The *Brand X* Liberation: Doing Away with *Chevron's* Second Step as Well as Other Doctrines of Deference

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This paper argues that the Court's decision in National Cable & Telecommunications Ass'n v. Brand X Internet Services *has cleared the path to discard the various doctrines of deference courts use to review agency interpretations and replace them with a single interpretive rule followed by arbitrary and capricious review. Courts have justified deference to: reasonable agency interpretations of ambiguous statutes where the agency employed its lawmaking powers* (Chevron USA v. Natural Resources Defense Council)*; persuasive agency interpretations where the agency acted in some less formal way* (Skidmore v. Swift & Co.)*; or even agency interpretations of their own ambiguous regulations* (Auer v. Robbins)*. The most far reaching doctrine,* Chevron*, has spurred countless debates. Courts and commentators have approached* Chevron *in two subtlety distinct ways, often at the same time. First, using the Deference Approach courts finding an ambiguity would defer to an agency interpretation so long as that interpretation was reasonable. Second, the Acceptance Approach required courts finding an ambiguity to envision whether the agency interpretation fell into the range of possible choices delegated to the agency by Congress and, if so, simply to accept it.* Brand X *confronted one of the few differences in these approaches: the effect of stare decisis when a court interpreted the statute prior to an agency interpretation worthy of* Chevron*. Although* Brand X *itself continued to employ rhetoric from both approaches, it is best justified, given its*

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holding, under the Acceptance Approach. There are several important implications of Brand X*'s endorsement of the Acceptance Approach. First,* Brand X *assigns an interpretive role to the courts to identify a zone of discretion afforded by Congress to the agency to make law and set policy. This zone includes both the substantive choices that the agency can make and how it must make them. Second, once the court has performed that task, then a reasonableness inquiry under Step Two of* Chevron *is not needed nor permitted. Courts can and should review the agency's process and reasoning in reaching its choice using the arbitrary and capricious standard of review. Finally, courts' institutional mandate to identify a zone of agency lawmaking that relates to both substance and form renders other doctrines of deference indefensible. Discarding these various doctrines would: better focus both courts and agencies on their tasks; resolve some of the outstanding disputes concerning those tasks; eliminate pernicious vagueness that is too easily used to fudge analysis; and still maintain a clear, limited, deferential standard of review.*

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INTRODUCTION

In *National Cable & Telecommunications Ass'n v. Brand X Internet Services*,[1] the Supreme Court explained *Chevron U.S.A. v. Natural Resources Defense Council*[2] allows agencies to choose among permissible interpretations of an ambiguous statute even in the face of a prior court interpretation.[3] With this holding, the Court substituted a single interpretive rule for a tangled web of so-called doctrines of deference.

Certainly *Chevron* is the most celebrated of these doctrines. Prior to *Brand X*, courts and commentators approached *Chevron* analysis in two subtly distinct ways. One approach was to view *Chevron* as a doctrine of deference, where courts would decide which agency interpretations should be accorded deference, the "Deference Approach." The other was to approach *Chevron* as a rule about institutional roles, where under certain circumstances courts were bound to accept an agency's interpretation, the "Acceptance Approach." Sometimes courts employed rhetoric from both approaches at the same time. Indeed, *Brand X* employs language from both approaches, but ultimately it is best understood as adopting the Acceptance Approach.

The Court's adoption of the Acceptance Approach has numerous, serious consequences. Where Congress has empowered the agency to give meaning to ambiguous statutory language, and the agency does so, the Acceptance Approach removes the need for courts to pass upon the substantive reasonableness of agency interpretations. In addition, *Brand X* compels or counsels the demise of two other convoluted deference doctrines: the *Skidmore* doctrine according deference to interpretations with the power to persuade; and deference to agency interpretations of their own regulations under *Auer*.[4]

Part I recounts courts' pre-*Chevron* and post-*Chevron* review of agency interpretations prior to the Court's decision in *Brand X*. Prior to *Chevron*, courts sometimes granted deference to agencies based on a variety of rationales.[5] Courts and commentators understood *Chevron*

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

[2] Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 837 (1984).

[3] *See Brand X*, 545 U.S. at 984-85 (finding that court of appeals erred in refusing to apply *Chevron* to FCC's interpretation of statute because its precedent had only found best reading of statute, it was not only permissible reading of statute).

[4] *See infra* Part II.B-C.

[5] PETER L. STRAUSS, ADMINISTRATIVE JUSTICE IN THE UNITED STATES 367 (2002)

as establishing a two-step inquiry by which courts were to review agency interpretations. First, a court must see if the statute is ambiguous.[6] Second, if it is, a court must determine whether the agency's interpretation is reasonable.[7]

Chevron's ontology from the beginning and up until *Brand X* appeared schizophrenic. On the one hand, courts said what the law was when they deferred to the agency. Alternatively, courts exercised their judicial supremacy finding that there was no precise rule and defining the interpretive authority given to the agency. Support for both approaches can be found in *Chevron* itself.

Part I then reviews the various *Chevron* debates exasperated by the unexplained coexistence of the Deference Approach and the Acceptance Approach.[8] Courts and commentators argued over the steps involved in *Chevron*: Step One, determining if the statute was ambiguous; and Step Two, assessing whether the agency interpretation was reasonable.[9] The argument over whether *Chevron* was even a two-step doctrine at all was really an argument over the two approaches.[10]

[hereinafter STRAUSS, ADMINISTRATIVE JUSTICE]; Mark Seidenfeld, *A Syncopated* Chevron*: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 87 (1994). While maintaining primary and ultimate authority on questions of law, courts pre-*Chevron* recognized that agencies "constituted a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Id.* at 88 (citing Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

[6] *Chevron*, 467 U.S. at 842.

[7] *Id.* at 842.

[8] For the debate over *Chevron*, see Linda Jellum, Chevron*'s Demise: A Survey of* Chevron *from Infancy to Senescence*, 59 ADMIN. L. REV. 725, 725 (2007); for Step One, see Evan J. Criddle, Chevron*'s Consensus*, 88 B.U. L. REV. 1271, 1271 (2008); for Step Two, see Ronald M. Levin, *The Anatomy of* Chevron*: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253, 1253 (1997) [hereinafter Levin, *The Anatomy of* Chevron]; and for *United States v. Mead Corp.*, see Lisa Schultz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1443 (2005).

[9] *E.g.*, Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under* Chevron, 6 ADMIN. L.J. AM. U. 187, 210-12 (1992) (arguing that judicial review under Step Two should apply to agency interpretations made pursuant to express delegation of interpretive authority); Seidenfeld, *supra* note 5, at 125-38 (arguing for increased emphasis on Step Two of *Chevron* and more scrutiny of reasonableness of agency interpretation). *See generally* Cont'l Air Lines, Inc. v. Dep't of Transp., 843 F.2d 1444, 1449 (D.C. Cir. 1988) (discussing "*Chevron* yardstick of 'reasonableness,' . . . [which] is to be determined by reference both to the agency's textual analysis (broadly defined, including where appropriate resort to legislative history) and to the compatibility of that interpretation with the Congressional purposes informing the measure").

[10] Levin, *The Anatomy of* Chevron, *supra* note 8, at 1254-55 (arguing that *Chevron*'s second step should be reconceptualized as application of arbitrary or

Courts and commentators also tangled over when the framework applied at all (Step Zero) given the manner in which an agency reached its interpretation.[11] Finally, the Court reached the question decided in *Brand X*: whether a prior judicial interpretation of a statute forecloses an agency's future interpretation.

Part I then explains how *Brand X* resolved many of these debates by explaining the stare decisis reach of a prior judicial interpretation in a *Chevron* case. Although *Brand X* invokes language that supports both the Acceptance Approach and the Deference Approach, the Court's holding that a prior judicial interpretation of the statute does not have a stare decisis effect on future agency interpretations renders the Deference Approach unconvincing. If an agency is not bound by a prior court interpretation of the statute, then the Court must be interpreting the statute as giving the power to the agency to make the binding choice — to make the law within the limits set by Congress. In effect a prior judicial interpretation means that the court decided the case in front of it, but the agency will decide the law going forward. This thinking supports the Acceptance Approach — it is an acknowledgment that Congress has delegated a lawmaking power that is complete within the parameters set by Congress.

Conversely, under the Deference Approach, the court would identify an ambiguity and then defer to an agency's interpretation, if reasonable. The Deference Approach envisions a-less-than-complete delegation to the agency. It is a delegation of interpretive authority that becomes binding once the court passes on it as reasonable. As a delegation of interpretive authority, it would have to cede to a prior judicial interpretation, otherwise the agency would be reversing the judicial interpretation. Thus, *Brand X*'s holding contradicts the Deference Approach because a prior judicial interpretation of the

capricious review); Matthew C. Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 VA. L. REV. 597, 598-609 (2009) (noting inconsistencies in judicial review under *Chevron* and proposing collapsing *Chevron*'s independent judicial task into "unitary" inquiry into "the reasonableness of the agency's statutory interpretation" and modifying Step Two's review into "standard" hard look review under Supreme Court's *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.* decision). *But cf.* Criddle, *supra* note 8, at 1278 (2008) (noting that *Chevron* two-step formula is merely restatement of Supreme Court's prior jurisprudence); Seidenfeld, *supra* note 5, at 87 (arguing that emphasis should be on *Chevron*'s second step, while retaining two-step framework).

[11] *See* Christensen v. Harris Cnty., 529 U.S. 576, 587 (2000) (finding that administrative agencies "interpretations such as those in opinion letters — like interpretations contained in policy statements, agency manuals, and enforcement guidelines . . . do not warrant . . . deference" under *Chevron*); *see also* Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 873-74 (2001).

statute did not preclude the agency's power to choose a different interpretation. Consequently, *Brand X* promotes the Acceptance Approach alone.

This distinction helpfully clarifies the roles of courts and agencies. Initially, a court will delineate the scope of the agency's power with respect to the types of things that the agency will decide.[12] For example, courts will determine whether or not an agency can decide jurisdictional questions. Then, a court will determine the process by which agencies may exercise this lawmaking power.[13] Once the court has determined that the agency has acted on a matter regarding which it has been delegated interpretive authority and has done so in a procedurally acceptable way, a court's role ends.[14] As a result, *Chevron*'s second step cannot stand because *Chevron* requires a court to accept the agency's lawmaking activity where Congress has delegated the lawmaking power to the agency and the agency has exercised it. A court would contradict itself if it said that the agency has authority to decide, and then to assess that choice for reasonableness. The agency's decision-making process and reasoning may be reviewed under arbitrary and capricious review.[15] Arbitrary and capricious review, however, is different from deciding whether as a substantive matter the court thinks the agency's choice is reasonable.

Part I further explains how courts should use the arbitrary and capricious standard of review to assess agency decision making after *Brand X*. Review under the Administrative Procedure Act ("APA") requires an inquiry into the rationality of the substantive decision,[16] but only where the decision does not involve an interpretation under *Chevron*. Where *Chevron* is at play, the court has already approved the rationality of the decision in its initial interpretation of the range of permissible choices that the agency may make. Thus, arbitrary and

[12] *See, e.g.*, Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005) (noting that "Congress had delegated to the Commission the authority to'execute and enforce' the Communications Act").

[13] *See, e.g.*, *id.* at 981 (noting that "the Commission issued the order under review in exercise of that authority").

[14] *See, e.g.*, *id.* (noting that "the Commission issued the order under review in exercise of that authority").

[15] *See, e.g.*, Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (noting that under arbitrary and capricious review, court will look to whether "agency [ ] examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made' ") (internal citation omitted).

[16] STRAUSS, ADMINISTRATIVE JUSTICE, *supra* note 5, at 375-76 (discussing review of agency's exercise of judgment and noting that agency is "constrained by procedures, by substantive law, and by expectations of rationality and openness").

capricious review in a *Chevron* case will only be a review of whether the agency's reasoning and the process by which it reached its decision, was arbitrary and capricious.

Part II discusses how this new *Brand X* world means that other doctrines of deference including *Skidmore* and *Auer* should fall. *Brand X*'s division of responsibilities for courts and agencies suggests that the continuum of deference for agency of interpretations, of which *Skidmore* is a part, is no longer necessary. Courts should retain interpretive authority where Congress has not delegated that power to the agency, and they should assess the agency choice in light of their role using traditional arbitrary and capricious review. *Skidmore* deference is unhelpful and suggests that agencies might be entitled to some magical amount of consideration that will be too easily subjectively manipulated.

Auer follows a long tradition that gives deference to an agency's interpretations of its own regulations.[17] This tradition stems less from the notion that Congress has delegated its function to the agency, than from the very practical notion that the agency is in the best position to explain what it meant when it wrote its regulations.[18] *Auer* instructs courts to give agency interpretations controlling weight.[19] This instruction undermines *Brand X*. *Auer* gives agencies the power to bind courts in formats that might not be sustained as within their lawmaking discretion under *Brand X*.

Finally, Part III offers an example of *Brand X* review, using the Court's 2009 decision in *United States v. Eurodif S.A.*[20] Courts will interpret a statute by establishing a range of permissible agency discretion to bind courts. This discretion will cover the substantive choices the agency can make as well as the formats in which they can make them. Courts will identify this range by discerning congressional intent to delegate this lawmaking power to the agency. The court will first assess whether the agency interpretation falls within that range, as a matter of substance and form. Also, courts will determine if the agency arrived at the interpretation by procedurally appropriate and rational means. Part III demonstrates how this approach resolves

[17] Auer v. Robbins, 519 U.S. 452, 461 (1997); Lyng v. Payne, 476 U.S. 926, 939 (1986); Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945).

[18] Gonzales v. Oregon, 546 U.S. 243, 257-58 (2006). *But see* Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 151 (1991) (noting that "the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers"). *See generally* 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 6.11 (4th ed. 2002) (discussing same further).

[19] *Auer*, 519 U.S. at 461.

[20] United States v. Eurodif S.A., 129 S. Ct. 878, 878 (2009).

disputed *Chevron* issues and best ensures administrative legitimacy. It also focuses agencies on their task: rational, reflective, deliberate, and considered decision making in every instance. It tosses talismanic deference doctrines aside in exchange for considered lawmaking reached in a rational manner.

I. *CHEVRON*'S LABYRINTH

The *Chevron* framework had two conceptual foundations. *Chevron* spoke in a language of deference, implying that while the court retained its power to say what the law meant, the court was also carefully considering the agency's views. At the same time *Chevron* cautioned that the agency's reasonable choice would bind the court. Thus, as Subpart A explains, *Chevron* started as a schizophrenic doctrine and fostered two subtly distinct approaches: the Deference Approach and the Acceptance Approach. The former involved the court finding an ambiguity and then considering the agency's interpretation and adopting it so long as it was reasonable. The latter involved the reverse order of events. Under the Acceptance Approach, the court identified a range of permissible agency interpretations in the first instance and then simply accepted the agency's choice of one of those interpretations. Subpart B tracks how these approaches fueled a series of debates leading eventually to *Brand X* and the question over the stare decisis effect of a prior court interpretation prior to a *Chevron* case. Finally, Subpart C illustrates how *Chevron* maintained an intellectually awkward coexistence with arbitrary and capricious review.

A. Schizophrenic Chevron*: Two Approaches to* Chevron

In *Chevron*, the Court encountered a fairly common situation and transformed a tradition of judicial consideration into a two-step rule. The agency gave meaning to terms in its organic act that were undefined, and the Court accepted those meanings as permissible applications of the statute.[21] More specifically, the organic act in

[21] *Chevron* involved a situation where the agency changed its mind about the statutory interpretation. *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 857-59 (1984). But agency changes in position are by no means unusual. *See generally* 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 (2008) (conducting multifaceted empirical study of Supreme Court's application of deference doctrines and, among other things, providing detailed tabular data that also highlights numerous variations of agency interpretation).

question, the Clean Air Act, established a permit program for "new or modified major stationary sources."[22] The Court adopted the agency's regulatory interpretation of the act's ambiguous language "new or modified stationary source."[23] Prior to *Chevron*, a court might defer to an agency's interpretation based upon a variety of rationales.[24] For example, under *Skidmore*, the court might justify deference to the agency interpretation if it was well-reasoned, long-held, and persuasive.[25] On the other hand, courts might accept agency interpretations because they were reasonable[26] or simply not inconsistent with the plain meaning of the statute.[27] The *Chevron* Court itself acknowledged this tradition, stating: "We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations."[28] Still, some saw the *Chevron* two-step framework, although born out of a tradition of deference, as revolutionary.[29] The framework ushered in a new judicial attitude. This attitude espoused the idea that the courts should not be making the policy choices left open by regulatory statutes because those choices were really the province of the agency.[30]

There were two ways that one could conceptualize this framework; unfortunately, *Chevron* embraced both. The first way was to say that *Chevron* was a doctrine of deference where agencies "interpreted" the words of the statute, and their interpretations were blessed as "the law" out of deference by the court (Deference Approach).[31] The

[22] *Chevron*, 467 U.S. at 840.

[23] *Id.*

[24] STRAUSS, ADMINISTRATIVE JUSTICE, *supra* note 5, at 361-62.

[25] Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

[26] Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 512 (1989).

[27] STRAUSS, ADMINISTRATIVE JUSTICE, *supra* note 5, at 365.

[28] *Chevron*, 467 U.S. at 844 (footnote omitted).

[29] Seidenfeld, *supra* note 5, at 84. Some commentators have reported, though, that at the time of the decision, the Supreme Court did not consider *Chevron* to be such a remarkable decision. It was only when the lower courts applied the decision that it was seen as revolutionary. *See* Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 976 (1992) [hereinafter Merrill, *Judicial Deference*] (noting that some time had passed before *Chevron*'s analysis of deference question became regarded as fundamental departure from "previous era").

[30] *See* Merrill, *Judicial Deference*, *supra* note 29, at 971; Keith Werhan, *The Neoclassical Revival in Administrative Law*, 44 ADMIN. L. REV. 567, 593-94 (1992); *see also* Eskridge & Baer, *supra* note 21, at 1121.

[31] *Chevron*, 467 U.S. at 843 n.9.

second way was to view the court as interpreting the statute to identify the zone of discretion Congress granted the agency and allowing the agency to choose a statutory meaning within that zone, which the court was bound to accept (Acceptance Approach).[32]

Conceptually, the difference between these two approaches boils down to when the court identifies the range of permissible agency choices. Under the Deference Approach, the court splits its tasks. It determines first that the statute is not clear. The court then assesses the agency's choice in light of that ambiguity as either reasonable or not. If the choice is reasonable, it will defer to the agency's choice.[33] Thus, under the Deference Approach the court will have two steps: first, it will find an ambiguity; and second, it will consider the agency choice and assess whether the agency made a permissible choice. Under the Acceptance Approach, the court has one task when reviewing an agency's interpretation of its organic statute: It interprets the statute either to have a precise meaning, or it identifies the statute as granting a range of discretion afforded to the agency.[34] Thus, the Acceptance Approach differs from the Deference Approach because the Acceptance Approach is really a one-step test.

In some respects, the difference between the two approaches really does not matter. A court is always doing an analysis after the agency has acted, so whether it does so in two steps (Deference Approach) or one (the Acceptance Approach) seems to be nothing more than a matter of form. The court will sanction a reasonable choice by the agency where Congress has delegated the power to the agency to make that choice.

Nevertheless, each approach has different implications. The most important difference between the two approaches was what each meant for the principle of stare decisis. The Deference Approach's emphasis on the court as the interpreter of the law, deferring to the agency choice, suggested that a prior court interpretation would foreclose future agency choices.[35] Also the choice of the Deference Approach required a reasonableness review, which is hard to define and, at best, seemed to overlap with arbitrary and capricious review.[36]

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[32] *Id.* at 865.

[33] *Id.* at 844.

[34] Stephenson & Vermeule, *supra* note 10, at 598-99 (describing *Chevron*'s first step).

[35] United States v. Mead Corp., 533 U.S. 218, 249-50 (2001) (Scalia, J., dissenting) (noting that "ossification of federal law" is inevitable as once Court accords deference, it will be "law forever, beyond the power of the agency to change even through rulemaking").

[36] Levin, *The Anatomy of* Chevron, *supra* note 8, at 1260-63 (noting that *Chevron*

The Acceptance Approach rendered the prior court interpretation as an acknowledgement that the ultimate policy choice was left to the agency and, thus, prior judicial interpretation would not affect future agency choices.[37] The Acceptance Approach has the additional advantage of asking the court to identify the complete legislative grant to the agency in terms of both substance and form and requires the court to accept whatever agency action the agency takes within that grant. After all, if Congress were delegating legislative authority, then it logically would include how that power could be exercised.[38] Finally, the Acceptance Approach reconciles *Chevron* with arbitrary and capricious review as well as other doctrines of deference that cause confusion for the courts.[39] The confusion began with *Chevron* itself because it contained the seeds for both approaches.[40] The debates that followed in *Chevron*'s wake, up until *Brand X*, reflected the confusion the Court's ambivalence caused.[41] The Court supports the Deference Approach:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue,

Step Two is often characterized as reasonableness review and that it overlaps with arbitrary and capricious review).

[37] *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982-83 (2005) ("A court's prior judicial construction of a statute trumps an agency construction . . . 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.").

[38] *See infra* note 66 and accompanying text.

[39] *See infra* Part III.

[40] *See infra* notes 41, 50, and accompanying text.

[41] Peter L. Strauss, *Overseers or "the Deciders" — the Courts in Administrative Law*, 75 U. CHI. L. REV. 815, 816-18 (2008) [hereinafter Strauss, *Overseers*] (noting that *Chevron*'s language tended to obscure its point that agency had range of policy choices available to it).

> the question for the court is whether the agency's answer is based on a permissible construction of the statute.[42]

The Court tells us that the agencies will perform an essentially interpretive task, and the court will "review[] an agency's construction."[43] The Court characterizes courts as being the ultimate interpreters — but acting with deference: "If the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."[44] A court will extend deference to an agency's interpretation, in part, because agencies are experts and, thus, are better suited to interpret the statute.[45]

Thus, under the Deference Approach, the Court's *Marbury v. Madison* role is to say what the law is or to declare the statute ambiguous and then say what the law is by deferring to a reasonable agency interpretation. Under the Deference Approach, once the Court gave agencies the role of "interpreters," it had to speak in the language of deference in order to preserve the Court's constitutional role "to say what the law is."[46] *Chevron* emphasizes this role by pointing out in a footnote: "The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent."[47] Thus, once the agency is deemed to be the initial interpreter, if the court is still to have the final "say," then, as the final interpreter, it sees itself as "deferring" to the agency's interpretive choice (rather than to an essentially legislative choice).[48] Even using this approach, deferring to the agency's

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[42] Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842-43 (1984).

[43] *See id.*

[44] *Id.* at 843.

[45] *See* Barnhart v. Walton, 535 U.S. 212, 222 (2002) (considering "the related expertise of the Agency" as relevant and according *Chevron* deference); Ronald J. Krotoszynski, Jr., *Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of* Skidmore, 54 ADMIN. L. REV. 735, 736-37, 739-42 (2002) (discussing history of agency expertise rationale). The Acceptance Approach also takes note of the agency's expertise and accountability, but in doing so, it envisions Congress setting a range of possibilities for the agency to choose given that expertise and accountability.

[46] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 173-74 (1803).

[47] *Chevron*, 467 U.S. at 843 n.9.

[48] "[C]ourts do not necessarily abdicate a Marshallian duty to 'say what the law is' by deferring to agencies. Courts retain the authority to control administrative abuses of power; deferential review simply recasts the question of 'law' as whether the agency's interpretation is 'reasonable'." Colin Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 569 (1988) (citing Henry P. Monaghan,

interpretation undercuts the Court's *Marbury* power. The after-the-fact review of reasonableness grants the agency the power to say what the law is in the first instance. The most charitable view of the Deference Approach can only argue that the court is saying what the law is; it is just saying that in doing so it will go along with what the agency says unless to do so would be unreasonable.[49]

The Acceptance Approach, on the other hand, acknowledges that the agency is really performing a legislative task, within a zone of discretion granted to it by Congress. Under the Acceptance Approach the court performs its *Marbury* role by saying that there is no legal rule. The agency's choice is a legislative pronouncement that must be

Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 27-28 (1983)); *see also* Ronald M. Levin, *Identifying Questions of Law in Administrative Law*, 74 GEO. L.J. 1, 21 (1985); Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 27-28 (1983) (arguing that "the court is not abdicating its constitutional duty to 'say what the law is' " because "court's task is to fix the boundaries of delegated authority" and "specify what the statute cannot mean, and some of what it must mean, but not all that it does mean"). A good example of this can be found in *Barnhart v. Walton* where the Court found the interpretation "disability" in the Social Security Act by Social Security Administration to fall within the agency's "lawful interpretive authority." *Barnhart*, 535 U.S. at 215. The Court assessed the agency's regulations by measuring the interpretation against the statue:

> [T]he Agency's construction is "permissible." The interpretation makes considerable sense in terms of the statute's basic objectives. The statute demands some duration requirement. No one claims that the statute would permit an individual with a chronic illness — say, high blood pressure — to qualify for benefits if that illness, while itself lasting for a year, were to permit a claimant to return to work after only a week, or perhaps even a day, away from the job. The Agency's interpretation supplies a duration requirement, which the statute demands, while doing so in a way that consistently reconciles the statutory "impairment" and "inability" language.

Id. at 219.

[49] The *Chevron* court noted that:

> [T]he question before it was not whether in its view the concept is "inappropriate" in the general context of a program designed to improve air quality, but whether the Administrator's view that it is appropriate in the context of this particular program is a reasonable one. Based on the examination of the legislation and its history which follows, we agree with the Court of Appeals that Congress did not have a specific intention on the applicability of the bubble concept in these cases, and conclude that the EPA's use of that concept here is a reasonable policy choice for the agency to make.

Chevron, 467 U.S. at 845.

accepted by the court if the agency stays within that zone.[50] The Court's decision in *Chevron* also supports the Acceptance Approach:

> In these cases, the Administrator's interpretation represents a reasonable accommodation of manifestly competing interests and is entitled to deference: the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies. Congress intended to accommodate both interests, but did not do so itself on the level of specificity presented by these cases. Perhaps that body consciously desired the Administrator to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so; perhaps it simply did not consider the question at this level; and perhaps Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency. For judicial purposes, it matters not which of these things occurred.[51]

Here, despite the use of the word "deference," the Court is basically saying Congress did not intend a precise legal rule; rather, it gave a range of discretion to the agency from the very beginning.[52] In contrast to the Deference Approach, the court is the initial interpreter. It says what the law is by defining a range of policy choices available to the agency[53] and outlining a range of ways in which to make them. Within those ranges, the agency has the power to choose what the law will be.

The Court justified this delegation by pointing to the relative institutional competency of agencies as compared to courts to make the appropriate policy choices.[54] Agencies, as specialists in particular fields, possess superior expertise as compared to generalist courts.[55] Moreover, agencies are more politically accountable than judges who

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[50] *See* Monaghan, *supra* note 48, at 27-28.

[51] *Chevron*, 467 U.S. at 865.

[52] E. Donald Elliott, Chevron *Matters: How the* Chevron *Doctrine Redefined the Roles of Congress, Courts and Agencies in Environmental Law*, 16 VILL. ENVTL. L.J. 1, 11-12 (2005).

[53] Peter L. Strauss, *One Hundred Fifty Cases per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1119-21 (1987) (discussing courts' role within "range of [statutory] indeterminacy").

[54] *Chevron*, 467 U.S. at 865.

[55] *Id.*

are insulated from political concerns and, thus, better suited to fill in the meaning of ambiguous statutes.[56] Even though the Court employs deference rhetoric in *Chevron* when it says the "Administrator's interpretation represents a reasonable accommodation of manifestly competing interests and is entitled to deference,"[57] it is still carving out a policy space delegated to the agency.[58] As E. Donald Elliott noted after *Chevron*, statutes no longer necessarily had a "single meaning." Rather, agencies could operate within a " 'policy space,' a range of permissible interpretive discretion, within which a variety of decisions that the agency might make would be legally defensible to varying degrees."[59] This opinion makes sense given the fact that the court was "granting deference" even though the EPA's decision represented a change in policy.[60] The Acceptance Approach acknowledges that the agency has a policy range within which it may operate. Congress has given the agency that policy range forever, not just to give precise meaning to the statute once. However, if the agency gives meaning by choosing the law (from within a congressionally sanctioned range), then the court would simply have to accept that meaning, not defer to it, so long as the agency acted within the scope of its delegation.[61]

Under both approaches, the courts must first decide whether the agency interpretation is worthy of *Chevron* at all.[62] In *Brand X*, the Court did not address which interpretations (i.e., what formats) warrant *Chevron*, it simply announced that the Commission was empowered to "promulgate binding legal rules."[63] However, previously, in *Mead* and *Barnhart*, the Court struggled to acknowledge a Congressional limitation on the agency's lawmaking power without

[56] *Id.* As *Chevron* itself noted, while agencies are not "directly accountable[,]" the Chief Executive is. *Id.*

[57] *Id.*

[58] *See* Jacob E. Gersen & Adrian Vermeule, Chevron *as a Voting Rule*, 116 YALE L.J. 676, 691 (2007) (arguing that point of *Chevron* innovation is "to open up space for discretionary policy judgments by agencies"); *see also* Elliott, *supra* note 52, at 11-12.

[59] Elliott, *supra* note 52, at 11-12.

[60] *See Chevron*, 467 U.S. at 862. In fact, given that the agency could always change its interpretation, even after a court had affirmed a prior interpretation under *Chevron*, suggests that *Chevron* was always best understood by the Acceptance Approach. *See id.* at 863-64.

[61] *See* Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1, 50 (1990) [hereinafter Anthony, *Which Agency Interpretations*].

[62] *See* United States v. Mead Corp., 533 U.S. 218, 230-31 (2001).

[63] Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980-81 (2005).

setting a bright line rule defining it.[64] In each case, the Court looked at the particular agency, the format it used, the power it was given under the organic act, and the context in which the interpretation was made in order to determine whether the particular type of interpretation was an exercise of lawmaking power.[65] The Court's holdings that only certain agencies interpretations can bind courts, combined with the Court's unwillingness to provide a general rule for which agency interpretations will do so,[66] suggest that each substantive delegation contains the specific procedural constraint. As each agency is unique, it seems reasonable that the delegation of lawmaking powers could differ as a matter of process from agency to agency. Thus, if we accept the Acceptance Approach, we need to recognize that the substantive delegation to the agency to bind the courts is necessarily limited by the procedural requirements Congress envisioned when making its delegation.[67] Undeniably, Congress often delegates implicitly and, therefore, courts discern or assume the substantive delegation.[68] Under the Acceptance Approach, courts will need to perform the same type of analysis (as they have already done in *Mead* and *Barnhart*) to discern the procedural limitations on the delegation. [69]

Thus, *Chevron* contained the seeds for both the Acceptance Approach and the Deference Approach. Indeed, one sees the *Chevron* Court vacillate between its two approaches even in the same passage:

> If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate

[64] Barnhart v. Walton, 535 U.S. 212, 222 (2002) (listing variety of factors that support application of *Chevron*); *id.* at 217-18 (noting that courts decide "whether the interpretation, for other reasons, exceeds the bounds of the permissible"); *Mead Corp.*, 533 U.S. at 230-31 (discussing that while authorization to engage in notice and comment regulation is very good indication of agency's power to speak with force of law, it is not necessarily determinative).

[65] *Barnhart*, 535 U.S. at 221-22 (discussing agency's interpretation and expertise); *Mead Corp.*, 533 U.S. at 231-34 (discussing customs rulings in general).

[66] *Barnhart*, 535 U.S. at 227 (noting that Court should state why interpretation is entitled to deference) (Scalia, J., concurring); *Mead Corp.*, 533 U.S. at 246 (noting majority refusal to set bright line rule).

[67] Anthony, *Which Agency Interpretations*, *supra* note 61, at 33 (discussing court's *Marbury* role and obligation to find delegation of lawmaking authority).

[68] *See, e.g.*, *Barnhart* 535 U.S. at 221-22, 225 (finding that "[t]he statute's complexity, the vast number of claims that it engenders, and the consequent need for agency expertise and administrative experience" warrant the conclusion that statute delegates authority to agency); Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 844 (1984) (showing delegation may be implicit).

[69] *Barnhart*, 535 U.S. at 221-22 (discussing agency's interpretation and expertise); *Mead Corp.*, 533 U.S. at 231-34 (discussing customs rulings in general).

> a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. . . . We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations. [70]

This paragraph actually gives the agency two roles simultaneously. The agency is the ultimate interpreter or legislator filling a gap (for whom acceptance is required). At the same time, the agency is the initial interpreter construing a statute (to whom deference is owed). On the one hand, the agency is writing the law, and, on the other hand, the agency is telling us what it thinks the statute means, and the court must confirm that meaning if it is reasonable. Not surprisingly, the Court's approach led to some confusion and a series of contested opinions leading finally to *Brand X*.

B. The Tortured Road to Brand X

Chevron schizophrenia fueled an important *Chevron* debate that eventually led to the Court's decision in *Brand X*. If *Chevron* required courts to accept the agency pronouncement, one could see a potential for abuse by agencies using informal means to interpret statutes and then demanding judicial acceptance.[71] Thus, a significant debate arose concerning when *Chevron* applies; this debate came to the Supreme Court in *Mead*.

Mead invoked both the Deference Approach and the Acceptance Approach. Even though the agency's decision in *Mead* was not entitled to *Chevron*, the Court invoked the Deference Approach by explaining that it would give some consideration to the agency's decision under *Skidmore* which instructs the court to consider a variety of factors.[72] Indeed, one could see how the reference to *Skidmore* actually strengthened the deference rhetoric because *Skidmore* consideration is

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[70] *Chevron*, 467 U.S. at 843-44.

[71] *Cf.* Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidance, Manuals, and the Like — Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1312 (1992) (suggesting that agencies often inappropriately use non-legislative rules, which by definition cannot legally bind, "with the intent or effect" of binding public).

[72] *Mead Corp.*, 533 U.S. at 228, 234-35.

less than *Chevron* consideration.[73] Emphasizing that the court was still the ultimate interpreter in either case:

> To agree with the Court of Appeals that Customs ruling letters do not fall within *Chevron* is not, however, to place them outside the pale of any deference whatever. . . . There is room at least to raise a *Skidmore* claim here, where the regulatory scheme is highly detailed, and Customs can bring the benefit of specialized experience to bear on the subtle questions in this case. . . . Such a ruling may surely claim the merit of its writer's thoroughness, logic, and expertness, its fit with prior interpretations, and any other sources of weight.
>
> . . . Although we all accept the position that the Judiciary should defer to at least some of this multifarious administrative action, we have to decide how to take account of the great range of its variety. If the primary objective is to simplify the judicial process of giving or withholding deference, then the diversity of statutes authorizing discretionary administrative action must be declared irrelevant or minimized. If, on the other hand, it is simply implausible that Congress intended such a broad range of statutory authority to produce only two varieties of administrative action, demanding either *Chevron* deference or none at all, then the breadth of the spectrum of possible agency action must be taken into account.[74]

Thus, the Court uses the language of *deference* and articulating a continuum of consideration by comparing *Chevron* with *Skidmore*. *Chevron* is at the high end of that continuum.

Mead, read as the Deference Approach, also explains the criticism in Justice Scalia's dissent.[75] Scalia cautioned that the result of *Mead* will be the ossification of administrative law because its constraint on *Chevron*'s application will mean that courts will more often reach the interpretive question prior to agencies and preclude future agency flexibility.[76] Only under the Deference Approach does stare decisis preclude future agency flexibility.[77] The Deference Approach sees the court as the final interpreter, while the Acceptance Approach

[73] *Id.* at 234-35.
[74] *Id.* at 234-36.
[75] *Id.* at 236-39.
[76] *Id.* at 247.
[77] *Infra* notes 111-130 and accompanying text.

acknowledges that a range of discretion has been afforded to the agency to speak with the force of law.

Mead also invoked the Acceptance Approach when it explained that *Chevron* would apply when there was either an explicit or implicit delegation to be able to "speak with the force of law."[78] The Court stated:

> This Court in *Chevron* recognized that Congress not only engages in express delegation of specific interpretive authority, but that "[s]ometimes the legislative delegation to an agency on a particular question is implicit." Congress, that is, may not have expressly delegated authority or responsibility to implement a particular provision or fill a particular gap. Yet it can still be apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law, even one about which "Congress did not actually have an intent" as to a particular result. When circumstances implying such an expectation exist, a reviewing court has no business rejecting an agency's exercise of its generally conferred authority to resolve a particular statutory ambiguity simply because the agency's chosen resolution seems unwise, but is obliged to accept the agency's position if Congress has not previously spoken to the point at issue and the agency's interpretation is reasonable.[79]

The Court invoked the Acceptance Approach by allowing the agency to "speak with the force of law"[80] and "accepting" the agency's interpretation.[81]

The Court vacillated again in *Barnhart v. Walton*,[82] when it invoked the Acceptance Approach, asking whether the agency's interpretation fell "within the Agency's lawful interpretive authority."[83] In *Barnhart*, the Court considered a decision by the Social Security Administration ("SSA"), which required, *inter alia*, a disability to have lasted twelve months in order for it to satisfy the statute, which spoke of an

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[78] *Mead Corp.*, 533 U.S. at 229.

[79] *Id.* (alteration in original) (internal citation omitted).

[80] *Id.*

[81] *Id.*

[82] Barnhart v. Walton, 535 U.S. 212, 215 (2002).

[83] *Id.* at 215.

" 'inability' to engage in any substantial gainful activity."[84] The agency arguably enacted the regulations in response to the pending litigation, thus assuring itself *Chevron* deference.[85] The Court responded to this objection with language supporting the Deference Approach:

> And the fact that the Agency previously reached its interpretation through means less formal than "notice and comment" rulemaking does not automatically deprive that interpretation of the judicial deference otherwise its due. . . .
>
> In this case, the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time all indicate that *Chevron* provides the appropriate legal lens through which to view the legality of the Agency interpretation here at issue.[86]

The Court explains a heightened level of consideration by emphasizing the "long-standing" duration of the SSA's interpretation as well as the complicated statute and the agency expertise.[87] Emphasizing these attributes reinforces the view that the Court is considering the agency's decision in light of these attributes, and this consideration is part and parcel of its ultimate decision to defer under *Chevron*.

Despite this ongoing ambivalence, many commentators cautioned that *Chevron* was really always a doctrine of acceptance. Professor Robert Anthony emphasized *Chevron* as a doctrine of acceptance using the terms "*Chevron* acceptance" and "*Skidmore* consideration."[88] Professor Peter Strauss cautioned that *Chevron* "obedience" was the better terminology.[89] Others emphasized the Deference Approach.[90] This debate further highlighted Justice Scalia's concern of binding courts.

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[84] *Id.* at 214.

[85] *Id.* at 221.

[86] *Id.* at 221-22 (internal citation omitted).

[87] *Id.*

[88] Anthony, *Which Agency Interpretations*, *supra* note 61, at 4, 13.

[89] STRAUSS, ADMINISTRATIVE JUSTICE, *supra* note 5, at 371; *see also* Claire Kelly & Patrick Reed, *Once More unto the Breach: Reconciling* Chevron *Analysis and De Novo Judicial Review After* United States v. Haggar Apparel Company, 49 AM. U. L. Rev. 1167, 1170 (2000).

[90] *See* Krotoszynski, *supra* note 45, at 735; *see also* Criddle, *supra* note 8, at 1273-76, 1306-08 (arguing that *Chevron* results not from one theory but from several).

Brand X inevitably arose after *Mead* to address Justice Scalia's warning that *Mead*'s constraints would lead to administrative ossification:

> Worst of all, the majority's approach will lead to the ossification of large portions of our statutory law. Where *Chevron* applies, statutory ambiguities remain ambiguities subject to the agency's ongoing clarification. They create a space, so to speak, for the exercise of continuing agency discretion. . . . For the indeterminately large number of statutes taken out of *Chevron* by today's decision, however, ambiguity (and hence flexibility) will cease with the first judicial resolution. . . . Once the court has spoken, it becomes *unlawful* for the agency to take a contradictory position; the statute now *says* what the court has prescribed. . . . It will be bad enough when this ossification occurs as a result of judicial determination (under today's new principles) that there is no affirmative indication of congressional intent to "delegate"; but it will be positively bizarre when it occurs simply because of an agency's failure to act by rulemaking (rather than informal adjudication) before the issue is presented to the courts.[91]

Scalia could not see how courts could accept any subsequent agency interpretation if it contradicted the court's interpretation, unless one were to accept a total judicial abdication.[92] In effect, courts would have to allow agencies to overrule them in order to maintain administrative flexibility. *Brand X* solved this conundrum.[93]

In *Brand X*, the court confronted the scenario foretold by *Mead*'s dissent: an agency was faced with the interpretation of an ambiguous statute that a court had previously interpreted.[94] The Federal Communications Commission ("FCC") interpreted "[t]he terms 'information service' and 'telecommunications service'[95] provided in the Communications Act of 1934."[96] Its declaratory order found that broadband cable service was an information service but not a

[91] United States v. Mead Corp., 533 U.S. 218, 247 (2001) (Scalia, J., dissenting) (emphasis in original).

[92] *Id.* at 247-48.

[93] *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 983 (2005).

[94] *Id.* at 979-80, 982.

[95] *In re* Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, 17 FCC Rcd. 4798, 4820-33 (2002) [hereinafter *FCC Declaratory Ruling*].

[96] Communication Act of 1934, 47 U.S.C. §§ 151-615b (1934) (amended 1996).

telecommunications service.[97] The Court of Appeals refused to afford the order *Chevron* deference and relied instead on an earlier decision it had issued classifying cable service as a telecommunications service.[98] The Court of Appeals thus vacated the agency's classification of cable service.[99]

The Supreme Court clarified the scope of *Chevron* review while reversing the Court of Appeals. It held:

> 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. This principle follows from *Chevron* itself. *Chevron* established a "presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." Yet allowing a judicial precedent to foreclose an agency from interpreting an ambiguous statute, as the Court of Appeals assumed it could, would allow a court's interpretation to override an agency's. *Chevron*'s premise is that it is for agencies, not courts, to fill statutory gaps. The better rule is to hold judicial interpretations contained in precedents to the same demanding *Chevron* step one standard that applies if the court is reviewing the agency's construction on a blank slate: Only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction.[100]

This means that the judicial role is limited to finding the existence of a gap and identifying its bounds. It does not fill the gap (except to say that there is none).[101] If a court must decide a case before it, and the agency has not yet filled the gap, it will merely decide for that

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[97] *FCC Declaratory Ruling*, 17 FCC Rcd. at 4832.

[98] *Brand X*, 545 U.S. at 979-80.

[99] Brand X Internet Servs. v. FCC, 345 F.3d 1120 (9th Cir. 2003), *rev'd sub nom. Brand X*, 545 U.S. at 967.

[100] *Brand X*, 545 U.S. at 982-83 (internal citation omitted).

[101] *See id.* at 982.

particular case. Its decision will have no effect on the agency's power to exercise its legislative authority going forward.[102]

This logic makes the most sense if we adopt the Acceptance Approach and reject the Deference Approach. Under the Acceptance Approach, the court interprets the statute to be a legislative grant of discretion to the agency.[103] The agency is free to make a choice from a range of choices and even to change its mind.[104] That means that the court is saying that the "law" is a range of choices for the agency to make.[105] Once the court identifies a range of choices, its job as to the substantive choice made by the agency is done. It does not need to defer, and it should not review for substantive reasonableness. Therefore, the only judicial interpretation that would preclude the agency from making a choice different from the prior judicial interpretation is if the prior judicial interpretation held that the statute was not ambiguous; there was no range of available choices.[106]

Admittedly, *Brand X* does not abandon the rhetoric of deference. It discusses the "delegation of authority to the agency to fill the statutory gap in reasonable fashion,"[107] referring to *Chevron's* Step Two reasonableness review. It refers to its own decision in *Chevron* when it "deferred to an agency interpretation that was a recent reversal of agency policy."[108] It refers to the agency as the "authoritative interpreter (within the limits of reason) of such statutes,"[109] again invoking a Step Two reasonableness review. Finally it concludes its analysis of *Chevron*'s requirements by stating "we defer at step two to the agency's interpretation, so long as the construction is 'a reasonable policy choice for the agency to make.' " [110]

Despite the references to *Chevron*'s two-step framework and a court's role to assess the reasonableness of an agency's choice, *Brand X* further commends the Acceptance Approach by confronting a trio of cases that previously had been read, in light of the Deference Approach, to hold that stare decisis would foreclose agency choice once a court had reached an interpretive question. Prior to *Brand X*, it

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[102] *See id.* at 983-84.

[103] Elliott, *supra* note 52, at 11-12.

[104] Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 863-64 (1984).

[105] *Brand X*, 545 U.S. at 982-83.

[106] *Id.*

[107] *Id.* at 980.

[108] *Id.* at 982.

[109] *Id.* at 983.

[110] *Id.* at 986 (quoting Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 845 (1984)).

is fair to say that at least some agencies, courts, and commentators understood the law to require stare decisis to apply to judicial precedents interpreting administrative statutes.[111] One commentator noted that prior to *Brand X* "commentators generally have read these three decisions as establishing the proposition that the Supreme Court will adhere to its precedents in the face of contrary agency interpretations."[112] As *Brand X* explains, the issue of whether an

[111] For example, a notice from the Department of Justice illustrates this understanding:

> A fundamental premise of the immigration enforcement process must be that the substantive regulations codified in title 8 of the Code of Federal Regulations are binding in all administrative settings, and this specifically includes substantive regulations interpreting and applying the provisions of the Act. Of course, the Service and the Board are bound by the decisions of the federal courts, *see, e.g.*, Matter of Anselmo, 20 I&N Dec. 25 (BIA 1989), but even the federal courts owe deference to authoritative agency interpretations of the substantive provisions of the Act, within the limits recognized by the Supreme Court. Chevron v. NRDC, *supra* (deference due agency's interpretation of statutes delegated for administration); INS v. Aguirre-Aguirre, *supra* (deference due administrative interpretations of the Act); *cf.*, Fisher v. INS, 79 F.3d 955, 961 (9th Cir. 1996) (en banc) (same; different standard). In the absence of such controlling judicial interpretations, the respondents, the immigration judges, the Service, and the public at large should not be left to wonder whether the regulations interpreting and applying the substantive provisions of the Act will be binding in administrative proceedings under the Act. *Cf. In re* Rodriguez-Tejedor, 23 I&N Dec. 153, 156 (B.I.A. 2001).

Board of Immigration Procedure: Procedural Reforms Improve Case Management, 67 Fed. Reg. 54878, 54878-01 (Aug. 26, 2002) (to be codified at 8 C.F.R. pt. 3); *see* Cal. Dep't of Soc. Servs. v. Thompson, 321 F.3d 835, 851 (9th Cir. 2003) (stating that "[o]nce the United States Supreme Court determines a statute's clear meaning, lower courts must adhere to that determination under the doctrine of *stare decisis*, and courts judge an agency's later interpretation of the statute against the prior determination of the statute's meaning").

[112] Doug Geyser, *Courts Still "Say What the Law is": Explaining the Functions of the Judiciary and Agencies After* Brand X, 106 COLUM. L. REV. 2129, 2145 (2006) (citing Kenneth A. Bamberger, *Provisional Precedent: Protecting Flexibility in Administrative Policymaking*, 77 N.Y.U. L. REV. 1272, 1306-20 (2002)) (discussing these three cases and noting that Court "has applied to the administrative law context the traditional standard of strong judicial precedent rooted in the theory of incorporation"); Gregg D. Polsky, *Can Treasury Overrule the Supreme Court?*, 84 B.U. L. REV. 185, 202 (2004) (arguing that "this trilogy of decisions ending with *Neal* provides that when the Court has independently interpreted a term on a prior occasion, that interpretation becomes 'incorporated' into the statute and binds the executive branch"); *see also* Paul A. Dame, Note, Stare Decisis*,* Chevron*, and* Skidmore*: Do Administrative Agencies Have the Power to Overrule Courts?*, 44 WM. & MARY L. REV. 405, 424 (2002). Another set of commentators identified the *Brand X* problem and called for the solution it eventually offered. Merrill & Hickman, *supra* note 11, at 915-16 (pointing to logical conflict

agency could continue to "fill the gap" after a court had already spoken on the issue had already reached the court in *Neal v. United States*.[113]

Neal involved a petitioner who had been convicted of selling LSD. He was sentenced under the Sentencing Guidelines, which at that time, required that the weight of the blotter paper upon which the LSD was sold should be included in the weight of the drugs for sentencing purposes.[114] The Guidelines were consistent with the Supreme Court's prior decision, *Chapman v. United States*,[115] which had interpreted the statute:

> In *Chapman*, we interpreted the provision of the Act that provided a mandatory minimum sentence of five years for trafficking in an LSD "mixture or substance" that weighed one gram or more . . . . We construed "mixture" and "substance" to have their ordinary meaning, observing that the terms had not been defined in the statute or the Sentencing Guidelines and had no distinctive common-law meaning. . . . Reasoning that the "LSD is diffused among the fibers of the paper . . . [and] cannot be distinguished from the blotter paper, nor easily separated from it," . . . we held that the actual weight of the blotter paper, with its absorbed LSD, is determinative under the statute . . . .[116]

Petitioner argued, though, that the Commission, as the expert with the authority to interpret the enabling act, and with the authority to "respond to judicial decisions in developing a coherent sentencing regime,"[117] should interpret the statute, and courts should give its interpretation deference under *Chevron*.[118] The Court rejected that argument outright:

> While acknowledging that the Commission's expertise and the design of the Guidelines may be of potential weight and relevance in other contexts, we conclude that the

between congressional delegation to agencies recognized in *Chevron* and doctrine of stare decisis); *see also* Richard L. Pierce, Jr., *Reconciling* Chevron *and* Stare Decisis, 85 GEO. L.J. 2225, 2260 (1997) (discussing apparent conflict between *Chevron* Step Two and adherence to Supreme Court's precedent).

113 *Brand X*, 545 U.S. at 984; Neal v. United States, 516 U.S. 284, 284 (1996).

114 *Neal*, 516 U.S. at 286.

115 Chapman v. United States, 500 U.S. 453, 453 (1991).

116 *Neal*, 516 U.S. at 289 (citations omitted).

117 *Id.* at 290.

118 *See id.*

> Commission's choice of an alternative methodology for weighing LSD does not alter our interpretation of the statute in *Chapman*. In any event, principles of *stare decisis* require that we adhere to our earlier decision.[119]

The *Neal* Court added: "Once we have determined a statute's meaning, we adhere to our ruling under the doctrine of *stare decisis*, and we assess an agency's later interpretation of the statute against that settled law."[120] The *Brand X* majority explained that in *Neal* the Court dealt with a decision not to defer to an agency's construction that conflicted with a statutory construction. *Brand X* explained that *Neal* held the statute was unambiguous, thus there was no discretion afforded to the agency.[121]

The Court also addressed the cases cited in *Neal*, *Lechmere, Inc. v. NLRB*,[122] and *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*[123] The Court read these cases for the proposition that a prior judicial interpretation of a statute should foreclose differing agency interpretations where the Courts had found a "clear" meaning, signifying that there was no agency discretion.[124] By implication, a prior court decision interpreting a statute where the statute afforded discretion to the agency would not bind the agency in future cases.

Arguably though, the idea that an agency could reach a different interpretive conclusion than one court had reached previously was antithetical to the principle of stare decisis because it would compel a subsequent court to ignore precedent in order to affirm the agency's decision. *Brand X* deflected this line of thought by explaining its decision as a decision about institutional roles:

> Since *Chevron* teaches that a court's opinion as to the best reading of an ambiguous statute an agency is charged with administering is not authoritative, the agency's decision to construe that statute differently from a court does not say that the court's holding was legally wrong. Instead, the agency may, consistent with the court's holding, *choose a different construction*, since the agency remains the authoritative

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[119] *Id.*

[120] *Id.* at 295 (citing Lechmere, Inc. v. NLRB, 502 U.S. 527, 536-37 (1992); Maislin Indus., U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 131 (1990)).

[121] Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 984 (2005).

[122] Lechmere, Inc. v. NLRB, 502 U.S. 527, 536-37 (1992).

[123] Maislin Indus., U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 131 (1990).

[124] *Brand X*, 545 U.S. at 984.

> interpreter (within the limits of reason) of such statutes. In all other respects, the court's prior ruling remains binding law (for example, as to agency interpretations to which *Chevron* is inapplicable).[125]

Thus, *Brand X*'s explication of *Chevron*'s effect on stare decisis suggests that *Chevron* should be viewed through the Acceptance Approach because *Brand X* requires that the court's initial interpretation identify a range of discretion for the agency's lawmaking power and courts must accept any choice within that range.[126]

One could try to read *Brand X* as saying that courts will defer to agency interpretations unless there is no agency interpretation, but doing so would conflict with the Court's explanation in response to Justice Scalia's dissent. Justice Scalia argued in dissent that the Court's holding renders "judicial decisions subject to reversal by executive officers."[127] The Court responded that the agency was not overruling the court because the court was not empowered to give meaning to the legislative gap left by Congress; it simply had decided the case before it.[128] The agency had the power to fill the legislative gap.[129] The Court was merely accepting the agency's legislative pronouncement as it must.[130]

Once courts and commentators concede that *Brand X* validates the Acceptance Approach, despite some deference rhetoric, Step Two of *Chevron* must fail. *Chevron*'s second step contradicts the premise of the Acceptance Approach. Once there is a permissible range of agency discretion, then the only question is whether the agency choice is within that range. Agency reasoning and process still matter, but those factors are assessed by the arbitrary and capricious standard.

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[125] *Id.* at 983 (emphasis added).

[126] *Id.* at 982 (quoting Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 740-41 (1996) (noting that "[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. This principle follows from *Chevron* itself. *Chevron* established a 'presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows' ")).

[127] *See id.* at 1016 (Scalia, J., dissenting).

[128] *See id.* at 983-84.

[129] *See id.*

[130] *See id.* at 980.

C. Chevron*'s Step Two, Arbitrary and Capricious Review, and* Brand X

Brand X's validation of the Acceptance Approach renders *Chevron*'s second step meaningless and clarifies *Chevron*'s relationship with arbitrary and capricious review. *Chevron* has always coexisted awkwardly with arbitrary and capricious review, most commonly under the APA.[131] Under the APA, courts must review agency action pursuant to standards set forth by Congress. First, under Section 706, courts say what the law is "[t]o the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."[132] The APA then directs the review of agency action. A reviewing court shall:

> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> > (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . [or] . . .
> >
> > (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; . . .[or] . . .
> >
> > (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.[133]

Initially, one can see several points where one must reconcile *Chevron* review with arbitrary and capricious review under Section 706. First, as others have noted, Section 706 grants courts the power to decide all questions of law.[134] The plain meaning seems to

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[131] Congress enacted the APA in 1946 to provide generally agencies' procedures and practices as well as general methods for judicial review. CHARLES H. KOCH, JR., 1 ADMINISTRATIVE LAW AND PRACTICE § 2:31 (2d ed. 2010). Review can also be specifically provided in an enabling act. Elizabeth V. Foote, *Statutory Interpretation or Public Administration: How* Chevron *Misconceives the Function of Agencies and Why It Matters*, 59 ADMIN. L. REV. 673, 723 (2007) (stating same); *see also* WILLIAM F. FOX, UNDERSTANDING ADMINISTRATIVE LAW 297-99 (5th ed. 2009).

[132] 5 U.S.C. § 706 (1966).

[133] *Id.* These sections apply to review of agency fact findings as indicated in the organic statute. Moreover, the arbitrary and capricious standard also applies to agency reasoning in every instance. STRAUSS, ADMINISTRATIVE JUSTICE, *supra* note 5, at 341-49.

[134] 5 U.S.C. § 706; *see, e.g.*, Michael Ray Harris, *Standing in the Way of Judicial Review: Assertion of the Deliberative Process Privilege in APA Cases*, 3 ST. LOUIS U. L.J. 349, 383-85 (2009) (stating that "Section 706 of the APA expressly states that, to the

contradict the notion that the agency would say what the law is under *Chevron*. But as discussed above, one solves that conflict not by viewing the court as deciding the interpretive issue, but as a matter of doctrine choosing to defer to the agency's decision of what the interpretation should be (the Deference Approach) or by viewing the court as deciding as a matter of law that there is a range of discretion afforded to the agency (the Acceptance Approach).[135]

Likewise, in terms of the prescription under Section 706(2), one might wonder whether *Chevron* covers interpretations that might be considered an "agency action, findings or conclusion."[136] As a

extent necessary, 'the reviewing court shall decide all relevant questions of law' ").

[135] *See* Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV 2071, 2085-88 (1990) [hereinafter Sunstein, *Law and Administration*] (arguing that "[t]he APA's provision for independent judicial interpretation of law is not inconsistent, then, with *Chevron*'s deference to the agency's interpretation if Congress has, under particular statutes, granted the relevant authority to administrative agencies"). Yet still, the question of whether *Chevron* should apply to pure questions of law persists. *See also* INS v. Cardoza-Fonseca, 480 U.S. 421, 446, 448, 452 (1987) (finding that "pure question[s] of statutory construction" are "for the courts to decide"). The Fonseca Court reasoned that:

> The "narrow legal question" is "quite different from the question of interpretation that arises in each case in which the agency is required to apply [standards from the statutes in question] to a particular set of facts;" as to the latter, a court under *Chevron* must respect the interpretation of the agency.

Anthony, *Which Agency Interpretations, supra* note 61, at 20 (quoting *Cardoza-Fonseca*, 480 U.S. at 446, 448, 452); *see, e.g.*, Young v. Cmty. Nutrition Inst., 476 U.S. 974 (1986) (finding that *Chevron* deference to pure issue of law was merited where statute was ambiguous); Alwan v. Ashcroft, 388 F.3d 507, 510 (5th Cir. 2004) (employing de novo review, as less deferential standard and "exception" to *Chevron*, to "purely legal question that Congress," by "terms of the statute itself," "has not consigned to the discretion of the BIA," expressly leaving "matter to be ultimately resolved by the courts"); Patel v. Ashcroft, 294 F.3d 465, 467 (3d Cir. 2002) (noting "that there is some confusion surrounding the proper standard of review" with regard to cases where agency interprets "a statute the agency is charged with administering"); Sandoval v. Reno, 166 F.3d 225, 250, 239-40 (3d Cir. 1999) (quoting *Cardoza-Fonseca*, 480 U.S. at 446) (expressing doubt whether *Chevron* applies and, thus, finding that "the question of a statute's effective date appears to present 'a pure question of statutory construction for the courts to decide' "); Henry v. INS, 8 F.3d 426, 433-34 (7th Cir. 1993) (noting Circuits' split whereas some, labeling question "purely legal," employ de novo review, others conduct "only a 'limited review' . . . 'to determine whether the decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law' "); *see also* Doo Nam Yang v. ACBL Corp., 427 F. Supp. 2d 327, 339-40 (S.D.N.Y. 2005) (finding that when reviewing agency determinations, New York courts are not required to defer when "the question is one of pure legal interpretation of statutory terms").

[136] 5 U.S.C. § 706(2).

threshold matter, one first needs to understand that subsections (A), (E), and (F) each provide a standard by which the court will review the agency's findings of fact (depending upon the prescription in the organic act).[137] Additionally, subsection (A) provides the standard to assess agency reasoning in all cases.[138] Therefore, the arbitrary and capricious standard of review will apply when a court reviews the reasoning supporting an agency's action, decision, or conclusion even when courts review the agency's findings of facts pursuant to a different standard.[139]

One could try to distinguish *Chevron* from arbitrary and capricious review by applying *Chevron* to legal interpretations, and the arbitrary and capricious review to the remaining agency actions, findings, and conclusions.[140] But as others have explained, the Supreme Court likely intended *Chevron* to support a broader power:[141] one that would apply to review of interpretations involving mixed questions of law and fact.[142] In fact, there appears to be more of a dispute over whether *Chevron* should apply to purely legal questions.[143]

The distinction between interpretation and reasoning remains as a potential dividing point between *Chevron* and arbitrary and capricious review. *Chevron* applies any time an agency "interprets" its statute or gives meaning to a term or phrase, while arbitrary and capricious review applies to agency reasoning (as well as the review of facts).[144]

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[137] *See* STRAUSS, ADMINISTRATIVE JUSTICE, *supra* note 5, at 341-49.

[138] *See id.* at 375-86.

[139] *See e.g.*, United States v. Eurodif S.A., 129 S. Ct. 878, 886-87 (2009) (reversing Federal Circuit, which affirmed CIT finding that Department of Commerce's decision was unsupported by substantial evidence, and holding that Department's take on transactions at issue as sales of goods rather than services reflects permissible interpretation and application of § 1673).

[140] *See* Levin, *The Anatomy of* Chevron, *supra* note 8, at 1266-67.

[141] *See id.*

[142] *See id.* Professor Sunstein made the converse point explaining why *Chevron* would apply to purely legal interpretations as opposed to just the application of law to fact. Sunstein, *Law and Administration*, *supra* note 135, at 2095 (noting that "the line between purely legal and mixed questions is extremely thin").

[143] Anthony, *Which Agency Interpretations*, *supra* note 61, at 20; Brian G. Slocum, *The Immigration Rule of Lenity and* Chevron *Deference*, 17 GEO. IMMIGR. L.J. 515, 532 (2003) (noting confusion among circuits about applicability of *Chevron* deference to "agency interpretations of purely legal questions, especially ones that do not implicate agency expertise").

[144] 5 U.S.C. § 706 (1966); Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005); Pub. Util. Comm'n v. Pollak, 343 U.S. 451, 458 (1952); Arent v. Shalala, 70 F.3d 610, 615-16 (D.C. Cir. 1995).

Admittedly, this distinction seems to discount the reasoning inherent in interpretation and avoids the question of whether reasoning can be obviated by interpretation. For example, in *FCC v. Fox*,[145] the FCC appealed a Second Circuit decision in which the court determined that the agency's change in policy regarding indecent language was arbitrary and capricious.[146] The Court stated, "[f]ederal law prohibits the broadcasting of 'any . . . indecent . . . language.' "[147] Prior to 2004, the FCC's interpretative policy was that "nonliteral expletives" were only "actionably indecent" if used repetitively within the same broadcast.[148] The agency explained, in part, that it was concerned about the First Amendment.[149] Yet, in 2004, the FCC declared that nonliteral expletives would "be actionably indecent, even when the word is used only once."[150] In holding that the policy change was arbitrary and capricious, the Second Circuit stated that the FCC did not adequately explain the change and was, thus, in violation of the APA.[151] The court reviewed the agency's decision using arbitrary and capricious review rather than *Chevron* because the agency's interpretation was not at issue in the case.[152] Its interpretation, which would be entitled to *Chevron* analysis, had not changed.[153] Only its decision to enforce its interpretation (to find that the use of indecent language was "actionable"), despite the lack of repetitive nonliteral expletives, was at issue.[154]

Previously, in *In re Citizen's Complaint Against Pacifica Foundation Station WBAI (FM)*, the FCC had defined the statutory term "indecent" as "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs . . . ."[155] As the

[145] FCC v. Fox Television Station, Inc. (*Fox II*), 129 S. Ct. 1800, 1800 (2009).

[146] *Id.* at 1809-10.

[147] *Id.* at 1805 (citing 18 U.S.C. § 1464 (2006)).

[148] *Id.* at 1807.

[149] Fox Television Station, Inc. v. FCC (*Fox I*), 489 F.3d 444, 449 (2d Cir. 2007) (citing Application of WGBH Educ. Found., 69 F.C.C.2d 1250, ¶ 10 (1978), *rev'd*, 129 S. Ct. 1800 (2009)).

[150] *Fox II*, 129 S. Ct. at 1807.

[151] *Fox I*, 489 F.3d at 461-62.

[152] *See id.* at 455. The Court of Appeals had rejected the agency's interpretation of the statutory term "profane" as unreasonable because it overlapped too greatly with the statutory term "indecent." *Id.* at 467. Thus, even though it felt that the agency had explained itself adequately, it still felt that the interpretation was "unreasonable." *Id.*

[153] *See Fox II*, 129 S. Ct. at 1806-11.

[154] *Id.* at 1810-12.

[155] *In re* Citizen's Complaint Against Pacifica Found. Station WBAI (FM), 56

Supreme Court noted in *Fox*, the FCC subsequently took a cautious approach in its enforcement policy, relying on the repetitive nature of the words found to be indecent.[156] As the FCC explained in *In re Infinity*, a case that involved late night and early morning radio shows containing "vulgar and shocking language":

> [T]he Commission took a very limited approach to enforcing the prohibition against indecent broadcasts. Unstated, but widely assumed, and implemented for the most part through staff rulings, was the belief that only material that closely resembled the George Carlin monologue would satisfy the indecency test articulated by the FCC in 1975. Thus, no action was taken unless material involved the repeated use, for shock value, of words similar or identical to those satirized in the Carlin "Filthy Words" monologue. Also widely shared was the view that such broadcasts would be actionable only if aired before 10:00 p.m. As a result, the Commission, since the time of its ruling in 1975, has taken no action against any broadcast licensee for violating the prohibition against indecent broadcasts.[157]

But one can categorize the FCC as interpreting its interpretation when deciding when to find an "actionable violation."[158] A court characterizing conduct as "actionable" is saying that the conduct violates the statute.[159] In *Pacifica*, the FCC interpreted an actionable violation as one that used "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs."[160] Later, the FCC staff interpreted that definition as also requiring both repetition and airing prior to 10 p.m.[161] The Court labels this second interpretation as an enforcement policy[162] — which is fair enough — but it is an enforcement policy based on an interpretation of what the statute can withstand. In other words, the FCC in its enforcement policy is interpreting the statute. Presumably, the FCC could have

F.C.C. 2d 94, 98 (1975).

[156] *Fox II*, 129 S. Ct. at 1806.

[157] *In re* Infinity Broad. Corp. of Pa., 3 FCC Rcd. 930, 930 (1987) (internal footnotes omitted).

[158] *See id.*

[159] In *In re Infinity*, the FCC defined "actionable" as "in violation of 18 U.S.C. § 1464." *Id.* at 931.

[160] *In re* Citizen's Complaint Against Pacifica, 56 F.C.C. 2d at 98.

[161] *See id.*

[162] *See Fox II*, 129 S. Ct. 1800, 1812 (2009).

simply interpreted the statute as either requiring or not requiring repetition of nonliteral expletives from the very beginning. Or, it could have not required repetition and then changed its mind and then changed its mind again (as it seems to have done). Thus, it is not clear whether the agency needs to explain the reason why it changed its enforcement policy or justify its interpretation of the statute.

Either way, it would seem that a court would have to consider whether the agency had the lawmaking discretion to make the choice that it did and whether it reached its decision in a rational and procedurally appropriate manner. In fact, *Citizens to Preserve Overton Park, Inc. v. Volpe*[163] shows that arbitrary and capricious review includes a review of authority and then reasoning. In *Overton Park*, the Court considered an attempt to enjoin the Secretary of Transportation from funding a road through a park. First, the Court needed to "decide whether the Secretary acted within the scope of his authority."[164] Thereafter, even if the agency has acted within the scope of that authority, it must have done so in a rational and procedurally proper manner: "The court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment."[165] As Professor Strauss has explained, this is an inquiry into the agency's process:

> "Consideration of the relevant factors" invites attention, not only to whether the Secretary asked all the right questions, but also to whether he asked any wrong ones. Did, for example, political "blackmail" play a role? Does the reasoning process represented to the reviewing court reveal gaps in thought or other irrationality?[166]

Thus, it would seem that no matter how one couches agency conduct one always needs to consider whether the agency is acting within its delegated discretion and whether it has explained itself.[167]

Despite the confusion created by this overlap, some contend that *Chevron*'s Step Two, which asks courts to assess the reasonableness of the agency interpretation, should be guided by the hard look review employed in the arbitrary and capricious standard of Section 706(2).[168] Other commentators have taken the overlap a step further arguing that

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[163] Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 402 (1971).

[164] *Id.* at 415.

[165] *Id.* at 416.

[166] *See* STRAUSS, ADMINISTRATIVE JUSTICE, *supra* note 5, at 377.

[167] *See id.* (noting how similar arbitrary and capricious analysis is to *Chevron*).

[168] PIERCE, *supra* note 18, § 7.4; Strauss, *Overseers*, *supra* note 41, at 817.

Chevron's Step Two and arbitrary and capricious review essentially do the same thing. Professor Ronald Levin, for example, in his 1997 article suggested that "step one review and arbitrariness review, properly defined, can cover all the types of inquiries that courts actually use step two to address."[169]

The tension identified by Levin and others has recently been revived in an important essay exchange.[170] Professors Matthew Stephenson and Adrian Vermeule claim that, properly understood, *Chevron* has only one step because all that is required is a "single inquiry into the reasonableness of the agency's statutory interpretation."[171] They contend that both steps are asking the same question: is the agency's interpretation permissible?[172] These steps, they claim, are "mutually convertible."[173] Stephenson and Vermeule argue that attempts to differentiate between Step One and Step Two are futile.[174] For instance, one can view Step One as an inquiry into whether there is only one possible meaning to the statutory term.[175] They reject this argument as false because it forecloses the possibility that "Congress'[s] intention may be ambiguous within a range."[176] Alternatively, one can distinguish Step Two as an analysis of the agency's mode of reaching its interpretation.[177] However, such an analysis renders Step Two redundant with arbitrary and capricious review; they propose eliminating this redundancy by collapsing *Chevron* into one step that assesses the reasonableness of the agency's

[169] Levin, *The Anatomy of* Chevron, *supra* note 8, at 1276. Other commentators have written on the overlap between *Chevron* Step Two and arbitrary and capricious review. *See, e.g.*, PIERCE, *supra* note 18, §§ 3.6, 7.4 (illustrating that *Chevron* Step Two amounts to application of *State Farm* reasonableness test where court sets aside as arbitrary and capricious agency's rescission of previously promulgated rule); Seidenfeld, *supra* note 5, at 127-30 (noting that courts at Step Two have employed APA's arbitrary and capricious review); Sunstein, *Law and Administration*, *supra* note 135, at 2105 (noting that "[t]he reasonableness inquiry should probably be seen as similar to the inquiry into whether the agency's decision is 'arbitrary' or 'capricious' within the meaning of the APA").

[170] Levin, *The Anatomy of* Chevron, *supra* note 8, at 1254-55.

[171] Stephenson & Vermeule, *supra* note 10, at 597.

[172] *Id.* at 599 (arguing that current *Chevron* inquiry "artificially divides one inquiry into two steps").

[173] *Id.*

[174] *Id.* at 601-02.

[175] *Id.* at 602.

[176] *Id.* at 602-03 (arguing that Step One's inquiry wrongfully assumes that statute can unambiguously forbid agency's interpretation only when Congress has specified single possible meaning).

[177] Stephenson & Vermeule, *supra* note 10, at 602-03.

interpretation.[178] They argue the negative consequence of this unnecessary division of tasks is that judges spend an "inordinate amount of time" at Step One trying to discern whether there is a clear and precise meaning to the statutory term.[179] Moreover, this judicial endeavor may lead judges to declare a single meaning, forever foreclosing agency discretion.[180]

Professors Kenneth Bamberger and Peter Strauss have replied that *Chevron*'s two steps are quite necessary as the first step requires that judges "deal squarely with the key question of statutory ambiguity."[181] They also see the *Chevron* framework as useful "for circumscribing the appropriate scope of independent judicial decisionmaking more generally."[182] They would retain the two-step analysis and, in particular, the "review of any agency determination falling with [the] range [established by Step One]."[183]

Bamberger and Strauss caution that a unitary analysis by courts will lead courts to conflate the two inquiries and lead to "aggrandizement by implication."[184] Courts that simply pass on whether an agency interpretation was "reasonable" may fail to articulate whether they are deciding the interpretive question once and for all and thus foreclosing future agency discretion or validating a permissible agency decision that the agency would be free to change in the future.[185] Bamberger and Strauss worry that this proposal would be most harmful in those cases where *Chevron* did not even apply.[186] These are cases where the court reviewed an interpretation not entitled to *Chevron* deference (because it was not *Mead* worthy) and decided the

[178] *Id.* at 597, 605-09 (arguing that doing so "would clarify the doctrine while keeping the interpretive question and the 'reasoned decisionmaking' question analytically separate").

[179] *Id.* at 605.

[180] *See id.* at 605-06.

[181] Kenneth A. Bamberger & Peter L. Strauss, Chevron's *Two Steps*, 95 VA. L. REV. 611, 612 (2009) (arguing that this would confuse "*Chevron*'s task-allocation function, thus distracting courts from an essential judicial function: that of bounding agency authority").

[182] *Id.* at 612.

[183] *Id.* at 614.

[184] *Id.* at 618 (noting that "[i]t may invite the inference that its holding constitutes a precedential Step One analysis for *Brand X* purposes, fixing the legal meaning of a statute and precluding future agency interpretations").

[185] *Id.* at 619-20.

[186] *Id.* at 619 (arguing that "[i]n these cases, the importance of judicial recognition of ambiguity analysis as the starting point for statutory interpretation is at its apex").

statutory interpretation question.[187] Under *Brand X*, the agency would still retain the authority to say what the law is at some later point.[188]

Bamberger and Strauss further warn that the Stephenson and Vermeule proposal would "orient judicial decisionmaking towards a touchstone of interpretive reasonableness,"[189] rather than clarifying that courts need to define the statutory ambiguity.[190] By defining the ambiguity, the prior resolution of the issue at hand governs only the present dispute. Consequently, the agency will retain discretion to resolve the ambiguity without fear of "overruling" the court.[191] Lastly, they point out that arbitrary and capricious review varies depending on context.[192] And they see distinct factors in *Chevron* reasonableness review not present in arbitrary and capricious review in three areas: first, whether an agency erroneously concluded that a statute unambiguously required a particular interpretation; second, whether an agency correctly construed a prior judicial construction to mean that the statute could bear only one particular meaning; finally, whether an agency had made the case to justify an interpretation that appeared to contradict the statute's plain language.[193] They also suggest that *Chevron*'s Step Two offers a location to assure that the agency has properly "taken account of other interpretive tools . . . employed appropriately robust procedures in construing statutory language or determining the scope of its authority."[194]

Stephenson and Vermeule's preference for characterizing *Chevron*'s two steps as one, in light of the work performed by arbitrary and capricious review, is appealing. They are right that arbitrary and capricious review can, and does, perform the work envisioned by Step Two. But the danger that "reasonableness" review will lead to a conflation of judicial tasks, as noted by Bamberger and Strauss, is real. A clear judicial articulation of ambiguity and the resulting range of permissible agency action can only help both courts and agencies. The Bamberger and Strauss criticism that arbitrary and capricious review

[187] *See id.*

[188] *See id.* (citing Kenneth A. Bamberger, *Provisional Precedent: Protecting Flexibility in Administrative Policymaking*, 77 N.Y.U. L. REV. 1272, 1294-306 (2002) (proposing and setting forth rationale for such outcome)).

[189] *See id.* at 620.

[190] *Id.* at 620 (arguing that *Chevron* doctrine should aim "to strengthen *Chevron*'s indication that interpreting courts must address the existence of ambiguity first as a means for ensuring recognition of the appropriate judicial role").

[191] *See id.* at 619.

[192] *Id.* at 622.

[193] *Id.* at 622-23.

[194] *Id.* at 623.

means different things in different places may be true, but it does not invalidate it as means to assess agency action that does all the work that *Chevron* Step Two could require.[195] Indeed, one could argue that its flexibility recommends it. Moreover, one could imagine that the unique inquiries that they see captured in Step Two, such as "whether an agency had made the case to justify an interpretation that appeared to contradict the statute's plain language,"[196] could be captured within arbitrary and capricious review.

Brand X, as a validation of the Acceptance Approach, invites (and perhaps requires) an attractive alternative: lose the *Chevron* framework altogether and replace it with the *Brand X* rule of institutional roles combined with an arbitrary and capricious review of the agency's decision-making process.[197] The court's role is to act as an initial interpreter to identify the substantive and procedural range of discretion afforded to the agency. The agency's role is to choose a meaning within that range in a rational and procedurally appropriate manner. This proposal differs from the Stephenson and Vermeule proposal because it would require an interpretive exercise under *Brand X* that went beyond reasonableness. Stephenson and Vermeule frame the question as "whether the agency's construction is permissible as a matter of statutory interpretation."[198] One might consider an interpretation of *Brand X* that requires courts to focus on the interpretive task and identify the range of permissible agency conduct (both as to substance and to form), but once they have done that, they have ended their interpretive task. There is no deference involved. Further, arbitrary and capricious review can commence thereafter and should consist of an inquiry over the agency reasoning and process in

[195] An agency's decision may be found arbitrary and capricious if it "has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 658 (2007) (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)). An agency's decision would be considered arbitrary where there is no "rational connection between the facts found and the choice made." Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc., 419 U.S. 281, 285 (1974).

[196] Bamberger & Strauss, *supra* note 181, at 622-23.

[197] *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 985 (2005) (noting that before court may trump agency decision, "the court must hold that the statute unambiguously requires the court's construction.").

[198] Stephenson & Vermeule, *supra* note 10, at 599.

making its decision. There is no need or use to test the "reasonableness" of the substance of that decision.

II. NO MORE DOCTRINES OF DEFERENCE

Courts should adopt the Acceptance Approach as the best approach in light of *Brand X* because it frees courts from the *Chevron* schizophrenia. The Acceptance Approach closes the conceptual loophole that always existed in *Chevron* but rose to prominence in *Mead*: if Congress has delegated to the agency the power to fill any implicit or explicit gap, then could a court undo that delegation by reaching the interpretive question first? *Brand X* instructs that the courts must identify the gap; but, after identifying it, the courts have no other interpretive task. Under the Deference Approach, conversely, courts would still check for reasonableness. Thus, *Brand X* undoes *Chevron* because Step Two itself is foreclosed by Step One. The court has already identified the range of reasonable choices. The agency's reasoning and process in reaching its choice can and should be assessed using arbitrary and capricious review.

Brand X not only alleviates the need for Step Two under *Chevron*, it also suggests that courts should abandon resort to *Skidmore* review where *Chevron* is inapplicable. *Skidmore*, which pre-dated the APA, speaks of the power to persuade and became the agency consolation prize for interpretations that were not *Chevron*-worthy.[199] But it was borne out of a time when the court's interpretative role trumped the agency's role and was part of a continuum of deference designed to mediate the functions of the courts and agencies. *Brand X* makes that continuum unnecessary for the most part. Courts will still be deferential to an agency's decisions, actions, and conclusions under the arbitrary and capricious standard of review. They will not, however, need doctrines of deference to assess legislative choices agencies make pursuant to congressionally delegated power.

Nor is *Auer* deference needed to assess nonlegislative agency choices. *Brand X* eviscerates *Auer* deference because it circumscribes when an agency can bind a court both in terms of substance and form. A form that is not suitable to bind a court when the agency is interpreting a statute will not become suitable when an agency interprets a regulation.

[199] *See supra* notes 72-73, 79-81, and accompanying text.

A. Step Two of Chevron *Should Go*

Brand X validates the Acceptance Approach and, thus, undoes *Chevron*'s two-step analysis. *Brand X* validates the Acceptance Approach because of what it tells us about the legislative gap left by Congress. Although *Chevron* explained that the gap was a delegation of lawmaking power to the agency, up until *Brand X*, there was an open question as to whether courts could ever fill that gap.[200] If a court reached an issue first, many assumed that the court could fill the gap and constrain future agency discretion.[201] Under the Deference Approach the court had final interpretive authority: it said what the statute meant even if what it was saying was that the agency's choice was a reasonable one. *Brand X* tells us that the gap represents a clear grant to the agency of lawmaking power; the court is not interpreting beyond finding the grant of that authority.[202] *Brand X* explains that the court lacks interpretive power to foreclose agency discretion through a prior judicial interpretation.[203] The court can decide a particular case and resolve a particular dispute,[204] but *Brand X* tells us that its decision does not preclude the agency from reaching a different interpretive conclusion.[205] Therefore, under *Brand X*, if an issue reaches a court before it reaches the agency, the court should first identify the ambiguity and the scope of agency discretion. Then it should pick its best choice within that zone to decide the particular case.

The advantages to approaching this interpretive task in the manner outlined above can be seen by looking at the Court's decision in *Lechmere, Inc. v. National Labor Relations Board* as discussed in *Brand*

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[200] *See* Neal v. United States, 516 U.S. 284, 290 (1996); *see also* Kenneth A. Bamberger, *Provisional Precedent: Protecting Flexibility in Administrative Policymaking*, 77 N.Y.U. L. REV. 1272, 1306-20 (2002) (noting that Court "has applied to the administrative law context the traditional standard of strong judicial precedent rooted in the theory of incorporation"); Polsky, *supra* note 112, at 202 (arguing that "trilogy of decisions ending with Neal provides that when the Court has independently interpreted a term on a prior occasion, that interpretation becomes 'incorporated' into the statute and binds the executive branch").

[201] *See* United States v. Mead Corp., 533 U.S. 218, 247-49 (2001) (Scalia, J., dissenting) (noting that "ambiguity (and hence flexibility) will cease with the first judicial resolution"); *Neal*, 516 U.S. at 295 ("Once we have determined a statute's meaning, we adhere to our ruling under the doctrine of *stare decisis*, and we assess an agency's later interpretation of the statute against that settled law."); *see also* Bamberger, *supra* note 200, at 1274.

[202] *See Brand X*, 545 U.S. at 982-83.

[203] *See id.*

[204] *See id.*

[205] *See id.*

X.[206] In *Lechmere*, the Court overturned the Court of Appeals decision enforcing the National Labor Relations Board ("Board") order which applied a three-part balancing test to decide whether an employer could exclude non-employee union organizers from its property.[207] In rejecting the Board's three-part test, the Court suggested that the test did not comport with stare decisis because the Court had previously rejected such balancing tests in the earlier decision of *National Labor Relations Board v. Babcock & Wilcox Co*.[208] *Brand X* explained *Lechmere* as holding that the prior interpretation was one which afforded no discretion to the agency.[209] However, the decision in *Babcock* did not appear to address the precise issue of what exceptions for non-employee access would be allowed under the National Labor Relations Act.[210]

Babcock interpreted Section 7 of the Act: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[211] Also, Section 8: "It shall be an unfair labor practice for an employer— '(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7."[212] *Babcock* explains the Act as one that makes a distinction between the rights of employees and the rights of nonemployees.[213] It finds that the Act "requires only that the employer refrain from interference, discrimination, restraint or coercion in the employees' exercise of their own rights. It does not require that the employer permit the use of its facilities for organization when other means are readily available."[214] The Court in *Lechmere* ultimately concludes (and subsequently restates in *Brand X*) that *Babcock* settled the "precise question at issue."[215] But it does not seem that it did.

[206] *Id.* at 984 (citing Lechmere, Inc. v. NLRB, 502 U.S. 527, 536-37 (1992)).

[207] Lechmere, Inc. v. NLRB, 502 U.S. 527, 540-41 (1992).

[208] *See id.* at 537 (citing NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 109-10 (1956)).

[209] *Brand X*, 545 U.S. at 984 (citing *Lechmere*, 502 U.S. at 536-37).

[210] National Labor Relations Act §§ 7, 8(a)(1), 29 U.S.C. §§ 157-158(a)(1) (1982).

[211] NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 109 n.2 (1956) (citing National Labor Relations Act, 29 U.S.C. § 157 (1947)).

[212] *Id.* (citing National Labor Relations Act, 29 U.S.C. § 158(a)(1) (1947)).

[213] *Id.* at 112-13.

[214] Lechmere, Inc. v. NLRB, 502 U.S. 527, 537 (1992) (noting that *Babcock* shows that "§ 7 speaks to the issue of nonemployee access to an employer's property"); *id.* at 113-14.

[215] *Id.* at 537 (citing *Babcock*, 351 U.S. at 110-11).

Babcock settled the question of whether nonemployees had the same right to unrestricted access that employees had, but it did not answer the question of what those rights were.[216] In fact, it seemed to have left that question to the Board.[217]

Prior to *Brand X*, one could have viewed the Court in *Lechmere* to have said that the Board's subsequent application of a balancing test was precluded by the Court's interpretation of the statute in *Babcock* or that it was unreasonable under *Chevron*'s Step Two. *Brand X* retroactively renders the *Babcock* holding a Step One holding. But if *Babcock* was a Step One case, the Court should have said more clearly that it was crafting a very narrow exception for non-employee access to an employer's facilities. It should have stated that the exception existed only where the "location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them."[218] Unfortunately, having to say that the statute was so narrowly drawn would require statutory language that did not seem to exist.

Nevertheless, *Brand X* provides an opportunity for courts to cast off the Step One/Step Two confusion that occurred in cases like *Lechmere*, but only if courts take seriously their duty to identify the authority delegated to the agency. Courts can and should identify the range of choices available to the agency. Thus, *Babcock* could have said that non-employee organizers were treated differently under the statute than employee organizers, and that Congress intended the agency to decide the limited exceptions where they would be allowed to enter the employer's property. Admittedly, this grant of discretion to the agency would likely have sustained the agency's three-part balancing test.

The *Brand X*/Acceptance Approach also answers the remaining problems under *Chevron* Step One. Under *Brand X*, agencies may have the power to bind the courts with respect to matters concerning their own jurisdiction.[219] Whether *Chevron* applied to questions of agency jurisdiction has been a particularly vexing question for courts because, on the one hand, it is unseemly to allow agencies to aggrandize

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[216] *Id.*

[217] *See Babcock*, 351 U.S. at 112-13.

[218] *Id.* at 113.

[219] *See* Miss. Power & Light Co. v. Mississippi *ex rel.* Moore, 487 U.S. 354, 377-83 (1988) (Scalia, J., concurring); PIERCE, *supra* note 18, § 3.5; Ernest Gellhorn & Paul Verkuil, *Controlling* Chevron*-based Delegations*, 20 CARDOZO L. REV. 989, 992-93 (1999) (advocating for rule "denying deference to expansive agency readings of their jurisdictional claims"); Quincy M. Crawford, Comment, Chevron *Deference to Agency Interpretations That Delimit the Scope of the Agency's Jurisdiction*, 61 U. CHI. L. REV. 957, 960-61 (1994).

themselves through their interpretive tasks. On the other hand, almost every interpretation in one way or another relates to jurisdiction.[220] *Brand X* review requires the court to delineate the range of discretion afforded to the agency. The range articulated by the court may include discretion for the agency to interpret jurisdictional issues. Professor Cass Sunstein has argued that there really is no principled way to except jurisdictional questions from *Chevron*'s reach as a rule.[221] This might be true, but courts must also decide whether the jurisdictional question has been delegated when explicating the scope of the delegation. It may be that Congress has intended some jurisdictional reach for the agencies. Whether it has or not is, first, a question for the courts.

Consistent with *Brand X*'s implications on jurisdictional questions is its effect on purely legal questions of statutory interpretation. A court will necessarily decide whether Congress delegated to the agency the power to make the policy choices found in purely legal questions because *Brand X* recognizes the courts' role as initial interpreters.[222] Such questions can implicate an agency's expertise just as much as a mixed question of law and fact, even if it does not do so as much as a matter of frequency. More importantly, the court in its search for the legislative delegation will say whether it did or not. Because it is not deferring to the agency, but accepting what it has already permitted (when it said what the law is), there is no *Marbury* problem.[223] The court has already said what the law is; the law is a range of discretion given to the agency.

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[220] *See* Melissa M. Berry, *Beyond* Chevron*'s Domain: Agency Interpretations of Statutory Procedural Provisions*, 30 SEATTLE U. L. REV. 541, 578-82 (2007); Merrill & Hickman, *supra* note 11, at 843-46; *see also* Gellhorn & Verkuil, *supra* note 219, at 1006-10.

[221] Cass R. Sunstein, Essay, Chevron *Step Zero*, 92 VA. L. REV. 187, 234-35 (2006). Sunstein argues that there is no substantial bases to support excepting jurisdictional questions from *Chevron*. He notes that such an exemption raises two fundamental issues. *Id.* at 235. First, such an exemption would further complicate the application of *Chevron* because there is no discernable line between jurisdictional and nonjurisdictional questions. *Id.* Second, the rationale in *Chevron*, he argues, may in fact support its application to issues of jurisdiction: "If an agency is asserting or denying jurisdiction over some area, it is either because democratic forces are leading it to do so or because its own specialized competence justifies its jurisdictional decision." *Id.*

[222] *See*, *e.g.*, Herz, *supra* note 9, at 222-25 (noting that "[t]he distinction is between issues of law and policy, which is at the core of *Chevron* . . . , [as] a 'pure [law] question' is a *Chevron* step one question"); Slocum, *supra* note 143, at 532-35, 578-79 (noting that there is circuit split on whether *Chevron* is applicable to pure legal questions and that even circuits that do not apply *Chevron* to pure legal questions have occasionally contradicted themselves).

[223] *See supra* notes 46-53 and accompanying text.

As to Step Two, once we understand *Chevron* as the Acceptance Approach, Step Two is meaningless. If the Acceptance Approach identifies a range of authority, then what does it mean to say that an agency choice is a reasonable choice within that range? It can only mean that the choice was made in a reasonable fashion. But that is a function of arbitrary and capricious review; arbitrary and capricious review remains to assess an agency's reasoning and process.

Courts and commentators that have distinguished the work of arbitrary and capricious review and Step Two have done so by focusing on the distinct nature of the interpretive analysis.[224] The D.C. Circuit in *Continental Air Lines v. Department of Transportation*,[225] for example, noted how interpretation was distinct from the typical arbitrary and capricious review.

> In our view, the critical point is whether the agency has advanced what the *Chevron* Court called "a reasonable explanation for its conclusion that the regulations serve the . . . objectives [in question]." This, of course, sounds closely akin to plain vanilla arbitrary-and-capricious style review. But it should immediately be made clear that interpreting a statute is quite a different enterprise than policy-making, especially as embodied in rules that have the force of law. . . . The applicable strain from the *Overton Park* mode of analysis is, again, the one we see in the Supreme Court's words in *Chevron*. They bear repeating: The agency is to provide "a reasonable explanation for its conclusion that [the interpretation] serve[s] the [statutory] objectives."[226]

Continental goes on to state that Step Two thus requires "a reasonable explanation for its conclusion that the [the interpretation] serve[s] the [statutory] objectives."[227] Thus, in trying to distinguish *Chevron* Step Two from arbitrary and capricious review, the court seemed either to say that the agency had to give a reasonable explanation (which seems

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[224] *See*, *e.g.*, Bamberger & Strauss, *supra* note 181, at 616-24 (evaluating commentators' suggested interpretative analysis under *Chevron*'s two steps, as relating to arbitrary and capricious inquiry, with focus on distinct nature of their interpretive analysis, and concluding that *Chevron*'s two steps provide for broader judiciary supervisory role, compared with *Chevron* "unitary" approach as equated with arbitrary and capricious review, which authors argue to be "too cramped a notion of judicial supervisory role").

[225] Continental Air Lines, Inc. v. Dep't of Transp., 843 F.2d 1444, 1444 (D.C. Cir. 1988).

[226] *Id.* (modification in original) (citation omitted).

[227] *Id.*

identical to arbitrary and capricious review) or that the court had to make sure that the agency's explanation was consistent with the purpose of the delegation (which overlaps with the Step One inquiry). After *Brand X*, the interpretive inquiry ends at Step One. *Brand X* instructs the court to identify the range of reasonable choices for a given ambiguity.

Courts should, after conducting a *Brand X* inquiry, then examine whether the agency arrived at the ultimate decision — the interpretation — in a manner that satisfies the arbitrary and capricious test. This might mean different things in different scenarios,[228] but at a minimum, it means that the court reviewed the agency decision to make certain that the agency has "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action."[229] A court will vacate an agency's decision that:

> has relied on factors which Congress ha[d] not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[230]

Thus, the Acceptance Approach reveals a conceptual place for arbitrary and capricious review in light of *Chevron*.

Under the Acceptance Approach, one can also resolve the *Mead* question using *Brand X*. *Mead* purported to answer the question of what types of agency decisions were entitled to *Chevron* analysis, but confusion persists.[231] *Brand X* delineates the agency's lawmaking authority, which includes a delineation of format as well as substance.[232] Thus, the courts should conduct a *Brand X* review that

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[228] Peter Strauss argues that "arbitrary or capricious" review is not a standard subject to "mathematically precise formulation[]." Strauss, *Overseers*, *supra* note 41, at 820. What "arbitrary or capricious" review means to a court differs depending on whether the court is reviewing a "congressional judgment[] in enacting legislation," "an agency's decision to adopt a high-consequence regulation," "an agency's judgment to forego rulemaking," or a "product[] of informal adjudication[] in [a] relatively low-consequence matter[]." *Id.* at 821.

[229] Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

[230] *Id.*

[231] *See* United States v. Mead Corp., 533 U.S. 218, 232-33 (2001) (discussing whether Custom's action at issue is type that qualifies for *Chevron* deference).

[232] Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980-81 (2005) (noting that commission has power to bind).

explains the range of substantive and procedural discretion afforded to the agency to make the law.[233] When a court understands the *Brand X* inquiry as one where the court articulates Congress's intent with respect to the lawmaking power of the agency both in terms of form and substance, it preserves the decisions in *Mead* and *Barnhart*.[234]

But *Mead* admittedly prompted an important criticism from Justice Scalia that the constraints on *Chevron* deference imposed by *Mead* would encourage more rulemaking:

> Another practical effect of today's opinion will be an artificially induced increase in informal rulemaking. Buy stock in the GPO. Since informal rulemaking and formal adjudication are the only more-or-less safe harbors from the storm that the Court has unleashed; and since formal adjudication is not an option but must be mandated by statute or constitutional command; informal rulemaking — which the Court was once careful to make voluntary unless required by statute . . . — will now become a virtual necessity.[235]

Perhaps that is true. But when one concedes that the Acceptance Approach is the best way to view *Chevron*, and, thus, as a grant of legislative power that can bind courts, it does not seem unreasonable to require more procedural formality in the absence of an explicit delegation to act less formally.[236]

B. Let's Get Rid of Skidmore *While We're at It*

For situations that are "less than" *Chevron*, there is *Skidmore*. In *Skidmore* situations an agency has interpreted its own ambiguous statute, but its pronouncement was only accorded the power to persuade.[237] *Brand X* does not mandate *Skidmore*'s demise, but it suggests that it would not be a bad idea. *Brand X* focuses on clear institutional roles. *Skidmore* deference was part of a continuum of deference that is no longer warranted.

Skidmore, which pre-dated the APA, involved the Fair Labor Standards Act. The statutory scheme gave interpretive powers to both

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[233] *See* Barnhart v. Walton, 535 U.S. 212, 217-18 (2002) (noting that courts decide "whether the interpretation for other reasons, exceeds the bounds of the permissible"); *Mead Corp.*, 533 U.S. at 303-04 (noting that not all agencies' interpretive choices bind judges to follow them).

[234] *See* cases cited *supra* note 233.

[235] *Mead Corp.*, 533 U.S. at 246 (internal citations omitted).

[236] Anthony, *Which Agency Interpretations*, *supra* note 61, at 30-35.

[237] Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

the Administrator and the courts.[238] The case required the Court to determine whether the act in question allowed firefighters at a plant to seek overtime pay for the time they spent waiting for a fire call.[239] The Court made clear that while the administrator had an interpretive role for its own purposes, it had no power to bind the Court.[240] The Court had all the interpretive power that was necessary, but it felt that the administrator's view of the statute was something that it should consider and give great weight.[241] *Mead* embraced the *Skidmore* idea of giving some decisions great weight.

Mead offered *Skidmore* as the "no *Chevron*" consolation prize.[242] *Mead* involved the tariff classification of "day planners" that were being imported into the United States. In *Mead*, the importer sought to have the day planners classified as articles similar to diaries, while Customs considered these products to be diaries.[243] The agency, the United States Customs Service, issued its initial Headquarters Ruling on the classification of day planners. The ruling letter essentially consisted of a conclusion. The primary analytical paragraph reads:

> After further review, concerning the classification of daily planners or multi-function looseleaf binders, Customs has modified its position on the applicable classification. In Headquarters Ruling Letter (HRL) 089960 dated February 10, 1992, Customs ruled that multi-function looseleaf binders or daily planners are generally used for daily recordkeeping and are classifiable as diaries. HRL 089960 also makes a distinction regarding whether the merchandise at issue is bound and classifiable as a diary under subheading 4820.10.2010, HTSUSA, or not bound and classifiable as an article similar to a diary under subheading 4820.10.4000, HTSUSA. Accordingly, the "Personal Planner" is properly classifiable under subheading 4820.10.2010, HTSUSA. The rate of duty is 4 percent ad valorem.[244]

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[238] *Id.* at 134-36.

[239] *See id.* at 137-38.

[240] *Id.* at 140 (finding Administrator interpretations, while not binding upon courts, persuasive due to her expertise and experience).

[241] *Id.* at 137-40 (noting that while Congress endowed courts with power to interpret Fair Labor Standards Act, it also created office of Administrator with significant authority).

[242] United States v. Mead Corp., 533 U.S. 218, 232-35 (2001).

[243] *Id.* at 225.

[244] U.S. Customs Headquarters Ruling Letter HQ 953126 (Jan. 11, 1993), *available at* 1993 WL 68471.

A subsequent headquarters' ruling gave considerably more reasoning,[245] but the Court found that Congress did not intend for Customs to be able to bind courts with interpretations in this format. The Court noted that: (i) the statute gave no indication that Congress intended such classification rulings to bind with the force of law; (ii) the Court of International Trade reviewed the ruling using a de novo standard: (iii) Customs did not view its rulings as binding except with respect to the particular importer seeking them; and (iv) the sheer number of rulings issued at over forty different locations throughout the country weighed against such rulings having binding effect.[246]

But the Court felt compelled to consider giving some respect to the Customs classification and, therefore, it called upon *Skidmore*.[247] Under *Skidmore*, "[t]he fair measure of deference to an agency administering its own statute . . . var[ies] with circumstances," including "the degree of the agency's care, its consistency, formality, and relative expertness, and . . . the persuasiveness of the agency's position."[248]

This compulsion to give some consideration to the agency's interpretation stems from the Deference Approach to *Chevron*. *Chevron* was the ultimate form of deference and *Skidmore* its lesser cousin:

> If, on the other hand, it is simply implausible that Congress intended such a broad range of statutory authority to produce only two varieties of administrative action, demanding either *Chevron* deference or none at all, then the breadth of the spectrum of possible agency action must be taken into account. Justice Scalia's first priority over the years has been to limit and simplify. The Court's choice has been to tailor deference to variety. This acceptance of the range of statutory variation has led the Court to recognize more than one variety of judicial deference, just as the Court has recognized a variety of indicators that Congress would expect *Chevron* deference.[249]

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[245] *Mead Corp.*, 533 U.S. at 225.

[246] *Id.* at 223-24 ("after Mead's protest, Customs Headquarters issued a new letter, carefully reasoned but never published, reaching the same conclusion"); *see* U.S. Customs Headquarters Ruling Letter HQ 955937 (Oct. 21, 1994), *available at* 1994 WL 712863.

[247] *Mead Corp.,* 533 U.S. at 221 (citing Skidmore v. Swift & Co., 323 U.S. 134, 134 (1944)).

[248] *Id.* at 228.

[249] *Id.* at 236-37.

Now that *Brand X* endorses the Acceptance Approach to *Chevron* as the better approach, perhaps it is time to reject the continuum of deference in favor of a simple interpretive analysis followed by arbitrary and capricious review. Sometimes Congress gives the agency an interpretive role that allows it to bind the court. When it does, the court should identify the grant, see if the choice falls within the range of discretion given to the agency, and review whether the agency proceeded in a rational and procedurally appropriate manner. When it does not, the interpretation can be assessed as part of the agency's decision which is subject to arbitrary and capricious review, which is itself deferential.

Jettisoning *Skidmore* has an additional advantage. Even though *Skidmore* characterizes itself as a deference system, one in which the court considers and gives weight to the agency's view, a deeper inquiry reveals that it gives weight depending on the "power to persuade."[250] Deference due to persuasion is not really deference.[251] It is persuasion. At the very least, perhaps now courts can restate *Skidmore* as basically saying that the court will adopt the agency's interpretation if the court is convinced that the agency got it right.

Moreover, if the degree of deference is a function of the "statutory variation," then arbitrary and capricious review adequately accounts for it. Under arbitrary and capricious review, the court must find "a 'rational connection between the facts found and the choice made.' "[252] It can set aside the agency decision (which could be an interpretation) where the agency:

> relied on factors which Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view of the product of expertise.[253]

These factors capture the *Skidmore* instruction to defer depending on "the degree of the agency's care, its consistency, formality, and relative expertness, and . . . the persuasiveness of the agency's position."[254]

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[250] Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

[251] *See* Anthony, *Which Agency Interpretations*, *supra* note 61, at 13 (referring to *Skidmore* consideration).

[252] Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42-43, 57 (1983).

[253] *Id.* at 43.

[254] *Mead Corp.*, 533 U.S. at 228; *see also Skidmore*, 323 U.S. at 139-40.

C. Auer *Goes As Well*

Although one might think of *Brand X* as affecting only those cases where an agency interprets its own statute, it also affects how courts think about agency interpretations of their own regulations. Currently, agencies receive *Auer* deference for their interpretations of their own ambiguous regulations.[255] *Auer* deference grants controlling weight to agency interpretations of agency regulations because agencies as experts are explaining what they meant when they promulgated the regulations.[256] *Chevron*, as a doctrine of deference, had no effect on *Auer*.[257] But if *Chevron* is best explained by the Acceptance Approach, then it will also define the procedural scenarios where the agency can bind the court. Thus, to the extent that *Auer* deference allowed agencies to bind courts,[258] it cannot stand.

Auer actually is the latest in a series of cases that includes *Bowles v. Seminole Rock & Sand Co.*,[259] *Udall v. Tallman*,[260] and *Lyng v. Payne*.[261] All of these cases were based on the idea that when an agency wrote a regulation, it knew what it was trying to do.[262] Therefore, if there was

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[255] *See* Auer v. Robbins, 519 U.S. 452, 462-63 (1997); *see also* Linares Huarcaya v. Mukasey, 550 F.3d 224, 229 (2d Cir. 2008) (applying *Auer* deference).

[256] *See Auer*, 519 U.S. at 461.

[257] *See* Gonzales v. Oregon, 546 U.S. 243, 255 (2006) (citing *Auer*, 519 U.S. at 452) (suggesting *Auer* and *Chevron* are separate doctrines); *see also* Air Tour Ass'n v. FAA, 298 F.3d 997, 1005 (D.C. Cir. 2002) (suggesting that *Auer* doctrine is independent doctrine from *Chevron* deference).

[258] *See, e.g.*, Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 151 (1991) ("Because applying an agency's regulation to complex or changing circumstances calls upon the agency's unique expertise and policymaking prerogatives, we presume that the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers.").

[259] Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945) (seminal case on deference to agency's construction of its own regulations).

[260] Udall v. Tallman, 380 U.S. 1, 16-17 (1965) (quoting *Seminole Rock*, 325 U.S. at 413-14) ("Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. . . . The . . . administrative interpretation . . . becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.").

[261] Lyng v. Payne, 476 U.S. 926, 939 (1986) (noting that regulatory agency's construction of its own regulations is entitled to substantial deference).

[262] "[I]n the typical *Seminole Rock* case, the agency interpreting the regulation also promulgated it. . . . Second, interpretations of ambiguous regulations . . . entail . . . resolution of policy. . . . [Hence] the agency's relative superiority over a court with respect to policymaking competence . . . ." Scott H. Angstreich, *Shoring up* Chevron*: A Defense of* Seminole Rock *Deference to Agency Regulatory Interpretations*, 34 UC DAVIS L. REV. 49, 98 (2000); *see Martin*, 499 U.S. at 150 (stating "it is well established 'that

something that was intentionally or unintentionally vague about the regulation, the agency was in the best position to fill in the blank.[263] The rule has been articulated in several ways, including most recently: "An administrative rule may receive substantial deference if it interprets the issuing agency's own ambiguous regulation."[264] Commentators have characterized it as even more deferential than *Chevron* in that it requires acceptance of plausible interpretations even without any inquiry into whether they are reasonable.[265] In effect, under *Auer*, the agency interpretation of a regulation would bind the court.[266]

Understandably, this doctrine has not escaped criticism.[267] One can readily see the potential for abuse by the agency.[268] And indeed in

an agency's construction of its own regulations is entitled to substantial deference' ").

[263] "This broad deference is all the more warranted when, as here, the regulation concerns 'a complex and highly technical regulatory program,' in which the identification and classification of relevant 'criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns.' " Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994); *see also* Mehmet K. Konar-Steenberg, *In Re* Annandale *and the Disconnections Between Minnesota and Federal Agency Deference Doctrine*, 34 WM. MITCHELL L. REV. 1375, 1396 (2008) (noting that justification for *Auer* deference was "pragmatic" as "the author of an ambiguous regulation is best positioned to explain it"); Merrill & Hickman, *supra* note 11, at 899.

[264] Gonzales v. Oregon, 546 U.S. 243, 255 (2006) (quoting Auer v. Robbins, 519 U.S. 452, 461-63 (1997)); *see, e.g.*, *Lyng*, 476 U.S. at 939 ("An agency's construction of its own regulations is entitled to substantial deference . . . ."); *Seminole Rock*, 325 U.S. at 414 ("The intention of Congress or the principles of the Constitution in some situations may be relevant in the first instance in choosing between various constructions. But the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.").

[265] STRAUSS, ADMINISTRATIVE JUSTICE, *supra* note 5, at 374-75; *see also* Richard J. Pierce, Jr., *Democratizing the Administrative State,* 48 WM. & MARY L. REV. 559, 569-70 (2006) (noting that doctrine is functionally indistinguishable from *Chevron*).

[266] *See* Auer v. Robbins, 519 U.S. 452, 461 (1997) (holding that agency's interpretation of its own regulations is "controlling unless plainly erroneous or inconsistent with the regulation"); *cf.* Belt v. EmCare, Inc., 444 F.3d 403, 416 (5th Cir. 2006) ("giv[ing] controlling weight" to DOL opinion letter, Handbook, and amicus brief under *Auer*); Star Enterprise v. U.S. EPA, 235 F.3d 139, 147 (3d Cir. 2000) (noting that, "in contrast" to varying degrees of deference afforded to agency's interpretive rules that are "not binding," agency's interpretation of its own regulation is controlling unless "plainly erroneous or inconsistent with the regulation").

[267] John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 631 (1996) (arguing that *Seminole Rock* doctrine, like *Chevron*, ignores "the Constitution's important commitment to the separation of powers").

[268] *Gonzales*, 546 U.S. at 275 (Scalia, J., dissenting); *Thomas Jefferson Univ.*, 512 U.S. at 518 (Thomas, J., dissenting); *see also* STRAUSS, ADMINISTRATIVE JUSTICE, *supra*

Mead, Justice Scalia foreshadowed the perverse incentive created by *Mead* in light of the *Auer* doctrine.[269] Agencies would be better off drafting vague regulations entitled to *Chevron* analysis, without detail, and flesh out the detail in informal interpretations which would bind the agency under *Auer*.[270]

The possibility that agencies might interpret overly broad regulatory language and claim *Auer* deference came to pass in *Gonzales v. Oregon*, where the Court confronted what appeared to be an attempt to misuse *Auer*. The agency invoked *Auer* deference of its own ambiguous regulations even though the regulations did nothing more than repeat the words of the ambiguous statute.[271] The Controlled Substance Act (CSA) defined a "valid prescription" as one "issued for a legitimate medical purpose."[272] The implementing regulations merely mimicked the statute's reference to "legitimate medical purpose."[273] The United States Attorney General issued an interpretive rule interpreting the CSA to the effect that "using controlled substances to assist suicide is not a legitimate medical practice and that dispensing or prescribing them for this purpose is unlawful under the CSA."[274] The Attorney General's interpretation sought both *Auer* and *Chevron* deference.[275] The majority denied both. *Auer* could not apply because the agency could not be said to be explaining what it meant when it wrote the regulation because it really did not write the regulation; the regulation merely parroted the statute.[276] *Chevron* would not apply because the interpretive rule did not command *Chevron* deference according to *Mead*.[277]

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note 5, at 374-75 (discussing view of D.C. Circuit).

[269] United States v. Mead Corp., 533 U.S. 218, 246 (2001) (Scalia, J., dissenting).

[270] *Id.*

[271] *Gonzales*, 546 U.S. at 277-78. The *Gonzales* Court reasoned:

> [O]ur unanimous decision in *Auer* makes clear that broadly drawn regulations are entitled to no less respect than narrow ones. "A rule requiring the Secretary to construe his own regulations narrowly would make little sense, since he is free to write the regulations as broadly as he wishes, subject only to the limits imposed by the statute."

Id.

[272] 21 U.S.C. § 830(b)(3)(A)(ii) (2006).

[273] *Gonzales*, 546 U.S. at 257.

[274] *Id.* at 249.

[275] *Id.* at 255.

[276] *Id.* at 255-58.

[277] *Id.* at 258.

Still, in the dissent, Justice Scalia (joined by Chief Justice Roberts and Justice Thomas) argued that not only was the interpretation entitled to *Auer*, it was entitled to *Chevron*. The dissent rejected the notion that *Auer* contained an anti-parroting exemption.[278] As to *Chevron*, the dissent noted that no one claimed that the format of the Attorney General's interpretation precluded *Chevron* analysis.

Chevron schizophrenia allowed *Auer* to persist in *Mead*'s wake despite its obvious flaws. *Chevron*, under the Deference Approach, was simply another point on the continuum of deference courts can give to agencies. *Chevron*, under the Deference Approach, did not purport to identify when the agency could bind the courts, only when the courts would defer. *Auer* allowed agencies to bind courts because of some extreme idea of deference to the agency's authorship of its regulations.[279] But *Chevron* under the Acceptance Approach means that Congress is defining the agency's power to bind the court by delegating lawmaking power to the agency both in terms of substance and form. If Congress has given the agency the power to bind the courts in interpretive rulings, then courts must accept those rulings under *Chevron*.[280] In the more likely scenario where Congress has not given the power to agencies to bind in that format, then *Auer* cannot contradict Congress's choice.

Despite the holding in *Gonzales v. Oregon*, *Auer* still persists in giving agencies the power to bind that could not be justified under *Chevron*. In *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*,[281] the petitioners challenged the issuance of a discharge permit by the Army Corps of Engineers. The relevant question was whether a prohibition under the Clean Water Act extended to the discharge of "fill material."[282] Neither the Act nor the regulations answered the question.[283] The EPA had issued a memorandum, however, that the Court acknowledged would not be entitled to *Chevron* deference. Nonetheless, the Court granted it *Auer* deference and accepted the agency's interpretation.[284]

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[278] *Id.* at 277-78.

[279] *See id.*

[280] Barnhart v. Walton, 535 U.S. 212, 217-18 (2002) (affording *Chevron* deference to agency's interpretations of its statute).

[281] Coeur Alaska, Inc. v. Se. Alaska Conservation Council, 129 S. Ct. 2458, 2473 (2009).

[282] *Id.* at 2463.

[283] *Id.* at 2469.

[284] *Id.* at 2473.

Now, a policy perspective may have driven the opinion to a perfectly correct decision. One would hope that the EPA is an expert agency and that its understandings of its regulations would be reasonable ones. But *Auer* deference creates a perverse incentive for the agency. Agencies may be less likely to engage in notice and comment rulemaking and all the process and review that accompany it, if they can garner the same effect from informal interpretive rulings. Admittedly, sometimes notice and comment rulemaking may be undesirable, but that does not lead to the conclusion that a memorandum should command the same treatment from a court that the notice and comment rulemaking would receive and did receive in *Coeur Alaska*.

Moreover, the *Coeur Alaska* decision raises serious concerns about administrative legitimacy. *Chevron*'s recognition of the policy setting role of agencies can at least be justified by the congressional delegation of lawmaking authority.[285] That delegation constrains the agency as a matter of both substance and form.[286] Under *Brand X*, a court must find that Congress delegated power to the agency to use a particular process (e.g., notice and comment rulemaking or informal adjudication) to give meaning to the statute. *Auer* deference circumvents the constraint as to form and presumes that any time the agency interprets its own regulations, no matter what the process, it binds the courts.[287] Courts could review agencies' actions deferentially using arbitrary and capricious review.

Interestingly, the Court explained its finding of deference in *Coeur Alaska* by reviewing five factors that could be likened to an arbitrary and capricious analysis:[288] (1) the memorandum did not undermine the Act's performance standards; (2) the memorandum did not allow dischargers to evade the Act's performance standard; (3) the

[285] *Compare* Criddle, *supra* note 8, at 1284 (stating that "the leading rationale for *Chevron* deference is the presumption that Congress delegates interpretive authority to administrative agencies when it commits regulatory statutes to agency administration"), *with* Thomas J. Byrne, *The Continuing Confusion Over* Chevron*: Can the Nondelegation Doctrine Provide a (Partial) Solution?*, 30 SUFFOLK U. L. REV. 715, 722 n.30 (1997) (citing BRUCE A. ACKERMAN & WILLIAM T. HASSLER, CLEAN COAL/DIRTY AIR 57 (1981)) ("Commentators have neatly described the mistaken belief in the scientific justification of administrative agencies as 'the well-worn myth of expertise.' "), *and* Krotoszynski, *supra* note 45, at 753 (arguing that "if the reviewing court finds an express or implied delegation of lawmaking authority . . . [t]his turns judicial review of agency efforts at statutory interpretation into a bad farce").

[286] *See* United States v. Mead Corp., 533 U.S. 218, 227-28 (2001).

[287] *See* Lisa Schultz Bressman, *Beyond Accountability*, 78 N.Y.U. L. REV. 461, 552-53 (2003) (discussing criticisms of *Auer*).

[288] *Coeur Alaska, Inc.*, 129 S. Ct. at 2473-74.

memorandum relied on the Corps' expertise; (4) the interpretation was narrow; it did not extend to toxic pollutants; and (5) the memorandum was "a sensible and rational construction that reconciles §§ 306, 402, and 404, and the regulations implementing them, which the alternatives put forward by the parties do not."[289] The Court's reasoning seems sensible. But arbitrary and capricious review probably would lead to the same outcome. Moreover, arbitrary and capricious review arguably better focuses courts on conducting a rationality review than *Auer*. *Auer*, as a doctrine of deference, tempts courts to defer without conducting a meaningful analysis.

A comprehensive examination of the federal courts' application of *Auer* is beyond the scope of this Article, but a snapshot of recent activity is interesting. In 2008, district courts purported to apply *Auer* twenty times.[290] In only eleven cases did the court analyze the rationality of the interpretation.[291] In 2009, *Auer* was at issue in

[289] *Id.* at 2473.

[290] McCall v. Astrue, No. 05-CIV-2042, 2008 WL 5378121, at *10 (S.D.N.Y. Dec. 23, 2008); Kellogg v. Wyeth, 612 F. Supp. 2d 421, 436 (D. Vt. 2008); Sierra Club v. Kempthorne, 589 F. Supp. 2d 720, 730 (W.D. Va. 2008); Atl. Sea Island Grp. L.L.C. v. Connaughton, 592 F. Supp. 2d 1, 9-11 (D.D.C. 2008); Demahy v. Wyeth Inc., 586 F. Supp. 2d 642, 647 (E.D. La. 2008); Johnson v. U.S. Dep't of Educ., 580 F. Supp. 2d 154, 158 (D.D.C. 2008); S.C. San Antonio, Inc. v. Leavitt, No. SA-07-CA-527, 2008 WL 4816611, at *2 (W.D. Tex. Sept. 30, 2008); Parker v. Halpern-Ruder, No. 07-401, 2008 WL 4365429, at *4 (D.R.I. Sept. 16, 2008); Hogback Basin Preserv. Ass'n v. U.S. Forest Serv., 577 F. Supp. 2d 1139, 1148 (W.D. Wash. 2008); Schaghticoke Tribal Nation v. Kempthorne, 587 F. Supp. 2d 389, 412 (D. Conn. 2008); Kakushadze v. Chertoff, No. 07-CIV-8338, 2008 WL 2885292, at *7 (S.D.N.Y. July 25, 2008); Pres. of Los Olivos v. U.S. Dep't of Interior, 635 F. Supp. 2d 1076, 1090 (C.D. Cal. 2008); United States v. UPS Customhouse Brokerage, Inc., 558 F. Supp. 2d 1331, 1353 (Ct. Int'l Trade 2008); O'Shannessy v. Doll, 566 F. Supp. 2d 486, 490 (E.D. Va. 2008); Villegas v. Pep Boys Manny Moe & Jack of Cal., 551 F. Supp. 2d 982, 990 (C.D. Cal. 2008); Machado v. Pep Boys-Manny Moe & Jack, Inc., No. CV 08-01469, 2008 WL 1986032, at *7 (C.D. Cal. May 06, 2008); Shipbuilders Council of Am. v. U.S. Dep't of Homeland Sec., 551 F. Supp. 2d 447, 454 n.8 (E.D. Va. 2008) (held that agency was not entitled to *Auer* deference because regulation merely restates governing statute); Butler v. Bank of Am., No. 06-CV-262, 2008 WL 1848426, at *2 (N.D. Tex. Apr. 21, 2008); Davidson v. Orange Lake Country Club, Inc., No. 06-CV-1674, 2008 WL 254136, at *7 n.6 (M.D. Fla. Jan. 29, 2008); Rivera v. Brickman Group, Ltd., No. 05-1518, 2008 WL 81570, at *10 (E.D. Pa. Jan. 7, 2008).

[291] See *Kellogg*, 612 F. Supp. 2d at 436; *Sierra Club*, 589 F. Supp. 2d at 730; *Atl. Sea Island Grp. L.L.C.*, 592 F. Supp. 2d at 9-11; *Demahy*, 586 F. Supp. 2d at 659-60; *Schaghticoke Tribal Nation*, 587 F. Supp. 2d at 415-17; *Pres. of Los Olivos*, 635 F. Supp. 2d at 1089-96; *UPS Customhouse*, 558 F. Supp. 2d at 1351-54; *O'Shannessy*, 566 F. Supp. 2d at 490-91; *Villegas*, 551 F. Supp. 2d at 990; *Machado*, 2008 WL 1986032, at *7; *Rivera*, 2008 WL 81570, at *10. "A letter is entitled to the full measure of deference when clarifying a formal DoL interpretation. The clarified DoL interpretation, 29 C.F.R. § 778.202(c), is in turn entitled to this Court's full

twenty-six district court cases.[292] The courts purported to apply *Auer* in nineteen of those cases,[293] two courts avoided the issue of whether *Auer* deference was applicable,[294] and six courts held *Auer* deference

deference." Scott v. City of New York, 592 F. Supp. 2d 475, 484 n.56 (S.D.N.Y. 2008) (citation omitted).

[292] Equity in Athletics, Inc. v. Dep't of Educ., 675 F. Supp. 2d 660, 675-77 (W.D. Va. 2009); Horne v. Dep't of Agric., No. CV-F-05-1549, 2009 WL 4895362, at *11 n.4 (E.D. Cal. Dec. 11, 2009); Shipbuilders Council of Am. v. Dep't of Homeland Sec., 673 F. Supp. 2d 438, 457-59 (E.D. Va. 2009); Stainback v. Mabus, 671 F. Supp. 2d 126, 131-33 (D.D.C. 2009); Am. Bar Ass'n v. Fed. Trade Comm'n, 671 F. Supp. 2d 64, 72 (D.D.C. 2009); Ohio Valley Envtl. Coal. v. U.S. Army Corps of Eng'rs, 674 F. Supp. 2d 783, 801-02 (S.D. W. Va. 2009); Sentry Select Ins. Co. v. Thompson, 665 F. Supp. 2d 561, 568 n.6 (E.D. Va. 2009); *In re* Genetically Modified Rice Litig., 666 F. Supp. 2d 1004, 1020-21 (E.D. Mo. 2009); Bailey v. Fed. Bureau of Prisons, No. 09-CV-360, 2009 WL 3245914, at *3 (W.D. Wis. Oct. 5, 2009); McAnaney v. Astoria Fin. Corp., 665 F. Supp. 2d 132, 163 n.33 (E.D.N.Y. 2009); Howmet Corp. v. Envtl. Prot. Agency, 656 F. Supp. 2d 167, 170 (D.D.C. 2009); Kakaygeesick v. Salazar, 656 F. Supp. 2d 964, 977-78 (D. Minn. 2009); Sauter v. Fed. Home Loan Bank of N.Y., No. 05-899, 2009 WL 2424689, at *10 (D.N.J. Aug. 5, 2009); State Farm Bank, F.S.B. v. District of Columbia, 640 F. Supp. 2d 17, 24-25 (D.D.C. 2009); Chattler v. United States, No. C-07-4040, 2009 WL 2450518, at *2-4 (N.D. Cal. July 10, 2009); Garcia v. Frog Island Seafood, Inc., 644 F. Supp. 2d 696, 718-19 (E.D.N.C. 2009); Radar Solutions, Ltd. v. FCC, 628 F. Supp. 2d 714, 734-35 (W.D. Tex. 2009); Bullard v. Babcock & Wilcox Technical Serv. Pantex, L.L.C., No. 07-CV-049, 2009 WL 1704251, at *27 (N.D. Tex. June 17, 2009); S. Shrimp Alliance v. United States, 617 F. Supp. 2d 1334, 1346 (Ct. Int'l Trade 2009); Torres v. Ridgewood Bushwick Senior Citizens Homecare Council Inc., No. 08-CV-3678, 2009 WL 1086935, at *4-5 (E.D.N.Y. Apr. 22, 2009); Zhang v. Napolitano, 604 F. Supp. 2d 77, 82 (D.D.C. 2009); Hardy v. Astrue, No. CV-07-1764, 2009 WL 700061, at *6 (C.D. Cal. Mar. 13, 2009); W. Watersheds Project v. Dyer, No. CV-02-521, 2009 WL 484438, at *26 (D. Idaho Feb. 26, 2009) (renumbered No. CV-04-181); Rupert v. PPG Indus., Inc., No. 07-CV-0705, 2009 WL 596014, at *47-48 (W.D. Pa. Feb. 26, 2009) (renumbered No. 08-CV-0616); Tracy v. NVR, Inc., 599 F. Supp. 2d 359, 363 n.1 (W.D.N.Y. 2009); Meedel v. Shinseki, 23 Vet. App. 277, 281-83 (Vet. App. 2009); Halcomb v. Shinseki, 23 Vet. App. 234, 240-41 (Vet. App. 2009).

[293] *Equity in Athletics*, 675 F. Supp. 2d at 675-77; *Shipbuilders Council of Am.*, 673 F. Supp. 2d at 457-59; *Bailey*, 2009 WL 3245914, at *3; *McAnaney*, 665 F. Supp. 2d at 163 n.33; *Howmet Corp.*, 656 F. Supp. 2d at 170; *Kakaygeesick*, 656 F. Supp. 2d at 977-78; *Sauter*, 2009 WL 2424689, at *10 (finding that cases on point are persuasive because there courts appropriately granted *Auer* deference); *Chattler*, 2009 WL 2450518, at *2-4; *Garcia*, 644 F. Supp. 2d at 718-19; *Radar Solutions*, 628 F. Supp. 2d at 734-36; *Bullard*, 2009 WL 1704251, at *27; *S. Shrimp Alliance*, 617 F. Supp. 2d at 1346; *Torres*, 2009 WL 1086935, at *4-5; *Zhang*, 604 F. Supp. 2d at 82; *Hardy*, 2009 WL 700061, at *6; *Rupert*, 2009 WL 596014, at *41 n.5 (applying *Auer* deference to one pending motion and opting for *Skidmore* deference in another motion); *Tracy*, 599 F. Supp. 2d at 362-63 n.1; *Meedel*, 23 Vet. App. at 281-83; *Halcomb*, 23 Vet. App at 240-41.

[294] *State Farm*, 640 F. Supp at 24-25 (holding that court did not need to decide applicable level of deference to agency's determination of preemption because court agreed with agency that statute and regulations called for preemption after de novo review); *Rupert*, 2009 WL 596014, at *15 n.1 (finding that because less deferential

not to be applicable.[295] The district courts applied *Auer* with no discussion of the standards or application seven-out-of-nineteen times.[296] In the remaining twelve cases, only eight courts gave more than a superficial review of the standard or application of the facts to the doctrine.[297]

It would appear that, in this admittedly short period of time, district courts perform some form of analysis on the application of the doctrine about half the time. But even in just this snapshot, one wonders what work the *Auer* doctrine really does, especially if one does not consider a conclusory statement by the court that the agency's interpretation was not unreasonable actual analysis.

III. *BRAND X* REVIEW

Brand X review does not require a wholesale change in judicial review. It better explains how a court reviews an agency action where the agency has interpreted its organic statute. It consists of a judicial identification of the discretion afforded to the agency, and an arbitrary and capricious review, which evaluates the agency's reasoning. The court will apply traditional tools of statutory interpretation and identify the range of interpretative choices, including whether Congress said exactly what it meant and there was only one possible

Skidmore deference is applicable, it was unnecessary to address whether heightened standard in *Auer* deference applied).

[295] *Horne*, 2009 WL 4895362, at *11 n.4 (finding that even if regulation was ambiguous, which it is not, court would defer to agency because it consistently interpreted meaning of term); *Stainback*, 671 F. Supp. 2d at 131-33 (holding that Secretary of Navy's interpretation of Naval Academy regulation was not entitled to deference because it was not reasonable interpretation); *Am. Bar Ass'n*, 671 F. Supp. 2d at 72; *Ohio Valley Envtl. Coal.*, 674 F. Supp. 2d at 801-02 (holding agency's interpretations were inconsistent with regulation and not entitled to deference); *Sentry Select Ins. Co.*, 665 F. Supp. 2d at 568 n.6; *In re Genetically Modified Rice Litig.*, 666 F. Supp. 2d at 1020-21 (finding that *Auer* deference is inapplicable where agency did not make any formal interpretation and that regulations were plain and unambiguous); *W. Watersheds Project*, 2009 WL 484438, at *26 (holding BLM's interpretation to be "plainly erroneous" because it conflicts with plain language of regulation).

[296] *Bailey*, 2009 WL 3245914, at *3; *McAnaney*, 665 F. Supp. 2d at 163 n.33; *Kakaygeesick*, 656 F. Supp. 2d at 977-78; *Sauter*, 2009 WL 2424689, at *10; *Bullard*, 2009 WL 1704251, at *27; *S. Shrimp Alliance*, 617 F. Supp. 2d at 1346; *Tracy*, 599 F. Supp. 2d at 363 n.1.

[297] *Equity in Athletics*, 675 F. Supp. 2d at 675-77; *Howmet Corp.*, 656 F. Supp. 2d at 170; *Chattler*, 2009 WL 2450518, at *2-4; *Radar Solutions*, 628 F. Supp. 2d at 734-36; *Torres*, 2009 WL 1086935, at *4-5; *Rupert*, 2009 WL 596014, at *41 n.5; *Meedel*, 23 Vet. App. at 281-83; *Halcomb*, 23 Vet. App at 240-41.

meaning.[298] *Brand X*, thus, tracks Section 706's mandate that the courts say what the law is.[299] Here, though, instead of deferring to an agency's interpretation where a statute is ambiguous, the court will identify the permissible range of meanings from which Congress allowed the agency to choose.[300] Thereafter, the court analyzes whether the agency's "action, findings, and conclusions" were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[301] This arbitrary and capricious review will necessarily be simply a review of process and reasoning since the court already addressed the appropriateness of the substantive choice in its analysis of the legislative delegation.

A recent Supreme Court case can illustrate how this will look. In *United States v. Eurodif S.A.*,[302] the Court upheld a decision by the Commerce Department to subject separative work unit ("SWU") contracts between domestic utilities and foreign enrichers for low enriched uranium ("LEU") to antidumping duties under 19 U.S.C. § 1673.[303] The issue was whether to characterize SWU contracts as providing for "sale of goods" or "sale of services."[304] The antidumping duty statute only subjects merchandise that "is being, or is likely to be, sold in the United States" at less than fair value, to antidumping duties.[305]

The Department of Commerce ("Commerce"), in its preliminary and final determinations, characterized the issue as whether the structure of the sale at issue rendered it one for goods versus services.[306] Commerce relied on a number of factors to determine that this particular transaction was really the sale of goods (merchandise) as required by the statute.[307] In particular, it reasoned that where a party performs a major manufacturing process that results in the substantial transformation of merchandise that is later imported into

[298] Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 986 (2005).

[299] 5 U.S.C. § 706 (1966).

[300] *Brand X*, 545 U.S. at 982 (discussing discretion granted to agency).

[301] 5 U.S.C. § 706(2)(a).

[302] United States v. Eurodif S.A., 129 S. Ct. 878, 878 (2009).

[303] 19 U.S.C. § 1673 (2006).

[304] *Eurodif S.A.*, 129 S. Ct. at 886.

[305] 19 U.S.C. § 1673.

[306] Low Enriched Uranium from Fr., No. C-427-819, 66 ITADOC 65877 (Dep't of Commerce Dec. 21, 2001) (final determination); Low Enriched Uranium from Fr., 66 Fed. Reg. 36,743, 36,744-45 (Dep't of Commerce July 13, 2001) (notice of prelim. determination).

[307] Low Enriched Uranium from Fr., 66 Fed. Reg. at 36744-45.

the United States, that merchandise is subject to antidumping duties.[308] The agency gave participants criteria for distinguishing between sales of services and sales of goods.[309] Transactions where the "sale" of services would effect a substantial transformation on the product will be considered sales of goods for the purposes of the antidumping law.[310]

In upholding Commerce's ultimate decision to subject the SWU contracts to the statute, the Court relied upon *Chevron* deference[311] and undertook a lengthy analysis of the many policy reasons that made the Commerce interpretation reasonable.[312] The Court analyzed roughly three different policy justifications for the agency's interpretation that undermined the case for any SWU contract exemption to the statute: the "economic reality" of international tariffs, the fungibility and transformation of the unenriched uranium, and the absurd results that might follow from an alternative interpretation and undermine the purpose of the statute.[313]

The case fits well into a *Brand X* review. Under *Brand X* analysis, the court would first articulate the range of discretion Congress afforded to the agency both as to form and substance. With respect to form, the agency's interpretation was embodied in an informal adjudication. Although antidumping decisions are not "formal" adjudications as defined by the APA, they have a very high degree of process to them and have long been thought to represent an example where Congress has empowered the agency to speak with the force of law.[314] Under *Brand X*, the court would first articulate these decisions as ones where the agency could bind the court.[315] Congress has provided a detailed

[308] *Id.* at 36,745.

[309] *Id.*

[310] *Id.*

[311] In contrast, the Federal Circuit in *Eurodif S.A. v. United States*, 423 F.3d 1275, 1278 (Fed. Cir. 2005), rendered the statute unambiguous on the issue, rejected *Chevron* deference, and bolstered its narrow reading of the statute by applying the persuasive authority of its own prior decision involving nearly identical facts.

[312] United States v. Eurodif S.A., 129 S. Ct. 878, 886-90 (2009).

[313] *Id.* at 887-90 (citing Tcherepnin v. Knight, 389 U.S. 332, 336 (1967)). The court noted in footnotes that any unexplained inconsistency would, at best, be a reason to reject the agency's action based on arbitrary and capricious review, and that its factual review was governed by the substantial evidence standard. *Id.* at 887 n.7, 889 n.9.

[314] *See* PATRICK C. REED, THE ROLE OF FEDERAL COURTS IN U.S. CUSTOMS AND INTERNATIONAL TRADE LAW 293-99 (1997).

[315] Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980-81 (2005) (citing Household Credit Servs., Inc. v. Pfennig, 541 U.S. 232, 238-39 (2004)); United States v. Mead Corp., 533 U.S. 218, 231-34 (2001); Christensen v.

scheme of procedural mechanisms, with the availability of notice and hearing rights.[316] The agency is an expert and the statutory scheme is exceedingly complex and technical.[317] Thus, even though the agency is acting through informal adjudication as it was in *Mead*, the ruling letters in *Mead* were much less formal and involved much less complexity than the process undergone by Commerce.[318] Even if the agency's power to speak with the force of law was unclear up to this time, this situation seems like just the type of interstitial scheme that the Court spoke of in *Barnhart*.[319]

Then the court would look to the range of substantive discretion. One could approach this task from two perspectives (starting either with the statute or the agency interpretation); one could look at the words of the statute and discern a range of permissible choices. Here the question for the court and the agency is what conduct represents the sale of a good such that the transaction is subject to the antidumping laws. In particular the agency must determine "(1) . . . that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value."[320] The question then for the court is what range of discretion is afforded to the agency when it determines when "merchandise is sold" in the United States. Or one could look at the agency's choice and question whether it is within the range of permissible choices. More often the courts do the latter; they declare the choice is within a permissible range rather than defining the range first.[321] The court (in this case, the Court of International Trade) would consider the text of the antidumping statute, its legislative history, and the purposes of the antidumping laws.

Antidumping laws protect U.S. manufacturers from the unfair trading practices of foreign producers who sell their products at

Harris Cnty., 529 U.S. 576, 586-88 (2000)).

316 19 U.S.C. §§ 1677-1, 1677-2 (2000).

317 Smith-Corona Group v. United States, 713 F.2d 1568, 1571 (Fed. Cir. 1983) (noting: "The Tariff Act of 1930, as amended by the Trade Agreements Act of 1979, establishes an intricate framework for the imposition of antidumping duties in appropriate circumstances. The number of factors involved, complicated by the difficulty in quantification of these factors and the foreign policy repercussions of a dumping determination, makes the enforcement of the antidumping law a difficult and supremely delicate endeavor.").

318 Kelly & Reed, *supra* note 89, at 1170.

319 Barnhart v. Walton, 535 U.S. 212, 221-22 (2002).

320 19 U.S.C. § 1673 (2006).

321 M. ELIZABETH MAGILL, *Step Two of* Chevron v. Natural Resources Defense Council, *in* A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 85, 93 (John F. Duffy & Michael Herz eds., 2005).

artificially low prices in the United States.[322] They are not meant to be punitive; rather, they remedy disparities in prices due to impermissible trade practices.[323] In light of these purposes, one could imagine that Congress could allow a range of choices for what constitutes a "sale of goods." Commerce might require cash for merchandise sale where title transferred to an exchange of cash and cash substitutes. The agency might allow a sale of goods to include a sale of goods mixed with services or only pure sales of goods. If Congress permitted a mix, it might be within the agency's discretion to formulate a test as to when it would consider a mixed sale to be a sale of goods. Given the remedial purposes of the statute combined with the vast variety of international business transactions (and the ability to manipulate them) and the agency's expertise in administering a complex statute, a court might reasonably conclude that Congress intended to grant the agency the broad range of substantive discretion. A court would have to sustain the agency's choice if, as a substantive matter, it fell within that range. The court would then review the agency's reasoning and process using the arbitrary and capricious standard.

Applying this new interpretive framework would allow courts to spend more time focusing on what they should focus on, namely defining the range of interpretive ambiguity.[324] Identifying this range is helpful to agencies and to those affected by them. It is helpful to those that will argue and seek to decide the relevant policy questions. Agencies also will benefit because they will be assured that courts will uphold their policy choices so long as they stay within the range delegated to them and follow a rational process in reaching and explaining their choice.

The *Brand X* liberation also leads to more legitimate administrative functioning. Courts will focus on the delegation to the agency; this delegation is a grant of power that gives the agency a range of choices to make in a range of permissible ways. If the agency stays within these ranges they will bind the courts. *Auer* deference undermined this analysis by creating scenarios where the agencies could bind the courts even in the absence of a delegation of lawmaking authority. This delegation also needs meaningful review and therefore it is less

[322] 19 U.S.C. § 1673.

[323] Sango Int'l, L.P. v. United States, 484 F.3d 1371, 1372 (Fed. Cir. 2007); Bethlehem Steel Corp. v. United States, 25 Ct. Int'l Trade 930, 933 (Ct. Int'l Trade 2001).

[324] Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005) (discussing discretion granted to agency).

legitimate when that review is collapsed in a reasonableness analysis that courts often gloss over.

CONCLUSION

Brand X is not revolutionary and neither is the Acceptance Approach to *Chevron*. Hopefully, *Brand X* has clarified that the Acceptance Approach is the best approach and explicates what it means. *Brand X* means that when courts face an implicit or explicit delegation of lawmaking authority, it is inappropriate to talk about deference. In those cases, the court identifies the delegation, and the agency must act within that delegation as a matter of substance and form.[325] The agency cannot act arbitrarily, and the court will review its procedures and its reasoning to make sure that it has not done so.[326] Doctrines of deference that purport to fix a magical level of acquiescence that is hard to define and easy to fudge are just not helpful. The foregoing does not mean that deference is dead. Courts will still use arbitrary and capricious review to assess an agency's process and reasoning when the agency has interpreted its organic act and is entitled to *Chevron*. And courts will also use arbitrary and capricious review to assess agencies substantive choices that do not involve lawmaking delegations entitled to *Chevron*. What courts will be less likely to do is to invoke a vague and manipulable concept of deference in lieu of either fulfilling their obligation to interpret statutes or conduct meaningful review of process and reason.

[325] *Compare* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 29 (1983) ("The National Traffic and Motor Vehicle Safety Act of 1966 (Act) directs the Secretary of Transportation to issue motor vehicle safety standards[.]"), *with* United States v. Mead Corp., 533 U.S. 218, 231-32 (2001) (finding Congress did not delegate to Customs authority to make rules with force of law).

[326] *See Mead Corp.*, 533 U.S. at 231-33; *State Farm*, 463 U.S. at 29.