The *Becerra* Cases: How Not to Do *Chevron*

*by William Yeatman**

The title of this article is meant both figuratively and literally. In the literal sense, the title refers to how the Supreme Court ducked deference in two similar (and similarly named) controversies, *American Hospital Association v. Becerra*[1] ("*American Hospital Association*") and *Becerra v. Empire Health Foundation*[2] ("*Empire Health Foundation*")—even though both cases seemed to be well-suited for the famous *Chevron* "two step." Although the Court confusingly applied elements of the two-step framework, the opinions make no mention of *Chevron*, and thereby demonstrate "how not to do" the doctrine.

The title's figurative meaning is prescriptive. By eliding *Chevron* (again), the Court continues its ongoing failure to police the deference that has run amok in the lower courts. Indeed, the *Becerra* controversies demonstrate the costs of the Court's passivity. In each case, lower courts applied an expansive gloss to the standard *Chevron* framework, effectively turning the doctrine into super-deference. For as long as the Court fails to explicitly rein in the *Chevron* doctrine, lower courts will continue to tilt the scales of justice in favor of administrative authority even beyond the already generous terms provided by deference doctrines under black-letter administrative law. Making matters worse, in at least one of the *Becerra* cases, the Court muddled its silent *Chevron* analysis, which incurs undue regulatory uncertainty. The upshot is that, in addition to the urgent imperative for cleaning up *Chevron* in the lower courts, the Court needs to tighten up its own interpretative methodology. Thus, the *Becerra* decisions' *sub silentio* and garbled application of the doctrine demonstrates "how not to do" *Chevron*.

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[1] 142 S. Ct. 1896 (2022).

[2] 142 S. Ct. 2354 (2022).

I. *Chevron*'s Vanishing Act

Chevron v. Natural Resources Defense Council is the most cited—and most controversial—decision in administrative law.[3] The *Chevron* doctrine establishes a two-step analysis for reviewing agency interpretations of laws they administer. *Chevron*'s first step asks whether Congress "has directly spoken to the precise question at issue."[4] If so, then "that is the end of the matter" because courts "must give effect to the unambiguously expressed intent of Congress."[5] If, however, the statute is ambiguous, then the court proceeds to *Chevron* step two, which inquires whether the agency's interpretation is "based on a permissible construction of the statute."[6]

By all appearances, *American Hospital Association* and *Empire Health Foundation* were tailor-made for *Chevron* deference. Both controversies involved the Medicare Act, a "complex statutory and regulatory regime" for public health insurance.[7] In *American Hospital Association*, the controversy centered around the calculation of a reimbursement rate for outpatient drugs.[8] In *Empire Health Foundation*, the interpretive dispute pertained to a mathematical fraction that establishes enhanced reimbursement rates for hospitals that serve a higher-than-usual percentage of low-income patients.[9] These kinds of complicated statutory questions typically invite deference. After all, the sine qua non of the *Chevron* doctrine is that agencies are comparatively competent (relative to courts) when it comes to interpreting highly technical statutes.

In both cases, moreover, the Department of Health and Human Services (HHS) had undertaken a resource-intensive rulemaking process to reach its interpretations.[10] Jumping through these

[3] 467 U.S. 837 (1984); see also, Abbe R. Gluck, What 30 Years of Chevron Teach Us about the Rest of Statutory Interpretation, 83 Fordham L. Rev. 607, 612 (2014) ("It is the most cited administrative law case in history and has been referenced in more than 7000 cases and more than 5000 law review articles.").

[4] 467 U.S. at 842.

[5] *Id.*

[6] *Id.* at 843.

[7] Good Samaritan Hosp. v. Shalala, 113 S. Ct. 2151, 2154 (1993).

[8] 42 U.S.C. § 1395l(t)(14)(A).

[9] 42 U.S.C. § 1395ww(d)(5)(F)(vi)(I).

[10] See 82 Fed. Reg. 52,362, 52,490 (Nov. 13, 2017) (setting forth interpretation in American Hospital Association); 69 Fed. Reg. 48,916, 49,098–99, 49,246 (Aug. 11, 2004) (issuing interpretation in Empire Health).

procedural hoops is "significant . . . in pointing to *Chevron* authority," under long-established Supreme Court precedent.[11]

In both *Becerra* cases, lower courts had applied the *Chevron* framework. In *American Hospital Association*, the D.C. Circuit upheld HHS's interpretation at *Chevron* step two,[12] while in *Empire Health Foundation*, the Ninth Circuit ruled against HHS at step one.[13]

Before the Supreme Court, the questions presented were worded in the language of the *Chevron* doctrine. In *American Hospital Association*, this framing was explicit: the question was "whether *Chevron* deference permits" the agency's interpretation. In *Empire Health Foundation*, the government's petition for certiorari asked whether the agency "has permissibly" interpreted the statute, which closely tracks *Chevron*'s command for courts to uphold an agency's interpretation if it is "based on a permissible construction of the statute."[14]

For all the above reasons, *Chevron* deference was a hot topic during oral arguments. In *American Hospital Association*, Justice Clarence Thomas started the day's questions by asking if the Court should "overrule *Chevron*,"[15] and the doctrine was invoked more than 50 times during the hearing. During arguments for *Empire Health Foundation*, Justices Samuel Alito, Stephen Breyer, Neil Gorsuch, and Sonia Sotomayor engaged in extensive exchanges over *Chevron* with the government's counsel.[16]

Against this backdrop, proponents of administrative power worried that either of the *Becerra* cases might provide an ideal vehicle for the "conservative" Court to undermine the *Chevron* doctrine. *Politico* reported that "many expect" the Court "to announce the death of *Chevron* deference."[17] At SCOTUSblog, Professor Nicholas Bagley warned that "the right wing of the court could use [*American Hospital*

[11] See United States v. Mead Corp., 533 US 218, 230–31 (2001).

[12] Am. Hosp. Ass'n v. Azar, 967 F. 3d 818 (D.C. Cir. 2020); Empire Health Found. v. Azar, 958 F.3d 873 (9th Cir. 2020).

[13] *Id.* at 884–86.

[14] 467 U.S. at 843.

[15] Tr. of Oral Arg. at 5, Am. Hosp. Ass'n v. Becerra, 142 S. Ct. 1896 (2022) (No. 20-1114), https://bit.ly/3d6HmWA.

[16] Tr. of Oral Arg. at 14–15, 24, 29, 44–45, Becerra v. Empire Health Found., 142 S. Ct. 2354 (2022) (No. 20-1312), https://bit.ly/3PYNlv7.

[17] David Bernstein, The Supreme Court Could Foster a New Kind of Civil War, Politico (June 14, 2022), https://politi.co/3zsxSMF.

Association] to narrow or even overturn *Chevron*, with potentially dramatic implications for the scope of executive-branch power."[18]

Then, in mid-June, the opinions came down and . . . nothing. *Chevron* was nowhere to be found. In terms of outcomes, the government lost *American Hospital Association* and won *Empire Health Foundation*. But there was no mention of *Chevron* or any variation of "defer." That's not to say the famed doctrine went entirely missing. Rather, both decisions seemed to silently adopt diluted versions of the *Chevron* steps.

Writing for a unanimous Court in *American Hospital Association*, Justice Brett Kavanaugh appeared to employ a step-one inquiry into whether the legislative language unambiguously evinces congressional intent. In his introduction, for example, he writes that the case was "straightforward" under "the text and structure of the statute."[19] He then performs a detailed discussion of the statutory provision before the Court. At the end of the opinion, he directly invokes *Chevron*'s doctrinal language, writing that HHS's interpretation failed scrutiny under "the traditional tools of statutory interpretation," which is the exact turn of phrase used in *Chevron* to describe a properly functioning first step of the doctrinal framework.[20] Still, the opinion omits any of the words and concepts that are the hallmark of a step-one inquiry, such as textual ambiguity, plain meaning, or statutory clarity. As a result, Kavanaugh's judicial methodology isn't entirely clear.

A similar methodological coyness pervades Justice Elena Kagan's majority decision in *Empire Health Foundation*. For the most part, her opinion reads like a *Chevron* step-two inquiry into the reasonableness of the agency's interpretation, albeit one with a strong textualist flavor. After performing a detailed analysis of the statutory language, she concludes that the "[t]ext, context, and structure all support" HHS's position, and this tone ("support") is indicative of a step-two analysis.[21] At other places, however, Kagan's opinion appears more like a *Chevron* step one. For example, she says the statute "disclose[s]

[18] Nicholas Bagley, Chevron Deference at Stake in Fight over Payments for Hospital Drugs, SCOTUSblog (Nov. 29, 2021), https://bit.ly/3oQqDZZ.

[19] 142 S. Ct. at 1904.

[20] *Id.* at 1906.

[21] 142 S. Ct. at 2362.

a surprisingly clear meaning—the one chosen by HHS."[22] Phrases like "clear meaning" are commonly associated with *Chevron*'s first step. In a similar vein, she writes that "[t]he structure of the relevant statutory provisions reinforces our conclusion that [the disputed text] means [what HHS says it means], and nothing more."[23] Taken at face value, this statement ("and nothing more") suggests that the agency's reading is the only available interpretation of the statute, which is a conclusion available only under a *Chevron* step-one analysis. The Court again was sending confusing signals about its interpretive reasoning.

II. Interpreting the Void

After the two *Becerra* cases came down with nary a word on *Chevron*, many understood the Court's silence as speaking to ulterior motives.

In a prepared statement, Professor Cary Coglianese wondered aloud if the Court's unanimous opinion in *American Hospital Association* is "part of a deliberate strategy of allowing *Chevron* to wither on the jurisprudential vine and ultimately die from desuetude."[24] Dan Deacon, a lecturer at the University of Michigan Law School, tweeted that the decision, "taken at face value . . . impl[ies] no deference whatsoever to the agency's interpretation," and he reiterated this sentiment on social media about the decision in *Empire Health Foundation*.[25]

At the popular legal blog "The Volokh Conspiracy," Professor Jonathan Adler posted that *American Hospital Association* "reinforces a message that the Court has been giving for several years now: The first task of a reviewing Court is to focus on the statutory language and follow Congress's instructions."[26] The idea here is that by performing an apparent *Chevron* step one without naming the doctrine, Kavanaugh was admonishing lower courts to put greater effort into the textual investigation at step one before they rush on to the

[22] *Id.*

[23] *Id.* at 2366.

[24] Profs. Cary Coglianese and Allison Hoffman Share Their Insights on American Hospital Association v. Becerra, Penn Law (Nov. 23, 2022), https://bit.ly/3PTecZr.

[25] @danieltdeacon, Twitter (June 15, 2022, 10:24 AM), https://bit.ly/3oT63It.

[26] Jonathan H. Adler, Supreme Court Decides Major Chevron Case without Citing Chevron, Volokh Conspiracy (June 15, 2022), https://bit.ly/3vBaDyL.

(easier) task of deciding whether to defer to the agency at step two. Jack Fitzhenry seconded this theory at the Federalist Society blog, where he argued that the *Becerra* cases imply "that courts should tighten up the statutory inquiry."[27]

Practitioners echoed these scholarly inferences. Regarding *American Hospital Association*, Samuel Rasche and Michael Showalter of the law firm ArentFox Schiff wrote that "[t]he Court appears to have applied a higher bar" at *Chevron* step one, meaning the government must make a greater showing of ambiguity before the Court will accept the agency's interpretation.[28] Attorneys at the Miller Canfield firm concluded that the *Becerra* cases "show an increased skepticism by the Court of agency interpretations of statutes and signal that going forward, the federal courts will more closely scrutinize administrative agency decisions in general."[29]

In sum, conventional wisdom holds that the *Becerra* decisions carried an implied message. Generalizing somewhat, scholars and practitioners have coalesced around two takes: To progressives, the Court is trying to starve *Chevron* to death; to conservatives, the Court is instructing lower courts to pay closer attention to the text.

Perhaps this speculation is right. Maybe the Court was indeed sending hidden messages. For my part, I'm not sold. Rather than implied intent, I suspect the Court's doctrinal silence is the product of two prosaic inputs, which I discuss in turn below.

A. Government's Self-Effacing Chevron *Claims*

One likely explanation for the Court's failure to mention *Chevron* is that the government sandbagged its own arguments for deference.

For example, in *Empire Health Foundation*, the solicitor general seemed to go out of her way to deemphasize the doctrine. In its merits brief, the government argued that the Court should "uphold [HHS's] interpretation simply because it is the better one, without

[27] Jack Fitzhenry, Has Chevron Step One Stepped to Center Stage?, FedSoc Blog (June 28, 2022), https://bit.ly/3zXTCBA.

[28] Samuel Rashe & J. Michael Showalter, Court Side-Steps Overturning Chevron Deference in Recent Health-Care Related Decision, JD Supra (June 24, 2022), https://bit.ly/3d5UTOa.

[29] Andrew Blum, Matthew Greenberg & Larry Saylor, Supreme Court Signals Move Away from Judicial Deference to Administrative Agencies, JD Supra (July 21, 2022), https://bit.ly/3zX5OT9.

addressing the additional weight due under *Chevron*."[30] In support of this unusual request, the government cited a footnote in *Coventry Health Care of Missouri, Inc. v. Nevils*, where the Court stated that "we need not consider whether *Chevron* deference attaches to" the agency's interpretation "because the statute alone resolves this dispute."[31]

As it did in *Empire Health Foundation*, the government in *American Hospital Association* reluctantly raised *Chevron* in an ancillary argument. Again, the solicitor general's brief is given mostly to arguing that the agency "can prevail without any deference to its interpretation."[32] To be precise, the brief broaches the *Chevron* doctrine only in its final three pages, and most of this argument is given to assurances that "[t]his case . . . does not present the potential concerns about *Chevron* deference" that have troubled many of the justices.[33] During the hearing, the solicitor general went so far as to say, "I do not think *Chevron* is necessary in this case."[34] In this fashion, the government treated *Chevron* almost like a liability, which is remarkable considering the D.C. Circuit had sided with HHS on the strength of deference alone.

To be sure, there have been other recent signs that the Supreme Court bar is wary of pressing *Chevron* claims. In 2020, for example, the Justice Department waived deference in *Guedes v. Bureau of Alcohol, Tobacco, Firearms and Explosives*.[35] A year earlier, in *BNSF Railway, Co. v. Loo*, Justice Gorsuch made light of the (private-sector) petitioner's reluctance to seek *Chevron* deference for a government interpretation that mirrored its own.[36] But the *Becerra* cases are the first examples that I've seen of the solicitor general arguing for *Chevron* in such a backhanded manner.

It's obvious what's going on here. The government's self-effacing *Chevron* claims are part of a risk-averse litigation strategy. These days, deference is a losing argument for (at least) a critical mass of justices,

[30] Br. for the Pet. at 26, Becerra v. Empire Health Found., 142 S. Ct. 2354 (2022) (No. 20-1312), https://bit.ly/3Jqugj3.

[31] 137 S. Ct. 1190, 1198 n.3 (2017).

[32] Br. for Respondents at 47, Am. Hosp. Ass'n v. Becerra, 142 S. Ct. 1896 (2022) (No. 20-1114), https://bit.ly/3d54kx2.

[33] *Id.* at 48.

[34] Tr. of Oral Arg., *supra* note 15, at 69.

[35] 140 S. Ct. 789 (2020) (statement of Gorsuch, J., respecting denial of certiorari).

[36] See 139 S. Ct. 893, 908–09 (2019).

as Chief Justice John Roberts, Thomas, Gorsuch, and Kavanaugh have all publicly stated a willingness to reform, diminish, or upend the *Chevron* doctrine. The solicitor general, who is no fool, litigates accordingly.

B. Getting to Yes

Likely, the most important reason the Court didn't mention *Chevron* is also the blandest explanation. The vote tally for both cases indicates that any engagement with *Chevron* was bargained away as winning coalitions were cobbled together during the behind-the-scenes horse-trading.

Looking at the Court's unanimous opinion in *American Hospital Association*, the justices reached broad agreement that the statute, whatever it means, doesn't mean what the agency says. Rather than press the *Chevron* issue, and use the case to launch broadsides against deference, I suspect that the Court's *Chevron*-skeptics were willing to take the doctrine off the table—by name, at least—to obtain a 9-0 ruling.

A similar dynamic likely played out in *Empire Health Foundation*. Kagan's majority opinion was supported by a peculiar alliance of justices, including Sotomayor, Breyer, Thomas, and Amy Coney Barrett. If we take a closer look at that lineup, *Chevron*'s vanishing act starts to make a lot more sense. During oral arguments, Justices Sotomayor and Breyer expressed reservations about whether HHS warranted deference due to deficiencies in the agency's notice-and-comment rulemaking.[37] And Justice Thomas, of course, has gone as far as any Article III judge in questioning the constitutional propriety of *Chevron* deference. Because there was no constituency for *Chevron* on the Court, Kagan's majority opinion does not mention the doctrine.

III. Fallout from the Void

Scholarship suggests that *Chevron*'s disappearance in the *Becerra* cases is the norm, not the exception. In a seminal survey of deference doctrines at the Supreme Court, Professors William Eskridge and Lauren Baer found that the Court applies the *Chevron* framework

[37] See Tr. of Oral Arg., *supra* note 16, at 15, 60 (Breyer: "I have an awful qualm about using *Chevron* here"; Sotomayor: "I don't see how we give you *Chevron* deference under those circumstances").

only about a quarter of the time the doctrine could apply.[38] As explained above, I don't think the Court's evident reluctance to resort to *Chevron* is part of some grand design. Yet just because there's no lurking intent, that doesn't mean the Supreme Court's doctrinal circumspection is not fraught with meaning. To the contrary, the Court's haphazard approach incurs several negative consequences, as discussed below.

A. Letting Lower Courts Run Riot

Even if the Court meant to admonish lower courts *sub silentio*, this muted strategy is unlikely to succeed. That's because lower courts have every incentive to ignore the high court's silence on *Chevron*. As explained by Professor Richard Pierce, "[i]t is much easier for a judge to apply the relatively simple *Chevron* standard and to uphold an agency interpretation of a statute as reasonable than it is to write a lengthy opinion" that elucidates the law.[39] Given this incentive structure, the only way for the Court to reform the *Chevron* doctrine is to do so explicitly—and such a course correction is sorely needed. To understand why it's necessary to rein in *Chevron*, look no further than the *Becerra* cases.

Consider, for example, the district court's bizarre, beefed-up *Chevron* framework in *Empire Health Foundation*.[40] Describing step one, the district court said it would employ the "[t]raditional tools of judicial statutory construction," including "the plain meaning of the language in the statute, dictionary definitions, canons of construction, *legislative purpose*, and *legislative history*."[41] By resorting to nontextual tools like legislative purpose and history at *Chevron*'s first step, the district court introduces a purposive influence into what is supposed to be textual analysis. At *Chevron* step two, the district court further distorted the doctrine. Rather than asking whether the agency's interpretation is reasonable under the statute, which is how this second step is supposed to operate, the district court asked

[38] 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, 1124–25 (2008).

[39] Richard J. Pierce Jr., Is Chevron Deference Still Alive?, Reg. Rev. (July 14, 2022), https://bit.ly/3QjtvdO.

[40] Empire Health Found. v. Price, 334 F. Supp. 3d 1134 (E.D. Wash. 2018).

[41] *Id.* at 1148 (emphasis added).

whether the statute "precludes" the agency's reading.[42] The result is to condone any interpretation that isn't expressly forbidden by the law, which is far more generous to the government than standard *Chevron* deference. Indeed, the district court deferred despite having conceded that the agency's interpretation "does not appear entirely reasonable."[43] Under a "normal" *Chevron* step two, HHS's unreasonable interpretation would have failed. Yet under the district court's souped-up version of the *Chevron* doctrine, the government prevailed. The district court's *Chevron* shenanigans went unadmonished by the Ninth Circuit.[44]

Turning to *American Hospital Association*, the D.C. Circuit seemed to skip *Chevron* step one in reviewing the agency's interpretation of the operative statutory question. This apparent doctrinal short cut prompted Justice Gorsuch, during oral arguments, to question whether the D.C. Circuit's decision reflects a "troubling trend" of lower courts jumping straight to deference without first exhausting the traditional tools of statutory construction at *Chevron* step one.[45] At step two, the D.C. Circuit transformed *Chevron* into super-deference, just like the district court did in *Empire Health Foundation*. According to the D.C. Circuit, "we would need to conclude that Congress unambiguously barred HHS" to side against the government.[46] And because "the statute does not clearly preclude" HHS's interpretation, the agency carried the day.[47] Again, this formulation lowers the bar from the standard *Chevron* framework, by putting the burden on Congress to specify all that HHS cannot do, when the burden should be on the agency to demonstrate that its interpretation is reasonable.

Alas, there is nothing anomalous about the lower courts' expansive gloss on the *Chevron* doctrine. As observed by Sixth Circuit Judge Raymond Kethledge, "the federal courts have become habituated to defer to the interpretive views of executive agencies, not as

[42] *Id.* at 1153.

[43] *Id.*

[44] The Ninth Circuit ruled on *Chevron* step-one grounds, by way of the *Brand X* doctrine, without commenting on the district court's *Chevron* methodology. Empire Health Found., 958 F.3d at 884–85.

[45] Tr. of Oral Arg., *supra* note 15, at 33.

[46] 967 F.3d at 831.

[47] *Id.* at 834.

a matter of last resort but first."[48] Justice Anthony Kennedy, in one of his final opinions, bemoaned "reflexive deference," by which he meant that "some Courts of Appeals engag[e] in cursory" textual analyses before deferring to the government.[49] Unless and until the Supreme Court takes on *Chevron*, reflexive deference will remain unchecked in the lower courts.

B. Is the Justice Department Rigging the Game?

In the *Becerra* cases, there is a stark difference in how the lower courts and the Supreme Court applied the *Chevron* doctrine. Whereas the lower courts viewed these controversies through an overly deferential lens, the Supreme Court ignored the doctrine altogether.

Scholarship suggests that this dichotomy holds true overall in Article III courts. As noted above, survey data indicate that the Supreme Court applies the *Chevron* two-step in only about 25 percent of the cases in which the doctrine could apply. Circuit courts apply *Chevron* much more frequently—about 77 percent of the time, according to research by professors Chris Walker and Kent Barnett.[50] Based on this discrepancy, the professors hypothesize that "there may be 'a *Chevron* Supreme' and 'a *Chevron* Regular,'" meaning that "*Chevron* deference may not have much of an effect on agency outcomes at the Supreme Court, but our findings suggest that it seems to matter quite a bit in the circuit courts."[51]

If the professors' supposition is correct, then it would make sense for the government to adopt a Janus-faced litigation strategy for *Chevron* deference. Under such a scenario, lawyers at the Justice Department would argue zealously for deference before the lower courts and then, in the off chance that certiorari is granted, the solicitor general's office would pull its punches on *Chevron* before the high court.

[48] Valent v. Comm'r of Soc. Sec., 918 F.3d 516, 525 (6th Cir. 2019) (Kethledge, J., dissenting); see also Arangure v. Whitaker, 911 F.3d 333, 336 (6th Cir. 2018) ("[A]ll too often, courts abdicate th[eir] duty [to say what the law is] by rushing to find statutes ambiguous, rather than performing a full interpretive analysis.").

[49] Pereira v. Sessions, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring); see also Valent, 918 F.3d at 525 ("In too many cases, courts do so almost reflexively, as if doing so were somehow a virtue, or an act of judicial restraint—as if [courts'] duty were to facilitate violations of the separation of powers rather than prevent them.").

[50] Kent Barnett & Christopher J. Walker, Chevron in the Circuit Courts, 116 Mich. L. Rev. 1, 29 (2017).

[51] *Id.* at 72–73.

I suspect such a cynical strategy was afoot in at least one of the *Becerra* cases. Above, I discussed how the solicitor general effaced the government's own *Chevron* claims in *Empire Health Foundation*. Before the Ninth Circuit, however, government lawyers sang a different tune. There, the Justice Department led with *Chevron*—the doctrine is introduced in the first sentence of the government's merits brief argument.[52]

The inescapable problem, of course, is that the Supreme Court hears only a tiny fraction of administrative law cases that are before the federal judiciary. And lower courts have every incentive to continue to reflexively apply *Chevron* deference, as it's a lot easier to defer than it is to perform a rigorous textual analysis.

The Justice Department seems to be exploiting—and exacerbating—this unfortunate status quo. Before the lower courts, government lawyers may press for ever more permissive glosses on the standard *Chevron* framework, knowing that the odds are exceedingly slim that the controversy will ever get before the high court. If certiorari is granted, the government can then basically discard its *Chevron* claims and count on the Court to leave the doctrine unchecked in the lower courts.

C. Regulatory Uncertainty

It's not just the lower courts that need to tighten up their judicial methodology. The Supreme Court's equivocal application of the *Chevron* doctrine, whatever the cause, creates regulatory uncertainty and is, therefore, deficient as a matter of interpretative technique.

In both *Becerra* cases, the Court never definitively established whether the underlying statutory provision is ambiguous—that is, the Court failed to perform a *Chevron* step-one analysis. This won't do. A robust step one is crucial if courts are to meet their duty to say what the law is. Even if the Court overturned *Chevron v. NRDC*—and it should—a step-one analysis must remain the starting point for whatever replaces deference. In every instance of statutory interpretation, all courts should begin with the text and then exhaust the tools of statutory construction.

Professors Kenneth Bamberger and Peter Strauss have advanced a public policy reason why it's incumbent upon courts to always

[52] Cross-Appellee Response Br. at 14, Empire Health Found. v. Azar, 958 F.3d 873 (9th Cir. 2020) (No. 18-35845).

search for unambiguously expressed legislative intent.[53] In determining that a statute is ambiguous, the court establishes that the agency may change its interpretation in the future. Obviously, the reverse also holds true: When the court fixes a statutory meaning, it binds the agency to a particular interpretation. It follows that a proper step one analysis provides important regulatory clarity. And a deficient step-one analysis will bring about undue regulatory uncertainty for the agency and the regulated community.

An example from the *Becerra* cases will help to demonstrate how a sloppy *Chevron* analysis can cause undue confusion.[54] In *Empire Health Foundation*, the Supreme Court "approve[d]" HHS's interpretation without first investigating whether the statute has an unambiguous meaning. Kagan's opinion sometimes implies the statute is ambiguous and at other times she hints that the statute unambiguously means what the government says it means. It's impossible to say for sure, even though the difference is highly significant for the regulatory regime. If the statute is unambiguous, then HHS is locked into that policy course. If the statute is unclear, then the agency is free to experiment with new policies.

It's easy to imagine how the resultant regulatory uncertainty might lead to administrative inefficiencies. For example, HHS could waste its limited resources implementing a new policy in the mistaken belief that the statute is ambiguous. Alternatively, HHS might be deterred from seeking regulatory changes warranted by sound policy due to the misimpression that *Empire Health Foundation* had identified the unambiguously expressed legislative intent of Congress. This uncertainty, and any attendant administrative waste, never would have been a concern if the Court hadn't muddled its step-one analysis.[55]

[53] Kenneth A. Bamberger & Peter L. Strauss, Chevron's Two Steps, 95 Va. L. Rev. 611, 617–18 (2009).

[54] This public policy concern is less of an issue in a decision like *American Hospital Association*, where the Court unequivocally rejected HHS's interpretation and, therefore, took that policy off the agency's menu of future discretionary choices.

[55] Professors Bamberger and Strauss argue that a proper step one is not exhausted "once a court has found statutory ambiguity," but instead entails the court "ascertaining . . . the range of meaning available to the agency." See Bamberger & Strauss, *supra* note 53, at 613–14. I suspect that's asking too much of courts. They probably would be satisfied with what they call a "point solution," which is basically a yes/no determination that the statute is either ambiguous or unambiguous.

The Court must do better. In addition to cleaning up *Chevron* for the lower courts, the Court should clean up its own statutory interpretation by faithfully exhausting the tools of statutory construction to discern whether Congress's intent is clear.

IV. Conclusion

Regarding Antonin Scalia's profound influence on the law, Justice Kagan famously said, "we are all textualists now." Among her peers on the Supreme Court, at least, she's undoubtedly correct, as demonstrated by the conspicuous commitment to textual analysis in both *Becerra* decisions. Outside the Court's chambers, however, Kagan's declaration rings hollow. In the lower courts, interpreting regulatory statutes remains a purposive affair that is characterized first and foremost by deference doctrines, as demonstrated by the amped up versions of *Chevron* employed by lower courts in the *Becerra* controversies. For its part, the government seems content to play both sides.

Because lower courts still haven't gotten the memo on textualism, the Supreme Court does a disservice to the law when, as in the *Becerra* cases, the Court declines to check the gross distortions of the *Chevron* framework that are running rampant in the federal judiciary. Ideally, the Court would overturn *Chevron v. NRDC* and nix the concept of binding judicial deference to self-serving agency interpretations. Short of that, the Court could explicitly call for lower courts to resolve more cases on *Chevron* step-one grounds; to the extent the Court already is sending implicit signals about step one, they're falling on deaf ears. Even a simple holding that the lower courts shouldn't expand on the standard *Chevron* framework would go far toward reining in worst practices. These much-needed reforms are the opportunity costs of the Court's doctrinal circumspection.

At the very least, the Court must tighten up its own method of statutory interpretation. Notwithstanding the Court's embrace of textualism, its opinions sometimes send mixed messages about whether the statute is ambiguous, which is what happened in *Empire Health Foundation*. This interpretive equivocation threatens to bring about undue regulatory uncertainty and, therefore, should be avoided by the Court.