Response

How to Win the Deference Lottery

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In Deference Lotteries, Jud Mathews proposes that the deference framework in administrative law be viewed through the game theory lens of a lottery. Such an approach helps us think critically about how varying standards of review may affect the behavior of agencies and courts engaged in the judicial review process. This Response suggests that the lottery lens can also help agencies think more strategically about how to develop and defend interpretations of statutes they administer. Assuming the validity of the lottery framework, the Response suggests a playbook for agencies to win the deference lottery. As the playbook reveals, this lottery is not a win-or-go-home contest. Instead, it is a repeated game—a dialogue of sorts between courts and agencies—where agencies have multiple opportunities to play and replay (and win). The predictive effect of tightening or loosening the lottery thus may not be as strong as one would hope.

I. Introduction

In Deference Lotteries,¹ Jud Mathews charts a fresh path through a well-traversed terrain in administrative law: the deference courts owe to an agency’s statutory interpretation. Instead of critiquing the Chevron standard² or the vagueness Mead³ reintroduced to the deference framework, Professor

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Mathews takes the cases as he finds them and applies a game theory model to explore how judicial review affects agency behavior in statutory interpretation. As the title indicates, he suggests we should view the deference framework as a “lottery” (as that term is used in expected utility theory). Such an approach in administrative law—as well as in other areas of the law—can help us think critically about how varying standards of review may affect the behavior of parties and courts engaged in the review process.

This Response assumes that the deference framework is a lottery as Professor Mathews suggests and proposes a playbook for agencies to win the lottery. These guidelines illustrate that agencies in the modern administrative state do not face a win-or-go-home contest when playing the lottery. Instead, it is a repeated game—indeed, a dialogue between courts and agencies—where agencies have multiple opportunities to play again (and win). Accordingly, tightening or loosening the lottery—in other words, making it harder or easier to win—may not have as strong an effect on agency behavior as would be the case in a win-or-go-home contest. Nevertheless, understanding judicial review as a lottery helps agencies think more strategically about how to develop and defend interpretations of statutes they administer.

II. The Lottery

Before presenting the playbook, it makes sense to briefly explain the lottery and its potential effect on agency behavior. *Deference Lotteries* makes two significant contributions to how we think about judicial review of administrative interpretations of law.

First, *Deference Lotteries* provides empirical support for the proposition that the deference framework is a lottery, or, more precisely, a compound lottery. As Professor Mathews explains, there are two main deference

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doctrines in administrative law: *Chevron* and *Skidmore*. A court’s decision about which doctrine applies is the first-stage lottery, and whether the agency’s interpretation is upheld under a particular doctrine is the second-stage lottery.

The first deference doctrine is the *Chevron* two-step approach, under which the court must defer to an agency’s interpretation of a statute it administers if, at step one, the court finds “the statute is silent or ambiguous” and then, at step two, determines that the agency’s reading is a “permissible construction of the statute.” This is a generous standard for agencies. The court “need not conclude that the agency construction was the only one it permissibly could have adopted . . . or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.”

The second main deference doctrine is the less generous *Skidmore* standard, which was given new life by *Mead*.

Under *Skidmore*, the court gives deference, as Professor Mathews explains, “on a sliding scale: an agency’s interpretation will be credited in proportion to its ‘power to persuade.’” Unlike under *Chevron*, an agency’s interpretation under *Skidmore* does not control so long as it is reasonable. Instead, it is merely given “weight” based on “the thoroughness evident in [the agency’s] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade.”

The interaction between these two deference doctrines, as Professor Mathews examines empirically, can be seen as a lottery because the Supreme Court has provided no bright-line standard for when courts should apply *Chevron* or *Skidmore*. Indeed, the Court’s 2001 decision in *Mead* refused to provide such a standard and, in so doing, made it even less predictable when *Chevron* or *Skidmore* applies. Due to this unpredictability, agencies

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8. *Id.* at 843 n.11.
11. Mathews, *supra* note 1, at 1350 n.3.
13. See *Mead*, 533 U.S. at 229–31; see also Mathews, *supra* note 1, at 1361.
face a lottery when they adopt a statutory interpretation. Professor Mathews calls this first-stage lottery the “Chevron lottery.”15 Importantly, there is a second-stage lottery as well, as the Court has similarly provided no bright-line standard for when to defer to an agency’s interpretation under Skidmore. Professor Mathews calls this second-stage lottery the “Skidmore lottery.”16 (Indeed, as explained later in Deference Lotteries, the second-stage lottery also applies when an agency receives Chevron review, as not all agency interpretations survive Chevron’s second step.17)

The second aim of Deference Lotteries is to examine agency behavior in statutory interpretation through the compound-lottery lens. Professor Mathews makes a number of somewhat counterintuitive observations about how, “relative to a Chevron-only regime, the deference lottery offers a more flexible tool for shaping agency behavior.”18 His central observation concerns how aggressive courts should be when applying Skidmore deference:

[Paradoxically, increasing the scrutiny an agency will receive under Skidmore can actually encourage an agency to adopt a less faithful interpretation of the statute. The reason is this: if Skidmore deference is very difficult to satisfy, at a certain point, the expected rewards from compromising on policy are so meager that it makes sense for an agency to give up its effort to “win” the Skidmore lottery entirely. Instead, the expected benefit is higher from selecting an interpretation the agency prefers and “betting it all” on the Chevron lottery.19]

Similarly, if the Skidmore lottery were too favorable to the agency (or, for that matter, if the Chevron lottery were too favorable), the agency would have less incentive to adopt a more faithful interpretation of the statute because it would almost always win the Skidmore lottery (or, for the latter, almost always receive Chevron deference).20 Conversely, simultaneously tightening the Skidmore and Chevron lotteries to make it harder for the agency to win either may be just as effective at encouraging a more faithful interpretation of the statute.21

Professor Mathews is careful to note that it is impossible “to say what is the optimal configuration of the deference lottery—the ideal mix of Chevron

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15. Mathews, supra note 1, at 1353.
16. Id.
17. Id. at 1388–89; see also Orin S. Kerr, Shedding Light on Chevron: An Empirical Study of the Chevron Doctrine in the U.S. Courts of Appeals, 15 YALE J. ON REG. 1, 31 (1998) (finding that agencies win 89% of time when courts apply Chevron’s “reasonableness” test).
18. Mathews, supra note 1, at 1354.
19. Id.
20. Id. at 1384–86.
21. Id. at 1385–86.
and Skidmore review, the ideal level of stringency within Skidmore.” That is because, among other things, we do not know agencies’ valuation of the cost of judicial reversal. In the following Part, this Response suggests that the cost of judicial reversal are far less severe than one might assume—in light of the playbook agencies can follow to ensure the lottery is not a win-or-go-home contest and thus increase their ultimate odds in the repeated-game contest.

III. The Playbook

This Response assumes the validity of Deference Lotteries’ first contribution to the literature—namely, “that agencies face a deference lottery when they defend statutory interpretations in court.” Instead, the Response focuses on the second and “ultimate object” of Deference Lotteries, which is “to explore how agencies would rationally respond to” the deference lottery. Perhaps the best way to understand how agencies may respond is to outline a playbook for agencies to win the lottery.

The Response thus sketches out five guiding principles that should be included in any agency playbook for developing and defending statutory interpretations. To be sure, these principles are not necessarily novel. Nor is an agency playbook merely hypothetical. But these principles, among others, must be understood and incorporated to even attempt to effectively model the deference framework as a lottery.

22. Id. at 1390.
23. Id. at 1387, 1390.
24. Id. at 1351. To examine this assumption would require a much longer response and perhaps empirical data not currently available. For instance, as Professor Mathews notes, judicial decisions with respect to whether an agency receives Chevron deference under a particular statute remove the unpredictability. See id. at 1367–68, n.116. So, in many instances, agencies will know in advance whether they have a winning Chevron lottery ticket—at least within the particular jurisdiction where such precedent is controlling. As demonstrated in this Part, however, many of the principles set forth in the playbook would apply even when, due to stare decisis, there is no first-stage, Chevron lottery to play.

Moreover, it should be noted that a number of doctrines affecting the likelihood of agency success in court—including several of the principles discussed below—could be modeled as “lotteries” under Professor Mathews’s approach, and it is not clear whether the effort is equally likely in every case to yield significant insight into actual agency behavior.
25. Mathews, supra note 1, at 1372 (“[T]he focus of the Article is squarely on the behavior of agencies in reaction to deference lotteries, not the behavior on courts that gives rise to them.”).
26. Indeed, many of the guidelines are those the author of the Response observed (and applied) while working on the Civil Appellate Staff at the U.S. Department of Justice, which defends federal agencies and their statutory interpretations in a variety of contexts. See Al Daniel, The Role of DOJ’s Appellate Staffs in the Supreme Court and in the courts of appeals, SCOTUSBLOG (Dec. 12, 2012), http://www.scotusblog.com/2012/12/the-role-of-dojs-appellate-staffs-in-the-supreme-court-and-in-the-courts-of-appeals/.
A. Agencies Should Reframe the Deference Standards as Chevron Space Versus Skidmore Weight

Courts have commonly characterized both Skidmore and Chevron as “deference” standards, but reference to deference can be confusing and counterproductive in helping agencies decide how to play the lottery. Agencies should follow Peter Strauss’s helpful reframing of these two standards as “Chevron space” and “Skidmore weight.” This reformulation is not made of whole cloth. Instead, it is grounded in terms the Court has sometimes used to describe the standards. For instance, the Skidmore Court itself explained that agency interpretations subject to Skidmore, “while not controlling upon the courts by reason of their authority,” are given “weight” based on their “power to persuade.” Similarly, Justice Scalia explained in his Mead dissent that ambiguities in statutes subject to Chevron “create a space, so to speak, for the exercise of continuing agency discretion.”

Nor is this space/weight distinction mere semantics. An agency receives Chevron space to fill in holes in statutes it administers because Congress has delegated authority for the agency to be “the authoritative interpreter (within the limits of reason) of such statutes.” Put differently, “the natural role of courts, like that of referees in a sports match, is to see that the ball stays within the bounds of the playing field and that the game is played according to its rules. It is not for courts themselves to play the game.” Chevron space is thus motivated by separation of powers, in that “Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.”

Skidmore weight, by contrast, does not implicate congressional delegation and thus does not give agencies space to be authoritative interpreters. Instead, as Professor Strauss explains, Skidmore weight “addresses the possibility that an agency’s view on a given statutory question may in itself warrant respect by judges who themselves have ultimate interpretive authority.” Typically there is no Chevron space afforded for

31. Strauss, supra note 27, at 1145.
33. Strauss, supra note 27, at 1145.
one of two reasons: either Congress has not delegated interpretive authority to the agency, or Congress has delegated such space, but the agency has “cho[sen] not to exercise that authority, but rather to guide—to indicate desired directions without undertaking (as [it] might) to compel them.”\textsuperscript{34} In such circumstances, the court (not the agency) is the authoritative interpreter.

The agency, however, has the power to persuade based on its special knowledge and experience that may qualify it as an expert of statutory meaning and purpose. For instance, the agency may have been present during the legislative drafting (and may actually have assisted in drafting), and the agency likely has extensive, nationwide experience in implementing the statute. Professor Strauss further notes:

> It is not only that agencies have the credibility of their circumstances, but also that they can contribute to an efficient, predictable, and nationally uniform understanding of the law that would be disrupted by the variable results to be expected from a geographically and politically diverse judiciary encountering the hardest . . . issues with little experience with the overall scheme and its patterns.\textsuperscript{35}

It is for these reasons that an agency’s non-controlling interpretation may be given Skidmore weight based on its power to persuade—a power greater than just the persuasiveness of the argument itself.

In sum, when the \textit{Chevron} and \textit{Skidmore} deference standards are reframed in terms of space versus weight, agencies can better understand what is at stake in the \textit{Chevron} lottery. Win, and the agency becomes the authoritative interpreter (within the bounds of reason) of the statutory ambiguity. Lose, and the agency is relegated to the role of an expert witness that must rely on its powers to persuade the court to adopt the agency’s preferred reading of the ambiguous statute.

\textbf{B. Agencies Should Consider Not Playing the First-Stage, Chevron Lottery}

Understanding this space/weight distinction leads to the second guideline: determining when it might be worth not playing the first-stage, \textit{Chevron} lottery at all. In this scenario, the agency would not seek \textit{Chevron} space for its interpretation, and thus only play the second-stage, \textit{Skidmore} lottery.

Simply put, if the agency’s interpretation is noncontroversial, it might make sense to forgo the time and expense of the more formal rulemaking or adjudication process and just seek \textit{Skidmore} weight.\textsuperscript{36} After all, the fear that

\begin{itemize}
\item \textsuperscript{34} \textit{Id.} at 1146.
\item \textsuperscript{35} \textit{Id.}
\item \textsuperscript{36} Kristin Hickman and Matthew Krueger found in their empirical study that courts of appeals considering \textit{Skidmore} weight “assessed the formality of the administrative interpretation’s procedural pedigree and format with somewhat less frequency than other factors.” Hickman & Krueger, \textit{supra} note 5, at 1283.
\end{itemize}
the *Skidmore* lottery is tighter than that afforded under *Chevron* space may be exaggerated. For instance, empirical work done by Bill Eskridge and Lauren Baer at the Supreme Court level suggests less than a three percent difference in agency win rates.\(^{37}\) Moreover, although the Court has listed a number of *Skidmore* factors, the validity of the agency’s reasoning—in other words, how noncontroversial or faithful the agency’s interpretation is in relation to the statutory text—is the most cited factor by courts of appeals.\(^{38}\)

Of course, where applicable, the agency should play up the longstanding, constant, or contemporaneous nature of the agency’s interpretation, as that evinces congressional intent and thus affects *Skidmore* weight.\(^{39}\) Consistency in agency interpretation should be given weight because it treats similarly situated parties the same, protects parties that rely on interpretations, and guards against arbitrary or capricious agency action.\(^{40}\) And it suggests the interpretation seeks to realize congressional intent, rather than partisan policy choices. But, as Kristin Hickman and Matthew Krueger have found, “courts are willing to accept changes in agencies’ policies so long as the agency accompanies those shifts with procedures and reasoning that alleviate concerns about arbitrariness and unfairness to regulated parties.”\(^{41}\) When an agency has changed its position, a thorough explanation may be enough to garner *Skidmore* weight.\(^{42}\)

If the agency decides to forgo the *Chevron* lottery, however, it should not hold back on its *Skidmore* analysis when litigating in the lower courts. The agency should utilize its “full panoply of *Skidmore* reasoning”—something agencies apparently sometimes save until the Supreme Court.\(^{43}\) Presenting a weak case (or none at all) in the court of appeals obviously decreases the agency’s chances of winning the *Skidmore* lottery there. But it also affects the agency’s chances before the Supreme Court because an

\(^{37}\) Eskridge & Baer, supra note 5, at 1143 (finding the agency win rate in *Skidmore* cases is 73.5% versus 76.2% in *Chevron* cases); cf. Hickman & Krueger, supra note 5, at 1275 (finding the agency win rate in *Skidmore* cases in the courts of appeals is 60.4%).

\(^{38}\) Hickman & Krueger, supra note 5, at 1285 n.265 (“By our count, 63 of the 79 sliding-scale *Skidmore* applications included a discussion of this factor.”). A court often reviews the agency’s interpretation in light of other *Skidmore* factors to assess the degree of weight and applies the validity factor as an ultimate litmus test. See id. at 1285; see, e.g., Cathedral Candle Co. v. U.S. Int’l Trade Comm’n, 400 F.3d 1352, 1366–67 (Fed. Cir. 2005); Heartland By-Products, Inc. v. United States, 264 F.3d 1126, 1135–37 (Fed. Cir. 2001).


\(^{40}\) See Yoav Dotan, Making Consistency Consistent, 57 ADMIN. L. REV. 995, 1000–01 (2005).

\(^{41}\) Hickman & Krueger, supra note 5, at 1286.

\(^{42}\) See id. at 1281–82 (“In five applications, courts held that an agency’s thoroughly considered interpretation can merit deference even if it is inconsistent with previous agency views.”).

\(^{43}\) Eskridge & Baer, supra note 5, at 1143 n.179.
interpretation advanced for the first time before the Court may be greeted with suspicion.\textsuperscript{44}

C. Agencies Should Remember that Brand X Likely Lets Them Replay the Lottery (and Win)

Another reason to consider not playing the first-stage, \textit{Chevron} lottery is \textit{National Cable & Telecommunications Ass’n v. Brand X Internet Services}.\textsuperscript{45} That is because \textit{Brand X} transforms the lottery into a repeated game before the same court, as opposed to a win-or-go-home contest.

In \textit{Brand X}, the Court reaffirmed the \textit{Chevron} space principle: “If a statute is ambiguous, and if the implementing agency’s construction is reasonable, \textit{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.”\textsuperscript{46} The Court, however, took that principle one step further. The Ninth Circuit below had refused to accord \textit{Chevron} space because it had already construed the same provision of the Communications Act in a conflicting manner. It thus held that its precedent foreclosed the FCC’s interpretation.\textsuperscript{47} The Supreme Court reversed, holding 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.”\textsuperscript{48} Once a court has identified an ambiguity, there is a “presumption” that Congress “desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.”\textsuperscript{49}

\textit{Brand X} has breathtaking implications for how agencies play the deference lottery.\textsuperscript{50} At least two merit elaboration in the playbook.

First, \textit{Brand X} dramatically lowers the cost of skipping the \textit{Chevron} lottery in the first instance. If an agency seeks only \textit{Skidmore} weight (or no weight at all) and the court disagrees with the agency’s interpretation of an ambiguous statute, the agency can go back to the drawing board and advance a new interpretation via formal adjudication or notice-and-comment

\textsuperscript{44} \textit{See}, \textit{e.g.}, Smith v. City of Jackson, 544 U.S. 228, 262–67 (2005) (O’Connor, J., concurring in judgment) (rejecting an agency’s position that was first expressed in an amicus brief by the Solicitor General).

\textsuperscript{45} 545 U.S. 967 (2005).


\textsuperscript{47} \textit{Id.} at 982.

\textsuperscript{48} \textit{Id.} at 982–83.

\textsuperscript{49} \textit{Id.} at 982 (quoting Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 740–41 (1996)).

\textsuperscript{50} Indeed, Kathryn Watts has noted that “the case has the makings of a watershed decision” and has suggested that after \textit{Brand X} courts should consider requesting agencies’ views on matters of interpretation of statutes agencies administer even in suits between private parties. Kathryn A. Watts, \textit{Adapting to Administrative Law’s Erie Doctrine}, 101 \textit{NW. U. L. REV.} 947, 997, 1025–47 (2007).
rulemaking.\textsuperscript{51} \textit{Zadvydas v. Davis} is instructive.\textsuperscript{52} In \textit{Zadvydas}, the Court considered whether certain noncitizens held pursuant to a provision in the Immigration and Nationality Act\textsuperscript{53} could be held indefinitely, and it did so in the absence of an agency’s formal interpretation of that statutory provision. Skipping the \textit{Chevron} lottery, the Government argued that the language “may be detained beyond the removal period” authorized indefinite detention.\textsuperscript{54} The Court, however, reasoned that indefinite detention, especially due to the lack of procedural protections, would present serious constitutional questions.\textsuperscript{55} The Court thus construed the ambiguous statute to mean that “once removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute.”\textsuperscript{56} Six months beyond the ninety-day removal period, the Court held, was a presumptively reasonable time to effectuate removal.\textsuperscript{57}

Following \textit{Zadvydas}, the agency promulgated through notice-and-comment rulemaking a set of comprehensive regulations intended to narrow the scope of its detention authority and bring it in conformity with \textit{Zadvydas}.\textsuperscript{58} As to most noncitizens—including those specifically addressed in \textit{Zadvydas}—the regulations provide for release if there is no likelihood of removal.\textsuperscript{59} For the subset of noncitizens that pose heightened risks to the public or national security, the regulations establish extensive procedures for continued detention beyond the six-month presumptively reasonable period.\textsuperscript{60} Two circuits reviewed the agency’s new interpretation without the benefit of \textit{Brand X} and struck it down as inconsistent with the Supreme Court’s interpretation.\textsuperscript{61} The Tenth Circuit, by contrast, considered the agency’s

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  \item 51. While perhaps not the best strategic move, the agency does not even need to advance a new interpretation so long as subsequent formal adjudication or rulemaking supports the agency’s prior interpretation. See, e.g., Garfias-Rodriguez v. Holder, 702 F.3d 504, 512–13 (9th Cir. 2012) (en banc) (affording \textit{Chevron} space to a formal agency interpretation that the Ninth Circuit had previously rejected when it came in the form of a less formal guidance memorandum).
  \item 52. 533 U.S. 678 (2001). This example is explored at greater length in Walker, \textit{Brand X Constitutional Avoidance}, supra note 32, at 156–67.
  \item 54. \textit{Zadvydas}, 533 U.S. at 689.
  \item 55. Id. at 690.
  \item 56. Id. at 699.
  \item 57. Id. at 701. In \textit{Clark v. Martinez}, 543 U.S. 371, 378 (2005), the Court held that its \textit{Zadvydas} interpretation of the statute applied to all noncitizens covered under the statute, not just those addressed in \textit{Zadvydas}.
  \item 59. Id. § 241.13(g)(1).
  \item 60. Id. § 241.14(f)(1).
  \item 61. Thai v. Ashcroft, 366 F.3d 790, 795 (9th Cir. 2004); Tran v. Mukasey, 515 F.3d 478, 485 (5th Cir. 2008). Judge Kozinski, joined by four others, dissented from the denial of hearing en banc in \textit{Thai}, foreshadowing the reasoning of the Supreme Court’s subsequent decision in \textit{Brand X}. See \textit{Thai} v. Ashcroft, 389 F.3d 967, 970 (9th Cir. 2004) (en banc) (Kozinski, J., dissenting); \textit{accord} Hernandez-Carrera v. Carlson, 547 F.3d 1237, 1248 (10th Cir. 2008) (“Judge Kozinski, dissenting
interpretation against the Brand X backdrop and upheld it under Chevron because it addressed all the constitutional concerns the Supreme Court had raised.62

The second implication of Brand X is that even if an agency plays the deference lottery and loses (either at the first or second stage), Brand X often allows the agency to play the lottery again. That is so at the first stage, as illustrated by the Zadvydas example above, because the agency can take more formal measures to obtain Chevron space.63 It is true at the second stage in the Chevron context because Brand X instructs that “a court’s opinion as to the best reading of an ambiguous statute an agency is charged with administering is not authoritative,” but “[i]nstead, the agency may, consistent with the court’s holding, choose a different construction, since the agency remains the authoritative interpreter (within the limits of reason) of such statutes.”64

D. Agencies Should Request a Ventura Remand and Express Willingness To Engage in the Court–Agency Dialogue

When playing the deference lottery, the agency should keep in mind a related principle: the Ventura ordinary remand rule. This rule instructs that when a court concludes that an agency’s decision is erroneous, the ordinary course is to remand to the agency for reconsideration (as opposed to deciding the issue itself).65 This “simple but fundamental rule of administrative law

from denial of rehearing en banc in Thai, anticipated Brand X to reach a conclusion similar to that which we reach today.”), cert. denied, 130 S. Ct. 1011 (2009).
62. Hernandez-Carrera, 547 F.3d at 1242, 1251.
63. See Cass R. Sunstein, Chevron Step Zero, 92 VA. L. REV. 187, 214 (2006) (explaining that “if agencies have been given power to use relatively formal procedures, and if they have exercised that power, they are entitled to Chevron deference”); see also, e.g., Garfias-Rodriguez v. Holder, 702 F.3d 504, 512–13 (9th Cir. 2012) (en banc) (deferring under Chevron to an agency interpretation it had previously rejected because the agency had since made that interpretation through more formal means). But see Nat’l Cable & Telecomms. Ass’n v. Brand X Servs., 545 U.S. 967, 1004 (2005) (Breyer, J., concurring) (stating that formal rulemaking “is not a sufficient condition [to obtain Chevron deference] because Congress may have intended not to leave the matter of a particular interpretation up to the agency, irrespective of the procedure the agency uses to arrive at that interpretation”).
64. Brand X, 545 U.S. at 983 (majority opinion); see, e.g., Garfias-Rodriguez, 702 F.3d 504, 516 n.8; see also Walker, Brand X Constitutional Avoidance, supra note 32, at 183–89 (exploring the application of Brand X in a variety of administrative contexts). The agency should be careful, however, not to read too much into pre-Chevron judicial declarations that a statute is ambiguous. See United States v. Home Concrete & Supply, LLC, 132 S. Ct. 1836, 1842–44 (2012) (reaffirming Brand X principle but rejecting the agency’s argument that a 1958 Supreme Court opinion stating that a statute is ambiguous creates space for subsequent agency interpretation when the statute is in fact unambiguous).
65. See, e.g., Negusie v. Holder, 129 S. Ct. 1159, 1168 (2009) (calling it “the Ventura ordinary remand rule”); accord Gonzales v. Thomas, 547 U.S. 183, 185 (2006) (per curiam) (noting that the rule is “what this Court described in Ventura as the ordinary remand rule” (internal quotation marks omitted)); INS v. Orlando Ventura, 537 U.S. 12, 17 (2002) (per curiam) (describing it as “the law’s ordinary remand requirement”).
has its origins in the Chenery decisions from the 1940s, but the Court has reiterated the rule on numerous occasions—especially over the last decade—when lower courts have failed to follow it. Moreover, after Negusie v. Holder, it is no longer an open question (to the extent it might have been before) that the remand rule applies to questions of statutory interpretation (in addition to factual issues and applications of law to fact). In Negusie, the agency had interpreted a provision of the Immigration and Nationality Act to require denial of asylum to any otherwise qualifying noncitizen if he had persecuted others in his native country, even if participation in persecution was not voluntary. The Court concluded that Chevron space did not apply because the agency had mistakenly believed it was bound by prior Supreme Court precedent and, thus, had not exercised discretion to provide an alternative interpretation.

The Negusie Court, however, did not provide its own interpretation. It instead remanded the question to the agency and reiterated the ordinary remand rule: “Having concluded that the BIA has not yet exercised its Chevron discretion to interpret the statute in question, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.” The Court grounded in Brand X the application of the remand rule even to questions of statutory interpretation: “This remand rule exists, in part, because ‘ambiguities in statutes within an agency’s jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion.’”

Whenever playing the deference lottery, the lesson from Negusie is that agencies should argue in the alternative that the court remand the statutory interpretation issue to the agency for further consideration. This mitigates the cost of a loss in the first round of the lottery and preserves the agency’s ability to more easily replay the lottery with a new interpretation in that same case. Indeed, writing for the Ninth Circuit en banc, Judge Bybee (a former administrative law professor) recently observed that remanding the

66. SEC v. Chenery, 332 U.S. 194, 196 (1947); see also SEC v. Chenery, 318 U.S. 80, 95 (1943) (remanding the matter to the agency because the “administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained”).
67. The evolution of the remand rule is explored in Walker, Dialogue-Enhancing Toolbox, supra note 4, at 7–22.
68. 129 S. Ct. 1159 (2009).
70. Negusie, 129 S. Ct. at 1162.
71. Id. at 1167 (internal quotation marks omitted).
72. Id. (quoting Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005)).
73. Based on the author’s experience on the DOJ Civil Appellate Staff and while clerking for judges on two different courts, the Federal Government is well aware of the strategic advantages of arguing in the alternative for a remand to the agency.
interpretation question to the agency “will, in most situations, avoid the Brand X problem posed in this case”—i.e., that an agency’s interpretation would trump a prior judicial interpretation.\footnote{Garfias-Rodriguez v. Holder, 702 F.3d 504, 516 n.8 (9th Cir. 2012) (en banc).}

When Brand X and the remand rule are considered together, the lottery can be seen not only as a repeated game, but also a continuing dialogue between courts and agencies. Accordingly, as part of the agency’s remand request, the agency should express a willingness to enter into a dialogue with the court on remand. Encouraging court–agency dialogue helps ensure a healthy separation of powers, and an agency’s respect for the dialogue in a repeated game is strategically advantageous.\footnote{The author of the Response further explores these separation-of-powers concerns and the usefulness of court–agency dialogue under the remand rule in Walker, Dialogue-Enhancing Toolbox, supra note 4, at 27–54; see also Emily Hammond Meazell, Deference and Dialogue in Administrative Law, 111 Colum. L. Rev. 1722, 1739–71 (2011) (examining the dialogue on remand in a variety of agency rulemaking contexts).} Moreover, listening to the court’s suggestions should go a long way to ensuring an agency victory in the next round of the lottery.

E. When Confronted with a Loss Before a Circuit Panel, Agencies Can Replay the Lottery En Banc, in Other Circuits, and Ultimately in the Supreme Court

Another reason Professor Mathews proffers for why the deference framework is a lottery is the random assignment of judges on a particular three-judge circuit panel: “[A] deference lottery follows naturally from reasonable assumptions about how multi-member courts operating in panels apply vague standards.”\footnote{Mathews, supra note 1, at 1374.} This feature of the judicial system, among others, also ensures that the deference lottery is a repeated game. The federal structure of judicial review allows the agency to play the lottery again and again—thus decreasing the cost of losing the lottery before a randomly assigned circuit panel.

If an agency loses the lottery at the panel stage, it can always attempt to replay the lottery by seeking rehearing en banc. The most obvious objective is to obtain rehearing and win the lottery before the en banc panel.\footnote{See, e.g., Morales-Izquierdo v. Ashcroft, 388 F.3d 1299, 1305 (9th Cir. 2004) (finding the summary reinstatement provision of the Immigration and Nationality Act unambiguous and, thus, invalidating the agency’s interpretation at Chevron step one), reh’g en banc granted, 423 F.3d 1118 (9th Cir. 2005); Morales-Izquierdo v. Gonzales, 486 F.3d 484, 489, 495 (9th Cir. 2007) (en banc) (upholding the agency’s interpretation of the ambiguous reinstatement statute as reasonable under Chevron step two).} Seeking rehearing may also, however, facilitate an internal corrective function, motivating the panel to reverse course or at least narrow the scope of its
opinion to avoid en banc rehearing. Even if the rehearing petition fails, it may attract a dissent from denial of rehearing, which can increase the chance of Supreme Court review as well as decrease the chance the agency will lose the lottery in another circuit.

Which leads to the second strategy an agency—or, more precisely, the Justice Department’s appellate staff handling the appellate strategy—can pursue to win the lottery: replay the lottery in another circuit. An agency loss in one circuit is not the end of the game. As the Zadydas example above illustrates, an agency, when it loses in one circuit, can and should continue to defend its interpretation in other circuits. And it often can win the lottery in other circuits. Indeed, a strategic agency may attempt to time consideration of the issue in the various circuits to correspond with the circuit that would be most favorable to the agency’s interpretation.

Such lottery victories in other circuits could influence the prior circuits to rehear the issue en banc in another case or, more likely, will at least build the case for Supreme Court review of the agency’s interpretation. After all, “[t]he deeper the [circuit] split, the more likely it is the Court will take the case.” The lesson for agencies is that one loss before one randomly drawn

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78. See Indraneel Sur, How Far Do Voices Carry: Dissents from Denial of Rehearing En Banc, 2006 Wis. L. Rev. 1315, 1339 (explaining how responses to petitions and, in particular, “a rehearing dissent may be able to serve the internal corrective function”).

79. See id. at 1347–48 (“Empirical evidence indicates that the very existence of a dissent raises the odds of Supreme Court review. Indeed, according to one account based on confidential interviews with Supreme Court Justices and clerks, the Court pays more attention to a dissent than to the petition for certiorari itself.” (footnotes omitted)); see also Alex Kozinski & James Burnham, I Say Dissental, You Say Concurral, 121 YAL. L.J. ONLINE 601, 607–08 (2012) (citing cases for observations that “[t]hey are cited by the Supreme Court in its opinions,” “Justices ask questions about them during oral argument,” and “[t]hey are relied upon by Supreme Court Justices in totally different cases”).

80. See Sur, supra note 78, at 1347 (citing cases for the observation that “[a] dissent thus reduces the persuasive weight that a panel opinion from one circuit carries in another circuit”); see also Kozinski & Burnham, supra note 79, at 608 (citing cases for the observation that “[t]hey are considered by other courts in deciding whether to follow the panel opinion”).

81. See Samuel Estreicher & Richard L. Revesz, Nonacquiescence by Federal Administrative Agencies, 98 YAL. L.J. 679, 735–36 (1989) (“Given the lack of intercircuit stare decisis, and the reasons underlying our system of intercircuit dialogue, an agency’s ability to engage in intercircuit nonacquiescence should not be constrained.”); see also Dan T. Coenen, The Constitutional Case Against Intracircuit Nonacquiescence, 75 MINN. L. REV. 1339, 1347 (1991) (distinguishing intercircuit nonacquiescence, which is common and permissible, from intracircuit nonacquiescence, which should not be permitted).


83. David C. Frederick, Christopher J. Walker & David M. Burke, The Insider’s Guide to the Supreme Court of the United States, in APPELLATE PRACTICE COMPENDIUM 1, 7 (Dana Livingston ed., 2012) (“[T]he critical factor motivating the Court’s exercise of discretion is whether the decision below conflicts with the decision(s) of other federal courts of appeals . . . .”). See generally EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 233–310 (9th ed. 2007) (exploring certiorari factors in more detail).
panel is only the beginning of the battle—a battle that can proceed en banc, in other circuits, and ultimately in the Supreme Court.

IV. Conclusion

Viewing the deference framework as a lottery can shed considerable light on how varying standards of judicial review may affect the behavior of those engaged in the review process. *Deference Lotteries* thus makes a significant contribution to how we think about judicial review in administrative law and may well have similar implications in other judicial review contexts. The deference lottery, however, must be understood against the full backdrop of judicial review in the modern administrative state.

When so understood, this lottery is properly viewed as a repeated game, not a win-or-go-home contest. Oftentimes it may be advantageous for an agency to skip the *Chevron* lottery and seek only *Skidmore* weight. Either way, *Brand X* allows the agency to replay the *Chevron* lottery, and the *Ventura* ordinary remand rule reduces the cost of a lottery loss because it allows the agency to play the lottery again in the same case. Moreover, even if the agency loses the lottery before a circuit panel, the agency can replay the lottery en banc, in other circuits, and then in the Supreme Court. That an agency has multiple opportunities to play and replay (and win) the lottery may temper predictions about the effect tightening or loosening the *Chevron* and *Skidmore* lotteries may have on agency behavior in statutory interpretation.

One final caution is merited about attempts to predict how agencies should rationally respond to the deference lottery. This Response has embraced *Deference Lotteries*’ framing of the court–agency dialogue as a game where the ultimate prize is an affirmed statutory interpretation. Sometimes, however, an agency is engaged in a larger strategic enterprise. A deference lottery win may not be the only good outcome for the agency, much less the optimal one. Nor do agencies always ascribe a negative value to a judicial reversal. For example, if the point of an agency’s novel interpretation is to abstain from regulation, the delay involved in years of litigation over the agency’s interpretation is itself a win. In other contexts, an agency’s ultimate lottery loss in the Supreme Court may help generate greater societal sympathy and support for a particular set of policy proposals. And, ultimately, it may mobilize supporters in Congress to amend the law—

84. Thanks to Jeremy Kidd and Peter Shane for suggesting this final observation.

85. *See*, e.g., *Massachusetts v. EPA*, 549 U.S. 497, 510–15 (2007) (chronicling the EPA’s successful delay in rulemaking with respect to regulating greenhouse gas emissions). Conversely, in other circumstances where the agency values a quick judicial affirmation of its interpretation, the delay cost caused by having to replay the lottery via *Brand X* or another circuit may outweigh the benefit of an ultimate victory; the more optimal solution may have been to obtain affirmation of a less controversial statutory interpretation.
thus strengthening the agency’s interpretive role over the long term. Finally, in some situations, the agency may be relatively indifferent to the outcome, but the point of the agency’s interpretation may be to demonstrate to some constituency that the Administration is trying to serve its ends.

In all events, perhaps the greater value of Deference Lotteries lies not in its predictive aspirations but in its ability to help agencies be more strategic in developing and defending interpretations of statutes they administer. The playbook outlined in this Response only scratches the surface of how to win the deference lottery (assuming the agency’s ultimate objective is to win the lottery, which as discussed may not always be the case). But even the surface reveals the multitude of ways agencies can play, replay, and ultimately prevail.

86. See, e.g., Margaret H. Lemos, The Consequences of Congress’s Choice of Delegate: Judicial and Agency Interpretations of Title VII, 63 Vand. L. Rev. 363, 420–21 (2010) (explaining that “Congress has been unusually active in the Title VII arena, stepping in to override six Supreme Court decisions”); see also Martha Chamallas, Ledbetter, Gender Equity and Institutional Context, 70 Ohio St. L.J. 1037, 1037–41, 1048–51 (2009) (detailing Congress’s latest and much publicized override of the Supreme Court’s Title VII interpretation in Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007)).