: *King v. Burwell*.[91] In *King*, the Court considered a key provision of the Patient Protection and Affordable Care Act (better known as "Obamacare").[92] Among other things, the Act (i) "bars insurers from taking a person's health into account when deciding whether to sell health insurance or how much to charge"; (ii) "generally requires each person to maintain insurance coverage or make a payment to the Internal Revenue Service"; and, relevant here, (iii) "gives tax credits to certain people to make insurance more affordable."[93] The case concerned whether those tax credits are available in States whose insurance-plan marketplaces were established by the Federal Government rather than the State.[94] Or, to borrow from the dissent, the key question was whether the statutory phrase "Exchange established by the State" (the trigger for tax credits) means "Exchange established by the State or the Federal Government."[95]

The stakes that were riding on the Court's judgment are difficult to overstate. To skip past the details, the upshot is that if tax credits were not available on exchanges established by the Federal Government, the market for health insurance in the States served by those exchanges would collapse.[96] Writing for a six-Justice majority, Chief Justice Roberts concluded that "the statutory scheme compel[led]" the Court to hold that credits were available, because a contrary reading "would destabilize the individual insurance market in any State with a Federal Exchange"—thwarting Congressional intent.[97]

For present purposes, what is most notable about the Chief Justice's opinion is not the result it reached, but rather the method of its reasoning. The Internal Revenue Service (IRS) had promulgated a rule instructing that tax credits were available in States with a Federal Exchange.[98] The Fourth Circuit, in the decision under review, had afforded *Chevron* deference to that interpretation.[99] The Chief Justice did not.[100] He reasoned:

---

91 135 S. Ct. 2480 (2015).
92 *Id.* at 2485.
93 *Id.*
94 *Id.*
95 *Id.* at 2496 (Scalia, J., dissenting).
96 *See id.* at 2493–94 (majority opinion).
97 *Id.* at 2492–93.
98 *Id.* at 2487.
99 *Id.* at 2488.
100 *See id.* at 2488–89.

> When analyzing an agency's interpretation of a statute, we often apply the two-step framework announced in *Chevron*. Under that framework, we ask whether the statute is ambiguous and, if so, whether the agency's interpretation is reasonable. This approach "is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps. In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation."
>
> This is one of those cases. The tax credits are among the Act's key reforms, involving billions of dollars in spending each year and affecting the price of health insurance for millions of people. Whether those credits are available on Federal Exchanges is thus a question of deep "economic and political significance" that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly.[101]

In so concluding, the Chief Justice reserved for the Court the construction of a critical piece of President Obama's signature legislation—and, perhaps more importantly, the most significant future questions of statutory delegation.

Interestingly, the Court in *King* could have reached the same result had it simply determined that the agency's construction was correct—as it ultimately did—without addressing the *Chevron* issue.[102] That would have been enough to affirm the Fourth Circuit's decision and resolve *King* itself. That fact suggests that the Chief Justice's discussion of *Chevron* was part of a larger project.

But in one sense, the Chief Justice's cabining of *Chevron* might matter for the precise legislative provision at issue in *King*. It is settled law that an agency can change its interpretation of a statute—as long as the statute does not foreclose the new interpretation—even after a court has interpreted the statute itself: "A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion."[103] In light of that reality, not deciding the *Chevron* question would have left open the possibility of a future administration flipping the IRS's interpretation and, in effect, "overruling" *King*.

---

101 *Id.* (citations omitted).

102 For example, in October Term 2015, Chief Justice Roberts joined a majority opinion explaining that because an agency's authority was "clear," the Court "need not address the Government's alternative contention that [the agency's] interpretation of the statute is entitled to deference under *Chevron*." FERC v. Elec. Power Supply Ass'n, 136 S. Ct. 760, 773 n.5 (2016).

103 Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005).

At a minimum, we know that the Chief Justice had considered that scenario. At oral argument, he asked the Solicitor General: "if you're right about *Chevron*, that would indicate that a subsequent administration could change that interpretation?"[104] Whether that concern motivated the Chief Justice's ratcheting back of *Chevron* is unclear, but what is clear is his reluctance to yield such a critical question of statutory interpretation to an agency.

C. *The Chief Justice at Oral Argument*

Although the subject of much less scrutiny than his opinions in *City of Arlington* and *King*, the Chief Justice has verbally signaled his disapproval with the exercise of agency discretion—or at least how the agency's lawyers have characterized that exercise—in other statutory cases, even when he has voted in the government's favor or not addressed the issue in writing. And when the Chief Justice speaks, the Solicitor General's office tends to listen.

U.S. Airways, Inc. v. McCutchen[105] presented a question concerning the Employee Retirement Income Security Act of 1974 (ERISA), on which the United States opined as an *amicus curiae*.[106] Taking its duty of candor to the Court seriously,[107] the Solicitor General included a footnote disclosing that in a prior case, "the Secretary of Labor had filed an amicus brief in which she argued that" in certain circumstances, courts "should not apply" the legal doctrine at issue in *McCutchen*—a position at odds with the Department of Labor's current position.[108] The

---

104 Transcript of Oral Argument at 76, *King*, 135 S. Ct. 2480 (No. 14-114). The Solicitor General responded that "a subsequent administration would need a very strong case under step two of the *Chevron* analysis that that was a reasonable judgment in view of the disruptive consequences." *Id.* Although the Chief Justice did not follow up at argument, portions of the opinion suggest that, even if *Chevron* did apply, step two would compel a ruling in favor of the availability of tax credits. *See, e.g.*, *King*, 135 S. Ct. at 2495 ("[T]he context and structure of the Act *compel* us to depart from what would otherwise be the most natural reading of the pertinent statutory phrase." (emphasis added)).

105 133 S. Ct. 1537 (2013).

106 *See* Brief for the United States as Amicus Curiae Supporting Neither Party, *McCutchen*, 133 S. Ct. 1537 (No. 11-1285).

107 Former Solicitor General Donald Verrilli has described the Office's duty of candor to the Court as "unflinching." Alexandra Gutierrez, *As Obama Term Winds Down, Solicitor General Don Verrilli Makes His Exit*, SCOTUSBLOG (June 30, 2016, 11:51 AM), http://www.scotusblog.com/2016/06/as-obama-term-winds-down-solicitor-general-don-verrilli-makes-his-exit. Based on this author's experience, that sense of duty pervades the Office more than any other.

108 Brief for the United States, *supra* note 106, at 22–23 n.9 (referring to Brief of Amicus Curiae Elaine L. Chao, Sec'y of the U.S. Dep't of Labor in Support of Appellee Requesting Affirmance, Bombardier Aerospace Emp. Welfare Benefits Plan v. Ferrer, Poirot & Wansbrough, PC, 354 F.3d 348 (2003) (No. 03-10195)).

footnote then explained that, "[u]pon further reflection, . . . the Secretary is now of the view that the . . . doctrine is generally applicable . . . ."[109]

If footnotes are where the Solicitor General buries the bodies, then oral argument was something of an exhumation:

> CHIEF JUSTICE ROBERTS: Counsel, the—the position that the United States is advancing today is different from the position that the United States previously advanced. You make [that] point in footnote 9 of your brief. You say that, in [a] prior case, the Secretary of Labor took this position. And then you say that, upon further reflection, the Secretary is now of the view—that is not the reason.
>
> It wasn't further reflection. We have a new Secretary now under a new administration, right[?]
>
> MR. PALMORE: We do have a new Secretary under a new administration. But that—
>
> CHIEF JUSTICE ROBERTS: I think it would be more candid for your office to tell us when there is a change in position, that it's not based on further reflection of the Secretary. It's not that the Secretary is now of the view—there has been a change. We are seeing a lot of that lately.
>
> It's perfectly fine if you want to change your position, but don't tell us it's because the Secretary has reviewed the matter further, the Secretary is now of the view. Tell us it's because there is a new Secretary. ***
>
> It's not the same person. You cite the prior Secretary by name, and then you say, the Secretary is now of the view. I found that a little disingenuous.[110]

The Office, so far as I know, has committed to following the Chief Justice's instruction. More importantly, this colloquy illustrates the Chief Justice's willingness to press the government—particularly attorneys from the Solicitor General's office—when it is litigating positions changed as a result of the (seemingly unfettered) exercise of agency discretion.[111]

Similar exchanges took place during oral arguments in other agency deference cases, such as *Decker v. Northwest Environmental*

---

109 *Id.*

110 Transcript of Oral Arguments at 32–33, *McCutchen*, 133 S. Ct. 1537 (No. 11-1285).

111 The Chief Justice's vote in the case appears to be unremarkable. *See McCutchen*, 133 S. Ct. at 1551 (Scalia, J., dissenting) (dissent, joined by Chief Justice Roberts and Justices Thomas and Alito, based on the scope of the cert. grant).

Defense Center[112] and *Christopher v. SmithKline Beecham Corp.*[113] Indeed, although the Chief Justice ultimately joined the Court in *Decker* in according *Auer* deference to the EPA,[114] he wrote separately to note that "[i]t may be appropriate to reconsider that principle in an appropriate case."[115] That potential bombshell,[116] along with the

---

112 133 S. Ct. 1326 (2013). In *Decker*, the Court considered "whether the Clean Water Act . . . and its implementing regulations require permits before channeled stormwater runoff from logging roads can be discharged into the navigable waters of the United States." *Id.* at 1330. Three days before oral argument, the EPA materially amended a critical regulation. *Id.* at 1332. Soon after the Deputy Solicitor General began his argument, the Chief Justice interrupted:

> MR. STEWART: On Friday, the EPA administrator signed a new rule that amends EPA's existing regulatory definition [and resolves the question presented as a prospective manner]. ***
>
> CHIEF JUSTICE ROBERTS: Were you as surprised, as we were, to learn about that final rule?
>
> MR. STEWART: No, we were not. ***
>
> CHIEF JUSTICE ROBERTS: Maybe in the future, you could let us know when [a final rule is about to issue]. ***

Transcript of Oral Argument at 18–19, *Decker*, 133 S. Ct. 1326 (No. 11-338).

113 132 S. Ct. 2156 (2012). At issue in *Christopher* was whether certain pharmaceutical sales representatives (or "detailers") came within "the term 'outside salesman,' as defined by Department of Labor . . . regulations" interpreting the scope of the Fair Labor Standards Act (FLSA). *Id.* at 2161, 2165. The Department "first announced its view that pharmaceutical detailers are not exempt outside salesmen"—and, thus, are protected by the FLSA—"in an [uninvited] *amicus* brief filed in the Second Circuit in 2009." *Id.* at 2165. Its rationale shifted between then and the time of briefing in *Christopher*, but the Department nevertheless asserted that its "new interpretation of the regulations [was] entitled to controlling deference." *Id.* at 2166. This time, other Justices joined the Chief Justice in the questioning (and even beat him to the punch):

> JUSTICE KENNEDY: [I]nstead of doing a regulation, amended regulation, as Justice Breyer indicates, you're filing amicus briefs quietly in different—different courts. It seems to me that's not nearly as fair or straightforward or as candid as—as an agency ought to be. ***
>
> JUSTICE BREYER: [W]hat is the process here? How do you know—at what level was this agency decision made to suddenly go ahead with this? ***
>
> MR. STEWART: Internally, the—the Solicitor's Office at the Department of Labor would consult with the Wage and Hour Division. ***
>
> CHIEF JUSTICE ROBERTS: *** [D]oes your office review the amicus filings in the courts of appeals by the agencies?
>
> MR. STEWART: There was SG authorization for the amicus brief to be filed.

Transcript of Oral Argument at 24–25, *Christopher*, 132 S. Ct. 2156 (No. 11-204). Justice Alito delivered the opinion of the Court, joined by the Chief Justice and Justices Scalia, Kennedy, and Thomas. *Christopher*, 132 S. Ct. at 2161. The Court rejected the Department's "interpretation of its regulations" as "quite unpersuasive." *Id.* at 2169.

114 *Auer* deference is the principle by which courts generally pay controlling deference to an agency's interpretation of its own regulation, unless it is "plainly erroneous or inconsistent with the regulation." Auer v. Robbins, 519 U.S. 452, 461 (1997) (citations omitted).

115 *Decker*, 133 S. Ct. at 1338 (Roberts, C.J., concurring).

examples discussed in this Section, portray a Chief Justice that is far from willing to write a blank check to agencies when it comes to matters of statutory interpretation.

CONCLUSION

Although less well known than his umpire analogy, this excerpt from the Chief Justice's confirmation hearing is telling:

> [W]hen I worked in the Department of Justice in the Office of the Solicitor General, it was my job to argue cases for the United States before the Supreme Court. I always found it very moving to stand before the Justices and say, "I speak for my country." But it was after I left the Department and began arguing cases against the United States, that I fully appreciated the importance of the Supreme Court in our constitutional system. Here was the United States, the most powerful entity in the world, aligned against my client, and yet all I had to do was convince the Court that I was right on the law, and the Government was wrong, and all that power and might would recede in deference to the rule of law.[117]

Those remarks are consistent with a view that the Supreme Court's ability to confine the executive branch within the boundaries of the rule of law is one of its most important functions. At least in the contexts of federal criminal law and agency deference, the Chief Justice's approach to statutory interpretation appears to reflect that view.

---

116 Justices Scalia, Thomas, and Alito have each questioned *Auer*'s continuing vitality as well. *See* Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1210 (2015) (Alito, J., concurring in part and concurring in the judgment); *id.* at 1212–13 (Scalia, J., concurring in the judgment); *id.* at 1213–15 (Thomas, J., concurring in the judgment). But it remains far from clear, especially in light of Justice Scalia's passing, whether a majority exists for revisiting *Auer*.

117 *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States*, *supra* note 1, at 55–56.