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Agencies Interpreting Courts Interpreting Statutes: The Deference Conundrum of a Divided Supreme Court

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AGENCIES INTERPRETING COURTS INTERPRETING STATUTES: THE DEFERENCE CONUNDRUM OF A DIVIDED SUPREME COURT

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ABSTRACT

Plurality decisions from the U.S. Supreme Court demand interpretation, especially because they tend to occur when the Court faces important but divisive legal issues. Most courts, agencies, and scholars have assumed that federal agencies are in no better position to interpret plurality decisions than the lower federal courts when confronted with a potentially precedential Supreme Court plurality decision—the agency must construe the Justices' various opinions in search of a controlling rationale. In so doing, however, the agency eschews any claim to Chevron *deference because it is no longer implementing a statute pursuant to congressionally delegated authority. Instead, it is merely an agency interpreting a court.*

This Article argues that pursuant to the Supreme Court's 2005 decision in National Cable & Telecommunications Ass'n v. Brand X Internet Services, *federal agencies have another option when dealing with a Supreme Court plurality decision regarding either a statute that the agency implements or the agency's prior interpretation of that statute. In the right circumstances, these post-plurality agencies can invoke their original congressionally delegated authority to implement the statute and issue new regulations that should be entitled to* Chevron *deference. Post-plurality agencies thus face a deference conundrum: they can defer to a fractured Supreme Court decision at the expense of their own claims to interpretive authority, or they can—admittedly with some risk in the next round of judicial review—reclaim interpretive deference for themselves.*

In assessing the deference conundrum, the exact character of the plurality decision is important. This Article includes a typology of Supreme Court plurality decisions involving agency-mediated statutes. When the

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Chevron/Brand X *framework applies, however, agencies have the opportunity, and arguably the duty, to eliminate the confusion and inconsistency that plurality decisions promote by issuing clarifying and nationally uniform rules.*

INTRODUCTION

In 1984, when the Supreme Court decided *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[1] it solidified a basic principle of federal administrative law: federal agencies are generally entitled to deference from the federal courts when those agencies interpret statutes that they implement, unless Congress has clearly already resolved the interpretive issue at hand.[2] While the Court has since modified the rules regarding the circumstances under which agencies are entitled to *Chevron* deference,[3] creating what many commentators have denominated "a confusing muddle" of deference tests,[4] it has never repudiated the core *Chevron* principle of interpretive deference.

Indeed, the Supreme Court has, on occasion, explicitly subordinated its own interpretive authority to that of agencies.[5] More generally, in 2005 it announced in *National Cable & Telecommunications Ass'n v. Brand X Internet Services* (*Brand X*) that the rationale of *Chevron* deference could allow an agency's interpretation of a statute to supersede a prior and contradictory interpretation by a federal court.[6]

Despite the Court's privileging of agency interpretations, judicial review remains an important component of the deference framework,[7] just as it is of

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

[2] *Id.* at 842–44.

[3] *See* United States v. Mead Corp., 533 U.S. 218, 226–27 (2001) ("We hold that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."); Christensen v. Harris Cnty., 529 U.S. 576, 586–87 (2000) (declining to accord *Chevron* deference to opinion letters issued regarding the Fair Labor Standards Act of 1938, Pub. L. No. 75-718, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201–219 (2006))).

[4] Ann Graham, *Searching for* Chevron *in Muddy* Watters*: The Roberts Court and Judicial Review of Agency Regulations*, 60 ADMIN. L. REV. 229, 262 (2008); *accord* Jack M. Beermann, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 809–35 (2010); Lisa Schultz Bressman, Chevron*'s Mistake*, 58 DUKE L.J. 549, 556, 606 (2009); Evan J. Criddle, Chevron*'s Consensus*, 88 B.U. L. REV. 1271, 1302, 1314–15 (2008); Claire R. Kelly, *The* Brand X *Liberation: Doing Away with* Chevron*'s Second Step as Well as Other Doctrines of Deference*, 44 U.C. DAVIS L. REV. 151, 158, 161 (2010); Matthew C. Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 VA. L. REV. 597, 605–09 (2009); Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 193–94, 202 (2006).

[5] *See* discussion *infra* Part I.C.3.

[6] 545 U.S. 967, 982 (2005).

[7] *See* Thomas O. Sargentich, *The Reform of the American Administrative Process: The Contemporary Debate*, 1984 WIS. L. REV. 385, 397–402; Peter L. Strauss, *Legislative Theory and the Rule of Law: Some Comments on Rubin*, 89 COLUM. L. REV. 427, 442–43 (1989).

administrative law more generally.[8] Judicial review of federal agencies' statutory interpretations serves several purposes: it ensures that agencies do not act *ultra vires* or improperly expand the scope of their statutory authorities;[9] it protects the public's right of participation in agency decision making;[10] it assesses the agency's interpretations for basic rationality;[11] it encourages the agency to take more care in resolving interpretive issues;[12] and most importantly for this Article, it ensures that both the agency and regulated entities receive clear guidance regarding what the law requires and allows.

In the context of federal agencies, such clarity promotes other values as well. For example, there is widespread acceptance, as a normative matter, that federal law should apply uniformly throughout the nation. Frank Easterbrook has noted that delegation to an agency "ensures that a single interpretation prevails" and "permits a nationally uniform rule without the need for the Supreme Court to settle the meaning of every law or regulation"[13]—even if the Court could undertake such a monumental task, which it cannot.[14] Similarly,

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[8] *See* Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461 (2003); Richard E. Levy & Sidney A. Shapiro, *Government Benefits and the Rule of Law: Toward a Standards-Based Theory of Judicial Review*, 58 ADMIN. L. REV. 499 (2006); David S. Rubenstein, *"Relative Checks": Towards Optimal Control of Administrative Power*, 51 WM. & MARY L. REV. 2169 (2010); Thomas O. Sargentich, *The Critique of Active Judicial Review of Administrative Agencies: A Reevaluation*, 49 ADMIN. L. REV. 599 (1997).

[9] *See* 5 U.S.C. § 706(2)(B) (2006) (allowing courts to overturn federal agency actions that are unconstitutional); *id.* § 706(2)(C) (allowing courts to overturn federal agency actions that are "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right"); Linda R. Hirshman, *Postmodern Jurisprudence and the Problem of Administrative Discretion*, 82 NW. U. L. REV. 646, 666–68 (1988); Sargentich, *supra* note 8, at 605–06.

[10] *See* 5 U.S.C. § 553(c) (requiring federal agencies to provide a public comment period during informal rulemaking); *id.* § 554(c) (requiring that interested parties be allowed to participate in federal agency hearings); *id.* § 706(2)(D) (allowing courts to overturn federal agency actions that do not follow proper procedures).

[11] *See id.* § 706(2)(A) (creating the federal "arbitrary and capricious" standard of review); *id.* § 706(2)(E) (creating the "substantial evidence" standard of review for formal agency proceedings); Bressman, *supra* note 8, at 474; Nina A. Mendelson, *Disclosing "Political" Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1134 (2010); Sargentich, *supra* note 8, at 605–06.

[12] *See* Mark Seidenfeld, *A Syncopated* Chevron*: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 128–30 (1994); Mark Seidenfeld, Chevron*'s Foundation*, 86 NOTRE DAME L. REV. 273, 303 (2011).

[13] Frank H. Easterbrook, *Judicial Discretion in Statutory Interpretation*, 57 OKLA. L. REV. 1, 7 (2004); *accord* William Wade Buzbee, Note, *Administrative Agency Intracircuit Nonacquiescence*, 85 COLUM. L. REV. 582, 602 (1985) (noting that "administrative agencies have a national jurisdiction" and assuming that "uniform administration by the agency" is a worthy goal).

[14] 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, 1100, 1117–26 (1987)

commentators or legislators seeking consistent resolutions to nationwide problems often seek to establish a regulatory program within a federal agency.[15] At the individual level, the federal courts insist that federal agencies treat similarly situated regulated entities throughout the nation consistently in adjudications.[16] Thus, judicial review promotes uniform implementation of regulatory law nationwide by giving clear guidance regarding the legitimacy of the agency's implementation of that law.

Legal clarity, certainty, and uniformity are recognized rule-of-law values,[17] particularly when the law seeks to regulate private conduct.[18] Judicial review by the Supreme Court promotes these rule-of-law values both by resolving

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(noting that, given the Court's limited docket, *Chevron* deference represents a concession that statutes are not precise).

[15] *See, e.g.*, Henry H. Drummonds, *Beyond the Employee Free Choice Act: Unleashing the States in Labor-Management Relations Policy*, 19 CORNELL J.L. & PUB. POL'Y 83, 120 (2009) ("[L]abor law preemption doctrine sprang from the New Dealers' faith in a federal administrative agency's ability to enunciate and promulgate a uniform and consistent national labor relations policy."); Joseph A. Peters, *The Meaningful Vote Commission: Restraining Gerrymanders with a Federal Agency*, 78 GEO. WASH. L. REV. 1051, 1068 (2010) ("A federal agency would provide a national, consistent system for limiting gerrymandering."); Bradley T. Tennis, Note, *Uniform Ethical Regulation of Federal Prosecutors*, 120 YALE L.J. 144, 178 (2010) ("A uniform national system of regulation for federal prosecutors can be created only by a federal agency . . . .").

[16] *See, e.g.*, P.I.A. Mich. City Inc. v. Thompson, 292 F.3d 820, 826 (D.C. Cir. 2002); Indep. Petrol. Ass'n of Am. v. Babbitt, 92 F.3d 1248, 1260 (D.C. Cir. 1996); Malcomb v. Island Creek Coal Co., 15 F.3d 364, 367, 369 (4th Cir. 1994); Int'l Rehabilitative Scis., Inc. v. Sebelius, 737 F. Supp. 2d 1281, 1288–90 (W.D. Wash. 2010).

[17] One group of scholars has summarized rule-of-law scholarship, concluding that "[t]he essential elements to a legal regime based on the rule of law involve: (1) clear and understandable rules; (2) predictability and certainty; (3) procedural validity in the formation of rules; and (4) rules independent of individual whims of government officials and instead with a basis in established law." Berkolow, *Much Ado About Pluralities: Pride and Precedent Amidst the Cacophony of Concurrences, and Re-Percolation after* Rapanos, 15 VA. J. SOC. POL'Y & L. 299, 309 (2008); *accord* Levy & Shapiro, *supra* note 8, at 503 ("While the rule of law has various connotations and shades of meaning, at a minimum it reflects a core requirement of legal regularity under which government actors derive their authority from, and are bound by, the law.") In administrative law, judicial review of agency decisions, including agency interpretations of statutes, can promote all four of the elements that Berkolow articulated, but this Article focuses on the first two. Other scholars have noted the significance of these elements, as well. *See* James F. Spriggs II & David R. Stras, *Explaining Plurality Decisions*, 99 GEO. L.J. 515, 529 (2011) ("Clear, understandable precedent is necessary to 'reduce[] transaction costs and wasted judicial effort, and encourage[] like cases to be treated alike—the bedrock of equality and fairness.'" (alterations in original) (quoting Michael L. Eber, Comment, *When the Dissent Creates the Law: Cross-Cutting Majorities and the Prediction Model of Precedent*, 58 EMORY L.J. 207, 233 (2008) (footnotes omitted))); Linda Novak, Note, *The Precedential Value of Supreme Court Plurality Decisions*, 80 COLUM. L. REV. 756, 758 (1980) (noting that our system values "certainty, reliance, equality, and efficiency").

[18] *See* Berkolow, *supra* note 17, at 301; Levy & Shapiro, *supra* note 8, at 504; Linas E. Ledebur, Comment, *Plurality Rule: Concurring Opinions and a Divided Supreme Court*, 113 PENN. ST. L. REV. 899, 919 (2009).

legal conflicts among the lower courts and by providing definitive statements of what the law is and what the law requires.[19] From this bird's-eye, and admittedly pragmatic, view of judicial review, this Article begins from the premise that, although the details of the *Chevron* deference framework have become convoluted and unpredictable,[20] a larger problem arises when judicial review fails to give federal agencies, lower courts, and the general public a clear decision regarding the validity of an agency's implementation of a statute. In other words, whatever level of deference the courts decide to give an agency's interpretation, what the agency and regulated entities want (or should want) *most* from the reviewing courts is clear guidance regarding what they can and cannot do under the statutory regime at issue.[21] Thus, without ignoring the very real complexities and problems that arise in applying the *Chevron* framework, it is worth remembering that that framework is, most essentially, a tool for assessing what is permissible under federal law.

Most discussions of the Supreme Court's deference cases focus, naturally, on the federal courts' *initial* review of an agency interpretation—on issues such as the kind of deference courts owe to various forms of agency interpretation[22] and the type of review each level of deference actually

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[19] Berkolow, *supra* note 17, at 306 ("Precedent is a means of enforcing rule-of-law values such as continuity and predictability.").

[20] *See* Beermann, *supra* note 4, at 788–94; Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 848–52 (2001); Connor N. Raso & William N. Eskridge, Jr., Chevron *as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727, 1744, 1767 (2010).

[21] *See* Scott A. Keller, *Depoliticizing Judicial Review of Agency Rulemaking*, 84 WASH. L. REV. 419, 457 (2009) (criticizing the courts for not providing clear guidance); James Michael Magee, Note, *The Public Policy Exception to Judicial Deferral of Labor Arbitration Awards—How Far Should Expansion Go?*, 39 S.C. L. REV. 465, 469 (1988) (noting criticism when the Court is too cryptic to provide guidance).

Of course, there are important distinctions between what the law requires of private entities and what it requires of federal agencies, as well as corresponding distinctions between the federal courts' interpretations of statutes in *Chevron* evaluations and in the direct regulatory context. Under *Chevron*, courts are primarily concerned with whether the agency is acting within a permissible sphere of interpretive authority. In contrast, when directly interpreting how statutes apply to regulated entities, courts, by necessity, must arrive at a particular meaning. *See* Mark Seidenfeld & Jim Rossi, *The False Promise of the "New" Nondelegation Doctrine*, 76 NOTRE DAME L. REV. 1, 5–8, 12–14 (2000) (discussing rule-of-law values and agency decision making in the nondelegation context). For purposes of this Article, the distinctions between the requirements for private entities and federal agencies are inconsequential because the issues are whether and when a federal agency, through *Chevron* and *Brand X*, can supplant direct court interpretation.

[22] *See, e.g.*, Bressman, *supra* note 4, at 556 (discussing difficulties in applying *Mead*); Nathan Alexander Sales & Jonathan H. Adler, *The Rest Is Silence:* Chevron *Deference, Agency Jurisdiction, and Statutory Silences*, 2009 U. ILL. L. REV. 1497 (arguing that agencies' determinations of the scope of their own jurisdiction should not receive *Chevron* deference); Thomas Moore, Note, *Abandoning* Mead*: Why Informal*

requires.[23] In contrast, this Article focuses on the *next* round of agency action, after the reviewing courts initially address, but do not fully resolve, the validity of a prior agency interpretation. Specifically, it investigates the options that remain for a federal agency when the Supreme Court reviews that agency's interpretation of a statute but reaches no majority decision regarding the interpretation's legal viability.

Plurality decisions[24] remain a small—but not insignificant—percentage of the Supreme Court's decisions.[25] Nevertheless, as Ken Kimura has observed, "A plurality decision, by its very nature, represents the most unstable form of case law."[26] In addition, empirical research indicates that the Court tends to issue plurality decisions about the *most* divisive legal issues it faces—"when the Court reviews politically salient and constitutional issues, and when there was dissensus on the lower court."[27] Thus, the issues that tend to produce

Adjudications Should Only Receive Minimal Deference in Federal Courts, 2008 UTAH L. REV. 719, 725–32 (discussing inconsistent application of judicial deference to informal agency adjudications).

[23] *See, e.g.*, Kenneth A. Bamberger & Peter L. Strauss, Chevron*'s Two Steps*, 95 VA. L. REV. 611 (2009) (comparing judicial roles under each step of the *Chevron* framework); 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, 1085–91 (2008) (discussing the wide variety of deference regimes the Supreme Court has employed in reviewing agency actions post-*Chevron*); Kelly, *supra* note 4 (discussing conflicting approaches to *Chevron* deference).

[24] For purposes of this Article, a "plurality decision" is a decision of the Supreme Court in which less than a majority of Justices agree on the rationale for a decision, even if a majority of Justices agree on the disposition of the case itself. *See* Spriggs & Stras, *supra* note 17, at 519. For example, a 5–4 decision to remand would still be a plurality decision if three of the Justices constituting the majority offered one rationale for remanding and the other two offered a different rationale. *See, e.g.*, *id.* A "plurality opinion," in contrast, is a particular Justice's rationale for a decision that is joined by fewer than a majority of the Justices. See Comment, *Supreme Court No-Clear-Majority Decisions: A Study in Stare Decisis*, 24 U. CHI. L. REV. 99, 101–53 (1956), for one example of a more detailed typology of Supreme Court plurality decisions.

[25] *See* Spriggs & Stras, *supra* note 17, at 519 (calculating that plurality decisions constituted 3.4% of the 5,711 cases decided between 1953 and 2006—a significant increase over the period from 1801 to 1955); Joseph M. Cacace, Note, *Plurality Decisions in the Supreme Court of the United States: A Reexamination of the* Marks *Doctrine After* Rapanos v. United States, 41 SUFFOLK U. L. REV. 97, 100 (2007) ("[P]lurality decisions . . . have become a conspicuous part of the Supreme Court's jurisprudence."); *see also infra* Part II (discussing the frequency of, and the law surrounding, Supreme Court plurality opinions).

[26] Ken Kimura, Note, *The Legitimacy Model for the Interpretation of Plurality Decisions*, 77 CORNELL L. REV. 1593, 1594 (1992).

[27] Pamela C. Corley et al., *Extreme Dissensus: Explaining Plurality Decisions on the United States Supreme Court*, 31 JUST. SYS. J. 180, 180 (2010); *accord* Spriggs & Stras, *supra* note 17, at 527; James A. Bloom, Note, *Plurality and Precedence: Judicial Reasoning, Lower Courts, and the Meaning of* United States v. Winstar Corp., 85 WASH. U. L. REV. 1373, 1374 (2008); Note, *Plurality Decisions and Judicial Decision Making*, 94 HARV. L. REV. 1127, 1140 (1981); W. Jesse Weins, Note, *A Problematic Plurality Precedent: Why the Supreme Court Should Leave* Marks *over* Van Orden v. Perry, 85 NEB. L. REV. 830, 831 (2007); Mark I. Levy, *Plurality Opinions*, NAT'L L.J., Feb. 12, 2007, at 13.

unstable plurality decisions are, perversely, the legal issues most in need of clarification.

Plurality decisions "represent extreme dissensus" and create precedential uncertainty because lower courts not only have to find the rationale for each opinion but also must decide *which* opinion's rationale governs.[28] Discerning this controlling rationale can be quite difficult.[29] Indeed, at least one scholar has referred to the interpretive task after a Supreme Court plurality opinion as "reading . . . the 'tea leaves.'"[30]

In the statutory context, the probability of a plurality decision has been enhanced in the last few decades because the Rehnquist and Roberts Courts have been deeply divided regarding the proper methodology for statutory interpretation. This deep division has often resulted in the Court issuing majority and dissenting opinions that display fundamental differences in interpretive approach,[31] in the weight the Justices give to extrastatutory concerns such as federalism,[32] and in the final interpretations the Justices offer.[33] As a result, the Court does not always deliver clear majority opinions in its statutory interpretation cases. For example, 4–4 decisions when one Justice does not participate[34] and, most problematically, decisions with multiple opinions and no clear majority[35] can leave both the lower courts and

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[28] *See* Corley et al., *supra* note 27, at 180, 181–83.

[29] *See, e.g.*, Justin F. Marceau, *Lifting the Haze of* Baze*: Lethal Injection, the Eighth Amendment, and Plurality Opinions*, 41 ARIZ. ST. L.J. 159, 160 (2009) (noting that the Supreme Court's plurality decision in Baze v. Rees, 128 S. Ct. 1520 (2008), left "the individual states and lower courts to quarrel over the weight and precedential value to be accorded to the case's seven separate opinions").

[30] Marvin Zalman, *Reading the Tea Leaves of* Chavez v. Martinez*: The Future of* Miranda, 40 CRIM. L. BULL. 299, 334 (2004).

[31] *See* Robin Kundis Craig, *The Stevens/Scalia Principle and Why It Matters: Statutory Conversations and a Cultural Critical Critique of the Strict Plain Meaning Approach*, 79 TUL. L. REV. 955, 958, 971–88 (2005).

[32] *Compare* Alabama v. North Carolina, 130 S. Ct. 2295, 2312–13 (2010) (Scalia, J.) (focusing on federalism concerns), *and* Horne v. Flores, 129 S. Ct. 2579, 2593–96 (2009) (Alito, J.) (same), *with Alabama*, 130 S. Ct. at 2317 (Kennedy, J., concurring) (virtually ignoring federalism concerns), *and Horne*, 129 S. Ct. at 2628–29 (Breyer, J., dissenting) (same).

[33] *See* discussion *infra* Part III.

[34] *See, e.g.*, Exxon Shipping Co. v. Baker, 554 U.S. 471, 484 (2008) (demonstrating that the Court was equally divided on the issue of respondeat superior liability when Justice Alito did not participate in the decision).

[35] *See* Spector v. Norwegian Cruise Line Ltd., 545 U.S. 119 (2005) (producing a particularly complex 5–3–4–2–3 split among the Supreme Court Justices when the Court decided whether the Americans with Disabilities Act (ADA) applied to foreign-flagged vessels temporarily in U.S. waters, specifically addressing whether there was a presumption that federal law applies to foreign vessels, what showing would be necessary to overcome that presumption, and to what extent the otherwise-controlling exemption from ADA

the implementing federal agency with the unenviable task of deciding what to do next.

At one point, the Supreme Court's plurality decisions were considered to have little precedential value, binding on lower courts, if at all, only for the exact holding and not for any legal rationale.[36] However, the Supreme Court has—admittedly, inconsistently[37]—insisted that a plurality opinion can be identified as the *ratio decidendi* for a plurality decision and hence operate as binding precedent.[38] As a result, federal courts have their own frameworks for discerning these binding rationales out of plurality decisions,[39] most commonly the *Marks* rule,[40] which is discussed more thoroughly in Part II. Importantly for this Article, because of the potential precedential status of plurality decisions, lower federal courts are not free to pursue independent courses of action in the wake of a Supreme Court plurality decision. Instead, they are essentially stuck with the task of trying to interpret the various Justices' opinions to decide how to apply them—or an identified *ratio decidendi*—to new factual contexts.[41]

In contrast to the typical practice of lower federal courts, this Article argues that after *Brand X* the post-plurality choices for federal agencies are not so

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requirements would apply); *see also* Marceau, *supra* note 29, at 160 (noting that the Supreme Court's plurality decision in *Baze* left "the individual states and lower courts to quarrel over the weight and precedential value to be accorded to the case's seven separate opinions"); Adam S. Hochschild, Note, *The Modern Problem of Supreme Court Plurality Decision: Interpretation in Historical Perspective*, 4 WASH. U. J.L. & POL'Y 261, 261 (2000) ("Real problems arise when there is less than a clear majority speaking for the Court—when the leading opinion of the Court is a plurality opinion. A Supreme Court plurality decision holds ambiguous precedential value.").

[36] *See* Marceau, *supra* note 29, at 164–66; Comment, *supra* note 24, at 100; Mark Alan Thurmon, Note, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 DUKE L.J. 419, 420 (1992); *see also* Saul Levmore, *Ruling Majorities and Reasoning Pluralities*, 3 THEORETICAL INQUIRIES L. 87, 95–98 (2002) (noting that "the general practice is to regard such a divided vote as no decision at all" and detailing that plurality decisions in early United States law and still in most common law jurisdictions "had no precedential value").

[37] *See* Bloom, *supra* note 27, at 1377 nn.20–22; Hochschild, *supra* note 35, at 282.

[38] *But see* Marceau, *supra* note 29, at 161 (critiquing "the unchallenged assumption that plurality opinions . . . generate reliably binding precedent in the context of capital appeals").

[39] *See* Kimura, *supra* note 26, at 1600–04 (discussing a variety of approaches courts have taken); Novak, *supra* note 17, at 767–78 (same).

[40] *See* Marks v. United States, 430 U.S. 188, 193 (1977) (setting out the "narrowest grounds" analysis for discerning the controlling rationale of plurality decisions); *see also* Ledebur, *supra* note 18, at 910–14 (discussing a variety of approaches to dealing with Supreme Court plurality decisions).

[41] *See* Marceau, *supra* note 29, at 162 (noting that, given stare decisis, "a published decision that does not contain any single rationale for judgment that is supported by a majority of the Court presents a unique predicament for judges and lawyers alike").

limited. Specifically, in the face of contradictory or irreconcilable plurality opinions from Supreme Court Justices regarding the viability of an agency's prior interpretation of a statute, a federal agency faces a choice: it can try to interpret *the Court*, or it may begin anew in interpreting *the statute*.

When choosing between these two responses, however, the agency faces what this Article refers to as the "deference conundrum." By following the first post-plurality path, the agency effectively chooses to defer to the Supreme Court's "decision" by trying to honor the Justices' plurality opinions. In doing so, the agency gives up its own claim to interpretive deference. Agencies that pursue this first path behave essentially as the lower courts do, attempting to discern a controlling rationale from the various Justices' opinions. Accordingly, the post-plurality agency moves itself one step away from the *Chevron*/*Mead*/*Skidmore* deference framework[42] because the agency is no longer an agency interpreting a statute that it implements. Instead, it is an agency interpreting a court interpreting a statute. As a result, the Supreme Court's *Chevron*/*Brand X* rationales for deferring to the agency's new implementation of the statute disappear because the agency is no longer acting pursuant to congressionally delegated lawmaking authority. Rather, the agency is taking over a quintessentially judicial function.

Alternatively, and with some admitted risk for the next round of judicial review, the post-plurality agency could treat the plurality decision as either a nondecision regarding statutory meaning or as proof positive that the statute is ambiguous for purposes of *Chevron* Step One. Of course, pragmatically, the agency should not ignore the Court's plurality decisions regarding the legitimacy of its own interpretation because, depending on how many opinions the Justices produced and how exactly those opinions align, it may be clear that the Court has effectively bounded the statutory ambiguity in some way. Nevertheless, by following this second post-plurality path, the agency treats the Justices' opinions as data points regarding the statute's meaning while retaining primary authority to interpret the statute.

The legal question is whether an agency will receive *Chevron* deference if it follows this second path. This Article argues that it should. Specifically, under the logic of *Chevron* and *Brand X*, if the agency, in the absence of the plurality decision, would otherwise be entitled to *Chevron* deference for its second-round interpretation, it should remain entitled to full *Chevron*

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[42] See *infra* Part I.A–B, for a discussion of this framework.

deference despite the fact that its new interpretation comes in the wake of a Supreme Court plurality decision regarding the viability of the prior interpretation. In addition, the agency's new interpretation will likely better promote the values of clarity, uniformity, equality, and fairness than the Supreme Court's plurality decision.

This Article explores the deference conundrum for post-plurality federal agencies—agencies coping with a Supreme Court plurality decision regarding the legitimacy of a prior agency interpretation of an agency-implemented statute. Part I outlines the *Chevron*/*Mead*/*Skidmore* framework and discusses the Supreme Court's 2005 decision in *Brand X*, which extended *Chevron* deference to agency interpretations that change federal court precedent. Part II provides an overview of Supreme Court plurality decisions, detailing their frequency, discussing their legal import, and analyzing lower courts' responses to them. However, because not all Supreme Court plurality decisions create the deference conundrum for federal agencies, Part III provides a typology of plurality decisions involving agency-mediated statutes and analyzes the potential relevance of *Chevron* and *Brand X* for each category. Part IV presents a case study of the deference conundrum—the joint response of the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Army Corps) to the Supreme Court's fractured interpretation of the federal Clean Water Act (CWA) in *Rapanos v. United States*.[43] It then recommends an alternative regulatory approach, especially salient in light of Congress's unwillingness to intervene and the split that has developed among the federal courts of appeals regarding how to analyze CWA jurisdiction. The Article concludes by arguing that if the Supreme Court punts the issue of determining, decisively, whether an agency interpretation of a statute is valid, particularly in a regulatory context, values of clarity and uniformity dictate that administrative agencies should exercise their authority under *Chevron* and *Brand X* to reinterpret the statutes that they administer.

I. THE CONVOLUTIONS OF *CHEVRON*, *MEAD*, *SKIDMORE*, AND *BRAND X*

A. Agency Interpretations of Statutes: Basic Chevron *Deference*

It has been a truism from the earliest days of the Supreme Court that "[i]t is emphatically the province and duty of the judicial department to say what the

[43] 547 U.S. 715 (2006).

law is."[44] However, given the rise of the administrative state in the federal government, the Supreme Court now often confronts issues of statutory construction with a mediating agency interpretation already in place. Such agency interpretations force federal courts to confront the possibility that Congress preferred that an entity within the Executive Branch construe the statutory scheme at issue.[45] Since at least 1984, the Supreme Court has respected this congressional preference, most commonly through the doctrine of *Chevron* deference.

In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[46] which involved the EPA's rather technical interpretation of the federal Clean Air Act,[47] the Supreme Court created a two-step process for reviewing an agency's interpretation of an agency-administered statute. When applying *Chevron*, federal courts first ask "whether Congress has directly spoken to the precise question at issue."[48] "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."[49] However, if Congress's intent is not clear—if there is an ambiguity or gap in the statutory scheme—the federal court proceeds to the second step in the analysis, asking "whether the agency's answer is based on a permissible construction of the statute."[50]

The *Chevron* Court clearly recognized that it was subordinating the federal courts' interpretive authority to that of administrative agencies. Thus, if the reviewing 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

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[44] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

[45] Whether this congressional preference is objectively "true" for any given statute, or even most statutes, has been debated at length by scholars, *see, e.g.*, John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 712–17 (1997), and Supreme Court Justices, *see, e.g.*, Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 267 (2002); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 514–17. Nevertheless, this congressional preference *is* the legal fiction upon which *Chevron* and, even more extensively, *Mead* rest, and it is beyond the scope of this Article to challenge that foundation.

[46] 467 U.S. 837 (1984).

[47] *Id.* at 839–42 (describing the EPA's interpretation of "stationary source" under the Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 (codified as amended at 42 U.S.C. §§ 7401–7671q (2006))).

[48] *Id.* at 842.

[49] *Id.* at 842–43.

[50] *Id.* at 843.

interpretation."[51] Instead, respect for Congress dictates respect for the agency to which Congress "entrusted" the statutory scheme.[52] Moreover, the agency's interpretation is entitled to such respect regardless of whether Congress's delegation of authority was explicit or implicit.[53]

The Court also indicated that deference to administrative agencies is particularly warranted when the agency's interpretation involves legislative-like policy choices in a highly complex and technical area of law—choices with respect to which the federal courts have no particular expertise or legitimacy.[54] As a result, when litigants challenge "the wisdom of [an] agency's policy," rather than its reasonableness under the relevant statute, the challenge must fail: "federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do."[55]

B. Limiting Chevron *Deference:* Christensen, Mead, *and* Skidmore

Chevron deference clearly remains available to federal agencies interpreting statutes that they administer. Nevertheless, at the beginning of the twenty-first century, the Supreme Court progressively limited the circumstances under which federal agencies' interpretations would receive full *Chevron* deference.

In its 2000 decision in *Christensen v. Harris County*[56] and its 2001 decision in *United States v. Mead Corp.*,[57] the Supreme Court determined that both the quality of the agency's decision-making process and the character of its delegated authority were relevant to the amount of deference, if any, the agency's statutory interpretation would receive. In *Christensen*, the Court held that an agency opinion letter issued under the Fair Labor Standards Act of 1938[58] (FLSA) was not entitled to *Chevron* deference because it did not carry the force of law.[59] In particular, the Court emphasized that the agency had not

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51 *Id.* (footnote omitted).
52 *Id.* at 844.
53 *Id.* at 843–44.
54 *Id.* at 865–66.
55 *Id.* at 866.
56 529 U.S. 576, 587–88 (2000).
57 533 U.S. 218, 227–29 (2001).
58 Pub. L. No. 75-718, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201–219 (2006)).
59 *Christensen*, 529 U.S. at 587.

arrived at its interpretation through deliberative proceedings, such as formal adjudication or notice-and-comment rulemaking.[60]

Although the agency's interpretation was not entitled to *Chevron* deference, the Court held it was still entitled to *some* deference pursuant to *Skidmore v. Swift & Co.*[61] Under *Skidmore*, agency interpretations of statutes are entitled to deference, "but only to the extent that those interpretations have the 'power to persuade.'"[62] More specifically, "The weight [accorded to an agency interpretation] in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it the power to persuade, if lacking power to control."[63]

Christensen thus suggested that the type of procedures that the agency used in issuing its interpretation would determine the level of deference that the interpretation received. *Mead* expanded the deference inquiry into the nature of the agency's statutory authority.[64] According to the *Mead* Court, "[A]dministrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."[65] The Court recognized that "agencies charged with applying a statute necessarily make all sorts of interpretive choices," and hence, "[t]he fair measure of deference to an agency administering its own statute has been understood to vary with circumstances."[66] The factors relevant to the level of deference accorded include "the degree of the agency's care, its consistency, formality, and relative expertness, and . . . the persuasiveness of the agency's position."[67]

The *Mead* Court also noted that when an agency has authority to act with the force of law and uses that authority to resolve a statutory ambiguity or to fill a statutory gap, *Chevron* deference applies with full force. As it had in *Chevron*, the Court emphasized:

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60 *Id.*
61 *Id.* (citing Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).
62 *Id.* (quoting *Skidmore*, 323 U.S. at 140).
63 *Skidmore*, 323 U.S. at 140.
64 United States v. Mead Corp., 533 U.S. 218, 227 (2001).
65 *Id.* at 226–27.
66 *Id.* at 227–28.
67 *Id.* at 228 (footnotes omitted).

> [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.[68]

Moreover, an agency's failure to announce its interpretation through formal adjudication or notice-and-comment rulemaking does not necessarily obviate *Chevron* deference.[69]

Nevertheless, the Court held that the Custom Service's tariff rulings at issue did not warrant *Chevron* deference.[70] As a statutory matter, the Court concluded that "the terms of the congressional delegation give no indication that Congress meant to delegate authority to Customs to issue classification rulings with the force of law."[71] The Customs Service itself did not view the tariff rulings as having the general force of law because they were binding only between itself and the relevant importer.[72] Moreover, "46 different Customs offices issue 10,000 to 15,000 of them each year."[73]

Mead thus complicated *Christensen*'s relatively simple focus on the procedures an agency uses. In his lengthy dissent, Justice Scalia anticipated "protracted confusion,"[74] arguing that "[w]e will be sorting out the consequences of the *Mead* doctrine . . . for years to come."[75] Much scholarship supports his prediction.[76]

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[68] *Id.* at 229 (citation omitted) (citing Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–46 (1984)).

[69] *Id.* at 230–31.

[70] *Id.*

[71] *Id.* at 231–32.

[72] *Id.* at 233.

[73] *Id.*

[74] *Id.* at 245 (Scalia, J., dissenting).

[75] *Id.* at 239.

[76] *See, e.g.*, Lisa Schultz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443 (2005); Kristin E. Hickman, *The Need for* Mead*: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537, 1577–78 (2006); Amy J. Wildermuth, *What* Twombly *and* Mead *Have in Common*, 102 NW. U. L. REV. COLLOQUY 276, 277–78 (2008); Estella F. Chen, Note, *Judicial Deference After* United States v. Mead*: How Streamlining Measures at the Board of Immigration Appeals May Transform Traditional Notions of Deference in Immigration Law*, 20 GEO. IMMIGR. L.J. 657, 677–78 (2006). *See generally* Amy J. Wildermuth, *Solving the Puzzle of* Mead *and* Christensen*: What Would Justice Stevens Do?*, 74 FORDHAM L. REV. 1877 (2006) (providing a summary of scholars' arguments regarding the continued confusion resulting from *Mead*).

C. *Agencies, Federal Court Precedent, and the Meaning of Statutes: The* Brand X *Complication*

1. *The* Brand X *Decision*

Christensen and *Mead* clearly limit the availability of *Chevron* deference, even if the exact boundaries between *Chevron* and *Skidmore* deference remain hazy. In contrast, in its 2005 decision in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*[77] (*Brand X*), the Supreme Court expanded the availability of *Chevron* deference and the authority of federal agencies to control the meaning of the statutes that they implement. In *Brand X*, the Court reviewed the Federal Communications Commission's (FCC) declaratory ruling that cable companies providing broadband Internet access are exempt from regulation under Title II of the Telecommunications Act,[78] which subjects all providers of "telecommunications servic[e]" to mandatory common-carrier regulation.[79] In March 2000, the FCC concluded that broadband Internet service provided by cable companies is an "information service," but not a telecommunications service, "[b]ecause Internet access provides a capability for manipulating and storing information" and because of "[t]he integrated nature of Internet access and the high-speed wire used to provide Internet access."[80]

Ultimately, on the merits, the Court upheld the FCC's decision under both *Chevron*[81] and an arbitrary-and-capricious analysis.[82] However, before reaching the merits, eight Justices agreed that federal agencies can "overrule" federal court constructions of statutes that the agencies administer.[83] Specifically, the Court concluded that "[o]nly 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."[84] Moreover, the agency's interpretation is entitled to *Chevron* deference if it otherwise qualifies for such deference.[85]

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77 545 U.S. 967 (2005).

78 Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

79 *Brand X*, 545 U.S. at 974 (alteration in original).

80 *Id.* at 977–79.

81 *Id.* at 980–82.

82 *See id.* at 1000–02 (finding that the FCC provided adequate rational justification for its conclusions).

83 *Id.* at 982–83.

84 *Id.*

85 *Id.* at 982.

In *Brand X* itself, numerous parties petitioned for judicial review of the FCC's declaratory ruling, and a judicial lottery sent the case to the U.S. Court of Appeals for the Ninth Circuit. Rather than use the *Chevron* analysis to review the FCC's construction of the Telecommunications Act, the Ninth Circuit invalidated the ruling based on its own precedent in *AT&T Corp. v. City of Portland*.[86]

The Supreme Court, however, held that the Ninth Circuit should have used the *Chevron* analysis, not its own precedent, to evaluate the FCC's construction of the Telecommunications Act. First, the Court reasoned, the *Chevron* analysis applied because Congress had delegated to the FCC authority to execute and enforce the Telecommunications Act and "the Commission issued the order under review in the exercise of that authority."[87]

Second, with regard to the role of federal courts' constructions in the first step of the *Chevron* analysis, the Court stated, "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."[88] The *Brand X* Court reasoned that "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."[89] The Court also distinguished its own precedent in *Neal v. United States*,[90] in which the existence of a prior Court construction resulted in the Court granting no deference to the agency's different interpretation, on the grounds that the judicial precedent at issue in *Neal* "had held the relevant statute to be unambiguous."[91]

Third, the Supreme Court indicated that federal court precedent renders a statute unambiguous only if the court's decision clearly indicates that its reading is "the *only permissible* reading of the statute."[92] The Ninth Circuit's decision in *City of Portland* did not achieve this level of exclusiveness because

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86 Brand X Internet Servs. v. FCC, 345 F.3d 1120, 1128–32 (9th Cir. 2003) (citing AT&T Corp. v. City of Portland, 216 F.3d 871, 875–79 (9th Cir. 2000)), *rev'd*, 545 U.S. 967 (2005).

87 *Brand X*, 545 U.S. at 980–81.

88 *Id.* at 982.

89 *Id.*

90 516 U.S. 284 (1996).

91 *Brand X*, 545 U.S. at 984 (citing Chapman v. United States, 500 U.S. 453, 463 (1991)).

92 *Id.*

the Ninth Circuit did not explicitly hold that the Telecommunications Act was unambiguous regarding whether cable Internet providers were "telecommunications carriers."[93]

The *Brand X* Court's rationale was thus much the same as the *Chevron* Court's: Congress delegates to federal agencies the authority to implement and interpret the statutes at issue, and hence, out of respect for Congress, the agencies' interpretations are to be preferred to those of the courts.[94] Nevertheless, *Brand X* goes one step further than *Chevron*, requiring federal courts not only to respect existing agency interpretations but also to actively subordinate their own prior interpretations of federal statutes to the later decisions of federal agencies. While the Supreme Court is still wrestling with the implications of this view of the federal courts' role, especially in connection with its own prior decisions, the lower courts have been steadily applying *Brand X* to conflicts between agency and court interpretations.[95]

2. Brand X *in the Lower Federal Courts*

While the cases to which the *Brand X* rule applies have been fairly limited, the lower federal courts have generally applied the rule to achieve the results that the Supreme Court dictated: agency interpretations of statutes receive *Chevron* deference despite existing court precedent to the contrary, and in fact, such agency interpretations can supersede that precedent. In one of the earliest cases applying *Brand X*, for example, the First Circuit set aside its own prior decision, which had concluded that applications for thermal variances under the CWA require a formal adjudication in accordance with the Federal

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93 *Id.* at 984–85.

94 *Id.* at 982.

95 *See* Hernandez-Carrera v. Carlson, 547 F.3d 1237, 1242–43 (10th Cir. 2008) ("We conclude that under the principles outlined in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, a subsequent, reasonable agency interpretation of an ambiguous statute, which avoids raising serious constitutional doubts, is due deference notwithstanding the Supreme Court's earlier contrary interpretation of the statute." (citation omitted)); Levy v. Sterling Holding Co., 544 F.3d 493, 502–03 (3d Cir. 2008) (citing *Brand X* for the proposition that if a court interprets an ambiguous statute one way, and an agency subsequently interprets the same statute another way, even the same court cannot ignore the agency's interpretation); Fernandez v. Keisler, 502 F.3d 337, 347–48 (4th Cir. 2007) (applying *Brand X* but noting that the decision did nothing to alter the effect of a finding that Congress spoke clearly to the issue under *Chevron* Step One); Gonzales v. Dep't of Homeland Sec., 508 F.3d 1227, 1235–36 (9th Cir. 2007) (noting the proviso that a court must accord *Chevron* deference to an agency's subsequent interpretation only if the "court's earlier precedent was an interpretation of a statutory ambiguity"); Dominion Energy Brayton Point, LLC v. Johnson, 443 F.3d 12, 16–17 (1st Cir. 2006) (noting that the Supreme Court's intent in *Brand X* was to eliminate the possibility that *Chevron* applicability would turn on the order in which judicial and agency interpretations issue).

Administrative Procedure Act[96] (APA), in favor of the EPA's new interpretation that the statutory "public hearing" could be something less than a full-blown evidentiary hearing.[97] The First Circuit emphasized that its prior decision came before not only the EPA's interpretation but also before *Chevron* itself and that its precedent merely established a presumption in favor of formal adjudication, not a definitive reading of the CWA provisions at issue.[98] Several other courts have similarly applied the *Brand X* rule.[99] In addition, the Third Circuit extended the *Brand X* rule to agency interpretations of regulations that contradict the court's prior interpretations.[100]

When lower federal courts resist the elimination of their own precedent pursuant to *Brand X*, they do so for one of two reasons. First, lower courts may consider judicial precedent to be so definitive or long established that it embodies the only allowable interpretation of the statute at issue, effectively rendering the statute unambiguous. For example, in 2006, the U.S. Tax Court went out of its way to distinguish *Brand X* and refused to accord *Chevron* deference to an Internal Revenue Service (IRS) regulation that contradicted long-standing court precedent.[101] The Tax Court differentiated *Brand X* on several grounds. Unlike the FCC's careful consideration of the statute and its policies during the promulgation of its regulation in *Brand X*, the IRS's "rationale for adopting the disputed regulations [wa]s at best perfunctory."[102] In addition, the FCC's regulations in *Brand X* were new, while the IRS was changing regulations that had been in place since 1957, raising additional

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[96] Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

[97] *Dominion Energy*, 443 F.3d at 14–17 (1st Cir. 2006) (distinguishing Seacoast Anti-Pollution League v. Costle, 572 F.2d 872, 877–78 (1st Cir. 1978)).

[98] *Id.* at 16–17; *accord* 33 U.S.C. §§ 1326(a), 1342(a) (2006) (requiring a "public hearing" under the CWA).

[99] *See, e.g.*, Morales-Izquierdo v. Dep't of Homeland Sec., 600 F.3d 1076, 1078, 1086–88 (9th Cir. 2010) (holding that its interpretation of the discretionary waiver of inadmissibility in immigration had been superseded by the Board of Immigration Appeals' (BIA) interpretation); *Fernandez*, 502 F.3d at 347–48 (concluding that the BIA's interpretation of the Immigration and Nationality Act's phrase "national of the United States," 8 U.S.C. § 1101(a)(22) (2006), superseded the court's own interpretation of that phrase in United States v. Morin, 80 F.3d 124 (4th Cir. 1996)).

[100] *See Levy*, 544 F.3d at 502–03 (extending *Brand X*'s logic and giving deference to the Securities and Exchange Commission's interpretation of its own regulation, even though the agency's interpretation contradicted Third Circuit precedent). This extension is logical because agencies typically receive even greater deference than *Chevron* deference from the courts regarding their interpretations of their own regulations. *See* Auer v. Robbins, 519 U.S. 452 (1997) (establishing this rule of greater deference).

[101] Swallows Holding, Ltd. v. Comm'r, 126 T.C. 96, 143–47 (2006), *vacated*, 515 F.3d 162 (3d Cir. 2008).

[102] *Id.* at 144.

issues regarding their reasonableness.[103] Moreover, whereas the FCC had not been a party in the Ninth Circuit's prior decision, the IRS had been a party in all other cases that had interpreted the statutory provision at issue.[104] The Ninth Circuit precedent in *Brand X* was only five years old, whereas the IRS was trying to change a court interpretation that had been in place since 1938.[105] Finally, although the prior court decisions regarding that interpretation of the tax code were not explicit that their interpretation was the only permissible one, the Tax Court nevertheless concluded that the required exclusivity was apparent in the opinions.[106]

On appeal, however, the Third Circuit vacated the Tax Court's decision, concluding that the IRS regulation was both entitled to *Chevron* deference[107] and valid.[108] The Third Circuit applied *Brand X* at *Chevron* Step One and disagreed with the Tax Court that prior courts had effectively determined that their interpretation was the only one possible.[109] "Accordingly," it concluded, "we are not bound by previous judicial interpretations."[110] Similar *Brand X* debates about the effect of precedent on statutory ambiguity have occurred in other courts as well, with similar results.[111]

Second, and more relevant to this Article, lower courts will refuse to allow the *Brand X* rule to overturn their own precedent when that existing precedent has already considered the agency regulation or interpretation at issue. For example, the Ninth Circuit refused to allow the Board of Immigration Appeals (BIA) to use *Brand X* to resurrect an interpretation of the Immigration and Nationality Act (INA) that the Ninth Circuit had previously determined was unreasonable under *Chevron*.[112] The Ninth Circuit emphasized that in *Brand X*, its prior decision "had not even considered an agency interpretation of the Communications Act, nor had we applied *Chevron* deference when we

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103 *Id.*

104 *Id.* at 144–45.

105 *Id.* at 145.

106 *Id.* at 146–47.

107 Swallows Holding, Ltd. v. Comm'r, 515 F.3d 162, 167–68 (3d Cir. 2008).

108 *Id.* at 168–72.

109 *Id.* at 170.

110 *Id.*

111 *Compare, e.g.*, Mayo Found. for Med. Educ. & Research v. United States, 503 F. Supp. 2d 1164, 1173–74 (D. Minn. 2007) (concluding that *Brand X* did not apply because the court's precedent declared the tax code provision at issue unambiguous), *rev'd en banc*, 568 F.3d 675 (8th Cir. 2009), *aff'd*, 131 S. Ct. 704 (2011), *with Mayo*, 568 F.3d at 679–83 (reversing the district court, declaring the statute ambiguous, and applying *Chevron* deference to the tax regulation).

112 Mercado-Zazueta v. Holder, 580 F.3d 1102, 1109 (9th Cir. 2009).

interpreted the statute."[113] In contrast, with respect to the BIA's proffered interpretation, the Ninth Circuit had previously fully considered that interpretation through a *Chevron* analysis and rejected it as unreasonable.[114] *Brand X*, according to the court, did not provide "that an agency may resurrect a statutory interpretation that a circuit court has foreclosed by rejecting it as unreasonable at *Chevron*'s second step."[115] Instead, the Ninth Circuit precedent remained viable, the agency's recycled interpretation remained unreasonable, and the agency approach at issue was deemed invalid.[116] Similarly, in a series of cases applying the FLSA, the U.S. Court of Federal Claims concluded that the *Brand X* rule does not apply when the agency interpretation predated the court precedent at issue and the prior court fully considered that interpretation in its application of the statute.[117]

Lower court applications of *Brand X* thus point out an important dichotomy. *Brand X* applies when the federal courts had the first chance to interpret an ambiguous statute that an agency implements, and it is unlikely that lower court judicial precedent—no matter how long established—will be deemed to have eliminated any inherent statutory ambiguity. However, if the judicial precedent at issue fully addressed the agency's proffered interpretation, an agency cannot use *Brand X* to circumvent the court's prior resolution. Instead, principles of stare decisis prevail. As Part III will discuss, the Supreme Court plurality decisions of interest to this Article complicate this rather neat dichotomy because they both engage an existing agency interpretation and fail to invalidate decisively the agency's view.

3. *The Remaining Issue: Will the U.S. Supreme Court Apply* Brand X *to Itself?*

While the lower federal courts are developing a coherent *Brand X* jurisprudence, the Supreme Court has so far failed to extend that coherence to its own decisions. Indeed, in *Brand X* itself, Justice Stevens concurred specifically to emphasize that the Court's decisions may warrant different treatment:

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113 *Id.* at 1114.

114 *Id.* at 1112–13 (citing Cuevas-Gaspar v. Gonzales, 430 F.3d 1013, 1029 (9th Cir. 2005)).

115 *Id.* at 1114.

116 *Id.* at 1115; *accord* Escobar v. Holder, 567 F.3d 466, 478–80 (9th Cir. 2009) (reaching the same conclusion in essentially identical language), *vacated*, 572 F.3d 957 (9th Cir. 2009).

117 Garner v. United States, 85 Fed. Cl. 756, 765–66 (2009); Stocum v. United States, 85 Fed. Cl. 217, 225–26 (2008); Hamilton v. United States, 85 Fed. Cl. 206, 214–15 (2008).

> While I join the Court's opinion in full, I add this caveat concerning Part III-B, which correctly explains why a *court of appeals'* interpretation of an ambiguous provision in a regulatory statute does not foreclose a contrary reading by the agency. That explanation would not necessarily be applicable to a decision *by this Court* that would presumably remove any pre-existing ambiguity.[118]

In 2009, the Supreme Court split 5–4 in deciding *Cuomo v. Clearing House Ass'n* regarding the role that *Brand X* should play when the Court's own precedent otherwise resolves the interpretive debate at issue.[119] In *Cuomo*, the attorney general for the State of New York sent letters to several national banks, "in lieu of subpoena," asking for certain nonpublic information to ascertain whether the banks were complying with the state's fair-lending laws.[120] The Federal Office of the Comptroller of the Currency (OCC) and the Clearing House Association brought suit to enjoin the request, claiming that the OCC's National Bank Act (NBA) regulations preempted state law enforcement against national banks.[121] The NBA states,

> *No national bank shall be subject to any visitorial powers* except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized.[122]

The OCC's regulation implementing this provision, adopted through notice-and-comment rulemaking, defines *visitorial powers* to include, inter alia, "[i]nspection of a bank's books and records" and "[e]nforcing compliance with any applicable federal or state laws concerning" activities authorized or permitted pursuant to federal banking law.[123]

The question for the Supreme Court was whether the OCC regulation preempted enforcement of nonbanking state laws against national banks. The majority stated both that the *Chevron* doctrine provided the framework for evaluating the OCC's regulation and that "[t]here is necessarily some ambiguity as to the meaning of the statutory term 'visitorial powers,'

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118 Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1003 (2005) (Stevens, J., concurring) (emphases added).

119 129 S. Ct. 2710 (2009).

120 *Id.* at 2714 (internal quotation marks omitted).

121 *Id.*

122 12 U.S.C. § 484(a) (2006) (emphasis added).

123 12 C.F.R. § 7.4000(a)(2)(ii), (iv) (2011).

especially since we are working in an era when the prerogative writs—through which visitorial powers were traditionally enforced—are not in vogue."[124] Thus, the case seemed ripe for deference to the OCC's interpretation that state enforcement was preempted.

Nevertheless, the majority was unwilling to defer to the OCC, emphasizing that under Supreme Court precedent, *visitorial powers* referred to the state-as-sovereign's supervisory role over corporations and charitable institutions.[125] As a result, the Court concluded that "[t]he Comptroller's regulation . . . does not comport with the statute."[126] Thus, according to the majority, Court precedent trumped a potential application of the *Brand X* rule, and the Court's prior interpretation of a statute settled the issue of statutory meaning, regardless of the potential statutory ambiguities that otherwise would have existed.

However, the dissenters—Justice Thomas, joined by Chief Justice Roberts and Justices Kennedy and Alito—would have applied *Brand X*. They agreed with the majority that the term *visitorial powers* was ambiguous.[127] However, they would have upheld the OCC's regulatory interpretation as reasonable.[128] Importantly, the dissenters specifically disagreed with the majority's conclusion that the OCC's interpretation "is unreasonable because it conflicts with several of this Court's decisions."[129] They instead noted that under *Brand X*, the New York attorney general

> cannot prevail by simply showing that this Court previously adopted a construction of § 484 that differs from the interpretation later chosen by the agency. "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."[130]

According to the dissenters, therefore, even Supreme Court precedent "is insufficient to deny *Chevron* deference to OCC's construction of § 484(a)."[131]

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[124] *Cuomo*, 129 S. Ct. at 2715.

[125] *See id.* at 2716–17 (noting that the Court's precedents confirm "that a sovereign's 'visitorial powers' and its power to enforce the law are two different things").

[126] *Id.* at 2719.

[127] *Id.* at 2722 (Thomas, J., concurring in part and dissenting in part).

[128] *Id.* at 2722–27.

[129] *Id.* at 2728.

[130] *Id.* at 2728–29 (quoting Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005)).

[131] *Id.* at 2730.

The Supreme Court still has not used *Brand X* to displace its own precedent. Nevertheless, the dissenters in *Cuomo* suggest that the Justices may someday soon directly grapple with the *Brand X* rule's implications for the Court's own interpretations of agency-implemented federal statutes. Moreover, as will be discussed in Part III, even if the Supreme Court does eventually exempt its majority decisions from the *Brand X* rule, good arguments remain that *Brand X* should apply to Supreme Court plurality decisions regarding the meaning of statutes that federal agencies implement. First, however, this Article will examine Supreme Court plurality decisions more generally.

II. SUPREME COURT PLURALITY DECISIONS

As many scholars have noted, the Supreme Court's practice of issuing plurality decisions is generally criticized.[132] According to these arguments, with which this Article largely agrees, Supreme Court plurality decisions upset the normal operation of binding precedent in lower courts.[133] More specifically, such decisions fail to provide clear and majoritarian reasoning for the legal result,[134] increase the work for lower courts,[135] potentially perpetuate or create splits of authority,[136] and, in general, represent an abdication of the Supreme Court's responsibilities as the ultimate legal decision maker.[137]

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[132] *E.g.*, Bloom, *supra* note 27, at 1373; Note, *supra* note 27, at 1127; Weins, *supra* note 27, at 831. *But see* Berkolow, *supra* note 17, at 348–49 (arguing that the indeterminacy created by plurality decisions can allow for valuable re-percolation of legal rules because "pluralities might indicate that the full Court was not yet ready or capable to fully resolve an interpretation, thereby signaling to the lower courts and other branches that they should make attempts to clarify the state of law"); Bloom, *supra* note 27, at 1417 ("Plurality decisions . . . initiate a type of normative dialogue between the Supreme Court and the lower courts, one which can contribute to the development of the law and help the law meet the demands of a changing society . . . ."); Novak, *supra* note 17, at 759–60 (arguing that plurality decisions allow for judicial freedom and flexibility).

[133] *See* Berkolow, *supra* note 17, at 320; Ledebur, *supra* note 18, at 905; Note, *supra* note 27, at 1127.

[134] Ledebur, *supra* note 18, at 903.

[135] *See* Berkolow, *supra* note 17, at 301; Bloom, *supra* note 27, at 1373, 1378.

[136] *See* Levmore, *supra* note 36, at 100; Spriggs & Stras, *supra* note 17, at 530–31 ("[T]he ambiguity and confusion created by plurality decisions can lead lower courts to 'experiment with alternative rules and outcomes based on their own criteria,' which can lead to an altered evolution of the law." (footnote omitted) (quoting Pamela C. Corley, *Uncertain Precedent: Circuit Court Responses to Supreme Court Plurality Opinions*, 37 AM. POL. RES. 30, 34 (2009))); Bloom, *supra* note 27, at 1378 ("[P]luralities obstruct the predictive function of law . . . .").

[137] Bloom, *supra* note 27, at 1373, 1378; Kimura, *supra* note 26, at 1625; Ledebur, *supra* note 18, at 919; Note, *supra* note 27, at 1128; *see also* Thurmon, *supra* note 36, at 419 ("[P]lurality decisions often do 'more to confuse the current state of the law than to clarify it.'" (quoting John F. Davis & William L. Reynolds, *Juridical Cripples: Plurality Opinions in the Supreme Court*, 1974 DUKE L.J. 59, 62)).

At the outset, it is worth noting that the difficulties that Supreme Court plurality opinions cause derive directly from the American legal system's expectation of binding majority decisions.[138] This expectation is itself a Supreme Court invention.[139] At the beginning of the nineteenth century, Chief Justice John Marshall purposely changed the Justices' prior practice—consistent with the practice in England—of announcing individual seriatim opinions.[140] Seriatim opinions, of course, left lower courts with all of the same problems of discerning a governing legal rationale for the ultimate resolution that plurality decisions do now.[141] To resolve this problem, but more importantly to increase the Supreme Court's authority and legitimacy in the early Republic, Chief Justice Marshall initiated the now well-established practice of the Supreme Court issuing unified majority—and preferably unanimous—opinions.[142]

Whatever its origin or quirkiness, the expectation of binding majority opinions has become the American norm. As a result, both the Supreme Court itself and legal scholarship have devoted much attention to how lower courts should deal with[143] the increasing number[144] of Supreme Court plurality

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138 *See* Kimura, *supra* note 26, at 1596–98 (discussing the principle of majoritarianism in Supreme Court decision making); Novak, *supra* note 17, at 757–61 (discussing the value of majority opinions and rationales).

139 Marceau, *supra* note 29, at 164–66.

140 Hochschild, *supra* note 35, at 283–85; Ledebur, *supra* note 18, at 902.

141 *See* Ledebur, *supra* note 18, at 902; *see also* Marceau, *supra* note 29, at 162 (arguing that, given stare decisis, "a published decision that does not contain any single rationale for judgment that is supported by a majority of the Court presents a unique predicament for judges and lawyers alike").

142 Marceau, *supra* note 29, at 166; Hochschild, *supra* note 35, at 267–68; Thurmon, *supra* note 36, at 427.

143 *See, e.g.*, Bloom, *supra* note 27, at 1374 (arguing that the courts need a consistent method for interpreting plurality decisions). Not everyone accepts, however, that nonmajority opinions should establish binding precedent. Linas Ledebur, for example, has argued that "[i]t seems logical that if cases are to be decided by a group of Justices, a majority of them must be required for the ruling to be binding." Ledebur, *supra* note 18, at 902–03.

144 Various scholars have counted Supreme Court plurality decisions in different ways, but all agree that the numbers of such decisions increased in the late twentieth and early twenty-first centuries. A 1981 note in the *Harvard Law Review* reported that between 1801 and 1955, the Supreme Court issued 45 plurality decisions; from 1955 through the end of the Warren Court, 42 plurality decisions; and by 1981 in the Burger Court, 88 plurality decisions. Note, *supra* note 27, at 1127 n.1. A January 2011 study concurs, finding only 45 Supreme Court plurality decisions between 1801 and 1955 (145 Terms) but 195 plurality decisions from 1953 to 2006 (54 Terms). Spriggs & Stras, *supra* note 17, at 519; *accord* Berkolow, *supra* note 17, at 302 ("[P]lurality opinions have proliferated in the Supreme Court."); Davis & Reynolds, *supra* note 137, at 60–61 (presenting counts of plurality opinions to conclude that there has been a "distinct increase in the Court's resort to the plurality opinion"); Marceau, *supra* note 29, at 168 (noting the increasing numbers of Supreme Court plurality decisions); Cacace, *supra* note 25, at 97–98 (noting that "[t]he Court has handed down a steadily increasing number of plurality decisions throughout its history" and discussing a variety of explanations for the phenomenon); Hochschild, *supra* note 35, at 272 ("Fractured opinions have increased dramatically since Chief

decisions in the last few decades. In 1977, for example, the Court established the *Marks* "narrowest grounds" rule,[145] which one scholar has described as "a conscious attempt to end the confusion surrounding plurality decisions' precedential value."[146]

On the merits, *Marks* involved due process challenges to the defendants' criminal convictions for transporting obscene materials in violation of federal statutes.[147] One potentially precedential Supreme Court decision was *Memoirs v. Massachusetts*, a plurality decision where the Justices split 3–2–4.[148] At its core, the issue in *Marks* was which standard of obscenity the government had to meet in order to convict the defendants: (1) the standard from *Miller v. California* (applied retroactively), which worked against the defendants;[149] (2) the Supreme Court's last majority enunciation of an obscenity test in *Roth v. United States*, which the court of appeals viewed as very similar to the *Miller* standard;[150] or (3) the *Memoirs* plurality standard, which favored the defendants.[151]

The court of appeals determined that the *Memoirs* standard could not govern because there was no binding majority rationale. As the Supreme Court summarized, the court of appeals

> noted—correctly—that the *Memoirs* standards never commanded the assent of more than three Justices at any one time, and it apparently concluded from this fact that *Memoirs* never became the law. By this line of reasoning, one must judge whether *Miller* expanded criminal liability by looking not to *Memoirs* but to *Roth v. United States*, the last comparable plenary decision of this Court prior to *Miller* in which a majority united in a single opinion announcing the rationale behind the Court's holding.[152]

Justice Marshall's tenure."); Ledebur, *supra* note 18, at 900 ("The second half of the twentieth century has seen a significant rise in dissension in the Court. That dissension has continued to exist, even in the current Court whose Chief Justice has made it a mission to promote unanimity." (footnote omitted)); Levy, *supra* note 27, at 13 ("[R]ecently, . . . plurality decisions have proliferated.").

145 Marks v. United States, 430 U.S. 188, 193 (1977).

146 Hochschild, *supra* note 35, at 279; *accord* Comment, *supra* note 24, at 154–55 (detailing the variety of ways in which lower courts treated Supreme Court plurality decisions before *Marks*); Thurmon, *supra* note 36, at 420 (describing the *Marks* rule as a means of assessing the precedential value of a plurality decision).

147 *Marks*, 430 U.S. at 189.

148 *Id.* at 190 (citing Memoirs v. Massachusetts, 383 U.S. 413 (1966)).

149 *Id.* at 189–90 (citing Miller v. California, 413 U.S. 15 (1973)).

150 *Id.* at 192–93 (citing Roth v. United States, 354 U.S. 476 (1957)).

151 *Id.* at 190–91.

152 *Id.* at 192–93 (citation omitted).

Nevertheless, the Supreme Court concluded, the court of appeals had gotten the analysis wrong. Instead of dismissing the plurality decision in *Memoirs*, the Court reasoned, the lower court should have applied what has now become known as the *Marks* rule: "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'"[153] As applied to *Memoirs*, the *Marks* rule meant that the plurality opinion *did* operate as controlling precedent because the two concurring Justices who provided the fourth and fifth votes for the actual resolution offered broader grounds for obscenity convictions than the plurality did.[154]

The *Marks* narrowest grounds rule sounds simple, and it can work quite well when the Supreme Court Justices actually offer "nested"—or progressively expanding—rationales in their plurality opinions (the "Russian dolls" model of plurality decisions).[155] As has been widely observed, however, the *Marks* rule offers little guidance when Supreme Court Justices offer unrelated rationales for a decision.[156] As a result, a number of commentators have both recognized that the lower courts vary widely in their applications of *Marks* to the Supreme Court's plurality decisions[157] and offered alternative strategies of their own.[158]

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[153] *Id.* at 193 (alteration in original) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (plurality opinion)).

[154] *Id.* at 193–94.

[155] *E.g.*, Lewis A. Kornhauser & Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 CALIF. L. REV. 1, 46 (1993); *accord* Berkolow, *supra* note 17, at 326–33 ("Where the *Marks* rule does easily apply, in those opinions written along a continuum of broad to narrow reasoning, it is an enormously useful doctrine that provides guidance for lower courts deciphering fractured decisions.").

[156] Berkolow, *supra* note 17, at 333; Marceau, *supra* note 29, at 169; Thurmon, *supra* note 36, at 442.

[157] *See, e.g.*, Marceau, *supra* note 29, at 170–74 (explaining the "common denominator" and "predictive" approaches to applying the *Marks* rule); Cacace, *supra* note 25, at 122–25 (recognizing three approaches to applying *Marks*—the narrowest grounds approach, the "conventional view," and the "social choice view"); Thurmon, *supra* note 36, at 429–42 (describing in detail two models for applying the *Marks* rule—the "implicit consensus" and predictive model); Weins, *supra* note 27, at 835–38 (detailing the implicit-consensus and predictive approaches to applying the *Marks* rule).

[158] *See, e.g.*, Davis & Reynolds, *supra* note 137, at 81–85 (urging stronger leadership within the Court to avoid plurality decisions); Bloom, *supra* note 27, at 1412–16 (recommending the "simple reconciliation" and "policy space" methods); Kimura, *supra* note 26, at 1604–11 (offering a "legitimacy model" for interpreting Supreme Court plurality decisions based on fidelity to existing precedent); Ledebur, *supra* note 18, at 914 (proposing to disallow concurring opinions); Thurmon, *supra* note 36, at 451–56 (offering an alternative approach to plurality decisions that emphasizes the role of imperative and persuasive authority in the Justices' reasoning).

With very limited exceptions, however, the jurisprudence and scholarship of plurality decisions have focused on the interpretive dilemma facing the lower *courts*. Lower courts, of course, are bound to follow precedent established in higher courts, even when discerning what the precedent is may be difficult.[159] However, as *Chevron* itself makes clear, federal agencies occupy a preferred position with respect to their authority to interpret statutes. Structurally, unlike lower federal courts, agencies are creations of the Legislative Branch and operate, for the most part, out of the Executive Branch.[160] Under *Chevron* and *Brand X*, a federal agency's interpretation of a statute that it implements, at least when issued through fairly formalized procedures pursuant to delegated lawmaking authority, is entitled to deference and can supersede the courts' prior interpretations. The issue that the next Part addresses is how the *Chevron*/*Brand X* framework should apply in the context of the Supreme Court's plurality decisions that interpret statutes that agencies implement.

III. A TYPOLOGY OF SUPREME COURT PLURALITY DECISIONS AND *BRAND X*'S APPLICABILITY TO THE AGENCY'S FOLLOW-UP RESPONSE

Not all Supreme Court plurality decisions involve an agency-mediated statutory scheme. For example, many questions of constitutional requirements in criminal procedure or questions involving the Federal Rules of Civil Procedure or Federal Rules of Evidence involve no agencies whatsoever. Plurality decisions on these subjects, therefore, do not raise any *Chevron*/*Brand X* issue.

While all Supreme Court plurality decisions implicating an agency-mediated statute potentially affect how the agency implements that statute, not all such decisions create the deference conundrum. Depending on what kind of issue, precisely, the Supreme Court is addressing, the agency may not have the option of invoking *Brand X* in its response. In such situations, federal agencies are essentially stuck in the same position as lower courts responding to the

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159 *See* Thurmon, *supra* note 36, at 422 (noting that the problem caused by plurality opinions is lower courts following higher courts).

160 Indeed, Elizabeth Foote has argued that the entire *Chevron* framework, by casting what agencies do as statutory interpretation, was a misstep *ab initio*. Elizabeth V. Foote, *Statutory Interpretation or Public Administration: How* Chevron *Misconceives the Function of Agencies and Why It Matters*, 59 ADMIN. L. REV. 673, 674–95 (2007). While this Article pursues the less ambitious task of arguing that post-plurality federal agencies still have room to maneuver within the *Chevron* framework, rather than seeking to replace that framework, it nevertheless concurs with much of Foote's argument.

Supreme Court's plurality decision: they must interpret the Justices' opinions in an attempt to discern a controlling legal rationale.

To better illuminate the contours of the deference conundrum and the potential role of the *Chevron*/*Brand X* framework in agency responses to Supreme Court plurality decisions, this Part presents a typology of five categories of Supreme Court decisions regarding agency-mediated statutes—decisions considering the statute's constitutionality; decisions involving the implications of a statute beyond the immediate federal regulatory context, as in federal preemption; decisions assessing the validity of an agency rule or order on noninterpretive grounds; decisions interpreting an agency-mediated statute in the absence of an agency interpretation; and decisions assessing the validity of an existing agency interpretation. For each category, it discusses the implementing agency's potential responses to plurality decisions from the Court.

Importantly, the deference conundrum arises only in the last two categories of decisions within this typology. Within those two categories, however, the *Chevron*/*Brand X* framework gives agencies the opportunity to avoid the confusion and uncertainty that often follow from Supreme Court plurality decisions.

A. Decisions on the Constitutionality of the Statute or the Agency's Regulation

As noted, one category of cases that is likely to prompt plurality opinions in the Supreme Court is constitutional cases—or more specifically for this Article, decisions on the constitutionality of federal statutes or agency regulations.[161] For example, in *Eastern Enterprises v. Apfel*,[162] the Court issued a plurality decision regarding the constitutionality of the Coal Industry Retiree Health Benefit Act of 1992 (Coal Act), which "establishes a mechanism for funding health care benefits for retirees from the coal industry and their dependents"[163] and is administered by the Commissioner of Social Security.[164]

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[161] Corley et al., *supra* note 27, at 180.

[162] 524 U.S. 498 (1998).

[163] *Id.* at 504 (plurality opinion) (citing Pub. L. No. 102-486, 103 Stat. 3036 (codified as amended at 26 U.S.C. §§ 9701–9722 (2006))).

[164] *Id.* at 514–15.

The plurality of Justice O'Connor, Chief Justice Rehnquist, Justice Scalia, and Justice Thomas relied on the regulatory takings balancing test from *Penn Central Transportation Co. v. New York City* to conclude that the Coal Act's funding mechanism resulted in an unconstitutional taking of the employer's (Eastern Enterprises') money.[165] Given its conclusion on the taking claim, the plurality did not decide Eastern Enterprises' substantive due process claim.[166]

Justice Kennedy concurred in the judgment that the Coal Act was unconstitutional, but for entirely different reasons. He concluded that the Coal Act

> must be invalidated as contrary to essential due process principles, without regard to the Takings Clause of the Fifth Amendment. I concur in the judgment holding the Coal Act unconstitutional but disagree with the plurality's Takings Clause analysis, which, it is submitted, is incorrect and quite unnecessary for decision of the case.[167]

Justice Kennedy reached his due process conclusion because the Coal Act's funding mechanisms operated retroactively.[168]

The dissenters, in two opinions, would have declared the Coal Act constitutional. Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, emphasized the historical context of the Coal Act to conclude that Congress's solution was constitutional.[169] Justice Breyer, joined by Justices Stevens, Souter, and Ginsburg, essentially agreed with Justice Kennedy that the takings analysis was incorrect and that the Due Process Clause provided the proper basis for evaluating the Coal Act, focusing, like Justice Kennedy did, on the Coal Act's retroactivity.[170] Unlike Justice Kennedy, however, Justice Breyer concluded that the Coal Act's retroactivity did *not* violate Eastern Enterprises' due process rights, in large part because of the equities of Eastern Enterprises' relationship with its miners.[171]

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165 *Id.* at 522–23, 529, 532, 537 (citing Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978)).

166 *Id.* at 537–38.

167 *Id.* at 539 (Kennedy, J., concurring in the judgment and dissenting in part).

168 *Id.* at 547–50.

169 *Id.* at 550–53 (Stevens, J., dissenting).

170 *Id.* at 554–58 (Breyer, J., dissenting).

171 *Id.* at 558–68.

Thus, while *Eastern Enterprises* gave a clear decision that the funding mechanisms of the Coal Act were unconstitutional, it provided little guidance to lower courts regarding the proper framework for future evaluations of the constitutional validity of economic regulation. Lower federal courts have since struggled with that issue. For example, the Eleventh Circuit, applying *Marks*, concluded:

> Justice O'Connor's opinion for the plurality in *Eastern Enterprises* would not constitute binding authority (i.e., would not constitute the narrower ground) under any of the several formulations of the *Marks* inquiry. We need not decide whether Justice Kennedy's concurrence constitutes the narrower ground, because we can assume *arguendo* that neither opinion constitutes the narrower ground, thus leaving us without binding authority, and leaving us with the obligation to independently evaluate the case law and determine for ourselves which approach is more consistent with the case law and more plausible.[172]

As a result, the Eleventh Circuit rejected the Takings Clause framework for evaluating the constitutionality of the Fair and Equitable Tobacco Reform Act of 2004.[173] Other lower federal courts[174] and state courts[175] have reached similar conclusions, and even the United States has argued in litigation that *Eastern Enterprises* does not constitute binding precedent for evaluating other statutes.[176] Indeed, several lower federal courts have held that *Eastern Enterprises* does not even control their decisions regarding other applications of the Coal Act.[177]

Nevertheless, while the *Marks* rule proves unhelpful in identifying a binding rationale in cases like *Eastern Enterprises*, post-plurality implementing federal agencies, like the Social Security Administration, cannot simply ignore the plurality decision, because federal courts routinely deny deference to agencies' views of constitutional matters. This denial of deference comes in three closely related "flavors," all of which could limit an agency's

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172 Swisher Int'l, Inc. v. Schafer, 550 F.3d 1046, 1054 (11th Cir. 2008) (footnote omitted).

173 *Id.* (construing 7 U.S.C. §§ 518–519(c) (2006)).

174 *See* United States v. Alcan Aluminum Corp., 315 F.3d 179, 189–90 (2d Cir. 2003); United States v. Dico, Inc., 189 F.R.D. 536, 541–42 (S.D. Iowa 1999), *aff'd*, 266 F.3d 864 (8th Cir. 2001).

175 *See* Verizon W. Va., Inc. v. W. Va. Bureau of Emp't Programs, Workers' Comp. Div., 586 S.E.2d 170, 189–92 (W. Va. 2003).

176 *Dico*, 189 F.R.D. at 541.

177 *See* Anker Energy Corp. v. Consolidation Coal Co., 177 F.3d 161, 168 (3d Cir. 1999); Ass'n of Bituminous Contractors v. Apfel, 156 F.3d 1246, 1247 (D.C. Cir. 1998); Holland v. Pardee Coal Co., 93 F. Supp. 2d 706, 716 (W.D. Va. 2000), *rev'd*, 269 F.3d 424 (4th Cir. 2001).

ability to discount a Supreme Court plurality decision involving constitutional issues.

First, and most basically, the federal courts have long proclaimed themselves the primary interpreters of the U.S. Constitution, especially with respect to the Executive Branch.[178] As the D.C. Circuit proclaimed in 1988, "The federal Judiciary does not . . . owe deference to the Executive Branch's interpretation of the Constitution."[179] Second, the Supreme Court has made it clear that agency interpretations of statutes that themselves push the boundaries of constitutionality are not entitled to *Chevron* deference.[180] Thus, if the Supreme Court issued a plurality decision suggesting that the agency's prior interpretation of a statute raises constitutional issues, the agency would have to seriously consider the Justices' arguments that its interpretation triggered constitutional concern in order to successfully claim deference in the next round of judicial review.[181] Third, in construing statutes, "the constitutional avoidance canon of statutory interpretation trumps *Chevron* deference."[182] Under this canon, the federal court's first duty is to find a constitutional interpretation of the federal statute at issue, and the courts "will not submit to an agency's interpretation of a statute if it 'presents serious constitutional difficulties.'"[183]

The canon of constitutional avoidance also has implications for any *Brand X* analysis because federal courts are likely to accord greater precedential weight to prior judicial interpretations of a statute that were based on that canon—in *Brand X*'s terms, to regard those prior court decisions as decisively resolving statutory ambiguities. Two decisions from the federal courts of appeals, one before the *Brand X* decision and one after, illustrate this point. In

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178 *See* United States v. Nixon, 418 U.S. 683, 704–05 (1974); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177–78 (1803); Akins v. FEC, 101 F.3d 731, 740 (D.C. Cir. 1996) (en banc), *vacated*, 524 U.S. 11 (1998).

179 Pub. Citizen v. Burke, 843 F.2d 1473, 1478 (D.C. Cir. 1988).

180 Solid Waste Agency v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 172–73 (2001).

181 *See, e.g.*, *In re* Needham, 354 F.3d 340, 345 n.8 (5th Cir. 2003) (refusing to accord *Chevron* deference to the U.S. Army Corps of Engineers' interpretation of the Oil Pollution Act because the agency's regulations raised constitutional issues).

182 Univ. of Great Falls v. NLRB, 278 F.3d 1335, 1340–41 (D.C. Cir. 2002); *accord* Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988); Nat'l Mining Ass'n v. Kempthorne, 512 F.3d 702, 711 (D.C. Cir. 2008); Hernandez-Carrera v. Carlson, 547 F.3d 1237, 1249 (10th Cir. 2008); Blake v. Carbone, 489 F.3d 88, 100 (2d Cir. 2007); Flores-Chavez v. Ashcroft, 362 F.3d 1150, 1162–63 (9th Cir. 2004).

183 *Nat'l Mining Ass'n*, 512 F.3d at 711 (quoting Chamber of Commerce v. FEC, 69 F.3d 600, 605 (D.C. Cir. 1995)).

University of Great Falls v. NLRB,[184] the D.C. Circuit in 2002 refused to defer to the NLRB's interpretation of the National Labor Relations Act[185] (NLRA) as applied to the University of Great Falls, which claimed the exemption for religious institutions that the Supreme Court had established in *NLRB v. Catholic Bishop of Chicago*.[186] According to the D.C. Circuit, the Supreme Court's interpretation of the NLRA was based on constitutional avoidance and, as a result, the NLRB's interpretation of the NLRA with respect to the University of Great Falls was not entitled to deference.[187]

In 2007, post-*Brand X*, the Second Circuit reached a similar conclusion about its own constitutional avoidance precedent in *Blake v. Carbone*.[188] In 1976, the Second Circuit had construed specific provisions of the INA to avoid Equal Protection Clause infirmities.[189] When the Immigration and Naturalization Service later tried to reinterpret those same provisions in ways that recreated the equal protection problems, the Second Circuit accorded no deference to the agency's interpretation, emphasizing its own duty to interpret the statute to avoid constitutional problems.[190]

Thus, the canon of constitutional avoidance severely attenuates the potential roles of both *Chevron* deference and the *Brand X* rule. In conjunction with the courts' unwillingness to defer to an agency's constitutional analysis or to agency interpretations of statutes that push constitutional boundaries, agencies coping with Supreme Court plurality decisions based on constitutional issues have few practical options other than to engage in their own *Marks*-rule analyses. The lesson for federal agencies dealing with plurality decisions in this category is thus stark: such agencies must cope as best they can—most likely, conservatively—with the constitutional concerns of the plurality Justices.

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184 278 F.3d 1335 (D.C. Cir. 2002).

185 29 U.S.C. §§ 141–197 (2006).

186 *Univ. of Great Falls*, 278 F.3d at 1341 (citing 440 U.S. 490, 499 (1979)).

187 *Id.* First, the NLRB was, in effect, an agency interpreting a court, not an agency interpreting a statute: "The application of *Catholic Bishop* to the facts of this case is thus an interpretation of precedent, rather than a statute, and for the court an occasion calling for the exercise of constitutional avoidance." *Id.* Second, deference to the NLRB was especially unwarranted "where, as here, the Supreme Court precedent, and subsequent interpretation, is based on constitutional concerns, an area of presumed judicial, rather than administrative, competence." *Id.*

188 489 F.3d 88 (2d Cir. 2007).

189 Francis v. INS, 532 F.2d 268, 272–73 (2d Cir. 1976).

190 *Blake*, 489 F.3d at 100.

B. Decisions Invoking Statutory Interpretation for Purposes Beyond the Direct Regulatory Application of the Statute

Most agency-mediated statutes are regulatory in character, and the federal agency's primary function under the statute is to implement a regulatory program. Nevertheless, federal courts often interpret federal statutes for purposes other than resolving issues regarding federal implementation of the regulatory program. One of the most prominent of these extraregulatory (at least from the perspective of the *federal* agency implementing the statute) statutory construction issues is federal preemption.

Federal preemption is based on the Supremacy Clause, which states that the laws of the United States, including the Federal Constitution, federal statutes, and treaties, "shall be the supreme Law of the Land . . . , any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[191] Unlike many provisions of the Constitution, the Supremacy Clause is not a basis for declaring a federal statute unconstitutional; indeed, the Clause's effect, if anything, is to reinforce the federal law. Instead, federal preemption analyses are concerned primarily with whether *states* can regulate in the same substantive sphere as the federal statute[192] and whether the federal statute displaces *state* tort liability.[193] Thus, when the Supreme Court issues a plurality decision regarding the preemptive effect of a federal statute, the entities left without clear legal guidance are state regulatory agencies and actual and potential tort victims. While important, these questions have little bearing on how the relevant federal agency chooses to implement the statute with respect

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191 U.S. CONST. art. VI, cl.2.

192 *See* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 541 (2001); Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 300–04 (1988); Ray v. Atlantic Richfield Co., 435 U.S. 151, 157 (1978); Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

193 *See* Wyeth v. Levine, 129 S. Ct. 1187, 1192 (2009); Bates v. Dow Agrosciences LLC, 544 U.S. 431, 434 (2005); Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 517–31 (1992).

to federally regulated entities.[194] Deference to the implementing federal agency is not the relevant issue,[195] and the deference conundrum does not arise.

Consider, for example, *Cipollone v. Liggett Group, Inc.*, which raised the question of whether federally mandated warning labels on cigarettes preempted state-law tort claims against cigarette manufacturers.[196] The Court split three ways, leaving the preemptive effect of the cigarette statutes and, more importantly, the process of preemption analysis in considerable doubt.

A majority of Justices concluded that the 1965 Federal Cigarette Labeling and Advertising Act[197] (1965 Act) did *not* preempt state law tort claims.[198] Section 5 of that act addressed preemption and stated:

> (a) No statement relating to smoking and health, other than the statement required by section 4 of this Act ["Caution: Cigarette Smoking May Be Hazardous to Your Health"], shall be required on any cigarette package.
> (b) No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.[199]

Justice Stevens, writing for himself, Chief Justice Rehnquist, Justice White, and Justice O'Connor, concluded that "on their face, these provisions merely prohibited state and federal rulemaking bodies from mandating particular cautionary statements on cigarette labels (§ 5(a)) or in cigarette advertisements (§ 5(b))" and that "there is no general, inherent conflict between federal preemption of state warning requirements and the continued vitality of state

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194 If the implementing federal agency attempts to preempt state law through regulations, the interpretive and deference issues become intermixed. This intermixing raises provocative questions regarding federal agency authority that have not yet been fully resolved. However, the *Chevron* questions that arise do not differ significantly from questions that have arisen in other contexts regarding an agency's authority to regulate when it claims deference. For recent scholarship exploring the issue of agency preemption, see generally Ashutosh Bhagwat, Wyeth v. Levine *and Agency Preemption: More Muddle, or Creeping to Clarity?*, 45 TULSA L. REV. 197 (2009); William Funk, *Judicial Deference and Regulatory Preemption by Federal Agencies*, 84 TUL. L. REV. 1233 (2010); and Victor E. Schwartz & Cary Silverman, *Preemption of State Common Law by Federal Agency Action: Striking the Appropriate Balance that Protects Public Safety*, 84 TUL. L. REV. 1203 (2010).

195 *See* Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 743–44 (1996) (emphasizing that the questions of whether a federal statute preempts state law and whether an agency's interpretation of the same statute should be given deference are separate).

196 505 U.S. 504, 508 (1992).

197 Pub. L. No. 89-92, 79 Stat. 282 (1965) (codified as amended at 15 U.S.C. §§ 1331–1341 (2006)).

198 *Cipollone*, 505 U.S. at 519–20.

199 § 5(a)–(b), 79 Stat. at 283.

common-law damages actions."[200] Justice Blackmun, joined by Justice Kennedy and Justice Souter, concurred in Stevens's conclusion because "[t]he narrow scope of federal pre-emption is . . . apparent from the statutory text, and it is correspondingly impossible to divine any 'clear and manifest purpose' on the part of Congress to pre-empt common-law damages actions."[201] In contrast, Justice Scalia, joined by Justice Thomas, concluded that the 1965 Act preempted failure-to-warn claims[202] because of the 1965 Act's general prohibition on "statements" relating to smoking and health.[203]

Congress changed the relevant preemption provisions when it enacted the Public Health Cigarette Smoking Act of 1969 (1969 Act), amending section 5(b) to read: "No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act."[204] According to Justice Stevens' plurality, "[T]he plain language of the pre-emption provision in the 1969 Act is much broader."[205] However, the plurality analyzed the plaintiff's tort claims claim by claim using what has become known as the "predicate-duty approach"[206] and concluded that (1) the 1969 Act created the only relevant duty regarding warnings and thus preempted failure-to-warn claims against cigarette manufacturers that allege that the manufacturers should have provided additional warnings;[207] (2) the 1969 Act did not create duties regarding the companies' testing or research practices and thus did not preempt failure-to-warn claims based solely on those activities;[208] (3) the 1969 Act did not govern duties regarding promises in advertising and thus did not preempt breach-of-express-warranty claims;[209] (4) the 1969 Act did not preempt fraudulent misrepresentation claims for similar reasons;[210] and (5) the 1969 Act did not preempt conspiracy claims because those were unrelated to safety

200 *Cipollone*, 505 U.S. at 518.
201 *Id.* at 534 (Blackmun, J., concurring in the judgment in part and dissenting in part).
202 *Id.* at 544 (Scalia, J., concurring in the judgment in part and dissenting in part).
203 *Id.* at 549–50.
204 Pub. L. No. 91-222, § 5, 84 Stat. 87, 88 (1970) (codified as amended at 15 U.S.C. §§ 1331–1341 (2006)).
205 *Cipollone*, 505 U.S. at 520 (plurality opinion).
206 Altria Grp., Inc. v. Good, 129 S. Ct. 538, 552 (2008) (Thomas, J., dissenting).
207 *Cipollone*, 505 U.S. at 524 (plurality opinion).
208 *Id.* at 524–25.
209 *Id.* at 525–27.
210 *Id.* at 527–29.

regulation.[211] Justices Blackmun, Kennedy, and Souter found "the plurality's conclusion that the 1969 Act pre-empts at least some common-law damages claims little short of baffling," because the 1969 amendment "no more 'clearly' or 'manifestly' exhibits an intent to pre-empt state common-law damages actions than did the language of its predecessor in the 1965 Act."[212] In contrast, Justices Scalia and Thomas found that the 1969 Act preempted all of the common law claims.[213]

To a certain extent, therefore, *Cipollone* did provide states and potential tort plaintiffs with real answers: the 1965 Act does not preempt any state law tort claims (7–2), and the 1969 Act preempts state law failure-to-warn claims (6–3), but it does not preempt four other kinds of damages claims (7–2). However, the fractured nature of the opinion and, in particular, the fact that only a plurality supported the predicate-duty approach to preemption analysis, provided little guidance to lower courts deciding whether the 1965 or 1969 Acts preempted other kinds of state law claims. Indeed, the lower courts split regarding whether the 1969 Act preempted tort claims based on alleged manufacturer fraud regarding the safety of "light" cigarettes. The Fifth Circuit analogized such claims to "warning neutralization" claims and held that the 1969 Act, as construed in *Cipollone*, preempted them.[214] In contrast, the First Circuit analogized the claims to fraud claims and held that, under *Cipollone*, they were not preempted.[215] Granting certiorari to review the First Circuit's decision, a 5–4 Supreme Court adopted the *Cipollone* plurality's predicate-duty approach and agreed with the First Circuit that the 1969 Act did not preempt the claim.[216] The Court reached this holding even over the dissent's objection that a majority of Justices in *Cipollone* had rejected that approach.[217]

Nevertheless, a decade and a half of uncertainty over how to analyze the cigarette warning's preemption of state tort law had little impact on the Food and Drug Administration's regulation of cigarette warnings,[218] demonstrating

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211 *Id.* at 530.

212 *Id.* at 534 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

213 *Id.* at 544, 551–55 (Scalia, J., concurring in the judgment in part and dissenting in part).

214 Brown v. Brown & Williamson Tobacco Corp., 479 F.3d 383, 392–93 (5th Cir. 2007).

215 Good v. Altria Grp., Inc., 501 F.3d 29, 37, 40–43 (1st Cir. 2007), *aff'd*, 129 S. Ct. 538 (2008).

216 *Good*, 129 S. Ct. at 545–46.

217 *Id.* at 552 (Thomas, J., dissenting).

218 Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44,396, 44,544 (Aug. 28, 1996). This regulation was later invalidated for lack of authority. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 125–26, 142–43, 159–60 (2000).

that the deference conundrum is unlikely to arise for this category of Supreme Court opinions. Even if it did, the Supreme Court has suggested—consistent with the federal courts' view of their primacy in constitutional interpretation in general—that it would be unwilling to defer to an agency's view of a *statute's* preemptive effect,[219] even though the Court will accord "some weight"—recently identified as *Skidmore* deference—to an agency's view of whether state law conflicts with an agency regulation having the force of law.[220]

C. Decisions Regarding the Validity of Noninterpretive Agency Action

The *Chevron*/*Mead*/*Skidmore* deference framework applies only to an agency's *interpretation* of a statute that it implements, but the Federal APA supplies courts with a variety of reasons for *overturning* agency action.[221] The deference conundrum does not arise from—and *Brand X* affords an agency no additional options for responding to—Supreme Court plurality decisions that evaluate agency actions on these other grounds, such as procedural compliance or evidentiary support.

For example, in *FCC v. Fox Television Stations, Inc.*, the Supreme Court splintered badly regarding the legitimacy of the FCC's attempts to prosecute Fox Television for two violations of the FCC's indecency restrictions for public broadcasts, through which the FCC implements the Communications Act.[222] While the FCC's implementation of this prohibition was originally limited to the use of sexual or scatological terms for their literal meanings, in 2004 it indicated for the first time that nonliteral (or explicative) use of the prohibited words could also be actionable.[223] The FCC cited Fox Television for broadcasting Cher's use of forbidden expletives during the 2002 Billboard Music Awards and for broadcasting Nicole Richie's use of forbidden expletives during the 2003 Billboard Music Awards.[224]

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[219] *See, e.g.*, Wyeth v. Levine, 129 S. Ct. 1187, 1201 (2009) ("[A]gencies have no special authority to pronounce on pre-emption absent delegation by Congress . . . ."); Watters v. Wachovia Bank, N.A., 550 U.S. 1, 20–21 (2007) (discounting an agency regulation and determining for itself whether a statute preempted state law); Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 744 (1996) ("We may assume (without deciding) that the . . . question [of whether a statute is preemptive] must always be decided *de novo* by the courts.").

[220] *Wyeth*, 129 S. Ct. at 1201 (quoting Geier v. Am. Honda Motor Co., 529 U.S. 861, 883 (2000)) (internal quotation marks omitted).

[221] *See* 5 U.S.C. § 706 (2006).

[222] 129 S. Ct. 1800, 1806 (2009) (construing 18 U.S.C. § 1464 (2006) and Pub. L. No. 73-416, 48 Stat. 1064 (codified as amended at 47 U.S.C. §§ 151–615b (2006))).

[223] *Id.* at 1807.

[224] *Id.* at 1808.

The issues for the Supreme Court were (1) whether the FCC had properly followed the APA's procedures in issuing its orders against Fox Television; (2) whether the FCC's application of the indecency rules to the broadcasts was arbitrary and capricious under the APA; and, in the background of the case, (3) whether the FCC's orders violated the First Amendment.[225] However, the plurality nature of the decision—in essence, a 4–1–4 split—arose from how the various Justices' opinions framed the proper scope of arbitrary-and-capricious review when a federal agency changes its policy on how to implement a statute.

The Court first held, 5–4, that the FCC changing its position on what constituted a violation of the indecency prohibitions did not warrant more stringent review under the APA's arbitrary-and-capricious standard.[226] Justice Scalia, joined by Chief Justice Roberts, Justice Thomas, Justice Alito, and, nominally at least, Justice Kennedy, thus purported to apply the usual arbitrary-and-capricious analysis. Nevertheless, in the context of an agency's changed policy, they also emphasized, "To be sure, the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position. An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books."[227]

A majority of Justices concluded that the FCC's implementation was *not* arbitrary and capricious. Justice Scalia's opinion upheld the FCC largely because "[i]t was certainly reasonable to determine that it made no sense to distinguish between literal and nonliteral uses of offensive words" and because technological advances made it much easier for broadcasters to "bleep" out any offending uses of prohibited words.[228]

Justice Kennedy complicated what could have been a clear majority approach. Although concurring in the judgment and nominally concurring in Justice Scalia's opinion, Justice Kennedy wrote separately to establish a new standard for arbitrary-and-capricious review in the context of changed policies—a standard that differed markedly from Justice Scalia's.[229] In essence, Justice Kennedy eschewed a one-size-fits-all analysis for a more

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225 *Id.* at 1810–12.
226 *Id.* at 1810–11.
227 *Id.* at 1811.
228 *Id.* at 1812–13.
229 *Id.* at 1822 (Kennedy, J., concurring in part and concurring in the judgment).

nuanced approach to arbitrary-and-capricious review that depends on the agency's exact circumstances and motivations for changing policy.[230]

In dissent, Justice Breyer, joined by Justices Stevens, Souter, and Ginsburg, insisted that agencies changing policies must explain, in a meaningful way relative to the initial decision, not just why the new policy was rational but also why exactly the agency had decided to change policies.[231] Because the FCC did not sufficiently explain the reasons for its change in policy, the dissenters declared its orders against Fox Television arbitrary and capricious.[232]

Fox Television thus leaves federal courts with multiple rules for how to approach arbitrary-and-capricious review when a federal agency changes policy, especially because Justice Kennedy's view of that standard aligns more readily with the four dissenters' than the majority's, despite his concurrence in the judgment. Nevertheless, the decision does not trigger the deference conundrum for two reasons. First, no federal agency is authorized to interpret the APA itself. Second, agency decisions subject to arbitrary-and-capricious review are, almost by definition, not subject to *Chevron* deference, and hence the *Brand X* rule is not relevant.[233] The same would be true in the aftermath of Supreme Court plurality decisions regarding whether the agency had correctly followed the APA's procedures[234] or whether the agency's decision was supported by substantial evidence.[235] In such circumstances, post-plurality agencies must do their best to interpret the Justices' rationales and to try to correct the deficiencies that at least some Justices discerned.

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230 *Id.* at 1822–23. Justice Kennedy stated:

> The question whether a change in policy requires an agency to provide a more-reasoned explanation than when the original policy was first announced is not susceptible, in my view, to an answer that applies in all cases. . . .
>
> The question in each case is whether the agency's reasons for the change, when viewed in light of the data available to it, and when informed by the experience and expertise of the agency, suffice to demonstrate that the new policy rests upon principles that are rational, neutral, and in accord with the agency's proper understanding of its authority.

Id.

231 *Id.* at 1829–32 (Breyer, J., dissenting).

232 *Id.* at 1829.

233 *See* Garcia v. Shanahan, 615 F. Supp. 2d 175, 185–86 (S.D.N.Y. 2009) ("[B]ecause the instant case is one calling only for statutory interpretation, . . . the Court does not find . . . the *Fox Television* decision to affect the outcome in this case.").

234 *See, e.g.*, 5 U.S.C. § 553 (2006) (setting out procedures for informal rulemaking); *id.* §§ 554, 556–557 (setting out procedures for formal rulemaking and adjudication); *id.* § 706(2)(D) (allowing the federal courts to set aside agency action when the agency did not follow the correct procedures).

235 *See* 5 U.S.C. § 706(2)(E) (establishing the "substantial evidence" standard of review).

D. Decisions Engaging in Statutory Interpretation in the Absence of an Agency Interpretation

In the prototypical *Brand X* situation, a court has interpreted a statute that an agency implements, in the absence of an existing agency regulation, and then the agency wants to interpret the statute differently than the court did. In fact, the question in *Brand X* itself was whether the Ninth Circuit was correct to follow its own precedent in interpreting the Communications Act or whether it should have accorded *Chevron* deference to the FCC's interpretation.[236] The *Brand X* majority clearly subordinated court interpretations to agency interpretations in this situation, concluding, as discussed, 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."[237]

Brand X left at least two questions regarding its scope. First, because the case dealt with *Chevron* deference and later agency interpretations that were clearly "otherwise entitled to *Chevron* deference,"[238] it provides little guidance regarding how courts should treat existing court precedent when later and contrary agency interpretations are *not* entitled to *Chevron* deference. Nevertheless, lower courts have found or implied that the *Brand X* rule applies only to agency interpretations that otherwise are entitled to *Chevron* deference,[239] which is consistent with the special status of *Chevron* deference. *Chevron* deference respects Congress's decision to invest interpretive authority in agencies rather than courts—so long as the agency deliberatively exercises delegated lawmaking authority. As the *Brand X* majority emphasized, if the two analytical steps are met, "*Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation."[240] In contrast, lesser standards of deference do not demand that a court give up its prerogative

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236 Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 979–83 (2005).

237 *Id.* at 982.

238 *Id.*

239 *See, e.g.*, Michael Simon Design, Inc. v. United States, 501 F.3d 1303, 1306 (Fed. Cir. 2007) (refusing to apply the *Brand X* rule to an interpretation that warranted only *Skidmore* deference); White & Case LLP v. United States, 89 Fed. Cl. 12, 22 (2009) ("To the extent that the term 'case' was construed by the Court of Claims in *Cornman*, however, this holding and related determinations continue to bind our Court—until the agency changes its construction of the statute in a manner garnering *Chevron* deference.").

240 *Brand X*, 545 U.S. at 990 (2005) (citing Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843–44 & n.11 (1984)).

to discern the "best" interpretation of a statute. For example, under *Skidmore* deference, an agency interpretation receives deference only to the extent that it has the "power to persuade."[241]

Second, as noted in Part I, the Justices disagree as to whether the *Brand X* rule encompasses the Supreme Court's own interpretations of statutes. There is nothing in the majority's rule that would exclude Supreme Court decisions, and scholarship has argued that Supreme Court interpretations should be included within the scope of the *Brand X* rule.[242] Conversely, as noted, Justice Stevens concurred specifically in *Brand X* to indicate that Supreme Court decisions *do* resolve statutory ambiguities, precluding application of the *Brand X* rule.[243] Scholars, too, have displayed some queasiness regarding the implications of applying the *Brand X* rule to the Supreme Court's interpretations of statutes,[244] and the Supreme Court has failed to apply *Brand X* to its own decisions, although usually not with explanation.[245]

Nevertheless, any squeamishness about applying the *Brand X* rule to constructions of statutes endorsed by a majority of the Supreme Court Justices should dissipate in the context of plurality decisions that offer no majority interpretation. Moreover, *Brand X* should apply to Supreme Court plurality decisions that interpret a statute that a federal agency implements even if the *Marks* rule could easily provide a controlling rationale.

To begin, of course, not all—and perhaps very few—Supreme Court plurality decisions even fit the *Marks*-rule structure. For example, in the most extreme version of a plurality decision, an equally divided Court issues no opinion. Thus, in *Borden Ranch Partnership v. United States Army Corps of Engineers*, the Ninth Circuit interpreted the CWA's prohibition of "discharge[s] of any pollutant" into the nation's waters to extend to "deep ripping" wetlands, a procedure "in which four- to seven-foot long metal prongs

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241 Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

242 *See* Richard Murphy, *The* Brand X *Constitution*, 2007 BYU L. REV. 1247, 1250–52; Doug Geyser, Note, *Courts Still "Say What the Law Is": Explaining the Functions of the Judiciary and Agencies After* Brand X, 106 COLUM. L. REV. 2129, 2131 n.13 (2006).

243 *Brand X*, 545 U.S. at 1003 (Stevens, J., concurring).

244 *See* Kathryn A. Watts, *Adapting to Administrative Law's* Erie *Doctrine*, 101 NW. U. L. REV. 997, 1015–16, 1023 (2007); Note, *Implementing* Brand X*: What Counts as a Step One Holding*, 119 HARV. L. REV. 1532, 1533 (2006); Darren H. Weiss, Note, X *Misses the Spot:* Fernandez v. Keisler *and the (Mis)Appropriation of* Brand X *by the Board of Immigration Appeals*, 17 GEO. MASON L. REV. 889, 893, 908–09 (2010).

245 *See* Robin Kundis Craig, *Administrative Law in the Roberts Court: The First Four Years*, 62 ADMIN. L. REV. 69, 172–86 (2010).

are dragged through the soil behind a tractor or a bulldozer," destroying the confining bottom layer of the wetland and allowing the wetland to drain.[246] While this interpretation is questionable, the Ninth Circuit did not defer to any interpretation by the U.S. Army Corps or the EPA to reach it, instead relying solely on statutory definitions and prior case law.[247] The Supreme Court, however, failed to provide *any* guidance regarding the correctness of the Ninth Circuit's interpretation or the validity of its reasoning. Instead, the entirety of the Court's opinion was as follows: "The judgment is affirmed by an equally divided Court. Justice Kennedy took no part in the consideration or decision of this case."[248]

In this extreme situation, it is difficult to conclude that the Supreme Court has issued *any* interpretation of the statute; instead, it has merely applied its default rule that 4–4 splits among the Justices affirm the lower court.[249] Indeed, the Court itself has noted that a 4–4 "judgment amounts at best to nothing more than an unexplained affirmance by an equally divided court—a judgment not entitled to precedential weight no matter what reasoning may have supported it."[250] As a result, if the Army Corps and the EPA wanted to promulgate a regulation, using full notice-and-comment rulemaking, that disagreed with the Ninth Circuit's interpretation—and if it concluded that the CWA does *not* extend to deep ripping—*Brand X* should apply to that regulation. In other words, the regulation should receive *Chevron* deference, despite the Supreme Court's nominal affirmance of the lower court's view.

Even in Supreme Court plurality decisions with substantial opinions, it cannot always be said that the Court has actually and definitively interpreted the statute at issue. Even if Justice Stevens's caveat to *Brand X* is assumed to be part of the *Brand X* rule, that caveat presumes that the Supreme Court's decision "remove[s] any pre-existing ambiguity."[251] In contrast, interpretations

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246 Borden Ranch P'ship v. U.S. Army Corps of Eng'rs, 261 F.3d 810, 812–15 (9th Cir. 2001) (internal quotation marks omitted) (construing 33 U.S.C. § 1311(a) (2006)), *aff'd per curiam by an equally divided court*, 537 U.S. 99 (2002).

247 *Id.* at 814–15.

248 *Borden Ranch*, 537 U.S. at 100.

249 *See* Durant v. Essex Co., 74 U.S. (7 Wall.) 107, 113 (1868) (noting the default rule but clarifying that the actual decision is binding on the parties involved); Hemmenway v. Fisher, 61 U.S. (20 How.) 255, 260 (1857) (noting the default rule); *see also* 28 U.S.C. § 2109 (2006) (applying the default rule to cases where the Supreme Court does not have a quorum).

250 Rutledge v. United States, 517 U.S. 292, 304 (1996).

251 Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1003 (2005) (Stevens, J., concurring).

of statutes in plurality decisions tend to underscore, rather than remove, statutory ambiguities. As John Davis and William Reynolds observed, "[A] plurality opinion is not, strictly speaking, an opinion of the Court as an institution; it represents nothing more than the views of the individual justices who join in the opinion."[252] As a result, "[A] plurality opinion often fails to give definitive guidance as to the state of the law to lower courts—both state and federal—as well as to the legislative, administrative, and executive agencies charged with implementing the standards so ambivalently articulated by the Court."[253]

For example, in *Lukhard v. Reed*, the Supreme Court split 4–1–4 regarding whether states could legitimately interpret "income" to include personal injury awards for purposes of determining the eligibility of families seeking Aid to Families with Dependent Children (AFDC).[254] At the federal level, the Department of Health and Human Services (HHS) implements this program, but the structure of the program leaves states with considerable discretion to interpret details. In the wake of 1981 legislation amending the program, for example, the Secretary of HHS "advised the States to adhere to their existing definitions of income."[255]

After the case was filed, the Secretary of HHS promulgated a regulation that required states to treat lump-sum awards as income.[256] Nevertheless, the four-Justice plurality (Justice Scalia, Chief Justice Rehnquist, Justice White, and Justice Stevens) declined to decide the case on the basis of that regulation,[257] engaging instead in straightforward statutory interpretation to determine whether the *State of Virginia*'s regulation regarding the treatment of income was legitimate.[258] The plurality rather weakly upheld Virginia's decision to treat personal injury awards as income, concluding not that the federal statutes clearly supported that interpretation but rather only that "[r]espondents have not demonstrated that Virginia's policy of treating

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252 Davis & Reynolds, *supra* note 137, at 61.

253 *Id.* at 62.

254 481 U.S. 368 (1987) (construing 42 U.S.C. § 602 (1982 & Supp. III 1985)). AFDC was replaced by Temporary Assistance to Needy Families in 1996. *See* Saenz v. Roe, 526 U.S. 489, 492–93 (1999).

255 *Lukhard*, 481 U.S. at 385 (Powell, J., dissenting) (citing Aid to Families with Dependent Children, 47 Fed. Reg. 5648, 5656 (Feb. 5, 1982) (to be codified at 45 C.F.R. pts. 205–206, 232–235, 238–239)).

256 *Id.* at 379 n.5 (plurality opinion) (citing 45 C.F.R. § 233.20(a)(3)(ii)(F) (1986) and Aid to Families with Dependent Children Adult Assistance Programs, 49 Fed. Reg. 45,558, 45,568 (proposed Nov. 16, 1984) (to be codified at 45 C.F.R. pts. 201, 205–206, 225, 232–235, 237)).

257 *Id.*

258 *Id.*

personal injury awards as income is inconsistent with the AFDC statute or HHS' regulations."[259]

Justice Powell dissented, joined by Justices Brennan, Marshall, and O'Connor. Looking at federal treatment of personal injury awards, they concluded that, "[i]n a variety of circumstances, Congress has recognized that injured persons and their families should be permitted to retain the full amount of [tort and workers' compensation] awards," and hence that "[i]t is unjust, and inconsistent with the basic purposes of the AFDC statute, to deny needy families the compensation our legal system affords to the rest of society."[260]

That left Justice Blackmun, who concurred in the plurality's decision to reverse the lower court but nothing else. His opinion, in its entirety, was as follows:

> I join the judgment of the Court but not the opinion of the plurality, for I would base my vote to reverse not on an endorsement of the original Virginia interpretation but, flatly, on the deference that is due the Secretary of Health and Human Services in his interpretation of the governing statutes. In a statutory area as complicated as this one, the administrative authorities are far more able than this Court to determine congressional intent in the light of experience in the field. If the result is unacceptable to Congress, it has only to clarify the situation with language that unambiguously specifies its intent.[261]

Thus, Justice Blackmun not only refused to join the plurality's reasoning but also explicitly invoked deference to federal agencies as the preferred alternative approach.

Lukhard, a 1987 decision, preceded *Brand X* by almost two decades. Moreover, the Secretary's regulation treating personal injury awards as income remains in place.[262] Nevertheless, as an intellectual exercise, it remains worthwhile to ask whether *Lukhard* in any way foreclosed HHS's ability to interpret the federal statutes to reach the opposite conclusion—that states *cannot* consider personal injury awards to be income for purposes of the AFDC program.

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259 *Id.* at 383.
260 *Id.* at 391–92 (Powell, J., dissenting).
261 *Id.* at 383–84 (Blackmun, J., concurring).
262 45 C.F.R. § 233.20(a)(3)(ii)(F) (2011).

The most intellectually honest conclusion is that the plurality decision had no such preclusive effect. Indeed, the very existence of the plurality opinions undermines any conclusion that the Supreme Court interpreted the AFDC statutes to remove all ambiguity regarding the scope of "income." The four dissenting Justices clearly thought that the alternative interpretation (personal injury awards are *not* income) was the better one, and Justice Blackmun would have preferred to decide the case based on deference to the HHS. Under the *Marks* rule, there is no narrowest grounds rationale to support the majority decision. Moreover, as a pragmatic matter, the concurrence and the dissent together suggest that five Justices would have deferred to (and upheld) the HHS's interpretation if it had promulgated a regulation embodying the dissent's interpretation.

In addition, the plurality opinion itself offers no definitive interpretation of the statute. The plurality was not trying to determine what the Federal AFDC statutes absolutely require but rather whether Virginia's policy was consistent with them. Thus, for example, the plurality concluded, after reviewing dictionary definitions, that "Virginia's revised regulations are consistent with a perfectly natural use of 'income'"[263]—but it also acknowledged that federal law had treated personal injury awards differently.[264] Similarly, it concluded that "personal injury awards are almost entirely a gain in well-being, as well-being is measured under the AFDC statute, and can reasonably be treated as income"[265]—not that they must or even should be treated as such. The complexity of the issue also contributed to the reasonableness of Virginia's policy and simultaneously suggested that other views might be equally reasonable: "Compensating for the noneconomic inequities of life is a task daunting in its complexity, and the AFDC statute is neither designed nor interpreted unreasonably if it leaves them untouched."[266] Finally, upholding Virginia's policy accorded the state "solicitude" in a federalist system[267]—but that consideration has little bearing on whether the plurality was definitively construing the federal statutes.

Thus, in a *Brand X* world, the HHS—and any federal agency reviewing its regulations or orders after a Supreme Court plurality decision relevant to a statute that the agency implements—should be able to claim *Chevron*

263 *Lukhard*, 481 U.S. at 376 (plurality opinion).
264 *Id.* at 376–77.
265 *Id.* at 381.
266 *Id.* at 382–83.
267 *Id.* at 383.

deference for any post-plurality agency interpretation that would otherwise be entitled to *Chevron* deference. Even if Justice Stevens's caveat is considered part of the *Brand X* rule, the Supreme Court plurality decision here did not remove the ambiguity because it did not offer a definitive interpretation of the statute.

But what if the Supreme Court issues a plurality opinion where the *Marks* rule could easily apply—where the various interpretations of the statute represent broadening viewpoints? Should the courts apply *Marks* to eliminate the agency's *Brand X* authority to reinterpret, or should *Brand X* trump *Marks*? Even assuming that Justice Stevens's concurrence is part of the *Brand X* rule, reasonable minds could differ on this point, but the better argument is that *Brand X* should trump *Marks*. First, to the extent that the Supreme Court's constitutional role is "to say what the law is,"[268] *any* plurality decision represents an abdication of that role.[269] As a normative matter, therefore, it is difficult to articulate why, under *Brand X*, federal agencies can displace the majoritarian—or even unanimous—interpretation of a federal court of appeals but not the plurality interpretation of four or fewer Justices.

Second, as a practical matter, a *Marks*-amenable plurality decision interpreting a statute would most likely consist of a series of progressively more expansive views of what a statutory term encompasses. An application of *Marks* could thus constrain agency policymaking discretion in ways that violate the spirit of *Chevron*. For example, assume that application of a statute that a federal agency implements depends on the meaning of a given term within the statute. At the Supreme Court, all nine Justices agree that the term includes *A*, but one concludes that it includes only *A*; three conclude that it includes *A* and *B*; one concludes that the term includes *A*, *B*, and *C*; two conclude that it includes *A* and *D*; and two conclude that it includes *A*, *D*, and *E*. The Supreme Court has failed to proffer an exact definition of the critical term, but heavy-handed application of *Marks* in this situation would limit the statutory regime to *A*, even though eight Justices believed that the statute should apply more broadly. *Brand X*, in contrast, would allow the implementing agency to determine just how broadly the statutory regime should apply as a matter of policy—a result more clearly in line with the principles of *Chevron* than the *Marks* rule.

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[268] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

[269] Berkolow, *supra* note 17, at 301; Bloom, *supra* note 27, at 1373, 1378–79; Kimura, *supra* note 26, at 1625; Ledebur, *supra* note 18, at 919; Note, *supra* note 27, at 1127–28.

This discussion can be summarized into the *Chevron* two-step analysis as follows. First, at *Chevron* Step One, no Supreme Court plurality opinion definitively removes all statutory ambiguity. Even when the *Marks* rule applies, the decision will not completely circumscribe the meaning of the statute at issue. Second, at *Chevron* Step Two, most Supreme Court plurality decisions will not even provide definitive guidance regarding the reasonableness of various interpretations, either because the Supreme Court offers no opinion at all or because the Justices' opinions are mutually contradictory. For certain plurality opinions, however, the *Marks* rule might elucidate the potential bounds of agency interpretive reasonableness. For example, in the hypothetical in the previous paragraph, operation of the *Marks* logic indicates that the agency would have a difficult time interpreting the relevant statutory term to *not* include *A*.

Nevertheless, in a *Brand X* world, plurality decisions in this category leave the agencies much latitude to continue to interpret the statutes that they implement. However, given the existence of judicial precedent in this situation (the lower courts' decisions, if not the Supreme Court's plurality decision) and the probable inapplicability of the *Brand X* rule outside the realm of *Chevron* deference, agencies are well-advised to issue post-plurality interpretations through procedures that would entitle the interpretation to *Chevron* deference.

E. Decisions Regarding the Validity of the Implementing Agency's Interpretation of the Statute

In the last category of this typology, the Supreme Court issues a plurality decision regarding the legitimacy of an existing agency interpretation of a statute. To assess the validity of the agency's interpretation, the Court must necessarily engage in its own construction of the statute, such as in *Chevron*'s Step One. As such, this category of plurality opinions raises all of the *Brand X* considerations that the previous category did, and the Justices' plurality interpretations are again unlikely to definitively remove all statutory ambiguity. However, because the Justices are also evaluating an existing agency interpretation, their plurality opinions are more likely to constrain the agency's post-decision reinterpretation of the statute than when the Court engages in unmediated statutory interpretation.

The Federal CWA's application to "navigable waters" has long raised complex issues of statutory interpretation, resulting in the Supreme Court's

plurality decision in *Rapanos v. United States* in June 2006.[270] Some statutory background is necessary to give context to the deference conundrum that the Army Corps and EPA now face in the aftermath of this decision. Moreover, because *Rapanos* is the basis for this Article's case study in Part IV, I present that decision in some detail here.

The CWA forbids "the discharge of any pollutant by any person" except as in compliance with the CWA, which generally requires that a discharger obtain a permit.[271] The CWA further defines "discharge of a pollutant" and "discharge of pollutants" to be "any addition of any pollutant to navigable waters from any point source,"[272] with "navigable waters" being "the waters of the United States, including the territorial seas."[273]

The two agencies that implement the CWA—the EPA[274] and the Army Corps[275]—issued identical notice-and-comment regulations broadly defining "waters of the United States." These regulations have been in place, virtually unchanged, since 1982.[276]

The Supreme Court has addressed the validity of these regulations three times, the last of which was in *Rapanos*. In its first decision in 1985, *United States v. Riverside Bayview Homes*, the Court had to decide whether to uphold the Army Corps' decision (and, by implication, the EPA's parallel decision) to include wetlands adjacent to a larger body of water within the scope of the CWA's "waters of the United States."[277] In its unanimous decision, the Court upheld the regulatory definition, reasoning that protection of aquatic ecosystems demanded broad federal authority to control pollution because "[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source."[278] The Court accorded the regulation

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270 547 U.S. 715 (2006).

271 33 U.S.C. § 1311(a) (2006).

272 *Id.* § 1362(12).

273 *Id.* § 1362(7). The CWA broadly defines "pollutant" to include almost any waste added to water. *Id.* § 1362(6). A "point source" is "any discernible, confined and discrete conveyance," such as a pipe or ditch. *Id.* § 1362(14). A "person" is "an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body." *Id*. § 1362(5).

274 40 C.F.R. § 230.3(s) (2010).

275 33 C.F.R. § 328.3(a) (2010).

276 United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 124 (1985).

277 *Id.*

278 *Id.* at 132–33 (alteration in original) (quoting S. REP. NO. 92-414, at 77 (1971)) (internal quotation marks omitted).

Chevron deference[279] and upheld the agencies' interpretation as reasonable, concluding that "the evident breadth of congressional concern for protection of water quality and aquatic ecosystems suggests that it is reasonable for the Corps to interpret the term 'waters' to encompass wetlands adjacent to waters as more conventionally defined."[280]

It was slightly more than fifteen years before the Supreme Court again addressed the agencies' regulations defining "waters of the United States" in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* (*SWANCC*).[281] This case resulted in a 5–4 decision on the validity of the Army Corps' "Migratory Bird Rule."[282] In 1986, in an attempt to clarify its definition of "waters of the United States," the Army Corps published a nonregulatory explanation of its regulations. Under this explanation, the Army Corps noted that it would assert CWA jurisdiction over intrastate waters that "are or would be used as habitat by birds protected by Migratory Bird Treaties"; that "are or would be used as habitat by other migratory birds which cross state lines"; that "are or would be used as habitat for endangered species"; or that are "[u]sed to irrigate crops sold in interstate commerce."[283] The Migratory Bird Rule thus clearly contemplated federal regulation of waters that had no immediate connection to larger waters of the United States, which became the key issue in *SWANCC*.

In *SWANCC*, the Army Corps had relied on migratory birds' use of filling ponds in an abandoned sand and gravel pit to conclude that the Solid Waste Agency needed a CWA permit before filling those ponds, despite the fact that the ponds had no apparent connection to other larger waters.[284] When the Army Corps refused to issue a permit, the Solid Waste Agency challenged the denial, arguing that the filling ponds were outside the Army Corps' CWA jurisdiction.[285] A majority of the Supreme Court agreed, concluding most explicitly "that the 'Migratory Bird Rule' is not fairly supported by the CWA."[286] However, the *SWANCC* Court also indicated interpretive limitations

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279 *Id.* at 131.
280 *Id.* at 133.
281 531 U.S. 159 (2001).
282 *Id.* at 162, 164.
283 Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986).
284 *SWANCC*, 531 U.S. at 164–65.
285 *Id.*
286 *Id.* at 167.

beyond the Migratory Bird Rule itself.[287] According to the majority, "It was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview Homes*."[288] As a result, the majority strongly suggested that the CWA's scope did not extend to isolated wetlands and ponds because Congress's use of "navigable waters" in the statute "has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made."[289] Moreover, the Court refused to defer to the Army Corps' more expansive view of CWA jurisdiction because that interpretation "alters the federal-state framework by permitting federal encroachment upon a traditional state power," raising constitutional concerns.[290]

Thus, going into the *Rapanos* decision, the Supreme Court had unanimously deferred to the agencies' conclusion that CWA "navigable waters" included wetlands adjacent to larger waters, but refused to accord deference and effectively invalidated the agencies' extension of "navigable waters" to isolated, intrastate waters, citing federalism concerns. *Rapanos* raised the interim issue: can CWA "navigable waters" or "waters of the United States," as the agencies had concluded by regulation, include wetlands adjacent to smaller tributaries of traditional navigable waters?[291]

The Supreme Court's decision in *Rapanos* did little to clarify the exact scope of CWA "waters of the United States," producing a 4–1–4 split among the Justices and five opinions. Justice Scalia authored the plurality opinion, which focused on the plain meaning of "*the waters* of the United States" to conclude that the CWA extends only "to water '[a]s found in streams and bodies forming geographical features such as oceans, rivers, [and] lakes' or 'the flowing or moving masses, as of waves or floods, making up such streams or bodies.'"[292] As a result, according to the plurality, jurisdiction under the CWA exists only for "those relatively permanent, standing or continuously

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287 *Id.*

288 *Id.*

289 *Id.* at 172 (citing United States v. Appalachian Elec. Power Co., 311 U.S. 377, 407–08 (1940)).

290 *Id.* at 173. "Permitting respondents to claim federal jurisdiction over ponds and mudflats falling within the 'Migratory Bird Rule' would result in a significant impingement of the States' traditional and primary power over land and water use." *Id.* at 174 (citing Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 44 (1994)).

291 Rapanos v. United States, 547 U.S. 715, 729 (2006) (plurality opinion).

292 *Id.* at 732–33 (alterations in original) (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY 2882 (2d ed. 1954) [hereinafter WEBSTER'S]).

flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] . . . oceans, rivers, [and] lakes.'"[293] As for wetlands, "[*O*]*nly* those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the [CWA]."[294]

The plurality also emphasized that its interpretation was the "only plausible interpretation" of "waters of the United States."[295] Thus, the plurality suggested that it was consciously foreclosing the application of *Brand X* to future agency interpretations.[296]

Chief Justice Roberts, who joined the plurality, authored his own opinion to speak more directly to the issue of deference and the agencies' prerogatives. According to Chief Justice Roberts, "Agencies delegated rulemaking authority under a statute such as the Clean Water Act are afforded generous leeway by the courts in interpreting the statute they are entrusted to administer."[297] However:

> Rather than refining its view of its authority in light of our decision in *SWANCC*, and providing guidance meriting deference under our generous standards, the Corps chose to adhere to its essentially boundless view of the scope of its power. The upshot today is another defeat for the agency.[298]

Chief Justice Roberts also anticipated that "[l]ower courts and regulated entities will now have to feel their way on a case-by-case basis," citing a discussion of *Marks* and implying that the agencies were no longer directly relevant to the interpretation of "waters of the United States."[299] Almost all of

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[293] *Id.* at 739 (alterations in original) (quoting WEBSTER'S, *supra* note 292, at 2882).

[294] *Id.* at 742.

[295] *Id.* at 739.

[296] *See* Helen Thigpen, Note, *The Plurality Paradox:* Rapanos v. U.S. *and the Uncertain Future of Federal Wetlands Protection*, 28 PUB. LAND & RESOURCES L. REV. 89, 107 (2007) (arguing that the plurality engaged in "near total dismissal of the Corps' and the EPA's expertise in environmental protection and hydrology").

[297] *Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring) (citing Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–45 (1984)).

[298] *Id.*

[299] *Id.* (citing Grutter v. Bollinger, 539 U.S. 306, 325 (2003)).

the scholarship regarding the interpretive aftermath of *Rapanos* has made the same assumption[300]—an assumption this Article obviously challenges.

Justice Kennedy concurred in the judgment to remand, but little else. Instead, he authored his own opinion, arguing that the "significant nexus" test announced in *SWANCC* still governed CWA navigable waters/waters of the United States.[301] As Justice Kennedy framed the issue, "[The] consolidated cases require the Court to decide whether the term 'navigable waters' in the Clean Water Act extends to wetlands that do not contain and are not adjacent to waters that are navigable in fact."[302] Reading *Riverside Bayview* and *SWANCC* together, he concluded:

> [I]n some instances, as exemplified by *Riverside Bayview*, the connection between a nonnavigable water or wetland and a navigable water may be so close, or potentially so close, that the Corps may deem the water or wetland a "navigable water" under the Act. In other instances, as exemplified by *SWANCC*, there may be little or no connection. Absent a significant nexus, jurisdiction under the Act is lacking.[303]

Moreover, *SWANCC*'s significant-nexus test served to eliminate one category of waters from CWA jurisdiction—those isolated intrastate waters "that appeared likely, as a category, to raise constitutional difficulties and federalism concerns"[304]—while preserving the federal government's legitimate concerns over water quality.

In most other cases, however, jurisdiction over wetlands must be assessed on a case-by-case basis.[305] Nevertheless, Justice Kennedy left much potential room for future regulations. First, he emphasized that "[a]s applied to wetlands

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300 *See, e.g.*, Berkolow, *supra* note 17, at 349 (emphasizing what the courts and legislatures can do in the wake of *Rapanos*, not the EPA and the Army Corps); Thigpen, *supra* note 296, at 90 ("Because the Court failed to render a majority opinion, the significance of *Rapanos* on wetland protection is uncertain and will ultimately be determined by *the courts* charged with deciphering whether to apply the reasoning set forth by the plurality or that presented in Justice Kennedy's concurrence." (emphasis added)); *id.* at 115 (focusing on the role of courts in resolving the interpretive problem that *Rapanos* left); *see also* Joshua C. Thomas, Note, *Clearing the Muddy Waters?* Rapanos *and the Post-*Rapanos *Clean Water Act Jurisdictional Guidance*, 44 HOUS. L. REV. 1491, 1528–29 (2008) (arguing that agency regulations would be preferable to agency guidance and noting that the 2007 *Rapanos* Guidance "closely tracks the language of the Court's opinion—*as it must*" (emphasis added)).

301 *Rapanos*, 547 U.S. at 759 (Kennedy, J., concurring in the judgment).

302 *Id.*

303 *Id.* at 767.

304 *Id.* at 776.

305 *Id.* at 782.

adjacent to navigable-in-fact waters, the Corps' conclusive standard for jurisdiction rests upon a reasonable inference of ecologic interconnection, and the assertion of jurisdiction for those wetlands is sustainable under the [CWA] by showing adjacency alone."[306] Second:

> Through regulations or adjudication, the Corps may choose to identify categories of tributaries that, due to their volume of flow (either annually or on average), their proximity to navigable waters, or other relevant considerations, are significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters.[307]

These "more specific regulations," Justice Kennedy indicated, would eliminate the need for a case-by-case significant-nexus analysis.[308]

Justice Stevens, writing for the four dissenters, would have expanded CWA jurisdiction to fulfill its purposes of restoring and maintaining the integrity of the nation's waters. Moreover, he explicitly would have accorded *Chevron* deference to the Army Corps' (and EPA's) regulations[309] in acknowledged perpetuation and extension of the *Riverside Bayview* analysis.[310] In fact, according to the dissenters, the case should have been *entirely* about *Chevron* deference because

> concerns about the appropriateness of the Corps' 30-year implementation of the Clean Water Act should be addressed to Congress or the Corps rather than to the Judiciary. Whether the benefits of particular conservation measures outweigh their costs is a classic question of public policy that should not be answered by appointed judges.[311]

The dissenters thus would have used a different approach in interpreting "waters of the United States" than that used by either Justice Scalia or Justice Kennedy. In light of the splits among the Justices, however, the dissenters complicated the plurality analysis by announcing that, "[g]iven that all four Justices who have joined this opinion would uphold the Corps' jurisdiction in

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306 *Id.* at 780.

307 *Id.* at 780–81.

308 *Id.* at 782.

309 *Id.* at 788 (Stevens, J., dissenting).

310 *Id.* at 788, 792 (citing Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–45 (1984)).

311 *Id.* at 799.

both of these cases[,] . . . on remand each of the judgments should be reinstated if *either* of those tests is met."[312]

Justice Breyer, one of the dissenting Justices, authored the fifth *Rapanos* opinion and announced, "In my view, the authority of the Army Corps of Engineers under the Clean Water Act extends to the limits of congressional power to regulate interstate commerce."[313] Moreover, he viewed new agency regulations as imperative, under *Chevron*-like logic, because "[i]f one thing is clear, it is that Congress intended the Army Corps of Engineers to make the complex technical judgments that lie at the heart of the present cases (subject to deferential judicial review)."[314]

Thus, the *Rapanos* Court split with regard to the proper test for figuring out what waters qualify as waters of the United States and with respect to the possibility and advisability of new agency regulations in the wake of the plurality decision. Regarding the deference conundrum and the potential applicability of *Brand X*, *Rapanos*—like *Lukhard*—offers three irreconcilable approaches to interpreting the statutory term at issue. Therefore, for all of the reasons argued in the previous category of this typology, *Rapanos* cannot be said to resolve all ambiguity regarding the scope of "waters of the United States," leaving room for the EPA and the Army Corps to assert the *Brand X* rule and issue a new regulatory interpretation of the CWA. This category of Supreme Court plurality opinions, like the previous one, thus presents the involved agencies with the deference conundrum.

Unlike in *Lukhard*, however, the *Rapanos* Court was evaluating the validity of the agencies' interpretation, embodied in notice-and-comment regulations. Moreover, five Justices (the plurality and Justice Kennedy) found that interpretation wanting, at least as applied to certain waters. As a result, and not forgetting the majority decision in *SWANCC*, the EPA and the Army Corps cannot use *Brand X* to simply reissue their existing regulations interpreting "waters of the United States." As was noted in Part I, even the lower federal courts would resist the application of *Brand X* in those circumstances.[315] *Rapanos*, despite its multiple opinions, does circumscribe the CWA's ambiguity to some not-quite-precise extent beyond the *SWANCC* majority's elimination of isolated waters.

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312 *Id.* at 810.
313 *Id.* at 811 (Breyer, J., dissenting).
314 *Id.* at 811–12.
315 *See* discussion *supra* Part I.C.2.

Thus, while under *Brand X* the EPA and Army Corps retain authority to reinterpret "waters of the United States," they cannot simply ignore the *Rapanos* opinions. Instead, those opinions should operate as data points regarding the boundaries of interpretive reasonableness. Or, to put this category of Supreme Court plurality decisions into *Chevron* terms, the plurality decision does not change the answer at *Chevron* Step One because the statute remains ambiguous, but it does help to shape the analysis at *Chevron* Step Two by limiting the scope of a reasonable agency interpretation.

THE TYPOLOGY OF SUPREME COURT PLURALITY DECISIONS REGARDING AGENCY-ADMINISTERED STATUTES

CATEGORY	EXAMPLE	AGENCY RESPONSE
Constitutional Validity: The Court issues a plurality decision while ruling on a statute's constitutionality.	***Eastern Enterprises v. Apfel***, 524 U.S. 498 (1998)	As a practical matter, the agency must interpret the Court's interpretation to discern which parts of the statute, if any, remain valid, because courts will not defer to agency determinations of the constitutionality of statutes.
Statutory Interpretation for Nonregulatory Purposes: The Court issues a plurality opinion while interpreting the statute for some purpose other than the agency's direct implementation, such as federal preemption.	***Cipollone v. Liggett Group***, 505 U.S. 504 (1992)	The Court's decision is largely irrelevant to the agency's regulatory decisions and hence the deference conundrum is unlikely to arise.

CATEGORY	EXAMPLE	AGENCY RESPONSE
Validity of a Noninterpretive Rule or Order: The Court issues a plurality opinion regarding the validity of an agency's rule or order on grounds other than whether the rule or order properly interprets the statute—for example, whether a rule is arbitrary and capricious or the agency properly followed APA procedures.	***FCC v. Fox Television Stations, Inc.***, 129 S. Ct. 1800 (2009)	The deference conundrum does not arise because the agency's interpretation of the statute is not the issue. If the agency wants to validate its action, it should resolve the identified problem(s) if it can.
Statutory Interpretation in the Absence of an Agency Interpretation: The Court issues a plurality opinion regarding the meaning of an agency-mediated statute in the absence of an existing agency interpretation.	***Lukhard v. Reed***, 481 U.S. 368 (1987) ***Borden Ranch Partnership v. United States Army Corps of Engineers***, 537 U.S. 99 (2002)	The agency faces the deference conundrum, but *Brand X* should govern any formal interpretation that the agency issues, because there is no definitive Supreme Court interpretation of the statute.
Validity of the Agency's Interpretation: The Court issues a plurality opinion regarding whether the agency's existing interpretation of the statute is valid.	***Rapanos v. United States***, 547 U.S. 715 (2006)	The agency faces the deference conundrum *and* indications from at least some Justices that there are problems with the agency's current interpretation. *Brand X* should still apply because there is no definitive interpretation of the statute, but a wise agency will also view the Justices' opinions as data points for its new interpretation.

IV. A CASE STUDY OF THE DEFERENCE CONUNDRUM: RESPONSES TO *RAPANOS V. UNITED STATES*

As noted in Part III, *Rapanos v. United States* presented the EPA and the Army Corps with a clear deference conundrum. Moreover, the agencies' choice regarding what do to in the wake of *Rapanos* was—and remains—important because the definition of "waters of the United States" delimits the scope of federal regulatory authority under the CWA. Continuing dissensus regarding what qualifies as a water of the United States has created confusion for the lower courts,[316] increased the EPA's and Army Corps' regulatory burden and frustrated their regulatory responsibilities,[317] left possibly regulated entities with unclear and nationally divided rules, and caused a potentially time-consuming and expensive process for determining whether and how they will be regulated.[318] Indeed, the EPA reported in 2009 that "[i]t has been difficult for EPA to craft jurisdictional determination guidance that is both legal [under *Rapanos*] and usable for field staff."[319] So far, however, like the lower courts, the agencies have chosen to interpret *Rapanos* itself rather than issue new regulations to clarify the meaning of "waters of the United States."

This Part explores the lower courts' reactions to *Rapanos*, then discusses the EPA's and the Army Corps' joint attempt to reconcile the Justices' opinions through agency guidance. It ends by suggesting that *Brand X* offers the agencies, the courts, and the many entities potentially subject to CWA regulation a clearer and more uniform response to the Supreme Court's plurality decision.

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316 *See* discussion *infra* Part IV.A.

317 OFFICE OF INSPECTOR GEN., U.S. EPA, REPORT NO. 09-N-0149, CONGRESSIONALLY REQUESTED REPORT ON COMMENTS RELATED TO EFFECTS OF JURISDICTIONAL UNCERTAINTY ON CLEAN WATER ACT IMPLEMENTATION 1 (2009) [hereinafter EPA REPORT], *available at* http://www.epa.gov/oig/reports/2009/20090430-09-N-0149.pdf (emphasizing that jurisdictional determinations are a "major resource drain," that "*Rapanos* has created a lot of uncertainty with regards to EPA's compliance and enforcement activities," and that CWA enforcement has decreased since the decision).

318 *See* Lawrence R. Liebesman et al., Rapanos v. United States*: Searching for a Significant Nexus Using Proximate Causation and Foreseeability Principles*, 40 ENVTL. L. REP. NEWS & ANALYSIS 11,242, 11,253 (2010) (noting that the average applicant for an individual Section 404 permit "spends 788 days and $271,596 in completing the process").

319 EPA REPORT, *supra* note 317, at 2.

A. Federal Courts' Reactions to the Rapanos *Decision*

In *Rapanos* itself, Chief Justice Roberts indicated that the *Marks* rule would guide lower courts in applying the plurality decision,[320] and several lower courts have followed that suggestion. For example, in two of the earliest court of appeals cases applying *Rapanos*, both the Ninth Circuit and the Seventh Circuit applied *Marks* to conclude that Justice Kennedy's significant-nexus test provided the narrowest grounds of the decision. The Ninth Circuit's analysis was rather short, citing *Marks* and concluding that "Justice Kennedy, constituting the fifth vote for reversal, concurred only in the judgment and, therefore, provides the controlling rule of law."[321] The Seventh Circuit provided a bit more reasoning, concluding that Justice Kennedy's "test is narrower (so far as reining in federal authority is concerned) than the plurality's in most cases."[322] Thus, somewhat ironically, these two courts used *Marks* to conclude that a test that garnered only one Justice's vote would be the exclusive interpretation of CWA "navigable waters."[323] The Eleventh Circuit later agreed.[324]

Other lower courts, however, found the *Marks* rule unhelpful. For example, in an early unpublished opinion, the U.S. District Court for the Middle District of Florida attempted to apply the *Marks* rule to *Rapanos*, but it concluded that there was no way to assess whether the plurality's test or Justice Kennedy's test constituted the narrowest grounds for the decision.[325] As a result, the district court adopted Justice Stevens's suggestion and concluded that CWA jurisdiction would exist when a water qualified as a water of the United States under either of the two interpretations.[326] The First Circuit soon followed suit,

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320 Rapanos v. United States, 547 U.S. 715, 758 (2006) (Roberts, C.J., concurring); *see also* Berkolow, *supra* note 17, at 319 (noting the Chief Justice's suggestion that the lower courts apply *Marks*).

321 N. Cal. River Watch v. City of Healdsburg, 457 F.3d 1023, 1029 (9th Cir. 2006) (citing Marks v. United States, 430 U.S. 188, 193 (1977)), *withdrawn*, 496 F.3d 993 (9th Cir. 2007). *But see* United States v. Moses, 496 F.3d 984, 989–91 (9th Cir. 2007) (using all three opinions in *Rapanos* to conclude that "the Supreme Court unanimously agreed that intermittent streams (at least those that are seasonal) can be waters of the United States").

322 United States v. Gerke Excavating, Inc., 464 F.3d 723, 724–25 (7th Cir. 2006) (per curiam) (citing *Marks*, 430 U.S. at 193).

323 Joseph Cacace has argued cogently that how the *Marks* rule applies to *Rapanos* depends on the approach to *Marks* that a court takes. Specifically, under either the narrowest-grounds approach or the social-choice view, Justice Kennedy's opinion emerges as controlling. Cacace, *supra* note 25, at 122–23, 125. In contrast, "The *Marks* doctrine is essentially inapplicable to *Rapanos* under the conventional view." *Id.* at 124.

324 United States v. Robison, 505 F.3d 1208, 1219–22 (11th Cir. 2007).

325 United States v. Evans, No. 3:05 CR 159 J 32HTS, 2006 WL 2221629, at *19 (M.D. Fla. Aug. 2, 2006) (discussing *Marks*, 430 U.S. at 193).

326 *Id.*

noting that *Marks* "has proven troublesome in application for the Supreme Court itself and for the lower courts."[327] In particular, applying any narrowest-grounds analysis to *Rapanos* was unhelpful because "[t]he cases in which Justice Kennedy would limit federal jurisdiction [we]re not a subset of the cases in which the plurality would limit jurisdiction."[328] As a result, the First Circuit adopted Justice Stevens's approach, noting that, in effect, at least five Justices had voted for both interpretations.[329] The Fifth Circuit,[330] Sixth Circuit,[331] and Eighth Circuit[332] have similarly followed or explicitly adopted this "either interpretation" approach.[333]

A very few lower courts essentially elected to ignore *Rapanos* entirely and revert to pre-*Rapanos* circuit precedent on "waters of the United States." For example, soon after *Rapanos* (and before the Fifth Circuit applied all three major opinions), the U.S. District Court for the Northern District of Texas announced that "the Supreme Court failed to reach a consensus of a majority as to the jurisdictional boundary of the CWA" and that Justice Kennedy "advanced an ambiguous test—whether a 'significant nexus' exists to waters that are/were/might be navigable. This test leaves no guidance on how to implement its vague, subjective centerpiece. That is, exactly what is 'significant' and how is a 'nexus' determined?"[334] As a result, "Because Justice Kennedy failed to elaborate on the 'significant nexus' required, this Court will look to the prior reasoning in this circuit."[335]

Thus, there is currently a split in the lower federal courts regarding how to assess CWA "navigable waters." Given the acknowledged differences between the plurality's approach and Justice Kennedy's, as a result of the *Rapanos* plurality, the CWA is being applied differently in different parts of the

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327 United States v. Johnson, 467 F.3d 56, 62 (1st Cir. 2006) (referring to *Marks*, 430 U.S. at 193).

328 *Id.* at 64.

329 *Id.* at 64–66.

330 United States v. Lucas, 516 F.3d 316, 325–27 (5th Cir. 2008).

331 United States v. Cundiff, 555 F.3d 200, 206–10 (6th Cir. 2009) (explicitly ducking what the court called the "*Marks*-meets-*Rapanos*" problem because the water at issue met both the plurality's and Justice Kennedy's tests).

332 United States v. Bailey, 571 F.3d 791, 798–99 (8th Cir. 2009).

333 *See* Berkolow, *supra* note 17, at 334–35 (noting that "the majority of courts" that have considered the issue have followed the either-interpretation approach); *id.* at 335–38 (noting that the lower courts have taken one of three approaches in applying *Marks* to the *Rapanos* opinions, including the either-interpretation approach).

334 United States v. Chevron Pipe Line Co., 437 F. Supp. 2d 605, 613 (N.D. Tex. 2006) (citation omitted).

335 *Id.*

country,[336] undermining a basic rule-of-law premise that federal law should apply relatively uniformly across the United States.[337] Moreover, lower court judges' frustration with the post-*Rapanos* quagmire is at times palpable.[338]

Congress, of course, could have resolved the meanings of "navigable waters" and "waters of the United States" through statutory amendment, but despite numerous efforts,[339] it has not (yet) done so. Perhaps more remarkably, in over five years of uncertainty, the EPA and the Army Corps have done little to resolve the confusion that *Rapanos* left. This inaction continues despite the importance of the issue to CWA regulation and the relatively clear declarations by five *Rapanos* Justices that agency action was possible—even imperative.

B. The 2007 Rapanos *Guidance*

While the EPA and the Army Corps have not issued new regulations defining "waters of the United States," they did, in 2007 (almost a year after the decision, with an amendment in 2008), issue joint guidance in response to *Rapanos*.[340] However, the guidance does not reinterpret the CWA; instead, it attempts to interpret and apply the *Rapanos* plurality opinions.[341] Moreover, like those federal courts that eschewed the *Marks* rule in favor of the Justice Stevens either-interpretation approach, the guidance refuses to choose between

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336 *See* EPA REPORT, *supra* note 317, at 3 (emphasizing the circuit split and the legal uncertainty that surrounds CWA jurisdictional determinations, despite the agencies' guidance).

337 *E.g.*, Easterbrook, *supra* note 13, at 7; Buzbee, *supra* note 13, at 602.

338 *See* United States v. Robison, 521 F. Supp. 2d 1247 (N.D. Ala. 2007) (detailing, on remand, Senior District Judge Robert B. Propst's frustrations with *Rapanos* and the Eleventh Circuit's decision to define Justice Kennedy's significant-nexus test as controlling under *Marks*, and "direct[ing] the Clerk to reassign this case to another judge for trial," at least in part because the judge was "so perplexed by the way the law applicable to this case has developed that it would be inappropriate for me to try it again").

339 Jeff B. Kray, *Five Years After* Rapanos*—EPA Prepares New Clean Water Act Jurisdictional Guidance*, MARTEN LAW (Feb. 3, 2011), http://www.martenlaw.com/newsletter/20110203-epa-prepares-new-cwa-guidance (noting that bills have been introduced in Congress to fix the jurisdictional problem in 2003, 2005, 2007, and 2009). The most recent attempts to define the CWA's term "waters of the United States" by statutory amendment are the Clean Water Restoration Act, S. 787, 111th Cong. (2009), and America's Commitment to Clean Water Act, H.R. 5088, 111th Cong. (2010).

340 U.S. EPA & U.S. ARMY CORPS OF ENG'RS, CLEAN WATER ACT JURISDICTION FOLLOWING THE U.S. SUPREME COURT'S DECISION IN *RAPANOS V. UNITED STATES* & *CARABELL V. UNITED STATES* 1 (2008) [hereinafter *RAPANOS* GUIDANCE], *available at* http://www.epa.gov/owow/wetlands/pdf/CWA_Jurisdiction_Following_Rapanos120208.pdf. This Article refers to this material as the "*Rapanos* Guidance."

341 *See* Berkolow, *supra* note 17, at 334 ("Significantly, the regulators agree with the majority of courts considering the issue thus far: the recently released guidance documents essentially provide that the regulators may assert jurisdiction under the CWA if either the plurality's or Justice Kennedy's test is satisfied."); *id.* at 346 ("Consequently, the agencies' approach to guidance for the regulated is a hybrid of the plurality's and Justice Kennedy's tests.").

the plurality's and Justice Kennedy's interpretations of "waters of the United States."

Specifically, the agencies declared that they would continue to assert jurisdiction over four categories of waters: "[t]raditional navigable waters" (the classic source of federal water jurisdiction); "[w]etlands adjacent to traditional navigable waters" (the *Riverside Bayview* category); "[n]on-navigable tributaries of traditional navigable waters that are relatively permanent where the tributaries typically flow year-round or have continuous flow at least seasonally" (i.e., tributaries that meet the plurality's test from *Rapanos*); and "[w]etlands that directly abut such tributaries" (i.e., wetlands that meet the plurality's test from *Rapanos*).[342]

For all other waters, the agencies use Justice Kennedy's significant-nexus test.[343] More specifically, the agencies use Justice Kennedy's interpretation to assess the jurisdictional status of "[n]on-navigable tributaries that are not relatively permanent," "[w]etlands adjacent to non-navigable tributaries that are not relatively permanent," and "[w]etlands adjacent to but that do not directly abut a relatively permanent non-navigable tributary."[344] According to the guidance, the agencies determine whether a significant nexus exists by "assess[ing] the flow characteristics and functions of the tributary itself and the functions performed by all wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical and biological integrity of downstream traditional navigable waters."[345] Thus, pursuant to the significant-nexus test, the agencies examine both hydrologic (physical) and ecologic factors.[346] Hydrologic factors include "volume, duration, and frequency of flow, including consideration of certain physical characteristics of the tributary"; "proximity to the traditional navigable water"; "size of the watershed"; "average annual rainfall"; and "average annual winter snow pack."[347] Ecologic factors include "potential of tributaries to carry pollutants and flood waters to traditional navigable waters," "provision of aquatic habitat that supports a traditional navigable water," "potential of wetlands to trap and filter pollutants or store flood waters," and "maintenance of water quality in

342 *RAPANOS* GUIDANCE, *supra* note 340, at 1.
343 *Id.*
344 *Id.*
345 *Id.*
346 *Id.*
347 *Id.* at 8.

traditional navigable waters."[348] The agencies also emphasize in their *Rapanos* Guidance that the significant-nexus test requires documentation of the evidence of the connections that tributaries and wetlands have to traditional navigable waters.[349]

For now, therefore, the Army Corps and EPA have declined to exercise the interpretive authority that the CWA delegated to them in responding to *Rapanos*. Moreover, the agencies appear to believe that this is their only option. In May 2011, they released a proposed second round of post-*Rapanos* guidance,[350] which again operates to reconcile the various *Rapanos* opinions.[351] The proposed new guidance does better in explaining some aspects of how the agencies will apply *Rapanos*, providing:

- Clarification that small streams and streams that flow part of the year are protected under the Clean Water Act if they have a physical, chemical or biological connection to larger bodies of water downstream and could affect the integrity of those downstream waters. Agencies would be able to evaluate groups of waters holistically rather than the current, piecemeal, stream-by-stream analysis.
- Acknowledgment that when a water body does not have a surface connection to an interstate water or a traditional navigable water, but there is a significant physical, chemical or biological connection between the two, both waterbodies should be protected under the Clean Water Act.
- Recognition that waterbodies may be "traditional navigable waters," and subject to Clean Water Act protections, under a wider range of circumstances than identified in previous guidance.
- Clarification that interstate waters (crossing state borders) are protected.[352]

Nevertheless, the agencies still very much consider themselves bound to reconciling the *Rapanos* plurality opinions. For example, they have declared

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348 *Id.*

349 *Id.* at 11.

350 EPA and Army Corps of Engineers Guidance Regarding Identification of Waters Protected by the Clean Water Act, 76 Fed. Reg. 24,479 (May 2, 2011); *see also* U.S. EPA & U.S. ARMY CORPS OF ENG'RS, DRAFT GUIDANCE ON IDENTIFYING WATERS PROTECTED BY THE CLEAN WATER ACT 1 (2011) [hereinafter DRAFT GUIDANCE], *available at* http://water.epa.gov/lawsregs/guidance/wetlands/upload/wous_guidance_4-2011.pdf.

351 DRAFT GUIDANCE, *supra* note 350, at 1–3.

352 *Guidance to Identify Waters Protected by the Clean Water Act*, U.S. EPA, http://water.epa.gov/lawsregs/guidance/wetlands/CWAwaters_guidesum.cfm (last updated Apr. 27, 2011).

that "[t]he proposed guidance is consistent with the principles established by the Supreme Court cases and is supported by the agencies' scientific understanding of how waterbodies and watersheds function."[353] The comment period for the proposed guidance remained open into July 2011, with final issuance expected thereafter.[354]

C. The Rapanos *Guidance in the Federal Courts*

In issuing the 2007 *Rapanos* Guidance, the EPA and the Army Corps elected to act as agencies interpreting the Supreme Court, rather than agencies interpreting the CWA. Under this Article's argument, therefore, the agencies have thus far foregone any claims to *Chevron* deference for their interpretation of "waters of the United States."[355]

Nevertheless, the *Rapanos* Guidance has received little discussion from the lower federal courts. What opinions do exist emphasize its tentative[356] and nonbinding nature,[357] underscoring the fact that *Chevron* deference is inappropriate regardless of *Brand X*.

So far, only one federal court, the U.S. District Court for the Eastern District of Virginia, has wrestled with the issue of deference to the Army Corps' determinations of CWA jurisdiction under the *Rapanos* Guidance, and its opinion demonstrates the tangled deference issues that courts now face in the context of CWA jurisdictional determinations. In *Precon Development Corp. v. United States Army Corps of Engineers*, the Eastern District of Virginia faced a challenge to the Army Corps' determination that CWA jurisdiction existed over a particular body of water after the Army Corps used

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353 EPA and Army Corps of Engineers Guidance Regarding Identification of Waters Protected by the Clean Water Act, 76 Fed. Reg. at 24,479.

354 *Id.*

355 Of course, the form of the guidance would also cause problems with *Chevron* deference because the agencies did not issue it through notice-and-comment rulemaking. The point here, however, is that the agencies have chosen to try to interpret the Supreme Court's plurality decision in *Rapanos* rather than assert their own authority to interpret the CWA itself.

356 P & V Enters. v. U.S. Army Corps of Eng'rs, 516 F.3d 1021, 1026 (D.C. Cir. 2008) (noting that, in light of the *Rapanos* Guidance, "[a]ny evaluation of the Corps' CWA jurisdiction thus appears far from complete").

357 *See* Precon Dev. Corp. v. U.S. Army Corps of Eng'rs (*Precon I*), 658 F. Supp. 2d 752, 764 (E.D. Va. 2009) (noting that the Army Corps is not bound by the guidance in making jurisdictional determinations); United States v. Moses, 642 F. Supp. 2d 1216, 1226 (D. Idaho 2009) (emphasizing, in response to a claim that the Army Corps had deviated from the guidance, that "the guidance memorandum is just that—a guidance memorandum").

the *Rapanos* Guidance to determine that jurisdiction existed.[358] The court spent two pages of the opinion discussing the appropriate deference and the potential applicability of the APA's arbitrary-and-capricious standard, the APA's substantial-evidence standard, and the *Chevron* framework.[359] It concluded that *Chevron* provided the correct framework for evaluating the deference owed to the agencies but that, after *SWANCC* and *Rapanos*, the Army Corps was not entitled to *Chevron* deference based on its unamended "waters of the United States" regulations.[360] Moreover, because the *Rapanos* Guidance was not issued through notice-and-comment rulemaking, and because the Army Corps did not make its jurisdictional determination through formal adjudication, neither the guidance nor the jurisdictional determination was entitled to *Chevron* deference.[361] Indeed, the United States conceded that the guidance was not entitled to *Chevron* deference.[362] As a result, the Army Corps' determination through the guidance would be judged pursuant to *Skidmore* deference.[363] In its January 2011 decision on appeal, the Fourth Circuit affirmed that *Skidmore* deference was appropriate.[364]

Although the district court did uphold the jurisdictional determination under *Skidmore*,[365] its struggles with the deference issue signal that *Rapanos*'s legacy of legal uncertainty is not limited to the question of what interpretation to use to determine whether a body of water qualifies as a CWA navigable water. In addition, the EPA's and Army Corps' partially invalidated and partially upheld notice-and-comment regulations currently coexist with the *Rapanos* plurality opinions, the lower court splits, and the informally issued *Rapanos* Guidance, creating a jumble of deference issues and adding to the confusion for lower courts already coping with the *Rapanos* plurality decision.

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358 *Precon I*, 658 F. Supp. 2d at 756.

359 *Id.* at 759–61.

360 *Id.* at 761–62.

361 *Id.*

362 *Id.* at 763.

363 *Id.*

364 Precon Dev. Corp. v. U.S. Army Corps of Eng'rs (*Precon II*), 633 F.3d 278, 290 n.10 (4th Cir. 2011) (confirming that the Army Corps could not receive *Chevron* deference); *id.* at 291 (confirming that the Army Corps was entitled to *Skidmore* deference).

365 *Precon I*, 658 F. Supp. 2d at 765. The Fourth Circuit reversed and remanded, finding the Army Corps' administrative record regarding the presence of a significant nexus under the *Rapanos* Guidance to be insufficient. *Precon II*, 633 F.3d at 297.

D. Resolving the Conundrum: A Better Response to Rapanos

As of mid-2011, therefore, none of the normative goals of a federal regulatory scheme (or the rule of law more generally) are actually being met. The CWA's term "waters of the United States" is subject to different legal tests in different circuits, destroying the goal of national uniformity. Regulated entities are subject to differing and unclear rules for when the CWA applies. This reality undermines norms of evenhanded regulation, consistency of the law, and comprehensible notice of legal obligations. Resolution of jurisdictional issues, especially pursuant to the case-by-case significant-nexus analysis,[366] is complex, time-consuming, and expensive for both the regulating agencies and the regulated entities, defeating goals of regulatory efficiency.

In the continued absence of congressional action, *Brand X* offers the EPA and the Army Corps a way to resolve the post-*Rapanos* definitional confusion regarding the CWA's "navigable waters." *Brand X* also offers a way to restore the national uniformity that is supposed to be the hallmark of federal law. As was discussed in Part III, the two agencies are not locked in a trap of interpreting the *Rapanos* Court; instead, as agencies, they can issue new notice-and-comment regulations and demand *Chevron* deference for their interpretations.

Of course, as lower courts have pointed out in other *Brand X* contexts,[367] the two CWA agencies could not legitimately repromulgate their existing regulations because the Supreme Court's decisions in *Riverside Bayview*, *SWANCC*, and even *Rapanos* provide relevant legal data points regarding the scope of a reasonable interpretation of "waters of the United States." For example, under all three decisions, navigable-in-fact waters are clearly subject to the CWA. Under *Riverside Bayview*, wetlands adjacent to these larger waters, and probably the immediate tributaries of those waters, are waters of the United States. In contrast, under *SWANCC*'s semi-constitutional analysis, "waters of the United States" cannot include small and isolated waters with no *hydrologic* connection to other waters. *SWANCC* and *Rapanos* also both underscore a concern with federalism issues and the Commerce Clause

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366 *See* EPA REPORT, *supra* note 317, at 1–3 (detailing the agency's difficulties after *Rapanos*); Kenneth S. Gould, *Drowning in Wetlands Jurisdictional Determination Process: Implementation of* Rapanos v. United States, 30 U. ARK. LITTLE ROCK L. REV. 413, 440–49 (2008) (detailing at length how difficult obtaining a permit has become under the significant-nexus test); Liebesman et al., *supra* note 318, at 11,253 ("The significant nexus concept is fraught with unknowns.").

367 *See supra* Part I.C.2.

limitations of federal regulatory authority, and all three cases indicate that the agencies' definition of "waters of the United States" should relate to the CWA's core purpose—"to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[368]

Nevertheless, while these legal data points identify interpretive constraints (especially constraints touching on the U.S. Constitution), they do not eliminate all (or even much) agency flexibility in defining "waters of the United States." In particular, the agencies should be free to reject both the plurality's test and Justice Kennedy's case-by-case significant-nexus approach—which both the agencies and commentators view as pragmatically unmanageable[369]—in favor of a definition of "waters of the United States" that is both broader than the plurality's interpretation and easier to apply than Justice Kennedy's interpretation. For example, the agencies could use their expertise to establish definitive categories of waters of the United States, with perhaps brighter-line tests based on size, flow, proximity to navigable waters, expected effects on downstream navigable waters and on commerce, and so forth. Such categories would both provide clearer criteria for regulated entities to apply than the significant-nexus analysis and improve regulatory efficiency on all sides.

If the courts are faithful to *Brand X*, these new and clearer regulations should become the nationally controlling law pursuant to *Chevron*. Such uniform, nationally applicable regulations would dramatically improve the post-*Rapanos* disarray by (1) improving the agencies' own enforcement efficiency and evenhandedness; (2) reestablishing the equality of potentially regulated entities throughout the nation with respect to the CWA's applicability; (3) clarifying when regulated entities are subject to the CWA's permitting requirements; and (4) clarifying and simplifying judicial review of challenged assertions of CWA jurisdiction.

CONCLUSION

At the formation of the United States, Alexander Hamilton argued that the definitive motive for establishing a single national Supreme Court was the "necessity of uniformity in the interpretation of the national laws."[370] When the

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368 *See* 33 U.S.C. § 1251(a) (2006).

369 *See supra* note 366.

370 THE FEDERALIST No. 80, at 244 (Alexander Hamilton) (Michael A. Genovese ed., 2009).

Supreme Court abdicates its responsibility to provide this national uniformity and clarity, as it does in plurality decisions, the legal issue at stake may in many cases simply have to re-percolate through the lower federal courts before the confusion and lower court splits are finally resolved.

However, when the Supreme Court issues plurality decisions regarding agency-administered statutes or administrative interpretations, Congress has provided another entity that can reestablish the expected norms of uniformity and clarity in the application of federal law. Indeed, an argument can be made that federal agencies, even more than the Supreme Court, have positive and normative duties to resolve the dissensus that a plurality decision embodies. As Elizabeth Foote aptly recognized, the core function of a federal agency is public administration of a federal program,[371] at a national level:

> Unlike courts, . . . agencies do not exist to issue disinterested and authoritative interpretations of statutes based on strictly legal processes. As organizations of public administration, agencies are charged with *carrying out* statutory provisions—that is, with implementing public policies through operational programs. Administrative rules represent interstitial, provisional, operational applications that can be, and often are, altered as agency expertise evolves and political currents shift. Accordingly, agencies by law use institutional processes that involve controls by the political branches. They have mechanisms for public input and accountability that advance bureaucratic and management objectives and rely on technical expertise. While statutory factors are part of the administrative process, the business of public bureaucracies is not the same as the business of the courts to interpret statutes in cases or controversies.[372]

In *Brand X*, the Supreme Court established that federal agencies can displace federal court interpretations of the statutes that federal agencies implement. Whatever arguments exist for sequestering Supreme Court majority decisions from the operation of *Brand X*, they cannot operate to immobilize federal agencies coping with Supreme Court plurality decisions. Instead, *Brand X* frees a federal agency to continue to exercise its own interpretive authority, promoting national uniformity and the rule of law in a post-plurality regulatory world.

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371 Foote, *supra* note 160, at 697.

372 *Id.* at 675.