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 than the lower federal courts when confronted with a potentially precedential Supreme Court plurality decision—that is, that 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, in contrast, argues that pursuant to the Supreme Court’s 2005 decision in National Cable & Telecommunications Association v. Brand X Internet Services, federal agencies dealing with a Supreme Court plurality decision regarding either a statute that the agency implements or the agency’s prior interpretation of that statute have another option. 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 existence of the deference conundrum, the exact character of the plurality decision is important. Thus, this Article includes a typology of Supreme Court plurality decisions involving agency-mediated statutes. When the Chevron/Brand X framework applies, however, it offers agencies the opportunity, and arguably duty, to eliminate the confusion and inconsistency that plurality decisions promote by issuing clarifying and nationally uniform rules.

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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 the statutes that they implement, unless Congress has clearly already resolved the interpretive issue at hand.² Moreover, 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 Association 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

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² *Id.* at 843-44.
³ *See* Christensen v. Harris County, 529 U.S. 576, 586-87 (2000) (declining to accord *Chevron* deference to opinion letters issued pursuant to the Fair Labor Standards Act); United States v. Mead Corp., 533 U.S. 218, 226-27 (2001) (holding “that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated rulemaking 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”).
⁵ *See* discussion *infra* Part I.C.3.
Nevertheless, despite the Court’s privileging of agency interpretations, judicial review remains an important component of the deference framework, just as it is of administrative law more generally. 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; it protects the public’s right of participation in agency decisionmaking; it assesses the agency’s interpretations for basic rationality; and, most importantly for this Article, judicial review 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, for example, has noted that “delegation to an agency ensures that a single interpretation prevails” and that “[d]elegation to an agency permits a nationally uniform rule without the need for the

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9 5 U.S.C. § 706(2)(B) (allowing courts to overturn federal agency actions that are unconstitutional), (2)(C) (allowing federal courts to overturn federal agency actions that are “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right”) (2010); Sargenich, *supra* note 8, at 601; Linda R. Hirschman, *Postmodern Jurisprudence and the Problem of Administrative Discretion*, 82 NW. U. L. Rev. 646, 666-68 (1988).


Supreme Court to settle the meaning of every law or regulation." Similarly, commentato
rors or legislatures seeking uniform and consistent resolutions to nation-wide
problems often seek to establish a regulatory program within a federal agency. At
the level of the individual, the federal courts insist that federal agencies treat similarly-
situated regulated entities throughout the nation be treated consistently in adjudications.
Thus, judicial review promotes uniform nationwide implementation of regulatory law by
giving clear guidance regarding the legitimacy of the agency’s implementation of that
law.

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12 Frank H. Easterbrook, Judicial Discretion in Agency Interpretation, 57 OKLA.
Rev. 1, 7 (2004). See also William W. 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).

13 See, e.g., Bradley T. Tennis, Note, Uniform Ethical Regulation of Federal
Prosecutors, 120 YALE L.J. 144, 178 (Oct. 2010) (“A uniform national system of
regulation for federal prosecutors can be created only by a federal agency . . . .”); Joseph
A. Peters, The Meaningful Vote Commission: Restraining Gerrymanders With a Federal
Agency, 78 GEO. WASH. L. Rev. 1051, 1068 (July 2010) (“A federal agency would
provide a national, consistent system for limiting gerrymandering.”); 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 (Fall 2009)
(noting that “labor 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.”).

14 P.I.A. Michigan City, Inc. v. Thompson, 292 F.3d 820, 826 (D.C. Cir. 2002);
Independent Petroleum Ass’n of America 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);
International Rehabilitative Sciences, Inc. v. Sebelius, --- F. Supp. 2d ---, 2010 WL
3119439, at *6 (W.D. Wash. 2010).
Legal clarity, certainty, and uniformity are recognized rule-of-law values, particularly when the law seeks to regulate private conduct. Judicial review by the Supreme Court promotes these rule-of-law values both by resolving legal conflicts among the lower courts and by providing definitive statements of what the law is and what the law requires. From this bird’s-eye and admittedly pragmatic view of judicial review, this Article begins from the premise that, as convoluted and unpredictable as the details of Chevron/Mead/Skidmore deference framework have become, that framework nevertheless is at least manageable when judicial review gives 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

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15 One group of scholars has summarized rule-of-law scholarship to conclude 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.” Berkelow (Melissa M. Berry, Donald J. Kochan, & Matthew Parlow), Much Ado About Pluralities: Pride and Precedent Amidst the Cacophonies of Concurrences, and Re-Percolation after Rapanos, 15 VA. J. SOC. POL’Y & L. 299, 309 (2008). See also 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 of these elements, but this Article focuses on the first two. See also James F. Spriggs II & David R. Stras, Explaining Plurality Decisions, 99 GEO. L.J. 515, 529 (Jan. 2011) (arguing that “[c]lear, 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’” (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))); Linda Novak, Note, The Precedential Value of Supreme Court Plurality Decisions, 80 COLUM. L. REV. 756, 758 (May 1980) (noting that our system values “certainty, reliance, equality, and efficiency”).

16 Linas E. Ledebur, Comment, Plurality Rule: Concurring Opinions and a Divided Supreme Court, 113 PENN. STATE L. REV. 899, 919 (Winter 2009); Berkelow, supra note 15, at 301; Levy & Shapiro, supra note 8, at 504.

17 Berkelow, supra note 15, at 306 (“Precedent is a means of enforcing rule-of-law values such as continuity and predictability.”).

and cannot do under the statutory regime at issue. Thus, without ignoring the very real complexities and problems that arise in applying the Chevron/Mead/Skidmore framework, it is nevertheless 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—that is, with issues such as what kind of deference the courts owe to various forms of agency interpretation and what kind of review each level of deference actually requires. In contrast, this Article focuses on the next round of agency action after the reviewing courts address but do not fully resolve the validity of a prior agency interpretation. Specifically, this Article investigates the options that remain to 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 remain a small—but not insignificant—percentage of the Supreme Court’s decisions. Nevertheless, as Ken Kimura has observed, “[a] plurality
decision, by its very nature, represents the most unstable form of case law.”

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 contentious or politically salient questions, in constitutional cases, and when there is dissensus in the lower courts.” These issues 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.” Discerning this controlling rationale can be quite difficult. Indeed, some scholars have referred to the interpretive task after a Supreme Court plurality opinion as “reading the tea leaves.”

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, often issuing majority and dissenting opinions that display fundamental differences in interpretive

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26 Corley, Sommer, & Ward, supra note 25, at 2.

27 See, e.g., Justin F. Marceau, Lifting the Haze of Baze: Lethal Injection, the Eighth Amendment, and Plurality Opinions, 41 ARIZ. STATE L.J. 159, 160 (Spring 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.”).

approach, in the weight the Justices will give to extra-statutory concerns such as federalism, and in the interpretations the Justices finally offer. As a result, the Court does not always deliver clear majority opinions in its statutory interpretation cases. Thus, for example, 4-4 decisions when one Justice does not participate and, most problematically, decisions with multiple opinions and no clear majority can leave both the lower courts and 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 of little precedential value, binding on lower courts, if at all, only for the exact holding and not for any legal rationale. However, the Supreme Court has—admittedly,


See infra Part III.


For a recent and particularly complex fracturing of the Justices in a Supreme Court interpretation of a statute, see generally Spector v. Norwegian Cruise Line, 545 U.S. 119 (2005) (producing, in the context of deciding whether the Americans with Disabilities Act applies to foreign-flagged vessels temporarily in U.S. waters, a 5-3-4-2-3 split among the Justices regarding the presumption of federal law’s applicability to foreign vessels, the showing necessary to overcome that presumption, and the scope of foreign vessels’ exemption from ADA requirements that would otherwise apply). See also Marceau, supra note 27, at 164-66 (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.”); Adam S. Hochschild, Note, The Modern Problem of Supreme Court Plurality Decision: Interpretation in Historical Perspective, 4 WASH. U.J.L. & POL’Y 261, 261-62 (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,” because “[a] Supreme Court plurality decision holds ambiguous precedential value.”).

Marceau, supra note 27, at 164-66; Mark Alan Thurmon, Note, When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions, 42 DUKE L.J. 419, 420 (Nov. 1992); 1956 Chicago Comment, supra note 22, at 100. See also Saul Levmore, Ruling Majorities and Reasoning Pluralities, 3 THEORETICAL INQUIRIES IN LAW 87, 95, 96-98 (Jan. 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
inconsistently—insisted that a plurality opinion can be identified as the *ratio decidendi* for a plurality decision and hence operate as binding precedent. As a result, federal courts have their own frameworks for discerning these binding rationales out of plurality decisions, especially the *Marks* rule, discussed more thoroughly in Part II. Importantly for this Article, moreover, 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 those opinions—or an identified *ratio decidentus*—to new factual contexts.

In contrast, this Article argues, after *Brand X* the post-plurality choices for federal agencies are not so 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.

However, in choosing between these two responses, 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, however, 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. In so doing, the post-plurality agency removes itself one step away from the *Chevron/Mead/Skidmore* deference framework, 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 United States law and still in most common law jurisdictions “had no precedential value.”).

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36 *But see* Marceau, *supra* note 27, at 161 (critiquing “the unchallenged assumption that plurality opinions . . . generate reliably binding precedent in the context of capital appeals.”).
37 *See* Novak, *supra* note 15, at 767-78 (discussing a variety of approaches); Kimura, *supra* note 24, at 1600-04 (discussing a variety of approaches to interpreting plurality decisions).
38 *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 16, at 910-14 (laying out a variety of approaches for dealing with Supreme Court plurality decisions).
39 *See* Marceau, *supra* note 27, 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.”).
agency is no longer acting pursuant to congressionally delegated lawmaking authority but rather 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 non-decision 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 for itself.

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* 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 will.

This Article explores the deference conundrum for post-plurality federal agencies—that is, agencies coping with a Supreme Court plurality decision regarding the legitimacy of a prior agency interpretation of a statute that the agency implements. Part I outlines the *Chevron*/*Mead*/*Skidmore* framework, then 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, providing a sense of 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 those decisions and analyzes the potential relevance of *Chevron* and *Brand X* for each category. Part IV, in turn, presents a case study of the deference conundrum—the U.S. Environmental Protection Agency’s (EPA’s) and the U.S. Army Corps of Engineers’ joint response to the Supreme Court’s fractured interpretation of the federal Clean Water Act (CWA) in *Rapanos v. United States*—and recommends an alternative regulatory approach, especially 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,

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particularly in a regulatory context, values of clarity and uniformity dictate that administrative agencies should exercise their authority under *Chevron* and *Brand X* to re-interpreting 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 law is.”. 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. 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.*, which involved the EPA’s rather technical interpretation of the federal Clean Air Act, the Supreme Court created a two-step process for reviewing an agency’s interpretation of a statute that the agency administers. In applying *Chevron*, federal courts first ask “whether Congress has spoken to the precise question at issue.” “If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” However, if Congress’s intent is not clear—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.”

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 of the statute, as would be necessary in the absence of an administrative interpretation.” Instead, respect for Congress dictated

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41 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).
43 *Id.* at 839-42 (describing the EPA’s interpretation of “stationary source” under the Clean Air Act).
44 *Id.* at 842.
45 *Id.* at 842-43.
46 *Id.* at 843.
47 *Id.*
respect for the agency to which Congress had “entrusted” the statutory scheme. Moreover, the agency’s interpretation is entitled to this respect regardless of whether Congress’s delegation of authority was explicit or implicit.

The Supreme 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. As a result, when litigants challenge “the wisdom of an agency’s policy” rather than its reasonableness under the statute, the challenge must fail, because “federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do.”

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

Chevron deference clearly remains available to federal agencies interpreting the statutes they administer. Nevertheless, at the beginning of the 21st century, the Supreme Court progressively limited the circumstances under which federal agencies would receive full Chevron deference for their interpretations.

In its 2000 decision in Christensen v. Harris County and its 2001 decision in United States v. Mead, the Supreme Court determined that both the quality of the agency’s decisionmaking process and the character of its delegated authority were relevant to the amount of deference, if any, that the agency’s statutory interpretation would receive. In Christensen, the Court held that an agency opinion letter issued under the Fair Labor Standards Act was not entitled to Chevron deference because it did not carry the force of law. In particular, the Court emphasized that the agency had not arrived at its interpretation through deliberative proceedings, such as formal adjudication or notice-and-comment rulemaking.

Nevertheless, although the agency’s interpretation was not entitled to Chevron deference, it was still entitled to some deference pursuant to Skidmore v. Swift & Co. Under Skidmore, agency interpretations of statutes are entitled to deference, “but only to

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48 Id. at 844.
49 Id. at 843-44.
50 Id. at 865-66.
51 Id. at 866.
55 Christensen, 529 U.S. at 587.
56 Id.
57 Id. (citing Skidmore v. Swift & Co., 323 U.S. 134 (1944)).
the extent that those interpretations have the ‘power to persuade.’”\(^{58}\) More specifically, “[t]he 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.”\(^{59}\)

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.\(^{60}\) According to the Mead Court, “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.”\(^{61}\) 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 the circumstances . . . .”\(^{62}\) 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 . . . .”\(^{63}\)

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 fill a statutory gap, Chevron deference applies with full force. As it had in Chevron, the Court emphasized that “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.”\(^{64}\) Moreover, an agency’s failure to announce its interpretation through formal adjudication or notice-and-comment rulemaking did not necessarily obviate Chevron deference.\(^{65}\)

Nevertheless, the Custom Service’s tariff rulings did not warrant Chevron deference.\(^{66}\) As a statutory matter, “the terms of the congressional delegation give no indication that Congress meant to delegate authority to Customs to issue classification

\(^{58}\) Id. (quoting Skidmore, 323 U.S. at 140).

\(^{59}\) Skidmore, 323 U.S. at 140.

\(^{60}\) Mead, 533 U.S. at 227.

\(^{61}\) Id. at 226-27.

\(^{62}\) Id. at 227, 228.

\(^{63}\) Id. at 228.

\(^{64}\) Id. at 229 (citing Chevron, 467 U.S. at 842-46

\(^{65}\) Id. at 131.

\(^{66}\) Id.
rulings with the force of law.” 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. Moreover, “46 different Customs offices issue 10,000 to 15,000 of them each year . . . .”

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

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 Association v. Brand X Internet Services, 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’s) declaratory ruling that cable companies providing broadband internet access are exempt from regulation under Title II of the Telecommunications Act, which subjects all providers of “telecommunications service” to mandatory common-carrier regulation. In March 2000, the FCC concluded that broadband internet service provided by cable companies is an “information service” but not a “telecommunications service.”

67 Id. at 131-32.
68 Id. at 233.
69 Id.
70 Id. at 245 (Scalia, J., dissenting).
71 Id. at 239 (Scalia, J., dissenting).
73 545 U.S. 967 (2005)
“[b]ecause Internet access provides a capability for manipulating and storing information” and because of “[t]he integrated nature of Internet access and high-speed wire used to provide Internet access . . . .”

Ultimately, on the merits, the Court upheld the FCC’s decision under both *Chevron* and “arbitrary and capricious” analyses. However, before reaching the merits, eight Justices agreed that federal agencies can “overrule” federal court constructions of the statutes that the agencies administer. Specifically, “[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.” Moreover, the agency’s interpretation is entitled to *Chevron* deference if it otherwise qualifies for *Chevron* deference.

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 Communications Act, the Ninth Circuit invalidated the ruling based on its own precedent in *AT&T Corp. v. City of Portland*.

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 Act. First, the *Chevron* analysis applied because Congress had delegated to the FCC authority to execute and enforce the Communications Act and “the Commission issued the order under review in the exercise of that authority . . . .”

Second, with regard to the role of federal courts’ constructions in the first step of the *Chevron* analysis, “[a] court’s prior judicial construction of a statute trumps an agency’s 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.” 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

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75 *Brand X*, 545 U.S. at 978, 979.
76 *Id.* at 980–82.
77 See *id.* at 1000–02 (finding the Commission provided adequate rational justification for its conclusions).
78 See *id.* at 982–83.
79 *Id.*
80 *Id.* at 982.
81 216 F.3d 871 (9th Cir. 2000).
82 *Brand X*, 545 U.S. at 980–81 (citation omitted).
83 *Id.* at 982.
statutory gaps.”

The Court also distinguished its own prior precedent in *Neal v. United States*, in which a prior Court construction resulted in no deference to the agency, on the grounds that the judicial precedent at issue in *Neal* “had held the relevant statute to be unambiguous.”

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.” The Ninth Circuit’s decision in *AT&T Corp. v. Portland* did not achieve this level of exclusiveness because the Ninth Circuit did not explicitly hold that the Communications Act was unambiguous regarding whether cable internet providers were “telecommunications carriers.”

*Brand X* thus signaled that the Supreme Court was willing to subordinate federal courts’ interpretations of statutes to federal agencies’. The *Brand X* Court’s rationale was 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. While the Supreme Court is still wrestling with the implications of this view of the federal courts’ roles, especially in connection with its own prior decisions, the lower courts have been steadily applying *Brand X* to conflicts between agency and court interpretations.

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84 *Id.*
86 *Brand X*, 545 U.S. at 984 (citing Chapman v. United States, 500 U.S. 453, 463 (1991)).
87 *Id.* at 984.
88 *Id.* at 984–85.
89 *Id.* at 982.
90 See Hernandez-Carrera v. Carlson, 547 F.3d 1237, 1242–43 (10th Cir. 2008) (concluding that, under *Brand X*, “a subsequent, reasonable agency interpretation of an ambiguous statute, which avoids raising serious constitutional doubts, is due deference notwithstanding” any “prior Supreme Court construction of the statute applying the canon of constitutional avoidance”); Levy v. Sterling Holding Co., LLC, 544 F.3d 493, 502–03 (3rd 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); Gonzales v. Dep’t of Homeland Security, 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”); Fernandez v. Keisler, 502 F.3d 337, 347–48 (4th Cir. 2007) (applying *Brand X*, but noting that that decision did nothing to alter the effect of a finding that Congress spoke clearly to the issue under *Chevron* step one); Dominion Energy v. Brayton Point, LLC, 443 F.3d 12, 16–17 (1st Cir. 2006) (noting the Supreme Court’s intent in *Brand X* was to
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 that rule to achieve the results that the Supreme Court dictated: agency interpretations of statutes should receive *Chevron* deference despite existing court precedent and, in fact, can supersede that precedent. In one of the earliest *Brand X* cases, for example, the U.S. Court of Appeals for 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 Administrative Procedure Act, in favor of the EPA’s new interpretation that the statutory “public hearing” could be something less than a full-blown evidentiary hearing.91 The First Circuit emphasized that its prior decision came before not only the EPA’s interpretation but also *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.92 Several other courts have similarly applied the *Brand X* rule.93 In addition, the U.S. Court of Appeals for the Third Circuit extended the *Brand X* rule to agency interpretations of regulations that contradict the court’s prior interpretations.94

When lower federal courts resist the application of *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 eliminate the possibility that *Chevron* applicability would turn on the order in which judicial and agency interpretations issue).

91 Dominion Energy Brayton Point, LLC v. Johnson, 443 F.3d 12, 14-15, 16-17 (1st Cir. 2006) (superseding Seacoast Anti-Pollution League v. Costle, 572 F.2d 872, 877-78 (1st Cir. 1978)).
92 Id. at 16-17; see also 33 U.S.C. §§ 1326(a), 1342(a) (2000) (the Clean Water Act provisions requiring a “public hearing”).
94 Levy v. Sterling Holding Co., LLC, 544 F.3d 493, 502-03 (3rd Cir. 2008) (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.
went out of its way to distinguish *Brand X* and refused to accord *Chevron* deference to an Internal Revenue Service regulation that contradicted long-standing court precedent, on several grounds. For example, 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 is at best perfunctory.” 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 issues regarding their reasonableness. 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. 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. 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.

On appeal, nevertheless, the Third Circuit reversed the Tax Court, concluding that the IRS regulation was both entitled to *Chevron* deference and valid. 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. “Accordingly,” it concluded, “we are not bound by prior judicial interpretations . . . .” Similar *Brand X* debates about the effect of precedent on statutory ambiguity have occurred in other courts, as well, with similar results.

Second, and more relevantly for this Article, lower courts resist application of *Brand X* when existing precedent has already considered the agency regulation or interpretation at issue. For example, the Ninth Circuit refused to allow the Bureau of

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95 Swallows Holding Ltd. v. Commissioner of Internal Revenue, 126 T.C. 96, 114-28 (2006), rev’d, 515 F.3d 162 (3rd Cir. 2008).
96 Id. at 144.
97 Id.
98 Id. at 144-45.
99 Id. at 145.
100 Id. at 145-46.
101 Swallows Holding Ltd. v. Commissioner of Internal Revenue, 515 F.3d 162, 167-68 (3rd Cir. 2008).
102 Id. at 168-72.
103 Id. at 170.
104 Id. (citing *Brand X*, 545 U.S. at 982-83).
105 See, e.g., Mayo Found. for Medical 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, 568 F.3d 675, 679-83 (8th Cir. 2009) (declaring the statute ambiguous and applying *Chevron* deference to the tax regulation).
Immigration Affairs (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*. 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 interpreted the statute.” 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. *Brand X*, according to the court, did not allow “that an agency may resurrect a statutory interpretation that a circuit court has foreclosed by rejecting it as unreasonable at *Chevron’s* second step.” Instead, the Ninth Circuit precedent remained viable, the agency’s recycled interpretation remained unreasonable, and the agency approach at issue was invalid. Similarly, in a series of cases applying the Fair Labor Standards Act, the U.S. Court of Federal Claims concluded that the *Brand X* rule does not apply when the agency interpretation pre-dated the court precedent at issue and the prior court fully considered that interpretation in its application of the statute.

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, generally because the agency interpretation pre-existed those prior cases, agencies 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. **Brand X** and the U.S. Supreme Court

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,

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106 Mercado-Zazueta v. Holder, 580 F.3d 1102, 1109 (9th Cir. 2009).
107 *Id.* at 1114.
108 *Id.* at 1112-13 (citing Cuevas-Gaspar v. Gonzales, 430 F.3d 1013, 1029 (9th Cir. 2005)).
109 *Id.* at 1114.
110 *Id.* at 1115. See also Escobar v. Holder, 567 F.3d 466, 478-80 (9th Cir. 2009) (reaching the same conclusion in essentially identical language).
in *Brand X* itself, Justice Stevens concurred especially to emphasize that the Court’s decisions may warrant different treatment:

> 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.\(^{112}\)

Nevertheless, recent decisions indicate that, even though the Court is generally reluctant to give up its own precedent, it also—consistent with *Chevron* and *Brand X*—prefers agency interpretation and implementation of statutes in many circumstances. Moreover, the Justices appear increasingly willing to apply *Brand X* to the Court’s own precedent.

The Supreme Court often appears unwilling to discard its precedent when that precedent seems directly applicable to regulatory regimes administered by federal agencies, despite *Brand X*. For example, in 2009 the Court split 5-4 in deciding *Cuomo v. The Clearinghouse Association* regarding both the meaning of “visitorial powers” and the role of *Brand X* in deciding that meaning.\(^{113}\) In this case, the Attorney General for the State of New York sent letters to several national banks, “in lieu of subpoena,” asking for certain non-public information in order to ascertain whether the banks were complying with the state’s fair lending laws.\(^{114}\) The federal Office of the Comptroller of the Currency (OCC) and the Clearinghouse Association brought suit to enjoin the request, claiming that the OCC’s National Bank Act (NBA) regulations preempt state law enforcement against national banks.\(^{115}\) The NBA states that “[n]o 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 either House thereof or by any committee of Congress or of either House duly authorized.”\(^{116}\) 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.\(^{117}\)

The question for the Supreme Court was whether the OCC regulation preempted enforcement of non-banking state laws against national banks. The majority stated both that the *Chevron* doctrine provided the framework for evaluating the OCC’s regulation

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\(^{112}\) *Brand X*, 545 U.S. at 1003 (Stevens, J., concurring).

\(^{113}\) 129 S. Ct. 2710 (2009).

\(^{114}\) *Id.* at 2714.

\(^{115}\) *Id.*


and that “[t]here is necessarily some ambiguity as to the meaning of the statutory term ‘visitorial powers,’ especially since we are working in an era when the prerogative writs—through which visitorial powers were traditionally exercised—are not in vogue.” 118 Thus, the case seemed ripe for deference to the OCC’s interpretation that state enforcement was preempted.

Nevertheless, the majority was unwilling to defer, emphasizing that, under Supreme Court precedent, “visitorial powers” referred to the state-as-sovereign’s supervisory role over corporations and charitable institutions.119 As a result, “[t]he Comptroller’s regulation . . . does not comport with the statute.”120 Thus, according to the majority, Court precedent trumped a potential application of the Brand X rule.

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. However, they would have upheld the OCC’s regulatory interpretation as reasonable.121 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.”122 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.”123

According to the dissenters, therefore, even Supreme Court precedent “is insufficient to deny Chevron deference to OCC’s construction of § 484(a).”124

While the Court has not yet used Brand X to displace its own precedent, a majority of the Court has displayed a Brand X-like preference for agency decisions that has limited its willingness to let federal courts—including itself—resolve cases. For

118 Clearinghouse Ass’n, 129 S. Ct. at 2715.
119 See id. at 2716–17 (noting that the Court’s precedents confirm “that a sovereigns ‘visitorial powers’ and power to enforce the law are two different things”).
120 Id. at 2719.
121 Id. at 2722–27 (Thomas, J., concurring in part and dissenting in part).
122 Id. at 2728.
123 Id. at 2728–29 (quoting Brand X, 545 U.S. at 982).
124 Id. at 2730.
example, in the April 2006 *per curiam* decision in *Gonzalez v. Thomas*, the Court summarily reversed the Ninth Circuit’s *en banc* decision to grant asylum to South African immigrants on the basis of persecution as a members of a family group, in favor of a remand to the Immigration and Naturalization Service (INS). Legally, the Ninth Circuit’s decision held that a family group may constitute a “social group” for the purposes of refugee status under the Immigration and Nationality Act (INA). Nevertheless, because the Ninth Circuit went ahead and also decided that the facts of the immigrants’ case met this standard, without the benefit of a prior agency decision on the issue, the Supreme Court held that it had committed “obvious” legal error in light of the “ordinary remand” rule announced in *INS v. Orlando Ventura*. Thus, because “[t]he agency has not yet considered whether Boss Ronnie’s family presents the kind of ‘kinship ties’ that constitute a ‘particular social group,’” or brought its expertise to bear on the facts of the case, remand to the agency was required.

Similarly, the Supreme Court remanded a case to the Board of Immigration Appeals (BIA) after concluding that the BIA had mistakenly relied on the Supreme Court’s own precedent in interpreting the INA’s “persecutor bar.” The persecutor bar denies refugee status and asylum to “any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.” The petitioner, Daniel Girmai Negusie, had been conscripted against his will by the Eritrean government to act as a prison guard for Ethiopian prisoners, raising the issue of whether the INA’s persecutor bar requires voluntary action. The BIA concluded that the Supreme Court’s interpretation of the Displaced Persons Act’s persecutor bar in *Fedorenka v. United States* was controlling and held that Negusie was barred from refugee status.

In *Negusie v. Holder*, however, the Supreme Court concluded that *Fedorenka* was not controlling, because the INA served different purposes than the Displaced Persons Act, and remanded the case to the BIA for reconsideration. The Court emphasized that “[j]udicial deference in the immigration context is of special importance, for executive officials ‘exercise especially sensitive political functions that implicate questions of foreign relations.’” Because the BIA mistakenly thought *Fedorenko*

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126 *Id.* at 187.
127 Thomas v. Ashcroft, 409 F.3d 1177, 1187 (9th Cir. 2005) (*en banc*) (overruling, *e.g.*, Estrada-Posadas v. INS, 924 F.2d 916 (9th Cir. 1991)).
128 537 U.S. 12, 18 (2002) (*per curiam*).
129 *Id.* at 187.
133 *Id.* at 1167.
134 *Id.* at 1163-64 (quoting *INS v. Abudu*, 485 U.S. 94, 100 (1988)).
controlled, it “has not yet exercised its interpretive authority” regarding the issue.\textsuperscript{135} As a result, because the agency had not yet exercised its \textit{Chevron} discretion, the proper remedy was to remand without interpreting the statute, because Congress had delegated gap-filling authority to the BIA and the BIA should therefore, in light of difficult policy choices, be the first interpretive entity to exercise that authority.\textsuperscript{136}

Thus, the Supreme Court has repeatedly abdicated its own authority to decide cases in favor of agency resolution. Moreover, the dissenters in \textit{Clearinghouse Association} suggest that the Justices may someday soon directly grapple with the \textit{Brand X} rule’s implications for the Court’s own interpretations of agency-implemented federal statutes.

\section*{II. \textsc{Supreme Court Plurality Decisions}}

As many scholars have noted, plurality decisions from the Supreme Court are generally viewed badly.\textsuperscript{137} According to these arguments, which with this Article largely agrees, Supreme Court plurality decisions upset the normal operation of binding precedent in lower courts.\textsuperscript{138} More specifically, such decisions fail to provide clear and majoritarian reasoning for the legal result,\textsuperscript{139} increase the work for lower courts,\textsuperscript{140} potentially perpetuate or create splits of authority,\textsuperscript{141} and, in general, represent an abdication of the Supreme Court’s responsibilities as the ultimate legal decisionmaker.\textsuperscript{142}

\begin{footnotesize}
\begin{enumerate}
\item Id. at 1167.
\item Id. (quoting \textit{Brand X}, 545 U.S. at 980).
\item Bloom, \textit{supra} note 25, at 1373 (2008); Weins, \textit{supra} note 25, at 831; 1981 Harvard Note, \textit{supra} note 25, at 1127. \textit{But see} Berkelow, \textit{supra} note 15, at 304, 347-48 (arguing that the indeterminacy created by plurality decisions can allow for valuable re-percolation of legal rule, 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, \textit{supra} note 25, at 1417 (noting that “[p]lurality 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, \textit{supra} note 15, at 759-60 (arguing that plurality decisions allow for judicial freedom and flexibility).
\item Ledebur, \textit{supra} note 16, at 901, 902-03; Hochschild, \textit{supra} note 33, at 284; Thurmon, \textit{supra} note 34, at 427.
\item Berkelow, \textit{supra} note 15, at 301, 313-14; Bloom, \textit{supra} note 25, at 1373, 1378-79; Thurmon, \textit{supra} note 34, at 419.
\item Spriggs & Stras, \textit{supra} note 15, at 530-31 (quoting Pamela C. Corley, \textit{Uncertain Precedent: Circuit Court Responses to Supreme Court Plurality Opinions}, 37 AM. POL.
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The difficulties that Supreme Court plurality opinions cause derive directly from the American legal system’s expectations for binding majority decisions, which is itself a Supreme Court invention. At the beginning of the 19th century, Chief Justice John Marshall purposely changed the Justices’ prior practice—consistent with the practice in England—of announcing individual seriatum opinions. Seriatum 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. 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 opinions—and preferably unanimous opinions.

Nevertheless, 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 the increasing numbers of Supreme Court plurality decisions in the last few

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142 Novak, supra note 15, at 757-61 (discussing the value of majority opinions and majority rationales); Kimura, supra note 24, at 1596-98 (discussing the principle of majoritarianism in Supreme Court decisionmaking).

143 See Novak, supra note 15, at 757-61 (noting that “pluralities obstruct the predictive function of law”).

144 Lebedur, supra note 16, at 919; Berkelow, supra note 15, at 301; Bloom, supra note 25, at 1373, 1378-79; 1981 Harvard Note, supra note 25, at 1127, 1128; Kimura, supra note 24, at 1625. See also Thurmon, supra note 34, at 419 (noting that “plurality 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 DUK L.J. 59, 62)).

145 See also Bloom, supra note 25, at 1378-79 (noting that “pluralities obstruct the predictive function of law”).

146 Marceau, supra note 27, at 164-66.

147 Marceau, supra note 27, at 166; Hochschild, supra note 33, at 267-68; Thurmon, supra note 34, at 427.

148 See, e.g., Bloom, supra note 25, at 1374 (arguing that the courts need a consistent method for interpreting plurality decisions). Not everyone accepts, however, that non-majority opinions should establish binding precedent. Linus Lebedur, 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.” Lebedur, supra note 16, at 902-03.
decades. In 1977, for example, the Court established the *Marks* “narrowest grounds” rule, which one scholar has described as “a conscious attempt to end the confusion surrounding plurality decisions’ precedential value.”

On the merits, *Marks* involved due process challenges to the defendants’ criminal convictions for transporting obscene materials in violation of federal statutes. One potentially precedential Supreme Court decision was *Memoirs v. Massachusetts*, a plurality decision where the Justices split 3-2-4. At its core, the issue in *Marks* was which standard of obscenity the government had to meet in order to convict the defendants, and the Court had three choices: (1) retroactive application of the standard from *Miller v. California*, which worked against the defendants; (2) application of the Supreme Court’s last majority enunciation of an obscenity test in *Roth v. United States*,

Various scholars have counted Supreme Court plurality decisions in different ways, but all agree that the numbers of such decisions increased in the late 20th and early 21st 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. 1981 Harvard Note, *supra* note 25, 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 15, at 519. See also Marceau, *supra* note 27, at 168 (noting the increasing numbers of Supreme Court plurality decisions); Ledebur, *supra* note 16, at 900, 901-02 (“The second half of the twentieth century has seen a significant rise in dissenion 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.”); Berkelow, *supra* note 15, at 302 (noting that “plurality opinions have proliferated in the Supreme Court.”); Cacace, *supra* note 23, at 97-98 (2007) (noting that “[t]he Court has handed down a steadily increasing number of plurality decisions throughout its history” and discussing the variety of explanations as to why); Levy, *supra* note 25, at 13 (noting that “recently, however, plurality decisions have proliferated”); Hochschild, *supra* note 33, at 272 (noting that “[f]ractured opinions have increased dramatically since Chief Justice Marshall’s tenure.”); John F. Davis & William L. Reynolds, *Juridical Cripples: Plurality Opinions in the Supreme Court*, 1974 DUKE L.J. 59, 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”).


Hochschild, *supra* note 33, at 279. See also Thurmon, *supra* note 34, at 420 (describing the *Marks* rule as a means of assessing the precedential value of a plurality decision); 1956 Chicago Comment, *supra* note 22, at 154-55 (detailing the variety of ways in which lower courts treated Supreme Court plurality decisions before *Marks*).

Marks, 430 U.S. at 189.

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

Id. at 189-90 (citing Miller v. California, 413 U.S. 15 (1973)).
which the Court of Appeals viewed as very similar to the *Miller* standard;\(^1\)\(^\text{155}\) or (3) the *Memoirs* plurality standard, which favored the defendants.\(^\text{156}\)

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*, 354 U.S. 476, 77 S. Ct. 1304, 1 L.Ed.2d 1498 (1957), 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.\(^\text{157}\)

Nevertheless, the Supreme Court concluded, the Court of Appeals had gotten the analysis wrong. Instead of dismissing the plurality decision in *Memoirs*, 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 . . . .’”\(^\text{158}\) 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.\(^\text{159}\)

The *Marks* “narrowest grounds” rule sounds simple, and it can work quite well for lower courts when the Supreme Court Justices actually offer “nested” or progressively expanding rationales in their plurality opinions (the so-called “Russian dolls” model of plurality decisions).\(^\text{160}\) As has been widely observed, however, the *Marks* rule offers

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\(^{155}\) *Id.* at 192-93 (citing Roth v. United States, 354 U.S. 476 (1957)).

\(^{156}\) *Id.* at 190-91.

\(^{157}\) *Id.* at 192-93.

\(^{158}\) *Id.* at 193 (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (Stewart, J., plurality opinion)).

\(^{159}\) *Id.* at 193-94.

\(^{160}\) See Berkelow, *supra* note 15, at 326-33 (offering justifications for the *Marks* rule and concluding that “[w]here 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.”).
little guidance when Supreme Court Justices offer unrelated rationales for a decision.\textsuperscript{161} As a result, a number of commentators have both recognized that the lower courts vary widely in their applications of \textit{Marks} to the Supreme Court’s plurality decisions\textsuperscript{162} and offered alternative strategies of their own.\textsuperscript{163}

With very limited exceptions, however, the jurisprudence and scholarship of plurality decisions has 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.\textsuperscript{164} However, as \textit{Chevron} itself makes clear, federal agencies occupy a preferred and lateral, rather than subordinate, position to the Supreme Court with respect to the authority to interpret statutes. Structurally, unlike lower federal courts, agencies are creations of the legislative branch that operate, for the most part, out of the executive branch.\textsuperscript{165} Under \textit{Chevron} and \textit{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

\textsuperscript{161} Marceau, \textit{supra} note 27, at 169; Berkelow, \textit{supra} note 15, at 333; Thurmon, \textit{supra} note 34, at 442.

\textsuperscript{162} See, \textit{e.g.}, Marceau, \textit{supra} note 27, at 170-74 (explaining the “common denominator” and “predictive” approaches to applying the \textit{Marks} rule); Bloom, \textit{supra} note 25, at 835-38 (detailing the “implicit consensus” approach and the “predictive” approach to applying the \textit{Marks} rule); Cacace, \textit{supra} note 23, at 122-25 (recognizing three approaches to applying \textit{Marks}—the “narrowest grounds” approach, the conventional approach, and the social choice view); Thurmon, \textit{supra} note 34, at 429-42 (describing in detail two models for applying the \textit{Marks} rule, the implicit consensus model and the predictive model).

\textsuperscript{163} See, \textit{e.g.}, Lebedur, \textit{supra} note 16, at 914 (proposing to disallow concurring opinions); Bloom, \textit{supra} note 25, at 1412-16 (recommending the simple reconciliation method and the policy space method); Thurmon, \textit{supra} note 34, at 451-56 (offering an alternative approach to plurality decisions that emphasizes the role of imperative and persuasive authority in the Justices’ reasoning); Kimura, \textit{supra} note 24, at 1604-11 (offering a “legitimacy model” for interpreting Supreme Court plurality decisions based on fidelity to existing precedent); Davis & Reynolds, \textit{supra} note 149, at 81-85 (urging stronger leadership within the Court to avoid plurality decisions).

\textsuperscript{164} Thurmon, \textit{supra} note 34, at 422 (noting that the problem caused by plurality opinions is lower courts following higher courts).

\textsuperscript{165} Indeed, Elizabeth Foote has argued that the entire \textit{Chevron} framework, by casting what agencies do as statutory interpretation, was a misstep \textit{ab initio}. Elizabeth V. Foote, \textit{Statutory Interpretation or Public Administration: How Chevron Misconceives the Function of Agencies and Why It Matters}, 59 ADMIN L. REV. 673, 674-78, 678-95 (Fall 2007). While this Article pursues the less ambitious task of arguing that post-plurality federal agencies still have room to maneuver even within the \textit{Chevron} framework rather than seeking to replace that framework, it nevertheless concurs with much of Foote’s argument.
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.

Moreover, 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 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 different categories of Supreme Court decisions regarding agency-mediated statutes—decisions about 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 non-interpretive 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 in only in the last two, related 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 case that is most 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.\textsuperscript{166} For example, in \textit{Eastern Enterprises v. Apfel},\textsuperscript{167} the Court issued a plurality decision regarding the constitutionality of the Coal Industry Retiree Health Benefit Act of 1992,\textsuperscript{168} “which establishes a mechanism for funding health care benefits for retirees from the coal industry and their dependents”\textsuperscript{169} and is administered by the Commissioner of Social Security.

The plurality of Justice O’Connor, Chief Justice Rehnquist, Justice Scalia, and Justice Thomas concluded that the act’s funding mechanism resulted in an unconstitutional taking of the employer’s (Eastern Enterprises’s) money, relying on the regulatory takings balancing test from \textit{Penn Central Transportation Company v. New York City}.\textsuperscript{170} Given its conclusion on the taking claim, moreover, the plurality did not decide Eastern Enterprises’s substantive due process claim.\textsuperscript{171}

Justice Kennedy concurred in the judgment that the act was unconstitutional, but for entirely different reasons. He concluded that the 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.”\textsuperscript{172} Justice Kennedy reached his due process conclusion because the act’s funding mechanisms operated retroactively.\textsuperscript{173}

The dissenters, in two opinions, would have declared the act constitutional. Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, emphasized the historical context of the act to conclude that Congress’s solution was constitutional.\textsuperscript{174} 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 act, focusing like Justice Kennedy did on the act’s retroactivity.\textsuperscript{175} Unlike Justice Kennedy, however, Justice Breyer concluded that the act’s retroactivity did not violate Eastern Enterprises’s due process rights, in large part because of the equities of Eastern Enterprises’s relationship with its miners.\textsuperscript{176}

\begin{thebibliography}{9}
\bibitem[165]{166} Corley, Sommer & Ward, \textit{supra} note 25, at i.
\bibitem[168]{169} \textit{Eastern Enterprises}, 524 U.S. at 504.
\bibitem[169]{170} \textit{Id.} at 522-23, 529, 532, 537 (citing \textit{Penn Central Transportation Co. v. New York City}, 438 U.S. 104, 124 (1978)).
\bibitem[170]{171} \textit{Id.} at 537-38.
\bibitem[171]{172} \textit{Id.} at 539 (Kennedy, J., concurring).
\bibitem[172]{173} \textit{Id.} at 547-50 (Kennedy, J., concurring).
\bibitem[173]{174} \textit{Id.} at 550-53 (Stevens, J., dissenting).
\bibitem[174]{175} \textit{Id.} at 554-58 (Breyer, J. dissenting).
\bibitem[175]{176} \textit{Id.} at 558-68 (Breyer, J., dissenting).
\end{thebibliography}
Thus, while *Eastern Enterprises* gave a clear decision that the funding mechanisms of the Coal Retiree Health Benefit Act were unconstitutional, it provided little guidance to lower courts regarding the proper framework for their future evaluations of the constitutional validity of economic regulation. Lower federal courts have since struggled with that issue. For example, the U.S. Court of Appeals for the Eleventh Circuit, applying *Marks*, concluded that

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.\(^{177}\)

As a result, it rejected the Takings Clause framework for evaluating the constitutionality of the Fair and Equitable Tobacco Reform Act of 2004.\(^ {178}\) Other lower federal courts\(^ {179}\) and state courts\(^ {180}\) 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.\(^ {181}\) Indeed, several lower federal courts have held that *Eastern Enterprises* does not even control their decisions regarding other applications of the Coal Act.\(^ {182}\)

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 “flavors,” all of which could limit an

\(^{177}\) Swisher Intl., Inc. v. Schafer, 550 F.3d 1046, 1054 (11th Cir. 2008).
\(^{178}\) Id. (citing 7 U.S.C. §§ 518 et seq.).
\(^{179}\) 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), aff’d 266 F.3d 864, 880 (8th Cir. 2001).
\(^{181}\) Dico, 189 F.R.D. at 541.
agency’s ability to discount a Supreme Court plurality decision involving constitutional issues.

First, the federal courts have long proclaimed themselves the primary interpreters of the U.S. Constitution, especially with respect to the Executive Branch.\footnote{Nixon v. United States, 418 U.S. 683, 704-05 (1974); Marbury v. Madison, 5 U.S. (1 Cranch) 134, 174 (1803); Akins v. Federal Election Comm’n, 101 F.3d 731, 740 (D.C. Cir. 1996).} As the U.S. Court of Appeals for the D.C. Circuit proclaimed in 1988, “[t]he federal Judiciary does not . . . owe deference to the Executive Branch’s interpretation of the Constitution.”\footnote{Public Citizen v. Burke, 843 F.2d 1473, 1478 (D.C. Cir. 1988).} Thus, even if a federal agency were to conclude post-plurality that the Supreme Court’s decision did not constitute binding precedent regarding the constitutionality of a statute or regulation, it would likely be unsuccessful in claiming deference for its own constitutional analysis, because such analyses are by definition interpretations of the Constitution, not (or not just) the statute.

Second, the Supreme Court has made it clear that agency interpretations of statutes that themselves push the boundaries of constitutionality are not entitled to \textit{Chevron} deference.\footnote{Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159, 172-73 (2001).} 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 gain little by way of deference by simply concluding that the Supreme Court’s opinion was nonbinding. Instead, it would have to seriously consider the Justices’ arguments that its interpretation triggered constitutional concern if it wanted to successfully claim deference in the next round of judicial review.\footnote{See, \textit{e.g.}, In re Needham, 354 F.3d 340, 345 n.8 (5th Cir. 2005) (refusing to accord \textit{Chevron} deference to the U.S. Army Corps of Engineers’ interpretation of the Oil Pollution Act because the agency’s regulations raised constitutional issues).}

Third, in construing statutes, “the constitutional avoidance canon of statutory interpretation trumps \textit{Chevron} deference.”\footnote{University of Great Falls v. National Labor Relations Bd., 278 F.3d 1335, 1340-41 (D.C. Cir. 2002). \textit{Accord}, Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988); Hernandez-Carrera v. Carlson, 547 F.3d 1237, 1249 (10th Cir. 2008); National Mining Ass’n v. Kempthorne, 512 F.3d 702, 711 (D.C. 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).} In other words, “[b]ecause the judiciary must rightly presume that Congress acts consistent with its duty to uphold the Constitution,” the federal court’s first duty is to find a constitutional interpretation of the federal statute at issue, regardless of any agency interpretation of the same statute, and the courts “will not submit to an agency’s interpretation of a statute if it ‘presents serious
constitutional difficulties . . .”188 As a result, post-plurality agencies cannot afford to ignore the Justices’ constitutional concerns about a statute, even if the plurality decision does not constitute binding precedent.

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 University of Great Falls v. National Labor Relations Board,189 the D.C. Circuit in 2002 refused to defer to the National Labor Relations Board’s (NLRB’s) interpretation of the National Labor Relations Act (NLRA) as applied to the University of Great Falls,190 which claimed the exemption for religious institutions that the Supreme Court had established in National Labor Relations Board v. Catholic Bishop of Chicago.191 According to the D.C. Circuit, the Supreme Court’s interpretation of the NLRA was based in constitutional avoidance and, as a result, the NLRB’s interpretation of the act with respect to the University of Great Falls was not entitled to deference.192 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.”193 Second, deference to the NLRB was especially unwarranted given the constitutional concerns at issue—i.e., “where, as here, the Supreme Court precedent and subsequent interpretation is based on constitutional concerns, an area of presumed judicial, rather than administrative, competence.”194

In 2007, post-Brand X, the U.S. Court of Appeals for the Second Circuit reached a similar conclusion about its own constitutional avoidance precedent in Blake v. Carbone.195 In 1976, the Second Circuit had construed specific provisions of the Immigration and Naturalization Act to avoid Equal Protection Clause infirmities.196 When the Immigration and Naturalization Service later tried to re-interpret those same provisions in ways that re-created the equal protection problems, the Second Circuit

188 National Mining Ass’n, 512 F.3d at 711 (quoting Chamber of Commerce v. Federal Election Comm’n, 69 F.3d 600, 605 (D.C. Cir. 1995)).
189 278 F.3d 1335 (D.C. Cir. 2002).
190 Id. at 1341.
192 University of Great Falls, 278 F.3d at 1341.
193 Id.
194 Id.
195 489 F.3d 88 (2d Cir. 2007).
accorded no deference to the agency’s interpretation, emphasizing its own duty to interpret the statute to avoid constitutional problems.\textsuperscript{197}

Thus, the canon of constitutional avoidance severely attenuates the potential roles of both \textit{Chevron} deference and the \textit{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 \textit{Marks} rule analyses. Indeed, a plurality decision declaring part of a statute unconstitutional may not even give the agency greater flexibility in implementing the other, constitutional provisions of the regulatory program. For example, in the aftermath of \textit{Eastern Enterprises}, the Commissioner of Social Security tried to reassign Coal Act benefits in a way that would avoid the constitutional problems that the Supreme Court had identified. While acknowledging that \textit{Chevron} provided the proper deference framework for evaluating the Commissioner’s attempt, the U.S. District Court for the Eastern District of Kentucky nevertheless concluded that the Commissioner’s efforts ran counter to congressional intent, because the Commissioner neither assigned the benefits to the beneficiaries Congress preferred (which would have been unconstitutional under \textit{Eastern Enterprises}) nor made use of the congressionally allowable option of unassigned benefits.\textsuperscript{198}

The lesson for federal agencies dealing with plurality decisions in this category is thus stark. Such agencies must cope as best they can—and most likely conservatively—with the constitutional concerns of the plurality Justices.

\textbf{B. Decisions Invoking Statutory Interpretation for Purposes Beyond the Direct Regulatory Application of the Statute}

Federal courts often interpret federal statutes for purposes other than resolving issues regarding direct federal regulation pursuant to the statute, which is the realm entrusted to the implementing federal agency. One of the most prominent of these extra-regulatory (at least from the perspective of the federal agency implementing the statute) statutory construction issues is federal preemption.

Federal preemption is based in the U.S. Constitution’s 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.”\textsuperscript{199} Unlike many provisions of the Constitution, the Supremacy Clause is not a basis for declaring a federal

\textsuperscript{197} \textit{Blake v. Carbone}, 489 F.3d at 100.
\textsuperscript{199} U.S. CONST., art. VI, cl.2.
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 and whether the federal statute displaces state tort liability. 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 to federally regulated entities. Deference to the implementing federal agency is not the relevant issue, 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. The Court split three ways with complex results, leaving the preemptive effect of the cigarette statutes and, more importantly, the process of preemption analysis in considerable doubt.

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202 Of course, if the implementing federal agency attempts to preempt state law through its own regulations, the interpretive issues and deference issues become intermixed, raising provocative questions regarding federal agency authority that have not yet been fully resolved but which do not differ significantly from questions regarding an agency’s authority to regulate that have arisen in other contexts where federal agencies have claimed deference. For recent scholarship exploring the issue of agency preemption, see generally Victor E. Schwartz, Preemption of State Common Law by Federal Agency Action: Striking the Appropriate Balance that Protects Public Safety, 84 TULANE L. REV. 1203 (May 2010); William Funk, Judicial Deference and Regulatory Preemption by Federal Agencies, 84 TULANE L. REV. 1233 (May 2010); Ashutosh Bhagwat, Wyeth v. Levine and Agency Preemption: More Muddle, or Creeping to Clarity?, 45 TULSA L. REV. 197 (Winter 2009).

203 See Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735, 743-44 (1996) (emphasizing that the question of whether a federal statute preempts state law and whether an agency’s interpretation of the same statute should be deferred to are two separate questions).


205 Id. at 508.
A majority of Justices concluded that the 1965 Cigarette Labeling and Advertising Act did not preempt state-law tort claims. Section 5 of that act addressed preemption and stated that:

(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.

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 pre-emption of state warning requirements and the continued vitality of state common-law damages actions.” Justice Blackmun, joined by Justice Kennedy and Justice Souter, concurred in this 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.” In contrast, Justice Scalia, joined by Justice Thomas, would have concluded that the 1965 Act preempted failure-to-warn claims because of the act’s general prohibition on “statements” relating to smoking and health.

Congress changed the relevant preemption provisions when it enacted the Public Health Cigarette Smoking Act of 1969, 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.” According to Justice Stevens’ plurality, “the plain language of the pre-emption provisions in the 1969 Act is much broader.”

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207 Cipollone, 505 U.S. at 519-20 (Stevens, J., plurality of four); id. at 534 (Blackmun, J., concurring & dissenting).
209 Cipollone, 505 U.S. at 518.
210 Id. at 534 (Blackmun, J., concurring & dissenting).
211 Id. at 544 (Scalia, J., concurring & dissenting).
212 Id. at 549-50 (Scalia, J., concurring & dissenting).
214 Cipollone, 505 U.S. at 520.
However, it analyzed the plaintiff’s tort claims claim-by-claim using what has become known as the “predicate duty approach,” concluding that: (1) the 1969 Act preempted failure-to-warn claims arguing that cigarette manufacturers should have provided additional warnings, because the Act created the only relevant duty regarding warnings; \(^{215}\) (2) the 1969 Act did not preempt failure-to-warn claims based solely on the companies’ testing or research practices because the Act created no duties regarding these activities \(^{216}\); (3) the 1969 Act did not preempt breach-of-express-warranty claims because it did not govern duties regarding promises in advertising \(^{217}\); (4) the 1969 Act did not preempt fraudulent misrepresentation claims for similar reasons \(^{218}\); and (5) the 1969 Act did not preempt conspiracy claims. \(^{219}\) 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.” \(^{220}\) In contrast, Justices Scalia and Thomas would have found that the 1969 Act preempted all of the common-law claims. \(^{221}\)

To a certain extent, therefore, *Cipollone* did provide states and would-be 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 not 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 U.S. Court of Appeals for the Fifth Circuit analogized such claims to “warning neutralization” claims and held that the 1969 Act, as construed in *Cipollone*, preempted them. \(^{222}\) In contrast, the U.S. Court of Appeals for the First Circuit analogized the claims to fraud claims and held that, under *Cipollone*, they were not preempted. \(^{223}\) Granting *certiorari* to review the First Circuit’s decision, a 5-4 Supreme Court adopted the *Cipollone* plurality’s “predicate duty approach” and


\(^{216}\) *Id.* at 524.

\(^{217}\) *Id.* at 524-25.

\(^{218}\) *Id.* at 525-27.

\(^{219}\) *Id.* at 527-29.

\(^{220}\) *Id.* at 530.

\(^{221}\) *Id.* at 534 (Blackmun, J., concurring & dissenting).

\(^{222}\) *Id.* at 544, 551-55 (Scalia, J., concurring & dissenting).

\(^{223}\) *Brown* v. *Brown & Williamson Tobacco Corp.*, 479 F.3d 383, 392-93 (5th Cir. 2007).

\(^{224}\) Good v. *Altria Gp.*, 501 F.3d 29, 37, 40-43 (1st Cir. 2007).
agreed with the First Circuit that the 1969 Act did not preempt the claim—despite the dissent’s objection that a majority of Justices in *Cipollone* had rejected that approach.\footnote{225}{Altria Gp., Inc. v. Good, 555 U.S. 70, 129 S Ct. 538, 545-46 (2008).} 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,\footnote{226}{Id. at 552 (Thomas, J., dissenting).} demonstrating that the deference conundrum is unlikely to arise for this category of Supreme Court opinions. Even if it did, moreover, 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,\footnote{227}{Food & Drug Administration, 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), overturned for lack of authority in Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 125-26, 142-43, 159-60 (2000).} even though the Court will accord “some deference”—recently identified as *Skidmore* deference—to an agency’s view of whether state law conflicts with an agency regulation having the force of law.\footnote{228}{See, e.g., Wyeth v. Levine, --- U.S. ---, 129 S. Ct. 1187, 1201 (2009) (noting that “agencies have no special authority to pronounce on preemption 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 (South Dakota), N.A., 517 U.S. 735, 744 (1996) (“We may assume (without deciding) that the ['question of whether a statute is pre-emptive'] must always be decided de novo by the courts.”).}  

C. Decisions Regarding the Validity of Non-Interpretive 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.\footnote{229}{Wyeth v. Levine, 129 S. Ct. at 1201; Geier v. American Honda Motor Co., Inc., 529 U.S. 861, 883 (2000).} 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.

For example, in *Federal Communications Commission v. Fox Television Stations*,\footnote{230}{5 U.S.C. § 706 (2010).} the Supreme Court splintered badly regarding the legitimacy of the Federal Communications Commission’s (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 of 1934. 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 non-literal (or explicative) use of the prohibited words could also be actionable. The FCC cited Fox Television for broadcasting Cher’s use of forbidden expletives during the 2002 Billboard Music Awards and for broadcasting Nicole Ritchie’s use of forbidden expletives during the 2003 Billboard Music Awards.

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 its 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. 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 regarding how to implement a statute.

The Court first held, 5-4, that the fact that the FCC changed 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. Justice Scalia, joined by Chief Justice Roberts, Justice Thomas, Justice Alito, and, nominally at least, Justice Kennedy, thus purported to apply the standard “arbitrary and capricious” analysis. Nevertheless, in the context of an agency’s changed policy, they also emphasized that:

“[t]o 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.”

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.

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233 FCC v. Fox Television, 129 S. Ct. at 1807.
234 Id. at 1808.
235 Id. at 1810, 1811-12.
236 Id. at 1810-11.
237 Id. at 1811.
238 Id. at 1812-13.
Justice Kennedy complicated what could have been a clear majority approach, however. Although concurring in the judgment and nominally concurring in Justice Scalia’s opinion, he also wrote separately to establish a standard for arbitrary and capricious review for changed policies that differed noticeably from Justice Scalia’s. In essence, Justice Kennedy eschewed a one-size-fits-all analysis for a more nuanced approach to “arbitrary and capricious” review that would depend on the agency’s exact circumstances and motivations for changing policy.

In dissent, Justice Breyer, joined by Justices Stevens, Souter, and Ginsburg, insisted that agencies changing policy 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. Because the FCC did not sufficiently explain the reasons for its change in policy, the dissenters would have declared its orders against Fox Television arbitrary and capricious.

FCC v. 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, and 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. The same would be true in the aftermath of Supreme Court plurality decisions regarding whether the agency had correctly followed the APA’s procedures or whether the agency’s decision was

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239 Id. at 1822 (Kennedy, J., concurring).
240 According to Justice Kennedy, “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. at 1822-23 (Kennedy, J., concurring).
241 Id. at 1829, 1831-32 (Breyer, J., dissenting).
242 Id. at 1829 (Breyer, J., dissenting).
243 See Garcia v. Shanahan, 615 F. Supp. 2d 175, 185-86 (S.D.N.Y. 2009) (holding explicitly that “because the instant case is one calling only for statutory interpretation, . . . the Court does not find that the Fox Television decision to affect the outcome in this case.”).
244 See, e.g., 5 U.S.C. § 553 (setting out procedures for informal rulemaking); §§ 554, 556, 557 (setting out procedures for formal rulemaking and formal adjudication); §
supported by substantial evidence. 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.

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, but has done so in the absence of an existing agency regulation, and then the agency wants to interpret the statute differently than the court did. Thus, for example, the question in Brand X itself was whether the Ninth Circuit had correctly followed its own precedent in interpreting the Communications Act, or whether it should have accorded Chevron deference to the Federal Communications Commission’s interpretation. 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 decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.”

Brand X left at least two questions regarding its scope. First, because the case dealt with Chevron deference and with later agency interpretations that were clearly “otherwise entitled to Chevron deference,” 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, 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

706(a)(1) (allowing the federal courts to set aside agency action when the agency did not follow the correct procedures) (2010).


Brand X, 545 U.S. at 979-83.

Id. at 982.

See, e.g., White & Chase 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.”); 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);
construction of the statute, even if the agency’s reading differs from what the court believes is the best statutory interpretation.”

In contrast, lesser standards of deference do not demand that a court give up its prerogative 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.”

Second, as noted in Part I, whether the Brand X rule encompasses the Supreme Court’s own interpretations of statutes is ambiguous. There is nothing in the majority’s rule that would exclude Supreme Court decision, and scholarship has argued that Supreme Court interpretations should be included within its scope. 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. Scholars, too, have displayed some queasiness regarding the separation-of-powers implications of applying the Brand X rule to the Supreme Court’s interpretations of statutes, and the Supreme Court has failed to apply Brand X to its own decisions, although usually not with explanation.

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. First, to the extent that the Supreme Court’s constitutional role is “to say what the law is,” plurality decisions represent an abdication of that role. Consider the most extreme version of this abdication, the equally divided Court that issues no opinion. For example, in Borden Ranch Partnership v. U.S. Army Corps of Engineers, the Ninth Circuit

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249 Id. at 980 (citing Chevron, 467 U.S. at 843-44 & n.11).
252 Brand X, 545 U.S. at 1003 (Stevens, J., concurring).
254 Robin Kundis Craig, Administrative Law in the Roberts Court: The First Four Years, 62 ADMIN. L. REV. 69, 172-86 (Winter 2010).
255 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).
interpreted the Clean Water Act’s prohibition of “discharges 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 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.”

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. 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: “The judgment is affirmed by an equally divided Court. Justice KENNEDY took no part in the consideration or decision of this case.”

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. Indeed, the Court itself has noted that a 4-4 “judgment amounts at best to nothing more than an unexplained afformanee by an equally divided court—a judgment not entitled to precedential weight not matter what reasoning may have supported it.” 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 concluded that the CWA does not extend to deep ripping, Brand X should apply to that regulation and it should receive Chevron deference, despite the Supreme Court’s nominal affirmance of the lower court’s view.

Second, even in Supreme Court plurality decisions with substantial opinions, it cannot always be said that the Court has actually 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.” In contrast, interpretations 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

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258 Id. at 814-15.
260 See Durrant v. Essex Co., 74 U.S. 107, 113 (1868) (noting the default rule but clarifying that the actual decision is binding on the parties involved); The Independence, 61 U.S. 255, 260 (1857) (noting the default rule); see also 28 U.S.C. § 2109 (2010) (applying the default rule to cases where the Supreme Court does not have a quorum).
262 Brand X, 545 U.S. at 1003 (Stevens, J., concurring).
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.”

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). 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.”

Interestingly, after the case was filed, the Secretary of HHS promulgated a regulation that required states to treat lump-sum awards as income. 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, engaging instead in straightforward statutory interpretation to determine whether the State of Virginia’s regulation regarding the treatment of “income” was legitimate. 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 “Respondents have not demonstrated that Virginia’s policy of treating personal injury awards as income is inconsistent with the AFDC statute or HHS’ regulations.”

Justice Powell dissented, joined by Justices Brennan, Marshall, and O’Connor. Looking at federal treatment of personal injury awards in a variety of contexts, 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.”

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263 Davis & Reynolds, supra note 149, at 61.
264 Id. at 62.
269 Id.
270 Id. at 383.
271 Id. at 391-92 (Powell, J., dissenting).
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.

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. 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—namely, that states cannot consider personal injury awards to be “income” for purposes of the AFDC program.

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 if it had promulgated a regulation embodying the dissent’s interpretation and hence that the plurality opinion posed no barriers to that alternative 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

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272 _Id._ at 383-84 (Blackmun, J., concurring).
‘income’”\textsuperscript{274}—but it also acknowledged that federal law had treated personal injury awards differently, as well.\textsuperscript{275} 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”\textsuperscript{276}—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 but 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.”\textsuperscript{277} Finally, upholding Virginia’s policy accorded the state “solicitude” in a federalist system\textsuperscript{278}—but that consideration has little bearing on whether the plurality was definitively construing the federal statutes.

Thus, in a\textit{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 \textit{Chevron} deference for any post-plurality agency interpretation that would otherwise be entitled to \textit{Chevron} deference. Even if Justice Stevens’ caveat is considered part of the \textit{Brand X} rule, Supreme Court plurality decisions in this category do not remove a statute’s ambiguity—\textit{i.e.}, do not change the conclusion at \textit{Chevron} Step 1—because they do not offer a definitive interpretation of the statute. Moreover, because plurality decisions in this category do not definitively invalidate any existing interpretation, they also provide little guidance regarding agency reasonableness at \textit{Chevron} Step 2, leaving the agency basically much latitude to defend its own post-plurality interpretation. 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 \textit{Brand X} rule outside the realm of \textit{Chevron} deference, agencies are well advised to issue post-plurality interpretations through procedures that would entitle the interpretation to \textit{Chevron} deference.

\textbf{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 \textit{Chevron’s} Step One. As such, this category of plurality opinions raises all of the \textit{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

\textsuperscript{274}\textit{Lukhard}, 481 U.S. at 376.
\textsuperscript{275}\textit{Id.} at 376-77.
\textsuperscript{276}\textit{Id.} at 381.
\textsuperscript{277}\textit{Id.} at 382-83.
\textsuperscript{278}\textit{Id.} at 383.
agency interpretation, their plurality opinions are more likely to constrain the agency’s post-decision re-interpretation of the statute than when the Court engages in unmediated statutory interpretation.

The CWA’s application to “navigable waters” has long raised complex issues of statutory interpretation, resulting in June 2006 in the Supreme Court’s plurality decision in *Rapanos v. United States.* 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 Act, which generally requires that a discharger get a permit. The Act further defines “discharge of a pollutant” and “discharge of pollutants” to be “any addition of any pollutant to navigable waters from any point source,” with “navigable waters” being “the waters of the United States, including the territorial seas.”

The two agencies that implement the Clean Water Act, the EPA and the Army Corps, issued identical notice-and-comment regulations broadly defining “waters of the United States.” These regulations have been in place, virtually unchanged, since 1982.

The Supreme Court has addressed the validity of these regulations three times, the last of which was *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.” 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

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282 33 U.S.C. § 1362(7) (2000). The Act 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).
controlled at the source.”286 The Court accorded the regulation *Chevron* deference287 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.”288

It was slightly more than 15 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. U.S. Army Corps of Engineers*.289 This case, better known as *SWANCC*, was a 5-4 decision on the validity of the Army Corps’ so-called “Migratory Bird Rule.” In 1986, in an attempt to clarify its definition of “waters of the United States,” the Corps published a non-regulatory explanation of its regulations. Under this explanation, the Corps noted that it would assert CWA jurisdiction over intrastate waters “[w]hich are or would be used as habitat by birds protected by Migratory Bird Treaties”; “[w]hich are or would be used as habitat by other migratory birds which cross state lines”; “[w]hich are or would be used as habitat for endangered species”; or are “[u]sed to irrigate crops sold in interstate commerce.”290 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 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.291 When the Corps then refused to issue a permit, Solid Waste Agency challenged that denial, arguing that the filling ponds were outside the Army Corps’ CWA jurisdiction. A majority of the Supreme Court agreed, concluding most explicitly “that the ‘Migratory Bird Rule’ is not fairly supported by the Clean Water Act.”292 However, the *SWANCC* Court also indicated interpretive limitations beyond the Migratory Bird Rule itself. According to the majority, “[i]t was the significant nexus between the wetlands and ‘navigable waters’ that informed our reading of the CWA in *Riverside Bayview Homes*.”293 As a result, the majority strongly suggested that the Act’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

287 Id. at 131.
288 Id. at 133.
291 *SWANCC*, 531 U.S. at 164-65.
292 *SWANCC*, 531 U.S. at 167.
293 Id. at 167.
that were or had been navigable in fact or which could reasonably be so made.”

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.

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?

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.’” As a result, according to the plurality, jurisdiction under the Acts exists only for “those relatively permanent, standing or continuously flowing bodies of water ‘forming geographic features’ that are described in ordinary parlance as ‘streams[,] . . . oceans, rivers, [and] lakes.’” As for wetlands, “only 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 Act.”

The plurality also emphasized that its interpretation was the “only plausible interpretation” of “waters of the United States.” Thus, the plurality suggested that it

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294 *Id.* at 172 (citing United States v. Appalachian Electric Power Co., 311 U.S. 377, 407-08 (1940)).

295 *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 Authority Trans-Hudson Corp., 513 U.S. 30, 44 (1994)).

296 *Rapanos*, 547 U.S. at 729.

297 *Id.* at 732-33 (quoting WEBSTER’S NEW INTERNATIONAL DICTIONARY 2882 (2d ed. 1954)).

298 *Id.* at 739 (quoting WEBSTER’S NEW INTERNATIONAL DICTIONARY 2882 (2d ed. 1954)).

299 *Id.* at 742.

300 *Id.* at 739.
was consciously foreclosing the application of Brand X to future agency interpretations.\(^{301}\)

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.”\(^{302}\) However, “[r]ather 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.”\(^{303}\) 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 to Marks and implying that the agencies were no longer directly relevant to the interpretation of “waters of the United States.”\(^{304}\) Almost all of the scholarship regarding the interpretive aftermath of Rapanos has made the same assumption—\(^{305}\)—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.”\(^{306}\) 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


\(^{303}\) Id. at 757-58 (Roberts, C.J., concurring).

\(^{304}\) Id. at 758 (Roberts, C.J., concurring).

\(^{305}\) See, e.g., Berkelow, supra note 15, 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 301, 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)), 115 (focusing again 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 Houston L. Rev. 1491, 1528, 1529 (Winter 2008) (arguing that agency regulations would be preferable to agency guidance but also noting that the 2007 Rapanos Guidance “closely tracks the language of the Court’s opinion—as it must” (emphasis added)).

\(^{306}\) Rapanos, 547 U.S. at 759 (Kennedy, J., concurring).
not contain and are not adjacent to waters that are navigable in fact.” Reading Riverside Bayview and SWANCC together, he concluded:

that in 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. 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” 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. Nevertheless, Justice Kennedy left much potential room for future regulations. First, he emphasized that “[a]s applied to wetlands 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 Act by showing adjacency alone.” Second, “[t]hrough 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.” These “more specific regulations,” Justice Kennedy indicated, would eliminate the need for a case-by-case significant nexus analysis.

Justice Stevens, writing for the four dissenters, would have expanded CWA jurisdiction to fulfill the Act’s purposes of restoring and maintaining the integrity of the nation’s waters and explicitly would have accorded Chevron deference to the Army Corps’ (and EPA’s) regulations, in acknowledged perpetuation and extension of the

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307 Id. (Kennedy, J., concurring).
308 Id. at 767 (Kennedy, J., concurring).
309 Id. at 776 (Kennedy, J., concurring).
310 Id. at 782 (Kennedy, J., concurring).
311 Id. at 780 (Kennedy, J., concurring).
312 Id. at 780-81 (Kennedy, J., concurring).
313 Id. at 782 (Kennedy, J., concurring).
314 Id. at 788 (Stevens, J., dissenting).
Riverside Bayview analysis.\textsuperscript{315} 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.”\textsuperscript{316}

The dissenters thus would have used a different approach to interpreting “waters of the United States” than either Justice Scalia’s plurality 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 both of these cases—and in all other cases in which either the plurality’s or Justice Kennedy’s test is satisfied—on remand each of the judgments should be reinstated if either of those tests is met.”\textsuperscript{317}

Justice Breyer, one of the dissenting Justices, authored the fifth Rapanos opinion to announce that, “[i]n 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.”\textsuperscript{318} 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).”\textsuperscript{319}

Thus, the Rapanos Court split not only with regard to the proper test for figuring out what waters qualify as “waters of the United States,” but also with respect to the possibility and advisability of new agency regulations in the wake of the plurality decision. With respect to 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 to issue a new regulatory interpretation of the CWA. This category of Supreme Court plurality opinion, like the previous one, thus presents the agencies involved with the deference conundrum.

Unlike Lukhard, however, the Rapanos Court was also evaluating the validity of the agencies’ own interpretation, embodied in notice-and-comment regulations.  

\textsuperscript{315} Id. at 788 (citing Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-45 (1984)), 792 (Stevens, J., dissenting).
\textsuperscript{316} Id. at 799 (Stevens, J., dissenting).
\textsuperscript{317} Id. at 810 (Stevens, J., dissenting).
\textsuperscript{318} Id. at 811 (Breyer, J., dissenting).
\textsuperscript{319} Id. at 811-12 (Breyer, J., dissenting).
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* as well, 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.\(^{320}\) *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.

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 1, because the statute remains ambiguous, but it does help to shape the analysis at *Chevron* Step 2 by limiting the scope of a “reasonable” agency interpretation.

### TABLE 1. THE TYPOLOGY OF SUPREME COURT PLURALITY DECISIONS REGARDING AGENCY-ADMINISTERED STATUTES

<table>
<thead>
<tr>
<th>CATEGORY</th>
<th>EXAMPLE</th>
<th>AGENCY RESPONSE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Constitutional Validity: The Court issues a plurality decision while ruling on a statute’s constitutionality.</td>
<td><em>Eastern Enterprises v. Apfel</em>, 524 U.S. 498 (1998)</td>
<td>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.</td>
</tr>
<tr>
<td>Statutory Interpretation for Non-Regulatory 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.</td>
<td><em>Cipollone v. Liggett Group</em>, 505 U.S. 504 (1992)</td>
<td>The Court’s decision is largely irrelevant to the agency’s regulatory decisions and hence the deference conundrum is unlikely to arise.</td>
</tr>
<tr>
<td>Validity of a Non-Interpretive Rule or</td>
<td><em>FCC v. Fox Television Stations</em>, 129 S. Ct. 1800</td>
<td>The deference conundrum does not arise because the</td>
</tr>
</tbody>
</table>

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\(^{320}\) *See supra* Part I.C.2.
**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.

<table>
<thead>
<tr>
<th>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.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Validity of the Agency’s Interpretation: The Court issues a plurality opinion regarding whether the agency’s existing interpretation of the statute is valid.</td>
</tr>
</tbody>
</table>

| (2009) | 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. |
|---|
| Lukhard v. Reed, 481 U.S. 368 (1987) | 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. |
| Borden Ranch Partnership v. U.S. Army Corps of Engineers, 537 U.S. 99 (2002) | 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 existence of a “water of the United States” defines the existence 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, both increased the EPA’s and Army Corps’ regulatory burden and frustrated their regulatory responsibilities and left potentially regulated entities with an unclear and nationally divided rules and with a potentially time-consuming and expensive process for determined whether and how they will be regulated. So far, however, like the lower courts, the agencies have chosen to interpret Rapanos itself rather than issue new regulations incorporating a refined agency interpretation of “waters of the United States,” even though 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 useful for field staff.”

This Part explores the lower courts’ reactions to Rapanos, then discusses the EPA’s and the Army Corps’s 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.

A. Federal Courts’ Reactions to the Rapanos Decision

In Rapanos itself, as noted, Chief Justice Roberts indicated that the Marks rule would guide lower courts in applying the plurality decision, and several lower courts have followed that suggestion. For example, in two of the earliest U.S. 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

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321 See discussion infra, Part IV.A.
322 OFFICE OF INSPECTOR GENERAL, U.S. EPA, CONGRESSIONALLY REQUESTED REPORT ON COMMENTS RELATED TO EFFECTS OF JURISDICTIONAL UNCERTAINTY ON CLEAN WATER ACT IMPLEMENTATION (Report No. 09-N-0149) 1 (April 30, 2009) [hereinafter 2009 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).
324 2009 EPA REPORT, supra note 322, at 2.
325 Rapanos, 547 U.S. at 758; see also Berkelow, supra note 15, at 319 (noting the Chief Justice’s suggestion that the lower courts apply Marks).
in the judgment and, therefore, provides the controlling rule of law.”326 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 . . . .”327 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.”328 The U.S. Court of Appeals for the Eleventh Circuit later agreed.329

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.330 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.331 The U.S. Court of Appeals for the First Circuit soon followed suit, noting that Marks “has proven troublesome in application for the Supreme Court itself and for the lower courts.”332 In particular, applying any “narrowest grounds” analysis to Rapanos was unhelpful, because “[t]he cases in which Justice Kennedy would limit federal jurisdiction are not a subset of the cases in which the plurality would find jurisdiction.”333 As a result, the First Circuit adopted Justice Stevens’s approach, noting that, in effect, at least five Justices had voted for both interpretations.334 The U.S. Courts of Appeals for the Fifth Circuit,335 Sixth

326 California 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)). 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.”).
328 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 23, at 122-23, 125. In contrast, “[t]he Marks doctrine is essentially inapplicable to Rapanos under the conventional [nested opinions] view.” Id. at 124.
329 United States v. Robison, 505 F.3d 1208, 1219-22 (11th Cir. 2007).
331 Id.
332 United States v. Johnson, 467 F.3d 56, 62 (1st Cir. 2006) (referring to Marks. 430 U.S. at 193).
333 Id. at 64.
334 Id. at 64-65, 66.
335 United States v. Lucas, 516 F.3d 316, 325-27 (5th Cir. 2008).
AGENCIES INTERPRETING COURTS INTERPRETING STATUTES

Circuit,\textsuperscript{336} and Eighth Circuit\textsuperscript{337} have similarly followed or explicitly adopted this “either
interpretation” approach.\textsuperscript{338}

A very few lower courts essentially elected to ignore \textit{Rapanos} entirely and revert to pre-\textit{Rapanos} circuit precedent on “waters of the United States.” For example, soon
after \textit{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?”\textsuperscript{339} As a result, “[b]ecause Justice Kennedy failed to
elaborate on the ‘significant nexus’ required, this Court will look to the prior reasoning in
this circuit.”\textsuperscript{340}

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 \textit{Rapanos} plurality, the CWA is being
applied differently in different parts of the country,\textsuperscript{341} undermining a basic rule of law
premise that federal law should apply relatively uniformly across the United States.\textsuperscript{342}
Moreover, lower court judges’ frustration with the post-\textit{Rapanos} quagmire is at times
crude.\textsuperscript{343}

\textsuperscript{336} United States v. Cundiff, 555 F.3d 200, 206-10 (6th Cir. 2009) (explicitly ducking
what the court called the “\textit{Marks}-meets-\textit{Rapanos}” problem because the water at issue met
both the plurality’s and Justice Kennedy’s test).

\textsuperscript{337} United States v. Bailey, 571 F.3d 791, 798-99 (8th Cir. 2009).

\textsuperscript{338} See Berkelow, supra note 15, at 334 (noting that “the majority of courts”
that have considered the issue have followed the either/or approach), 335-38 (nevertheless
noting that the lower courts have nevertheless taken three approached to applying \textit{Marks}
to the \textit{Rapanos} opinions).

\textsuperscript{339} United States v. Chevron Pipe Line Co., 437 F. Supp. 2d 605, 613 (N.D. Tex.
2006).

\textsuperscript{340} Id.

\textsuperscript{341} See 2009 EPA REPORT, supra note 322, at 3 (emphasizing the circuit split and the
legal uncertainty that surrounds CWA jurisdictional determinations, despite the agencies’
guidance).

\textsuperscript{342} E.g., Easterbrook, supra note 12, at 7; Buzbee, supra note 12, at 602.

\textsuperscript{343} See generally, e.g., 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
\textit{Rapanos} and the Eleventh Circuit’s decision to define Justice Kennedy’s “significance
nexus” test as controlling under \textit{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
Congress, of course, could have resolved the meaning of “navigable waters”/“waters of the United States” through statutory amendment, but despite numerous efforts, it has not (yet) done so. Perhaps more remarkably, over this five-years-and-counting period of uncertainty, the EPA and the Army Corps have also done little to resolve the confusion that Rapanos left, 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), issue joint guidance in response to Rapanos. However, the guidance does not re-interpret the CWA; instead, it attempts to interpret and apply the Rapanos plurality opinions. 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 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 class source of federal water jurisdiction); “[w]etlands adjacent to traditional navigable waters” (the Riverside Bayview Homes category); “[n]on-navigable tributaries of traditional navigable waters that are relatively permanent which the tributaries typically flow year-round or have continuous flow at least seasonally” (i.e., tributaries that meet the plurality’s test

the law applicable to this case has developed that it would be inappropriate for me to try it again.”).


345 U.S EPA & U.S. Army Corps of Engineers, Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in Rapanos v. United States & Carabell v. United States (June 2007) [hereinafter Rapanos Guidance].

346 Accord, Berkelow, supra note 15, at 334 (“Significantly, the regulators agree with the majority of courts considering the issue thus far: the recently release 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.”), 346 (“Consequently, the agencies’ approach to guidance for the regulated is a hybrid of the plurality’s and Justice Kennedy’s tests.”).
from *Rapanos*; and “[w]etlands that directly abut such tributaries” (i.e., wetlands that meet the plurality’s test from *Rapanos*).  

For all other waters, the agencies use Justice Kennedy’s “significant nexus” test. 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.” According to the guidance, the agencies determine whether a significant nexus exists by “assess[ing] the flow characteristics and functions of the tributary itself, together with the functions performed by any wetlands adjacent to that tributary, to determine whether collectively they have a significant nexus with traditional navigable waters.” Thus, pursuant to the significant nexus test, the agencies examine both hydrological (physical) and ecological factors. Hydrological 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.” Ecological 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 traditional navigable waters.” The agencies also emphasize in their *Rapanos* Guidance that the “significant nexus” test requires documentation of the evidence of the connections between tributaries and wetlands and traditional navigable waters.

For now, therefore, the Army Corps and EPA declined to exercise their own delegated interpretive authority in responding to *Rapanos*. Moreover, the agencies appear to believe that this is their only option, because the EPA is preparing in early 2011 to release a second round of post-*Rapanos* guidance.

C. **The Rapanos Guidance in the Federal Courts**

In issuing their 2007 *Rapanos* Guidance, the EPA and the Army Corps elected to act as agencies interpreting the Supreme Court, rather than as agencies interpreting the CWA. Under this Article’s argument, therefore, and even ignoring the form of the

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347 *Rapanos* Guidance, *supra* note 345, at 1, 4-6.
348 *Id.* at 1.
349 *Id.* at 1, 7.
350 *Id.* at 7.
351 *Id.* at 7.
352 *Id.*
353 *Id.*
354 Kray, *supra* note 344.
Guidance (which was not issued through notice-and-comment rulemaking), the agencies have so far foregone any claims to *Chevron* deference for their implementation of “waters of the United States.”

Nevertheless, the Guidance has received little discussion from the lower federal courts. What opinions exist emphasize its tentative and nonbinding nature, underscoring the fact that *Chevron* deference is inappropriate regardless of *Brand X*. Only one federal court so far, the U.S. District Court for the Eastern District of Virginia, has significantly wrestled with the issue of deference to the Army Corps’ determinations of CWA jurisdiction under the Guidance, and its opinion demonstrates the tangled deference issues that courts now face in the context of CWA jurisdictional determinations.

In *Precon Development Corp., Inc. v. U.S. Army Corps of Engineers*, the Eastern District of Virginia faced a challenge to the Corps’ determination that CWA jurisdiction existed over a particular waterbody after the Corps used the *Rapanos* Guidance to determine that jurisdiction existed. The court spent two pages discussing the issue of what deference was appropriate and the potential applicability of the APA’s “arbitrary and capricious” standard, the APA’s “substantial evidence” standard, and the *Chevron* framework. It concluded that *Chevron* provided the correct framework 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. 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 determination was entitled to *Chevron* deference. Indeed, the United States conceded that the Guidance was not entitled to *Chevron* deference. As a result, the Army Corps’ determination through the Guidance would be judged pursuant to *Skidmore* deference.

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356 Precon Development Corp., Inc. v. U.S. Army Corps of Engineers, 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.”).

357 658 F. Supp. 2d at 756.

358 *Id.* at 759-61.

359 *Id.* at 761, 762.

360 *Id.* at 762-63.

361 *Id.* at 763.

362 *Id.*
Although the district court did uphold that jurisdictional determination under *Skidmore*, 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 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 co-exist 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.

### D. Resolving the Conundrum: A Better Response to *Rapanos*

At the beginning of 2011, therefore, none of the normative goals of a federal regulatory scheme (or the rule of law more generally) are actually being met. CWA “waters of the United States” are subject to different legal tests in different circuits, destroying the goal of national uniformity. As a result, regulated entities are subject to differing and unclear rules for when they are subject to the CWA, undermining 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, 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” and 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 into a trap of being agencies interpreting the *Rapanos* Court; instead, they can issue new notice-and-comment regulations and demand *Chevron* deference for the result.

Of course, as lower courts have pointed out in other *Brand X* contexts, the two CWA agencies could not legitimately re-promulgate 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

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363 *Id.* at 763-65.
365 *See supra* Part I.C.2.
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 hydrological connection to other waters. SWANCC and Rapanos also both underscore a concern with federalism issues and the Commerce Clause 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.”

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—in favor of a definition of “waters of the United States” that is both broader than the plurality’s interpretation and simpler 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, and so forth, based on expected effects on downstream navigable waters and commerce. 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) re-establishing 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

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367 Liebesman, Petersen, & Galano, supra note 323, at 11,253 (detailing how “[t]he significant nexus concept is fraught with unknowns”); 2009 EPA REPORT, supra note 322, at 1-3 (detailing the agency’s difficulties after Rapanos); Gould, supra note 364, at 440-49 (detailing at length how difficult permitting has become under the “significant nexus” test).
uniformity in the interpretation of the national laws . . . “\(^{368}\) When the 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 re-establish 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 a normative duty to resolve the dissensus that a plurality decision embodies. As Elizabeth Foote has aptly recognized, the core function of a federal agency is public administration of a federal program,\(^{369}\) 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.\(^{370}\)

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 operations 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 nationality uniformity and the rule of law in a post-plurality regulatory world.

\(^{368}\) ALEXANDER HAMILTON, THE FEDERALIST No. 80, at 401 (Ian Shapiro ed. 2009).
\(^{369}\) Foote, supra note 165, at 697.
\(^{370}\) Id. at 675.