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Adapting to Administrative Law's *Erie* Doctrine

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Articles

ADAPTING TO ADMINISTRATIVE LAW'S *ERIE* DOCTRINE

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INTRODUCTION

Although the Supreme Court has declared that "[i]t is emphatically the province and duty of the judicial department to say what the law is,"[1] the Court's decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council*[2] effected a dramatic reallocation in authority between the branches,[3] shifting significant power from the judicial branch and handing it over to administrative agencies.[4] The Court's recent decision in *National Cable & Telecommunications Association v. Brand X Internet Services* marks yet another striking continuation in that shift.[5] In *Brand X*, the Court made clear that when a court independently construes an ambiguous provision in an agency-administered statute, the judicial construction is "*not* authoritative."[6] Rather, the agency remains free to subsequently adopt a contrary *Chevron*-eligible interpretation and to thereby trump a court's independent declaration of the best reading of the statute.[7] The new rule embraced in *Brand X*, accordingly, tells courts that even after they go through the exercise of independently declaring "what the law is,"[8] a *Chevron*-eligible agency will remain free to override the judiciary's own independent

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

[2] 467 U.S. 837 (1984).

[3] *See* Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 189 (2006) (arguing that *Chevron* went "so far as to create a kind of counter-*Marbury*"); *see also* Richard W. Murphy, *A "New" Counter-*Marbury: *Reconciling* Skidmore *Deference and Agency Interpretive Freedom*, 56 ADMIN. L REV. 1, 37 (2004) (noting the "tension between the *Marbury* norm that [courts] control legal meaning and the *Chevron* norm that agencies control policymaking, which in turn, sometimes controls legal meaning").

[4] Voluminous scholarly commentary underscores the significance of *Chevron*. *See, e.g.*, David J. Barron & Elena Kagan, Chevron*'s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201 (2002); Elizabeth Garrett, *Legislating* Chevron, 101 MICH. L. REV. 2637 (2003); Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking under* Chevron, 6 ADMIN. L.J. AM. U. 187 (1992); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511; Mark Seidenfeld, *A Syncopated* Chevron: *Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83 (1994); Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071 (1990).

[5] 545 U.S. 967 (2005).

[6] *Id.* at 982–84 (emphasis added).

[7] Only some agencies will benefit from *Brand X*'s new rule because only some agencies are eligible for *Chevron* deference. *See generally* Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 848–49 & nn.83–84 (2001) (listing the Equal Employment Opportunity Commission as an example of an agency that consistently has been denied *Chevron* deference). In addition, some statutes, such as the Administrative Procedure Act and the Freedom of Information Act, do not fall within *Chevron*'s reach because they are not administered by a single agency but rather "apply to all or virtually all administrative agencies." *Id.* at 893.

[8] Marbury v. Madison, 5 U.S. 137, 177 (1803).

declaration and to adopt a contrary construction so long as the judicial construction did not rest on the statute's clear text.[9]

Given that the Court just recently handed down *Brand X*, the full implications of the decision have yet to unfold.[10] Courts and commentators alike, however, already have begun to recognize that the case has the makings of a watershed decision.[11] Consider, for example, how the Court's new rule set forth in *Brand X* might play out in the following scenario. A suit between two private parties turns on the meaning of an ambiguous term found in a portion of the Communications Act: the term "at the same location."[12] The Federal Communications Commission ("FCC"), which is not a party to the case, has yet to interpret the meaning of this term, so the district court goes ahead and declares its own independent view of the best reading of the statute. After the Court of Appeals affirms the district court's construction, the FCC concludes that it disagrees with the judicial interpretation. Thanks to the new rule set forth in *Brand X*, the FCC need not adhere to the judicial construction in the future. Rather, the FCC—seizing on *Brand X*—may conduct a rulemaking proceeding and adopt a contrary construction, thereby erasing the prior judicial declaration of the best reading of the statute.[13]

Justice Scalia—unhappy with the Court's new rule—wrote a biting dissent in *Brand X* in which he attacked the majority for ignoring prior precedent and for creating a "breathtaking" novelty: "judicial decisions subject to reversal by Executive officers."[14] Justice Scalia made clear that he would not have objected to the Court's new rule *if* the rule were confined to situations where an agency sought to erase a judicial decision based on *Chevron* deference.[15] Given that *Chevron* operates under the assumption

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[9] *Brand X*, 545 U.S. at 982–84. Where Congress has chosen *not* to delegate lawmaking powers to an agency and the agency could *not* authoritatively interpret ambiguity in a statute pursuant to *Chevron*, the judicial role in the interpretive process remains unaffected by *Brand X*. In those situations, because Congress has chosen not to delegate legislative power to the relevant agency, the appropriate inference is that Congress would want the courts to interpret the statute "as faithful agents of Congress" when adjudicating matters implicating statutory ambiguities. Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2173 (2004).

[10] Administrative agencies are just beginning to recognize the import of *Brand X* and to rely on the decision to promulgate regulations that run contrary to statutory interpretations issued by the courts. *See, e.g.*, Proposed Rules, Department of Health and Human Services, Medicare Program; Competitive Acquisition for Certain Durable Medical Equipment, Prosthetics, Orthotics and Supplies, 71 Fed. Reg. 25,654, 25,660 (May 1, 2006) (relying on *Brand X* in support of proposed rule that would run counter to the decisions of three district courts).

[11] *See, e.g.*, AARP v. EEOC, 390 F. Supp. 2d 437, 442 (E.D. Pa. 2005) (noting that *Brand X* "dramatically altered the respective roles of courts and agencies under *Chevron*").

[12] 47 U.S.C. § 153(30) (2000); *see also In re* StarNet, Inc., 355 F.3d 634, 639 (7th Cir. 2004) (noting ambiguity in the term "location").

[13] *See Brand X*, 545 U.S. at 1015–17 (Scalia, J., dissenting).

[14] *Id.* at 1016–17.

[15] *Id.* at 1017–18, n.12.

that ambiguous terms can bear multiple meanings, a court applying *Chevron* does not purport to give statutory ambiguity its own independent judicial construction. Instead, the court merely accepts the agency's construction as *one* reasonable reading—leaving open the possibility that the agency might subsequently adopt a different construction.[16] Justice Scalia, however, correctly noted that the Court's new rule does not merely allow an agency to erase judicial precedents that rest on *Chevron* deference.[17] Rather, *Brand X* goes much further: it allows an agency to override even independent judicial interpretations reached in the absence of *Chevron* deference. It is in this respect that Justice Scalia decried the Court's new rule as a bizarre and likely unconstitutional transfer of power from courts to agencies.[18]

Although Justice Scalia's dissent highlights the magnitude of the Court's decision, none of the other justices joined Justice Scalia in rejecting *Brand X*'s new rule.[19] This Article, accordingly, accepts *Brand X* as a reality and proceeds to focus on how the courts might adapt to their newly reduced role in the interpretive process. Specifically, this Article focuses on one prominent question raised by the Court's decision: now that federal courts know that their independent constructions of regulatory statutes may amount to nothing more than an "interim" or "provisional" construction that the relevant agency can cast aside,[20] should the courts seek to avoid issuing

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[16] *Id.* (noting that a judicial decision deferring to an agency's position under *Chevron* "does not even 'purport to give the statute a judicial interpretation'"); *see also* Rebecca Hanner White, *The Stare Decisis "Exception" to the* Chevron *Deference Rule*, 44 FLA. L. REV. 723, 726 (1992) ("If the Court's prior opinion upheld the agency's interpretation as one reasonable reading of the statute, but not the only one possible, and the agency thereafter adopts a different interpretation, the new reading is entitled to deference under *Chevron*, free from the constraints of stare decisis."); Merrill & Hickman, *supra* note 7, at 916 (arguing that if a court upholds an agency interpretation under *Chevron* as a reasonable statutory construction, the court's acceptance of the agency's interpretation does not "foreclose the possibility that a different agency interpretation would also be reasonable").

[17] *Brand X*, 545 U.S. at 1017–18, n.12 (Scalia, J., dissenting).

[18] *Id.* at 1017.

[19] Justice Scalia is the only Justice who took the view that an agency should *not* be able to trump *any* judicial interpretations. Two other Justices (Souter and Ginsburg) did not express an opinion on the *stare decisis* issue; they joined only the portion of Justice Scalia's dissent that argued that the FCC's interpretation was implausible. *Id.* at 1005. In contrast, one Justice (Stevens) took the view that agencies should be able to trump lower court interpretations but not necessarily Supreme Court interpretations. *Id.* at 1008 (Stevens, J., concurring). The remaining five members of the *Brand X* Court—Justices Thomas, Kennedy, O'Connor, Rehnquist and Breyer—all seem to support applying the Court's new rule to *all* judicial interpretations, including Supreme Court precedent.

[20] In using the term "provisional," I borrow from Kenneth A. Bamberger, who argued prior to *Brand X* that "a court's choice of one reasonable construction of regulatory statutes" should be viewed as merely "provisional"—leaving the relevant agency free to adopt a contrary construction. Kenneth A. Bamberger, *Provisional Precedent: Protecting Flexibility in Administrative Policymaking*, 77 N.Y.U. L. REV. 1272, 1307–11 (2002). Although the Supreme Court did not cite Bamberger's article in *Brand X*, the Court essentially adopted Bamberger's framework for "provisional" precedent in the administrative realm.

their own independent judicial interpretations in the absence of the relevant agency's views in the first place?

Finding an answer to this question gains significance when one considers that Congress often chooses to give *both* federal courts and agencies roles in interpreting the very same statutory provisions. Many regulatory statutes—ranging from federal telecommunications laws to securities laws—empower an agency to set policy and to resolve legal questions in the context of agency enforcement and rulemaking efforts, but also simultaneously empower the courts to resolve legal issues while adjudicating private rights of action brought pursuant to agency-administered statutes.[21] Because the relevant agency is not a party when one private party pursues a private right of action in federal court against another private party, courts may not have the benefit of the relevant agency's views prior to construing ambiguity in the context of private litigation.[22] In such situations, should courts continue to blow full steam ahead and blindly issue their own independent but non-authoritative statutory constructions, or should courts in the wake of *Brand X* explore ways that they might avoid issuing independent constructions in the absence of the authoritative agency's views?

To answer this question, this Article looks to the federalism context and draws on the federal courts' experience adapting to the Court's landmark decision in *Erie Railroad Company v. Tompkins*.[23] Much like *Brand X*, the Court's *Erie* decision, which commanded federal courts to apply state law in all cases not governed by positive federal law,[24] significantly reduced the lawmaking power of the federal courts by putting the federal courts in the position of interpreting law that they cannot definitively construe. Although *Erie* seemed simple enough to adhere to when state law provided a clear answer, *Erie* posed a serious dilemma when federal courts faced the task of applying ambiguous state law that they could not authoritatively

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[21] *See generally* RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 18.5 (4th ed. 2002).

[22] Consider, for example, the federal securities laws. Private securities litigation filed in federal district courts by private parties "plays an essential role in federal securities regulation." David S. Ruder, *The Development of Legal Doctrine Through Amicus Participation: The SEC Experience*, 1989 WIS. L. REV. 1167, 1168. An important portion of private securities suits raises unresolved issues of law—the resolution of which often will affect the Securities and Exchange Commission's own enforcement and rulemaking efforts under the securities laws. *Id.* The courts, accordingly, frequently face "new and difficult legal questions" in the context of securities litigation between private litigants—questions that have yet to be resolved by the Commission. Giovanni P. Prezioso, General Counsel, Sec. and Exch. Comm'n, Remarks Before the American Bar Association Section of Business Law, General Counsel Forum, (June 3, 2004), http://www.sec.gov/news/speech/spch060304gpp.htm.

[23] Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

[24] *See id.* at 78. ("Except in matters governed by the Federal Constitution or acts of Congress, the law to be applied in any case is the law of the State."). *Erie*, in other words, declared that there is no such thing as "federal general common law." *Id. See generally* Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 890 (1986) (discussing the meaning and scope of "federal common law").

construe.[25] To try to resolve this dilemma, various mechanisms, including abstention and state certification procedures, emerged to enable federal courts to seek out a state's views on an unresolved issue of law before ruling on the issue.[26] The federal courts and state courts, in other words, sought to cooperate and to interact with each other rather than simply passing like ships in the night.

That the federal courts adapted to their reduced lawmaking role in the federalism context by seeking to cooperate and interact with state courts suggests that the federal courts similarly could adapt to their newly reduced interpretive role in the administrative realm post-*Brand X*. This Article argues that courts should become increasingly willing to utilize an "interactive" interpretive approach when independently resolving statutory ambiguity that, although delegated to a *Chevron*-eligible agency, has yet to be interpreted by the agency in a format commanding *Chevron* deference.[27] Pursuant to such an approach, courts should become increasingly willing to solicit agency views before issuing independent judicial interpretations of statutory ambiguities, *and* courts should be required to give due consideration to relevant agency views even if the views do not control the courts.[28] By soliciting agency views and giving appropriate consideration to agency interpretation of statutory ambiguities, courts will minimize the frequency of interbranch confrontations and further efficiency and uniformity in the law. In addition, increased interaction between courts and agencies will enable the courts to capitalize on agency expertise and to minimize judicial policymaking.

This Article proceeds in five parts. Part I describes the two polar models the courts currently use when allocating interpretive power: *Chevron*'s "deferential" model, which hands interpretive power over to the relevant

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[25] *See* Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After* Erie, 145 U. PA. L. REV. 1459, 1461, 1466 (1997); Judith S. Kaye & Kenneth I. Weissman, *Interactive Judicial Federalism: Certified Questions in New York*, 69 FORDHAM L. REV. 373, 376 (2000).

[26] *See infra* Part III.A.

[27] This might occur in a variety of circumstances. A court, for example, might need to reach an independent construction of a statutory ambiguity—even though Congress delegated interpretive powers to an agency—because the agency has yet to construe the ambiguous statutory terms in any form whatsoever. *See* AT&T Corp. v. City of Portland, 216 F.3d 871, 876 (9th Cir. 2000). Or a court may be forced to render an independent statutory construction because the agency has interpreted the ambiguity only in an informal format that lacks "the force of law" and thus does not bind the courts pursuant to *Chevron*. *See* S. Utah Wilderness Alliance v. Dabney, 222 F.3d 819, 829 (10th Cir. 2000).

[28] My proposal does *not* make interaction between courts and agencies mandatory but rather leaves both sides—courts and agencies—with the discretion to decide whether to engage in interaction in a given case. I view such a discretionary approach as preferable to a mandatory approach for two primary reasons. First, giving courts and agencies the power to decide within their discretion when interaction would be appropriate ensures that the benefits and costs of interaction can be weighed on a case-by-case basis. Second, *mandating* that courts seek out the views of agencies in pending cases might well meddle with the judicial process.

agency, and the "independent judgment" model,[29] which leaves statutory interpretation in the hands of the courts. Part II describes the state of the law prior to *Brand X* in terms of the relationship between these two competing models and principles of *stare decisis*. Part II then explains how *Brand X* broke away from prior Supreme Court precedent by—for the first time ever—expressly sanctioning the notion that a *Chevron*-eligible agency can overrule a court's own independent declaration of what the law means.

In light of *Brand X*'s new rule—that courts have the power to say what the law means only until an agency adopts a contrary construction—Part III calls for courts to draw on the lessons of the federalism model and argues for an "interactive" approach to statutory interpretation.[30] Part III argues that such an approach would be normatively satisfying because it would further notions of efficiency and uniformity, allow courts to draw on the comparative expertise of the relevant agency, and enable courts to minimize judicial policymaking.

Part IV proposes two concrete suggestions for how courts could move toward an interactive approach. First, drawing on an analogy to abstention and state certification procedures used in the federalism context, Part IV proposes that courts become increasingly willing to invite and consider agency views rather than blindly issuing a judicial construction of a statute that the agency has yet to construe.[31] The primary jurisdiction doctrine, which allows courts to refer a matter back to the agency for its initial determination, could serve as one potential mechanism for soliciting agency views. The ability of the lower federal courts to invite agencies to file amicus curiae briefs, however, provides an even more promising mechanism for soliciting agency views.

Second, Part IV also proposes that once courts solicit agency views by invoking the primary jurisdiction doctrine or inviting agency amicus briefs, the courts then must give due consideration to the agency's views, even if they are set forth in a non-binding format that does not command *Chevron* deference.[32] Specifically, I propose that *Skidmore v. Swift*—a recently revived 1944 Supreme Court decision—be conceptualized in a way that would require the courts to take any non-binding agency views into account

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[29] In using this term, I follow prior scholars' terminology. *See* Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 453–54 (1989); Gregg D. Polsky, *Can Treasury Overrule the Supreme Court*, 84 BOSTON U. L. REV. 185, 191–99 (2004).

[30] This Article in no way questions the continuing validity of courts engaging in independent (and non-interactive) statutory construction where statutory circumstances indicate no congressional intent to delegate legislative power to an agency and where the agency therefore lacks the ability to obtain *Chevron* deference. In those situations, because Congress has chosen not to delegate legislative power to an agency, the courts should continue to independently interpret any ambiguity in the statutes as faithful agents of Congress. *See supra* note 9 and accompanying text.

[31] *See infra* Part IV.A.

[32] *See infra* Part IV.B.

as a relevant but not necessarily controlling data point when reaching their own judicial constructions of statutes.[33] In other words, the courts should not be free to ignore an authoritative agency's views, even if the views do not bind the courts pursuant to *Chevron*.

Finally, Part V considers potential objections to the interactive model proposed here. Objections addressed in Part V include: whether it is proper to fashion interpretive rules in order to minimize friction between the branches; whether the interactive approach would minimize agency incentives to engage in notice-and-comment rulemaking; whether an interactive approach would muddle the law of deference; and whether the interactive approach would represent an abdication of the courts' role in the interpretive process by cutting courts out of the interpretive process and actually minimizing interaction between courts and agencies. This article concludes that these objections are not fatal and that it would be worthwhile to encourage courts and agencies to interact with each other in the wake of *Brand X*.

I. ALLOCATING INTERPRETIVE AUTHORITY BETWEEN COURTS AND AGENCIES: TWO COMPETING MODELS

When faced with resolving ambiguity in an agency-administered statute, courts currently utilize an "either-or" framework: either the authority to say what the law means rests with the agency and hence *Chevron*'s "deferential" model applies, or the authority to say what the law means remains with the courts and hence the courts follow an "independent" interpretive approach.[34] This Part describes these two competing models.

A. Chevron*'s Mandatory Deference Model*

At one side, *Chevron* operates as a mandatory deference doctrine that allocates primary interpretive authority to the relevant agency rather than the courts. When operating under *Chevron*'s "deferential model," the courts do not independently interpret ambiguous terms in an agency-administered statute in an attempt to discern the statute's "best" reading.[35]

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[33] Skidmore v. Swift, 323 U.S. 134 (1944).

[34] *See* Farina, *supra* note 29, at 453–54 (contrasting the "independent judgment model" under which "interpretive authority rests principally with the court" with the "deferential model," which requires courts to "accept any reasonable construction offered by the agency"); *see also* Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 971 (1992) (noting that "[t]he attitude of courts toward administrative interpretations of statutes has ranged between" deference and independent judgment models).

[35] *See* Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005) ("If a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation."); *see also* Farina, *supra* note 29, at 454 (stating that when the deferential model is applied, the court "determines only whether the interpretation the agency has chosen is a 'rational' reading, not whether it is the 'right' reading").

Rather, the courts frame the inquiry in terms of whether the relevant agency has selected a "reasonable" interpretation from various plausible readings.[36] Assuming that the agency has selected a reasonable interpretation, *Chevron* compels the courts to accept the agency's reading, even if the court would declare a different meaning if left to its own devices.[37]

In *Chevron* itself, the Court explained the mandatory rule of deference by referring to notions of congressional intent: "[If] Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation."[38] The Court, however, also relied upon principles of accountability, concluding that politically accountable agencies are better suited than courts to choose between competing policies when filling statutory "gaps."[39] In light of these different explanations for deference in the Court's decision, scholars quickly began to debate *Chevron*'s legal underpinnings. Some scholars saw *Chevron* as resting on "quasi-separation of powers" principles, including notions of accountability, legislative supremacy, and competence, whereas others read *Chevron* as resting on notions of Congress's delegatory intent.[40]

The Court—most likely sensing the need to offer clarification regarding *Chevron*'s legal underpinnings and its scope—recently handed down two significant *Chevron* decisions: *Christensen v. Harris County*[41] and *United States v. Mead Corp.*[42] In *Christensen* and *Mead*, the Court clarified that *Chevron* does not apply every time Congress leaves a gap in an agency-administered statute but rather applies only when two circumstances are met. First, Congress must have given the relevant agency the power to act with the "force of law"—meaning that Congress must have given the

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[36] *See generally* Farina, *supra* note 29, at 454 (noting that, pursuant to the deferential model, the court "must accept any reasonable construction offered by the agency, so long as the statutory language or, possibly, the legislative history is not patently inconsistent"); Merrill, *supra* note 34, at 971 (noting that when the "deference" mode applies, "[t]he task of the court is viewed not as discovering the best interpretation, but rather as assuring that the executive view does not contradict the statute and otherwise furthers legitimate objectives"); Polsky, *supra* note 29, at 210, n.141 ("If *Chevron* deference applies, the court will not independently interpret the term.").

[37] *See Brand X*, 545 U.S. at 981; *see also* Chevron U.S.A. Inc. v. Natural Res. Def. Council, 467 U.S. 837, 843–44 & n.11 (1984).

[38] *Chevron*, 467 U.S. at 843–44.

[39] *Id.* at 865–66 ("In contrast [to judges who are not part of either political branch of the Government,] an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments.").

[40] *See generally* Merrill & Hickman, *supra* note 7, at 863–867, 870–72.

[41] Christensen v. Harris County, 529 U.S. 576 (2000).

[42] United States v. Mead Corp., 533 U.S. 218 (2001).

agency the power to bind those outside the agency, including the courts.[43] Second, the agency must have invoked its delegated authority in rendering the interpretation at issue.[44] By limiting *Chevron* to these circumstances, the Court made clear that *Chevron*'s scheme of mandatory deference applies only when Congress contemplates that the agency can take (and where the agency has taken) administrative action with "the effect of law."[45] Because "[i]t is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for relatively formal administrative procedure,"[46] *Chevron* will apply to the fruits of notice-and-comment rulemaking and formal adjudication but generally will not reach more informal agency views, such as those expressed in policy statements, agency manuals, and enforcement guidelines.[47]

The Court's decision to limit *Chevron*'s scope in this way is best understood as resting on *Chevron*'s basis in congressional intent: *Mead* made clear that *Chevron* deference hinges on congressional intent to delegate primary interpretive authority to the agency.[48] Deference under *Chevron*, accordingly, is mandatory where an agency has been delegated the authority to act with the force of law because "Congress has commanded it."[49] In contrast, where Congress has not delegated lawmaking authority to an agency, Congress has not commanded deference to the agency's interpretations of statutory ambiguities, and hence *Chevron* does not apply.

B. The Independent Judgment Model

Whereas *Chevron*'s deferential model applies when statutory circumstances indicate congressional intent to delegate the power to act with the force of law and where the agency actually invokes delegated authority, the competing model—the "independent judgment" model—applies when Congress has not given an agency the power to act with the force of law or

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[43] *See Mead*, 533 U.S. at 226–27; *Christensen*, 529 U.S. at 587; *see also* Thomas W. Merrill & Kathryn Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 470, 479 (2002).

[44] *Mead*, 533 U.S. at 226–27; *see also* Merrill & Watts, *supra* note 43, at 479.

[45] *Mead*, 533 U.S. at 230.

[46] *Id.*

[47] *See Christensen*, 529 U.S. at 587 ("Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference."). *But see* Barnhart v. Walton, 535 U.S. 212, 222 (2002) (suggesting that *Chevron*'s applicability turns not on the use of formal procedures but rather on a variety of factors, including "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to the administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question").

[48] *See* Merrill & Watts, *supra* note 43, at 479; *see also* Gonzales v. Oregon, 126 S. Ct. 904, 908 (2006) ("*Chevron* deference . . . is not accorded merely because the statute is ambiguous and an administrative official is involved. A rule must be promulgated pursuant to authority Congress has delegated to the official.").

[49] *See* Merrill & Hickman, *supra* note 7, at 870–71.

when the agency has failed to exercise its delegated powers. When the independent judgment model applies, the power to fill statutory ambiguities remains with the courts rather than the relevant agency. Thus, when applying the independent judgment model, courts are not bound to accept agency views, such as views expressed in policy statements or agency manuals, but rather the courts remain free to select their own favored statutory reading using traditional tools of statutory interpretation, including textual analysis, legislative history, canons of construction, and policy considerations.[50]

Even though the independent judgment model ultimately leaves the courts free to select their own preferred statutory reading, *Skidmore v. Swift*—a 1944 decision—does allow courts to factor non-binding agency views into the interpretive mix.[51] In *Skidmore*, the Supreme Court made clear that even agency views that do not control the courts, such as views expressed in an interpretive bulletin or an agency amicus brief, may "constitute[] a body of experience and informed judgment to which courts and litigants may properly resort for guidance."[52] In deciding what type of weight to accord to non-binding agency views, *Skidmore* tells courts to consider a variety of factors, including the specialized competence of the agency, the thoroughness of the agency's consideration, the validity of the agency's reasoning, and "all those factors which give [the agency's views the] power to persuade, if lacking power to control."[53] *Skidmore* deference, accordingly, runs on a sliding scale ranging "from great respect on one end . . . to near indifference at the other."[54]

Scholars have paid relatively little attention to *Skidmore* through the years.[55] Nor has the Supreme Court done much to clarify *Skidmore*'s meaning—other than to make clear that agency interpretations that fail to qualify for *Chevron* deference may nonetheless be given some weight pursuant to *Skidmore*.[56] As a result, *Skidmore*'s precise meaning currently rests in the

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[50] *See* Farina, *supra* note 29, at 453–54; Merrill, *supra* note 34, at 971; Scalia, *supra* note 4, at 515.

[51] Skidmore v. Swift, 323 U.S. 134, 140 (1944); *see also Mead*, 533 U.S. at 227; *Christensen*, 529 U.S. at 587.

[52] *Skidmore*, 323 U.S. at 140.

[53] *Id.*

[54] *Mead*, 533 U.S. at 228. *See generally* Jim Rossi, *Respecting Deference: Conceptualizing* Skidmore *Within the Architecture of* Chevron, 42 WM. & MARY L. REV. 1105, 1129 (2001) ("What *Christensen* does not answer[] is what, exactly, *Skidmore* deference means, if it can be said to be 'deference' at all.").

[55] *See* Rossi, *supra* note 54, at 1110 (noting that "[f]ew law review articles address the topic" and that "although *Skidmore* has been around nearly forty years longer than *Chevron*, it is cited by courts less than twenty percent as often").

[56] *See Mead*, 533 U.S. at 237 ("*Chevron* left *Skidmore* intact and applicable where statutory circumstances indicate no intent to delegate general authority to make rules with force of law, or where such authority was not invoked . . . ."); *see also Christensen*, 529 U.S. at 587. Although the Supreme Court affirmed *Skidmore*'s continuing vitality in *Christensen* and *Mead*, not all of the Justices are on the same page with respect to *Skidmore*. Justice Scalia, for example, would like to eradicate *Skidmore* from the judicial vocabulary. *See Mead*, 533 U.S. at 250 (Scalia, J., dissenting) ("[T]otality-of-the-circumstances

hands of lower federal court judges who utilize diverging approaches.[57] Regardless of which approach to *Skidmore* is taken, however, the ultimate responsibility for selecting a preferred construction of the statutory ambiguity rests with the court. *Skidmore*, therefore, does not displace the independent judgment model.[58] Rather, it merely serves as a tool that courts can use along with other traditional tools of statutory interpretation.[59]

II. THE RELATIONSHIP BETWEEN *STARE DECISIS* AND THE TWO COMPETING MODELS

Given that *Chevron*'s "deferential" model allocates interpretive authority to agencies whereas the "independent judgment" model allocates interpretive authority to the courts, an interesting puzzle emerged in the wake of *Chevron*: What happens when a court goes ahead and engages in independent statutory construction pursuant to the independent judgment model because the relevant agency—although it could have issued a *Chevron*-eligible interpretation—has yet to do so?[60] Should principles of *stare de-*

Skidmore deference is a recipe for uncertainty, unpredictability, and endless litigation."). In addition, Justice Breyer appears to view *Chevron* as a special type of *Skidmore* deference. *See Christensen*, 529 U.S. at 596 (Breyer, J., dissenting); Barnhart v. Walton, 535 U.S. 212, 222 (2002) (Breyer, J.).

[57] *See infra* notes 252–56 and accompanying text; *see also* Rossi, *supra* note 54, at 1125–30 (describing various approaches to *Skidmore* that the Supreme Court took in its decision in *Christensen*); Amy J. Wildermuth, *Solving the Puzzle of* Mead *and* Christensen*: What Would Justice Stevens Do?*, 74 FORDHAM L. REV. 1877 (2006) (describing differing approaches the lower federal courts have taken in applying *Skidmore* since *Mead*); Eric R. Womack, *Into the Third Era of Administrative Law: An Empirical Study of the Supreme Court's Retreat from* Chevron *Principles in* United States v. Mead, 107 DICK. L. REV. 289, 341 (2002) (noting that the Supreme Court "has decided to leave a question fundamental to the functioning of the administrative state in the hands of lower court judges who may come to hundreds of different decisions on a sliding scale of *Skidmore* deference").

[58] *See, e.g.*, Warner-Lambert Co. v. United States, 407 F.3d 1207, 1209 (Fed. Cir. 2005) (stating that, even when according *Skidmore* deference, "this court has an independent responsibility to decide the legal issue"); United Techs. Corp. v. United States, 315 F.3d 1320, 1322 (Fed. Cir. 2003) (noting that the court engages in *de novo* review even when according agency interpretation deference pursuant to its power to persuade).

[59] *See* Molly A. Leckey & Stephanie A. Roy, *Recent Decisions of the United States Court of Appeals for the District of Columbia Circuit: Administrative Law*, 72 GEO. WASH. L. REV. 946, 954 (2004) (noting that, when applying *Skidmore*, "the court will simply engage in a *de novo* review of the statute through the use of traditional tools of statutory interpretation, and if by chance, the agency's interpretation matches the court's *de novo* interpretation, only then will the court grant *Skidmore* deference to the agency's construction"); Merrill & Hickman, *supra* note 7, at 855 (explaining that where *Skidmore* is applied, there is no agency interpretation that is binding on the courts but rather it is "ultimately up to the court" to decide whether to give the agency's non-binding interpretation any weight); Polsky, *supra* note 29, at 197 (noting that, when the independent judgment model is utilized, "the court will bear primary interpretive responsibility, and the weight given to the agency's view 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 power to persuade'"). *But see* Murphy, *supra* note 3, at 37 (arguing that *Skidmore* "judicial constructions are not fully 'independent' in the first place").

[60] If an agency does adopt a *Chevron*-eligible interpretation and a court accepts the agency's interpretation as a reasonable interpretation pursuant to *Chevron*, then *stare decisis* principles do not prevent

cisis, which generally carry particular force in the statutory construction arena,[61] lock the judicial interpretation into place, thereby trumping *Chevron* deference?[62] Or should the *Chevron*-eligible agency remain free to subsequently exercise its lawmaking powers and to trump the *stare decisis* effect of the prior judicial interpretation?

A. The Maislin, Lechmere *and* Neal *Trio*

In a trio of cases decided in the 1990s, the Supreme Court appeared to resolve the conflict between *Chevron* and *stare decisis* in favor of *stare decisis* by steadfastly adhering to the view that independent judicial constructions of statutes trump an agency's contrary views. In the first case in the trio, *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, the Court reviewed the validity of a recently adopted Interstate Commerce Commission ("ICC") policy.[63] The Court concluded that the ICC's new policy could not stand because it contravened numerous precedents issued by the Court.[64] In explaining why its previous judicial precedents prevailed, the Court declared: "Once we have determined a statute's *clear* meaning, we adhere to that determination under the doctrine of *stare decisis*, and we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning."[65] Although the Court did not spell out exactly what it meant by the term "clear," the statutory precedents enforced in *Maislin* rested on the Court's own understanding of the policies underlying the Act, *not* on some clear text included in the Act.[66] Thus, when properly read,

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the agency from later changing its reading of the statute. The reason for this is straightforward: where a court merely accepts an agency's *Chevron*-eligible views as one of multiple reasonable readings of a statute, the Court does not declare that the statute can only mean *one* thing. Thus, if a court accepts an agency's interpretation pursuant to *Chevron* and the agency subsequently changes its mind, the court's prior decision can give way to the new agency interpretation without violating notions of *stare decisis* because no "independent" judicial construction fixing the statute's meaning would have to be cast aside. *See, e.g.*, Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1017, n.12 (2005) (Scalia, J., dissenting); Merrill & Hickman, *supra* note 7, at 916; White, *supra* note 16, at 726.

[61] *See* IPB, Inc. v. Alvarez, 126 S. Ct. 514, 523 (2005); *see also* Patterson v. McLean Credit Union, 491 U.S. 164, 172–73 (1989). One reason why considerations of *stare decisis* carry such significant weight in statutory matters is because Congress always remains free to alter the statute and to thereby change a court's interpretation. *See* Ill. Brick Co. v. Illinois, 431 U.S. 720, 736 (1977); *Patterson*, 491 U.S. at 172–73. In other words, "judicial restraint strongly counsels waiting for Congress" to take the initiative in changing statutory rules. Hibbs v. Winn, 542 U.S. 88, 112 (2004) (Stevens, J., concurring). In addition, concerns about protecting reliance interests, reducing variations among decision makers, and protecting the judiciary's institutional reputation also underpin the principle of *stare decisis*. *See* Richard J. Pierce, *Reconciling* Chevron *and Stare Decisis*, 85 GEO. L.J. 2225, 2237 (1997).

[62] *See, e.g.*, Pierce, *supra* note 61, at 2227 (suggesting methods of integrating *Chevron* and *stare decisis*); White, *supra* note 16, at 746–55 (considering whether *Chevron* should displace *stare decisis*).

[63] 497 U.S. 116 (1990).

[64] *Id.* at 130.

[65] *Id.* at 131 (emphasis added).

[66] *See* Merrill & Hickman, *supra* note 7, at 918 (arguing that the precedent enforced in *Maislin* did not rest on the clear meaning of the statute or on a prior agency construction of the statute but rather rep-

Maislin supports the proposition that once the Court fixes a statute's meaning, the statute's meaning becomes "clear" and hence agencies must abide by that judicial reading.[67]

Next in the trio came *Lechmere, Inc. v. NLRB*.[68] In that case, the Court faced the task of reconciling the National Labor Relations Board's ("NLRB's") interpretation of a statutory provision with the Court's own prior judicial interpretation to the contrary.[69] In *Lechmere*, the Court quoted *Maislin* and concluded that its prior construction trumped the NLRB's subsequent views: "Once we have determined a statute's *clear* meaning, we adhere to that determination under the doctrine of stare decisis, and we judge the agency's later interpretation of the statute against our prior determination of the statute's meaning."[70] Here too the Court's characterization of its prior precedent as a determination of the "clear" meaning of the statute is somewhat vague.[71] However, an examination of the prior precedent that the Court relied upon in *Lechmere* demonstrates that the prior precedent merely represented the Court's own pre-*Chevron* attempt at construing an *ambiguous* statutory term.[72] In other words, it was the Court's own construction of the statute in the prior case—*not* the statute itself—that rendered the meaning of the statute clear and thus prevented the NLRB from adopting a contrary construction.

After *Lechmere* came the last case in the trio: *Neal v. United States*.[73] In *Neal*, the Court refused to defer to an interpretation of the United States Sentencing Commission because the Court already had reached an independent conclusion about what the statute required in a prior case.[74] Here

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resented the Court's "own understanding of the requirements of the policies underlying the Interstate Commerce Act"); *see also* Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1016, n.11 (2005) (Scalia, J., dissenting) ("When *Maislin Industries* referred to the Court's prior determination of a statute's 'clear meaning,' it was referring to the fact that the prior decision had made the statute clear, and was not conducting a retrospective inquiry into whether the prior decision had declared the statute itself to be clear on its own terms.").

[67] Alternatively, the Court could have been suggesting that the statute carried a "clear" meaning—in other words, that there was only *one* permissible reading of the statute. *See* White, *supra* note 16, at 744–45.

[68] 502 U.S. 527 (1992).

[69] In the prior case, the Court interpreted the term "unfair labor practice" as it is used within the Act, concluding that the Act requires that employers refrain from interfering with employees' rights to organize but that the Act does not prohibit employers from forbidding non-employees from using the employer's property for union organization if other means of communicating with employees are available. NLRB v. Babcock & Wilcox, Co., 351 U.S. 105, 109–14 (1956).

[70] *Id.* at 536–37 (quoting *Maislin*, 497 U.S. at 131) (emphasis added).

[71] *See generally* Pierce, *supra* note 61, at 2249.

[72] *See id.*

[73] Neal v. United States, 516 U.S. 284 (1996).

[74] *See id.* at 295 (citing Chapman v. United States, 500 U.S. 453 (1991)). Notably, the Court in *Chapman* refused to defer to the Sentencing Commission's interpretation of the statute *not* because the interpretation conflicted with the statutory text but rather because its interpretation conflicted with the Court's own prior interpretation in *Chapman*. *See id. See generally* Polsky, *supra* note 29, at 202, n.99.

the Court essentially borrowed from *Maislin* and *Lechmere*'s language but with one significant change: it omitted *Maislin*'s and *Lechmere*'s use of the qualifier "clear."[75] Specifically, the Court declared: "Once we have determined a statute's meaning, we adhere to our ruling under the doctrine of *stare decisis*, and we assess an agency's later interpretation of the statute against that settled law."[76]

When read together, *Maislin*, *Lechmere* and *Neal* indicated that principles of *stare decisis* prevent agencies from trumping the Supreme Court's own judicial constructions of statutory ambiguities.[77] In addition, the trio appeared to protect independent judicial constructions issued by the lower federal courts as well,[78] thereby preventing agencies from utilizing *Chevron* to trump the *stare decisis* effect not only of Supreme Court precedent but also the rulings of the circuit courts. A *stare decisis* "exception" to *Chevron*, accordingly, seemed to have taken root in *Maislin*, *Lechmere* and *Neal*.

B. The Court's Decision in Mead

The practical importance of *Maislin*, *Lechmere* and *Neal*'s apparent creation of a *stare decisis* exception to *Chevron* did not garner much atten-

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[75] *See generally* Murphy, *supra* note 3, at 43, n.203 (asserting that because *Neal* omitted the qualifier "clear," the case "taken at face value . . . indicates that the power of a judicial precedent to block agency departures should not turn on whether the precedent required the court to resolve statutory ambiguity").

[76] *Neal*, 516 U.S. at 295.

[77] *See, e.g.*, Murphy, *supra* note 3, at 36 & n.184 ("[O]ne can read *Neal* in particular as standing for the proposition that any non-*Chevron* judicial statutory construction should trump an agency's attempt to depart from it."); Polsky, *supra* note 29, at 202 ("[T]he trilogy of decisions ending with *Neal* provides that when the Court has independently interpreted a term on a prior occasion, that interpretation becomes 'incorporated' into the statute and binds the executive branch."); Patricia M. Wald, *Judicial Review in MidPassage: The Uneasy Partnership Between Courts and Agencies Plays On*, 32 TULSA L.J. 221, 245 n.129 (1996) (citing *Lechmere*, *Maislin* and *Neal* for the proposition that the Court has "refus[ed] to grant *Chevron* deference when an agency's interpretation conflicts with an earlier judicial construction of the statute"); Jennifer J. McGruther, Note, Chevron *vs.* Stare Decisis*: Should Circuit Courts Follow Judicial Precedent or Defer to Agencies As Mandated in* Chevron U.S.A., Inc. v. NRDC*?*, 81 WASH. U. L. Q. 611, 611 n.4 (2003) (citing *Neal* for the proposition that the Court is not required to defer to agencies after the Court has already judicially construed a statute).

[78] *See, e.g.*, Bankers Trust N.Y. Corp. v. United States, 225 F.3d 1368, 1376 (Fed. Cir. 2000) ("[W]e conclude that the Court of Federal Claims erred in holding that, on the facts of this case, an Executive agency regulation could effectively construe a statute in a manner different from a prior definitive court ruling."); BPS Guard Servs., Inc. v. NLRB, 942 F.2d 519, 523 (8th Cir. 1991) ("*Chevron* does not stand for the proposition that administrative agencies may reject, with impunity, the controlling precedent of a superior judicial body."); John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 942, n.234 (2004) (noting that the Court's approach in *Neal*, *Lechmere* and *Maislin* "suggest[s] that when a circuit court independently construes an agency-administered statute, the resulting precedent should count as the law of the circuit even if the agency later issues a contrary interpretation in a *Chevron*-eligible format"). *But see* McGruther, *supra* note 77, at 616 (noting disagreement among lower courts as to whether courts should follow *Chevron* and defer to agencies despite conflicting circuit precedent); Wald, *supra* note 77, at 245, n.129 (noting that the Supreme Court's *stare decisis* exception "has not played a substantial role in D.C. Circuit jurisprudence").

tion until the Court handed down *United States v. Mead Corporation* in 2001.[79] In *Mead,* the Court significantly limited the universe of *Chevron*-eligible agency interpretations.[80] This significantly increased the number of cases in which courts must independently resolve statutory ambiguity, which in turn brought the clash between *stare decisis* and *Chevron* to the fore.

On the one hand, if courts adhered to *Maislin*, *Lechmere* and *Neal* and continued to prefer *stare decisis* over *Chevron*, then independent judicial statutory constructions issued in the absence of a binding agency interpretation would freeze—or "ossify"—the meaning of ambiguous statutory provisions into place.[81] On the other hand, if courts abandoned notions of *stare decisis*, then judicial decisions independently construing statutes would "enter[] some nether world of impermanence hitherto unknown to our jurisprudence"[82] and inconsistency in application of the statute would result.[83]

Justice Scalia highlighted this dilemma in his dissenting opinion in *Mead*.[84] Justice Scalia argued that by limiting the universe of *Chevron*-eligible interpretations, the Court's decision in *Mead* would have the effect of increasing the number of independent judicial constructions. In turn, the increase in judicial interpretation would lock agencies out of the interpretive process because *stare decisis* (à la *Maislin*, *Lechmere* and *Neal*) would freeze the judicial construction into place and take away agency flexibility.[85] Specifically, he explained that once a court independently construes a statute pursuant to *Skidmore*, "the court has spoken, [and] it becomes

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[79] United States v. Mead Corp., 533 U.S. 218 (2001).

[80] *Id.*; *see also id.* at 240–41 (2001) (Scalia, J., dissenting); Bamberger, *supra* note 20, at 1275 (noting that *Mead* "limited the types of agency interpretations that are binding on the courts").

[81] *See* Bamberger, *supra* note 20, at 1275–76 (arguing that adhering to *stare decisis* "threatens, across a host of substantive areas, to replace administrative flexibility with unchanging judicial rules, freezing regulatory policy even as science, society and policy evolve"); Murphy, *supra* note 3, at 3–4 (identifying ossification problem that could arise if judicial construction of a statute could "freeze this construction into place, thereby blocking agencies from adopting new interpretations in light of evolving learning and policies").

[82] William S. Jordan, *Judicial Review of Informal Statutory Interpretations: The Answer is* Chevron *Step Two, Not* Christensen *or* Mead, 54 ADMIN. L. REV. 719, 724 (2002).

[83] *See* Nat'l Republican Cong. Comm. v. Legi-Tech Corp., 795 F.2d 190, 194, n.7 (D.C. Cir. 1986) ("[I]f the [Federal Election] Commission were free to reject our interpretation and proceeded to do so, the untoward result would be the inconsistent application of [the statute].").

[84] *See Mead*, 533 U.S. at 247 (Scalia, J., dissenting) (arguing that "the majority's approach will lead to the ossification of large portions of our statutory law"). *See generally* Bamberger, *supra* note 20, at 1275; Murphy, *supra* note 3, at 3–4; Polsky, *supra* note 29, at 195–207; Paul A. Dame, Note, Stare Decisis, Chevron, *and* Skidmore*: Do Administrative Agencies Have the Power to Overrule Courts?*, 44 WM. & MARY L. REV. 405 (2002).

[85] *Mead*, 533 U.S. at 247 (Scalia, J., dissenting).

unlawful for the agency to take a contradictory position; the statute now *says* what the court has prescribed."[86]

Despite Justice Scalia's lengthy dissenting opinion in *Mead*, the majority of the Court said nothing about the ossification problem posed by the intersection between the *Neal-Lechmere-Maislin* trio and *Mead*. Instead, the Court remained silent on the *stare decisis* issue, apparently preferring to await a future case before attempting to respond to how *Mead* and the *Maislin-Lechmere-Neal* trio would work together. As it turned out, the Court did not need to wait long.[87]

C. Brand X*: Allowing* Chevron *to Trump* Stare Decisis

Soon after the Court handed down *Mead*, the Ninth Circuit decided *Brand X Internet Services v. Federal Communications Commission*.[88] In *Brand X*, a three-judge panel of the Ninth Circuit reviewed the FCC's decision to classify cable modem service as an interstate information service rather than a "telecommunications service" within the meaning of the Communications Act of 1934.[89] Although the Ninth Circuit acknowledged that *Chevron* normally governs review of an agency's construction of a statute,[90] the Court of Appeals refused to apply *Chevron* in reviewing the FCC's decision because the FCC was neither "the only, nor even the first, authoritative body to have interpreted the provisions of the Communications Act as applied to cable broadband service."[91] Rather, several years before the FCC issued its construction, the Ninth Circuit had ruled in *AT&T v. City of Portland* that the term "telecommunications service" includes cable modem service.[92] In *Brand X*, the Ninth Circuit—relying on the Supreme Court's adherence to *stare decisis* in *Neal*—concluded that it was bound by

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[86] *Id.* (emphasis in original); *see also id.* at 249–50 ("What a court says is the law after according *Skidmore* deference will be the law forever, beyond the power of the agency to change even through rulemaking.").

[87] Shortly after *Mead*, the Court toyed with the battle between *stare decisis* and *Chevron* in *Edelman v. Lynchburg College*, 535 U.S. 106 (2002). In that case, the Court seemed to suggest that an agency might remain free to override even a court's independent statutory construction arrived at using *Skidmore* deference. *Id.* at 114 & n.8 (suggesting that agency would remain free to change its statutory interpretation regardless of whether *Chevron* or *Skidmore* deference applied). The Court, however, buried this suggestion in a footnote that (to put it generously) was rather cryptically worded. *See id.* at 114 n.8. In addition, Justice O'Connor wrote a separate concurring opinion in which she expressed "doubt that it is possible to reserve th[e] question [of *Chevron* deference] while simultaneously maintaining, as the Court does, that the agency is free to change its interpretation." *Id.* at 122 (O'Connor, J., concurring in judgment) (citation omitted). Thus, the Court's decision in *Edelman*—much like its decision in *Mead*—did not definitively resolve the *stare decisis* issue but rather kept the debate simmering.

[88] 345 F.3d 1120 (9th Cir. 2003).

[89] *See* 47 U.S.C. § 153(44) (2000) (subjecting all providers of "telecommunications service[e]" to mandatory common-carrier regulation).

[90] *Brand X*, 345 F.3d at 1127.

[91] *Id.*

[92] AT&T v. City of Portland, 216 F.3d 871 (9th Cir. 2000).

its prior *City of Portland* decision and that the FCC's new construction of the statute could not trump the court's own prior judicial determination.[93] The Ninth Circuit reached this conclusion and foreclosed the FCC's new interpretation even though the FCC had not been a party to the *City of Portland* case.[94]

On appeal, the Supreme Court reversed, concluding that the Ninth Circuit erred in relying on *Neal* and that it erroneously elevated *stare decisis* over *Chevron*.[95] The Court explained that "*Chevron* established a 'presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.'"[96] Allowing a judicial precedent "to foreclose an agency from interpreting an ambiguous statute" would contravene *Chevron*'s central premise that "it is for agencies, not courts, to fill statutory gaps."[97] The Court thus set forth the following new rule: "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."[98] Where a judicial precedent construing a statute does *not* indicate that the statute unambiguously forecloses alternative meanings, then the "agency may . . . choose a different construction, since the agency re-

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[93] Although all three panel members agreed that the doctrine of *stare decisis* foreclosed the FCC's conflicting construction of the Act, Judge O'Scannlain wrote a separate concurring opinion. In his concurrence, Judge O'Scannlain expressed concern about allowing three judges to tell an "agency acting within the area of its expertise that its interpretation of the statute it is charged with administering cannot stand—and that [the court's] interpretation of how the Act should be applied to a 'quicksilver technological environment,' is the correct, indeed the only, interpretation." *Brand X*, 345 F.3d at 1133–34 (O'Scannlain, J., concurring) (citation omitted). By foreclosing the FCC's interpretation and freezing the Ninth Circuit's *City of Portland* interpretation into place, Judge O'Scannlain worried that the court was "effectively stop[ping] a vitally important policy debate in its tracks." *Id.* at 1133.

[94] The FCC did file an amicus brief in the *City of Portland* case but declined to weigh in on the issue of statutory interpretation facing the Ninth Circuit. *See* Brief of the FCC as Amicus Curiae at 29–30, AT&T Corp. v. City of Portland, No. 99-35609, 1999 WL 33631595 (9th Cir. Aug. 17, 1999) (declining to impose regulations and stressing the need for caution given the nascent, developing nature of the technology at issue).

[95] Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982–84 (2005). Interestingly, the Court addressed the relationship between *Chevron* and *stare decisis* even though it could have ducked the question entirely. *See id.* at 985 (acknowledging that it was not necessary for the Court to determine the *stare decisis* effect of the *City of Portland* decision); *see also id.* at 1019–20 (Scalia, J., dissenting) (arguing that the Court did not need to resolve the *Chevron* issue because, whatever the effect of the *City of Portland* decision in the Ninth Circuit, the decision had no binding effect on the Supreme Court).

[96] *Id.* at 982 (quoting Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 740–41 (1996)).

[97] *Id.*

[98] *Id.* (emphasis added).

mains the authoritative interpreter (within the limits of reason) of such statutes."[99]

The new rule set forth by the Court in *Brand X* appears to be supported by two separate justifications. First, notions of congressional intent support the Court's rule: by delegating interpretive authority to an agency, Congress intends the agency to act as the "authoritative interpreter" of ambiguity in the statute.[100] If an agency fails to exercise its congressionally-delegated interpretive powers, the courts remain free to impose their own interpretation in the interim. But if the agency later elects to exercise its congressionally-delegated powers to select a contrary construction, *Chevron* commands that the courts apply the agency's construction, so long as it is reasonable.

Second, the Court's decision in *Brand X* also rests on a desire to avoid the concerns Justice Scalia raised in *Mead* about the "ossification of large portions of our statutory law."[101] Allowing *stare decisis* to trump *Chevron* would have meant that an agency's congressionally-delegated lawmaking powers could be usurped due to a simple fluke of timing: "If the court's construction came first, its construction would prevail, whereas if the agency's came first, the agency's construction would command *Chevron* deference."[102] By refusing to allow a mere coincidence of timing to determine who has ultimate interpretive authority, the Court adhered to a central premise underlying *Chevron*: that allowing Congress to allocate primary interpretive authority to agencies rather than to the courts furthers notions of competency, accountability, and democratic legitimacy in the interpretive process by enabling courts to leave policy decisions to agency decision-makers.[103] Thus, the new rule established in *Brand X* remains true to *Chevron* and its basis in congressional intent.

Despite the sound justifications for the Court's new rule, the rule does represent a substantial departure from the Court's prior precedents in *Maislin*, *Lechmere* and *Neal*.[104] In addition, as Justice Scalia pointed out in his

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[99] *Id.* at 983.

[100] *Id.*

[101] *Id.* (quoting United States v. Mead Corp., 533 U.S. 218, 247 (2001) (Scalia, J., dissenting)).

[102] *Id.*

[103] *See generally* Bamberger, *supra* note 20, at 1283–84 (noting that *Chevron* was "consistent with structural and normative conceptions—rooted in notions of competence, accountability, and democratic legitimacy—about the proper location of political decisionmaking"); Chevron *Deference*, 119 HARV. L. REV. 395, 401 (2005) (asserting that a contrary holding in *Brand X* "would have established immutable interpretations of statutes, undermining Congress's intent to allow agencies the flexibility necessary to achieve evolving constructions").

[104] Justice Scalia was the only Justice to acknowledge the incongruity between the Court's prior precedents and the new rule set forth in *Brand X*. In a lengthy dissent in *Brand X*, Justice Scalia criticized the majority for engaging in a revisionist reading of the *Maislin-Lechmere-Neal* trio. Specifically, he argued that *Neal* "plainly rejected the notion that any form of deference could cause the Court to revisit a prior statutory-construction holding" and that *Maislin*—the oldest case in the trio—did "not rely

dissenting opinion in *Brand X*, the Court's new rule raises interesting separation of powers questions by—for the first time ever—condoning the notion of "judicial decisions subject to reversal by Executive officers."[105]

In responding to Justice Scalia's reliance on the *Maislin-Lechmere-Neal* trio of cases, the majority concluded that the cases established only that a precedent holding a statute to be "clear" forecloses a contrary agency construction.[106] In other words, the majority—engaging in a rather creative interpretation of the prior precedents—ducked the *Maislin-Lechmere-Neal* trio by determining that the cases did not foreclose an agency from overriding a court's independent interpretation of an *ambiguous* statutory provision but rather only foreclosed an agency from overriding a court's interpretation of an *unambiguous* statutory provision.[107]

The Court also brushed away Justice Scalia's concerns about allowing judicial decisions to be subject "to reversal by Executive officers."[108] The Court did not dispute that its decision in *Brand X* will allow agencies to alter a court's interpretation of the best reading of a statute.[109] The Court, however, made clear that this is not equivalent to "subject[ing] judicial decisions to reversal by Executive officers," as Justice Scalia charged.[110] Specifically, the Court explained:

> Since *Chevron* teaches that a court's opinion as to the "best" reading of an ambiguous statute an agency is charged with administering is not authoritative, the agency's decision to construe that statute differently from a court does not say that the court's holding was legally wrong. Instead, the agency may, consistent with the court's holding, choose a different construction, since the agency remains the authoritative interpreter (within the limits of reason) of such statutes.[111]

In this sense, the majority noted that the new rule erected in *Brand X* would not allow a judicial precedent to be "'reversed' by the agency[] any more than a federal court's interpretation can be said to have been 'reversed' by a

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on a prior decision that held the statute to be clear, but on a run-of-the-mill statutory interpretation contained in a 1908 decision." *Brand X*, 545 U.S. at 1016, n.11 (Scalia, J., dissenting).

[105] *Id.* at 1016–17 (Scalia, J., dissenting). Justice Scalia attacked the majority for creating what he saw as a "breathtaking" and "probably unconstitutional" novelty: "judicial decisions subject to reversal by Executive officers." *Id.* Specifically, he argued that allowing agencies to sit in review of courts raised serious separation of powers concerns because "Article III courts do not sit to render decisions that can be reversed or ignored by Executive officers." *Id.* at 1017 (Scalia, J., dissenting).

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

[107] *Id.*

[108] *Id.* at 983.

[109] *Id.*

[110] *Id.*

[111] *Id.*

state court that adopts a conflicting (yet authoritative) interpretation of state law."[112]

Thus, in the end, neither the Court's past pronouncements in the *Maislin-Lechmere-Neal* trio nor Justice Scalia's separation of powers concerns prevented the Court from adopting a significant new rule: *Chevron*-eligible agencies may override independent judicial constructions of ambiguous statutes.[113]

III. DRAWING ON THE LESSONS OF THE FEDERALISM MODEL: TOWARD AN INTERACTIVE INTERPRETIVE MODEL

Although the full implications of the Court's decision in *Brand X* have yet to unfold,[114] it is clear that the Court's decision in *Brand X* breaks significant new ground.[115] For the first time ever, the Court expressly sanctioned the notion that a *Chevron*-eligible agency can overrule a court's own independent judicial construction of what a statute means.[116] By enabling agencies to trump statutory precedents, the Court "dramatically altered" the judiciary's role in the interpretive process,[117] paving the way for independent judicial constructions of statutes to amount to nothing more than an interim precedent to be cast aside at the will of an agency.

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[112] *Id.* at 983–84. Whether the Court ultimately was correct to reject Justice Scalia's separation of powers concern is not a question that this Article seeks to resolve. Rather, this Article accepts *Brand X* as a reality and proceeds to examine the ramifications of the decision. For an argument that Justice Scalia's concerns are misplaced, see Doug Geyser, Note, *Courts Still "Say What the Law Is": Explaining the Functions of the Judiciary and Agencies After* Brand X, 106 COLUM. L. REV. 2129 (2006).

[113] In an intriguing one-paragraph concurrence, Justice Stevens suggested that perhaps the Court's new rule might be limited to the lower federal courts. Specifically, Justice Stevens opined that even though "a court of appeals' interpretation of an ambiguous provision in a regulatory statute does not" freeze the court's reading into place at the expense of a later agency interpretation, perhaps a decision by the Supreme Court might do so. *Brand X*, 545 U.S. at 1003 (Stevens, J., concurring). Justice Stevens, however, did not explain the basis for this suggestion. Nor did any other Justices join his concurrence. There is, therefore, no indication that the other Justices viewed the Court's new rule as being limited to the lower court context.

[114] The Courts have just begun to interpret and apply *Brand X's* command. *See, e.g.*, Dominion Energy Brayton Point, LLC v. Johnson, 443 F.3d 12, 17 (1st Cir. 2006) (deferring to an EPA regulation and allowing the regulation to trump a prior judicial precedent); Skranak v. Castenada, 425 F.3d 1213, 1220 (9th Cir. 2005) (citing *Brand X* for the proposition that the "Forest Service is not bound to interpret the statute the same way we have when considering it *de novo*"); Levy v. Sterling Holding Co., LLC, No. 00-994, 2007 WL 582555, at *5–6 (D. Del. Feb. 13, 2007) (applying *Brand X* and concluding that a Third Circuit precedent did not preclude the SEC from adopting a new interpretation of statutory ambiguity); *see also* Riverkeeper, Inc. v. EPA, 475 F.3d 83, 108–09 (2d Cir. 2007); Elm Grove Coal Co. v. Director, O.W.C.P., No. 05-1108, 2007 WL 678248, at *9 (4th Cir. Mar. 7, 2007).

[115] *See, e.g.*, AARP v. EEOC, 390 F. Supp. 2d 437, 442 (E.D. Pa. 2005) (*Brand X* "dramatically altered the respective roles of courts and agencies under *Chevron*.").

[116] *See* United States v. Mead Corp., 533 U.S. 218, 248–49 (2001) (Scalia, J., dissenting) ("I know of no case, in the entire history of the federal courts, in which we have allowed a judicial interpretation of a statute to be set aside by an agency—or have allowed a lower court to render an interpretation of a statute subject to correction by an agency.").

[117] *AARP*, 390 F. Supp. 2d at 442.

By handing *Chevron* a victory in the longstanding battle between "'the *Marbury*-esque' view[] that agencies must abide by judicial constructions . . . and the . . . '*Chevron*-esque' view[] that agencies should enjoy the power to interpret their statutory mandates flexibly,"[118] the Court did create a solution to the ossification problem posed by *Mead*. In creating a solution to one problem, however, the Court raised an entirely new set of problems concerning the judiciary's role in the interpretive process.[119] Most prominently, *Brand X* raises questions about whether federal courts faced with unresolved regulatory law should go ahead and construe statutory ambiguities in the absence of agency views on the subject—thereby inviting the agency to either override the court's interpretation or to refuse to acquiesce in the interpretation.[120] Or is there an alternative approach that courts could use to minimize those situations where courts must independently resolve statutory ambiguity prior to the relevant agency weighing in on the issue?

A. Erie *and the Federalism Model's Use of Interactive Tools*

In thinking about how the federal courts might adapt to their newly reduced role in the interpretive process, the federalism model provides a useful analogy.[121] In the federalism context, the Supreme Court's seminal 1938 decision in *Erie Railroad v. Tompkins*[122] forced the federal courts to significantly rethink their lawmaking role.[123] In *Erie*, the Court commanded that federal courts apply state law in all cases not governed by positive federal law, thereby stripping the federal courts of the authority to declare substantive rules of common law applicable in a state.[124] *Erie*'s command that fed-

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[118] Murphy, *supra* note 3, at 3.

[119] *See, e.g.*, Note, *Implementing* Brand X*: What Counts As a Step One Holding?*, 119 HARV. L. REV. 1532 (2006) (focusing on one question raised by *Brand* X—namely, how courts should identify when prior judicial holdings flow from the "unambiguous" terms of the statute).

[120] Agency refusal to acquiesce in adverse court rulings—although controversial—would not be a new phenomenon. *See generally* Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 681 (1989) (describing the "refusal of administrative agencies to conduct their internal proceedings consistently with adverse rulings of the courts of appeals—a practice commonly termed agency nonacquiescence").

[121] The logic of looking to the federalism model finds support in the *Brand X* decision itself where the Court drew on the federalism analogy in an attempt to respond to Justice Scalia's charge that the Court's new rule allowed for executive "override[s]" of judicial decisions. *See Brand X*, 545 U.S. 967, 983–84 (2005) (noting that the rule erected in *Brand X* would not allow a judicial precedent to be "'reversed' by the agency[] any more than a federal court's interpretation can be said to have been 'reversed' by a state court that adopts a conflicting (yet authoritative) interpretation of state law"). It also is supported by an article published prior to the Court's decision in *Brand X*, which argued that the conflict between *Chevron* and *stare decisis* could be solved by drawing on the federalism model's use of "provisional" precedent. *See* Bamberger, *supra* note 20, at 1276.

[122] 304 U.S. 64 (1938).

[123] Sosa v. Alvarez-Machain, 542 U.S. 692, 726 (2004) (noting that *Erie* heralded a "significant rethinking of the role of the federal courts").

[124] 304 U.S. at 78 ("Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. . . . There is no federal general common law.").

eral courts "*apply* but not *declare* state law" seemed simple enough to adhere to when state law provided a clear answer, but it proved considerably more difficult for federal courts to follow when faced with applying ambiguous state law.[125] In such situations, the federal courts essentially were forced to "predict" how the state would come out on the unresolved issue.[126] A federal court's "prediction" would prevail in the particular case before the federal court and could bind other federal courts, but it would not subsequently bind the state courts.[127] Rather, policymaking agents of the state would remain free to adopt an alternative construction and to thereby wipe away the federal court's reading of state law.[128]

To try to adapt to their reduced role in the lawmaking process, the federal courts began to use various mechanisms that enabled federal courts to seek out a state's views on an unclear issue of law *before* ruling on the issue. First came various "*Erie*-based abstention" doctrines that allowed the federal courts to abstain from deciding cases that presented unresolved questions of state law.[129] In *Burford v. Sun Oil Co.*, for example, the Court created a type of "administrative abstention" whereby federal courts could abstain if federal proceedings would interfere with a detailed state regulatory scheme.[130] Similarly, in *Louisiana Power & Light Co. v. City of Thibodaux*, the Court approved a district court's decision to stay federal proceedings until the state's highest court had been afforded an opportunity to interpret ambiguity in the state's eminent domain statute—a statute that was intimately involved with the state's sovereign prerogatives.[131] In con-

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[125] Clark, *supra* note 25, at 1461 (emphasis in original); *see also* Kaye & Weissman, *supra* note 25, at 376 (noting that *Erie* created a "thorny problem" relating to how federal courts "should ascertain state law in cases where it is unclear").

[126] *See* Clark, *supra* note 25, at 1466 (noting that when federal courts face an unclear issue of state law, most federal courts "attempt to predict" how the state's highest court would rule); *see also* Naguin v. Prudential Assurance Co., 71 F.3d 512, 512 (5th Cir. 1995) (stating the court was forced to make an "*Erie* guess"); Todd v. Societe Bic, S.A., 21 F.3d 1402, 1416 & n.2 (7th Cir. 1994) (Ripple, J., dissenting) (referring to the difficulty of making "*Erie* guesses") (citing Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 VA. L. REV. 1671, 1679 (1992)); Kaye & Weissman, *supra* note 25, at 377.

[127] Todd, 21 F.3d at 1416.

[128] *See, e.g.*, *id.* ("In any diversity case, this court's decision has no precedential effect on the state courts."); *see also* Leavitt v. Jane L., 518 U.S. 137, 146 (1996) (Stevens, J., concurring) ("[T]he decision of a federal court (even this Court) on a question of state law is not binding on state tribunals . . . ."); Diginet, Inc. v. W. Union ATS, Inc., 958 F.2d 1388, 1395 (7th Cir. 1992) ("State courts are not bound by federal courts' interpretations of state law.").

[129] Clark, *supra* note 25, at 1517–24 (discussing "*Erie*-based abstention"); *see also* David Frisch, *Contractual Choice of Law and the Prudential Foundations of Appellate Review*, 56 VAND. L. REV. 57, 107 (2003) ("In the immediate aftermath of *Erie*, when state law was unclear, many federal courts, rather than risking incorrect determinations, chose to abstain from exercising their jurisdiction until the state court was given an opportunity to resolve the state law issue.").

[130] 319 U.S. 315, 333–34 (1943).

[131] 360 U.S. 25, 29 (1959) ("The special nature of eminent domain justifies a district judge, when his familiarity with problems of local law so counsels him, to ascertain the meaning of a disputed state

doning the use of these and other abstention doctrines,[132] the Court noted that abstention could help to "avoid the waste of a tentative decision" as well as to minimize "friction" between the federal courts and the states.[133]

Despite the theoretical appeal of minimizing federal–state friction by enabling federal courts to defer to state decision makers on questions of state law, abstention has proved somewhat problematic in practice because parties are required to go through a full round of litigation in the state courts after a federal court abstains—resulting in added expense and delays.[134] In addition, the Court limited the potential reach of judge-made abstention doctrines by making clear that abstention cannot be invoked merely because a federal court finds it difficult to ascertain state law or because a federal court wants to demonstrate deference toward state decision makers.[135] Rather, the Court announced that federal courts have a "virtually unflagging obligation" to exercise the jurisdiction given to them and therefore are obliged to read the Court's judge-made abstention doctrines narrowly.[136]

Given the limitations of abstention, an alternative and more promising mechanism soon emerged: state certification procedures.[137] State certification procedures have been touted as more efficient and less costly than abstention because they allow a federal court to "certify" unresolved questions

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statute from the only tribunal empowered to speak definitively—the courts of the State under whose statute eminent domain is sought to be exercised—rather than himself make a dubious and tentative forecast."); *see also* Grode v. Mutual Fire, Marine and Inland Ins. Co., 8 F.3d 953, 957 (3d Cir. 1993) (noting that *Thibodaux*, which "permits a federal court to abstain in a diversity case where state law is unclear and an important state interest is at stake," really stands as "a variant of the *Burford* abstention doctrine and has not evolved as a separate doctrine of its own").

[132] *See, e.g.*, R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 500–01 (1941) (allowing the use of abstention in a federal question case where state law was unclear and resolution of state law issue could render unnecessary the resolution of a federal constitutional issue).

[133] *Pullman*, 312 U.S. at 500; *see also Thibodaux*, 360 U.S. at 28.

[134] *See* Arizonans for Official English v. Arizona, 520 U.S. 43, 76 (1997) (noting that although abstention was desirable in theory, it "proved protracted and expensive in practice"); *see also* Martha A. Field, *The Abstention Doctrine Today*, 125 U. PA. L. REV. 590, 591 (1991) ("The delay and expense inherent in the abstention procedure are legendary, and have caused some judges and commentators to bemoan the doctrine from the outset."). Abstention also has been criticized on the ground that it violates notions of separation of powers. *See* Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 76–77 (1984) (arguing that judge-made abstention constitutes judicial lawmaking in violation of notions of separation of powers by depriving litigants of a judicial forum provided for by Congress).

[135] Louisiana Power & Light Co. v. Thibodaux, 360 U.S. 25, 27 (1959); Meredith v. Winter Haven, 320 U.S. 228, 234 (1943).

[136] Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 813, 817 (1976) (noting that only "exceptional circumstances" justify a federal court's refusal to abstain from deciding a case in deference to state courts).

[137] *See* Kaye & Weissman, *supra* note 25, at 385–86 (noting that as of 2000, forty-five states, the District of Columbia, and Puerto Rico allowed their courts to answer questions certified from other courts); JONA GOLDSCHMIDT, CERTIFICATION OF QUESTIONS OF LAW: FEDERALISM IN PRACTICE 1 (1995); Clark, *supra* note 25, at 1544.

of state law directly to a state's highest court.[138] If the state's highest court agrees to answer the certified question and sends an answer back to the federal court,[139] then the federal court resolves the case in accord with the state court's authoritative ruling.[140] This enables the federal court to avoid having to "guess" how the state courts would resolve the state law issue and helps to minimize the likelihood of an erroneous federal court reading of state law.[141] State certification, accordingly, emerged as a mechanism that was thought to save "'time, energy, and resources'" and also to "hel[p] build a cooperative judicial federalism."[142] In other words, certification enabled the federal courts to interact and communicate with state courts in the wake of *Erie* rather than blindly imposing their own interpretations on unclear state law.[143]

B. Carrying Erie*'s Lessons Over into the Administrative Realm*

The development of an interactive model in the federalism context in the wake of *Erie* is instructive in terms of suggesting how the federal courts might react to their newly reduced role in the administrative realm post-*Brand X*. Without a doubt, the analogy between *Brand X* and *Erie* is not perfect. Whereas federal courts in the federalism context must construe a

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[138] *See* Theodore B. Eichelberger, Note, *Certification Statutes: Engineering a Solution to Pullman Abstention Delay*, 59 NOTRE DAME L. REV. 1339, 1341 (1984) ("While the certification procedure does not completely eliminate the delay in deciding a case, the delay is usually substantially shorter than that incurred after an abstention order.").

[139] State courts do not always agree to answer questions that are certified to them. *See, e.g.*, Allstate Ins. Co. v. Serio, 261 F.3d 143, 152 n.14 (2d Cir. 2001); *see also* GOLDSCHMIDT, *supra* note 137, at 46.

[140] *See* State Farm Mutual Auto. Ins. Co. v. Mallela, 372 F.3d 500, 505 (2d Cir. 2004) ("The certification process 'permits the federal courts to ask the highest court of a state directly to resolve a question of state law and to do so while the federal suit is pending.'" (quoting *Allstate*, 261 F.3d at 151)).

[141] *See* Kaye & Weissman, *supra* note 25, at 381 ("[C]ertification saves federal courts from the awkwardness of predicting state law, and allows state high courts to articulate the law without the complication of potentially contradictory federal decisions on the issue."); *see also* GOLDSCHMIDT, *supra* note 137, at 1, 53.

[142] Arizonans for Official English v. Arizona, 520 U.S. 43, 77 (1997) (citing Lehman Bros v. Schein, 416 U.S. 386, 391 (1974)).

[143] *See* Lehman Bros. v. Schein, 416 U.S. 386, 390–91 (1974) (noting that certification "does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism"); David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 545 (1985) (concluding that federal courts' ability to exercise its discretion to decline to hear a case "contribute[s] to the easing of interbranch and intergovernmental tensions"); Julie A. Davies, Pullman *and* Burford *Abstention: Clarifying the Roles of State and Federal Courts in Constitutional Cases*, 20 U.C. DAVIS L. REV. 1, 9–10 (1986) (noting that *Pullman* abstention may "further harmony between federal and state courts because federal courts defer to state courts on unclear state law issues," which "allows states to chart the course of their own law without the threat of erroneous federal court interference"); GOLDSCHMIDT, *supra* note 137, at 1 ("One area in which federal and state courts have an opportunity to interact in the spirit of cooperative federalism is that of certification of questions of law."); Gerald M. Levin, Note, *Inter-Jurisdictional Certification: Beyond Abstention Toward Cooperative Judicial Federalism*, 111 U. PA. L. REV. 344, 350 (1963) (noting that certification represents an "attempt at cooperative judicial federalism").

body of state law that belongs to the states and thus must try to "predict" the meaning of unresolved state law questions, federal courts in the administrative law context are construing purely federal law and thus—in the absence of binding agency views—must provide a judicial construction of the ambiguous term rather than merely "predicting" what an agency might do in the future.[144] Furthermore, *Erie*'s reallocation of power between the federal and state courts can be seen as resting primarily on notions of federalism and comity and the desire to protect states' sovereignty by allowing states to maintain control over their own state law. In contrast, in the administrative law context, the reallocation of authority between courts and agencies that took place in *Chevron* and *Brand X* can be seen as resting primarily on notions of Congress's delegatory intent, as well as "quasi-separation of powers" principles such as notions of political accountability and competence.

Despite these differences, *Erie* and *Brand X* share one significant thing in common: both significantly reduced the lawmaking power of the federal courts by reallocating lawmaking authority to other institutions and thereby put federal courts in the position of interpreting laws that they ultimately lack the power to definitively construe.[145] The federal courts' willingness to react to their reduced lawmaking power in the federalism context by moving toward a more interactive model demonstrates that the federal courts similarly could adapt to their newly reduced role in the administrative realm.[146] In other words, the *Erie* analogy is useful to show that the federal courts—when faced with a significant reduction in their lawmaking authority—previously were willing to accept procedures that demonstrated defer-

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[144] Forcing courts to "predict" an agency's future interpretation also would be inappropriate because it would require the courts to openly rely on non-legal tools to construe statutory ambiguity. For example, a court trying to "predict" what the EPA might do under a new Republican administration would have to take the President's policy goals and politics into account in arriving at a construction of an ambiguous statutory term.

[145] *See* Cass R. Sunstein, *Is Tobacco A Drug? Administrative Agencies As Common Law Courts*, 47 DUKE L.J. 1013, 1057 n.215 (1998) (noting that *Chevron* "has much in common" with *Erie* because "[b]oth cases involve a rejection of the view that federal courts could neutrally declare 'the law,' and both cases, following that rejection, reallocate legal authority from federal courts to other institutions").

[146] A few scholars have discussed similarities between *Erie* (or the federalism model more generally) and *Chevron* in the past. *See, e.g.*, Lawrence Lessig, *Erie-Effects of Volume 110: An Essay on Context in Interpretive Theory*, 110 HARV. L. REV. 1785, 1795–1801 (1997) (describing *Chevron* as an example of the "*Erie*-effect" where "a change in the interpretive context" of institutional authority brings about a reallocation of institutional authority among legal actors); Cass R. Sunstein, *Beyond* Marbury*: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2583 (2006) (suggesting that both *Erie* and *Chevron* share an important understanding of what interpretation involves: the understanding that "[w]hen courts resolve genuine ambiguities, they cannot appeal to any 'brooding omnipresence in the sky'" but rather "must rely on policy judgments of their own"); *see also* Sunstein, *supra* note 145, at 1057 n.215. Most prominently, Professor Bamberger argued prior to *Brand X* that the ossification problem posed by *Mead* could be solved by drawing on the federalism model's acceptance of "provisional" precedent. *See* Bamberger, *supra* note 20, at 1275–76.

ence toward outside institutions that ultimately possess the authoritative power to construe the law.

Drawing on *Erie*'s lessons and moving toward a more interactive model in the administrative realm could yield significant benefits. First, respect for the primacy of the agency as the authoritative statutory interpreter would be furthered if courts interact with and seek out the views of the governing agency prior to issuing their own statutory constructions of ambiguous terms. *Chevron* placed lawmaking primacy in the hands of the governing agency, and *Brand X* underscores the fact that agencies—*not* the courts—serve as the authoritative interpreters of statutory ambiguity.[147] Thus, where an agency with delegated lawmaking powers has yet to construe an ambiguous statute, respect for the primacy of the agency suggests that the agency should be given a chance to weigh in before the court issues its own construction.

Second, an interactive approach would allow the courts to benefit from the comparative expertise of the relevant agency. As Tom Merrill and Kristin Hickman have contended, "federal statutory programs have become so complex that it is beyond the capacity of most federal judges to understand the full ramifications of the narrowly framed interpretational questions that come before them."[148] This may mean "that the goal of resolving statutory ambiguities in such a way as to further the purposes of the statute is increasingly becoming a task beyond the grasp of generalist judges."[149] An interactive approach through which courts seek out relevant agency expertise would help courts to better understand the ramifications of the interpretive questions before them and could lead to better decisions in the first place.

Outside the agency context, the courts have long recognized that significant benefits can flow from obtaining assistance from specialists. The courts, for example, often appoint experts to assist them with complex or technical matters in appropriate cases.[150] In addition, the Supreme Court frequently asks for the advice of the Solicitor General in cases where the government is not a party to the case.[151] The judiciary's willingness to seek out the views of experts in these contexts serves as an important reminder that generalist judges can benefit from soliciting expert views.

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[147] Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 983 (2005) ("[A] court's opinion as to the best reading of an ambiguous statute an agency is charged with administering is not authoritative . . . .").

[148] Merrill & Hickman, *supra* note 7, at 861.

[149] *Id.* at 862.

[150] *See generally* John F. Duffy, *On Improving the Legal Process of Claim Interpretation: Administrative Alternatives*, 2 WASH. U. J.L. & POL'Y 109, 142 & n.128 (2000) (discussing courts' power to appoint nonwitness experts in appropriate cases); *see also* FED. R. EVID. 706.

[151] *See, e.g.*, Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc., 126 S. Ct. 714 (2005); Fed. Trade Comm. v. Schering-Plough Corp., 126 S. Ct. 544 (2005); Cruz v. Blue Cross and Blue Shield of Illinois, 126 S. Ct. 414 (2005); Empire Healthchoice Assurance, Inc. v. McVeigh, 126 S. Ct. 414 (2005); KSR Int'l Co. v. Teleflex, Inc., 126 S. Ct. 327 (2005).

Third, an interactive approach would enable courts to minimize the number of cases where the courts must engage in judicial policymaking. One of the primary reasons why *Chevron* prefers agency interpretations to judicial interpretations is that selecting one reading of an ambiguous statute over another can be viewed as a "political act" that turns on policy questions.[152] Because courts are rather ill-suited to engage in policymaking,[153] an interactive model—whereby the federal courts seek out and solicit agency views *prior* to imposing their own judicial construction—would help minimize those situations where the courts must impose their own individual policy preferences on a public to which they are not democratically accountable.

Fourth, by decreasing those situations where courts will be faced with construing ambiguous statutory provisions in the dark without agency assistance, an interactive approach would decrease those situations where agencies might feel compelled to "override" or to refuse to acquiesce in a court decision. This would not only help to minimize interbranch friction but also would help to bring more uniformity and predictability to the law,[154] thereby protecting the judiciary's institutional legitimacy as well as individual reliance interests.[155]

Fifth, even apart from the goal of avoiding interbranch friction, notions of judicial efficiency and fairness to litigants provide yet another reason why it might be valuable to avoid situations where a court's view of regulatory law is later overruled by an agency.[156] If an agency stands as the ultimate authority on the meaning of an ambiguous statutory provision, then a court's efforts could be viewed as "wasted" if the court goes through the

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[152] Merrill & Hickman, *supra* note 7, at 861; *see also* Farina, *supra* note 29, at 467 (noting that *Chevron* deference rests in part on the notion that the judiciary "is an inappropriate body to make the kinds of policy choices that are unavoidable in construing contemporary regulatory statutes").

[153] Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005) (noting that filling statutory gaps "involves difficult policy choices that agencies are better equipped to make than courts"); *see also* Murphy, *supra* note 3, at 40 ("[C]ourts are relatively ill-suited to the task of policymaking—judges are generalists who gather information through the incomplete, skewed process of litigation.").

[154] Uniformity and predictability, of course, will never be completely attainable in the regulatory context given that *Chevron*-eligible agencies are free to change their mind over time. *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 863–64 (1984). However, uniformity and predictability certainly should increase if courts solicit agency views when construing unresolved issues of statutory ambiguity in the first instance.

[155] *Cf.* Payne v. Tennessee, 501 U.S. 808, 827 (1991) (explaining that one reason why *stare decisis* is the preferred course is "because it promotes evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process").

[156] An extreme example of the unfairness and lack of uniformity that could result post-*Brand X* if courts and agencies do not communicate with each other is demonstrated by the following hypothetical: Imagine that a court independently construes the meaning of an ambiguous statutory term in the context of private litigation between party A and B, siding with A's reading of the statute. The agency then later initiates an enforcement proceeding against party A and adopts a contrary reading of the statute.

process of independently construing the statute in the absence of agency views only to have the governing agency subsequently impose a contrary construction.[157] In addition, the parties will have been deprived the opportunity to have their case decided under the authoritative view of the governing agency should the agency subsequently disagree with the court's provisional construction.[158]

Given the benefits that could be obtained by utilizing an interactive approach in the administrative realm, the next question becomes: how could the courts adapt to *Brand X* by moving toward a more interactive approach to statutory interpretation in the administrative realm? Would the creation of an interactive approach require major changes in the law?

IV. IDENTIFYING POTENTIAL INTERACTIVE TOOLS

Moving toward a more "interactive" or "shared" approach to statutory interpretation would not require any drastic doctrinal changes. Rather, as this Part explains, the courts could move toward a more interactive approach simply by becoming increasingly willing to use tools that—although often neglected—already have a foothold in the law.

A. Calling for the Views of the Relevant Agency

The first mechanism through which the courts could move toward a more interactive approach is relatively simple: where a court faces an ambiguous statutory term in an agency-administered statute but the agency has yet to weigh in on the ambiguity, the court could solicit the agency's views. Two potential means of soliciting agency views are considered here: (1) referring the matter to the agency pursuant to the primary jurisdiction doctrine, and (2) calling for the relevant agency to file an amicus curiae brief setting forth its views. Both of these tools, of course, will reach only those situations where the relevant agency is *not* a party to the case before the court. Where the relevant agency *is* a party to the case, however, there is little need for some sort of special interactive mechanism given that the agency will be free to provide the court with its views during the course of the litigation. Furthermore, where an agency *is* a party to the case, the court always can consider whether it would be appropriate to remand the matter

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[157] *Cf.* Town of Castle Rock, Colo. v. Gonzales, 545 U.S. 748, 778 (2005) (Stevens, J., dissenting) (arguing in the federalism context that because state courts remain the "ultimate authority on the meaning" of state law, the Court's "efforts will have been wasted" if in later litigation the state court should disagree with the Court's provisional state-law holding); R.R Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 500 (1941) ("The reign of law is hardly promoted if an unnecessary ruling of a federal court is thus supplanted by a controlling decision of a state court.").

[158] *Cf. Town of Castle Rock, Colo.*, 545 U.S. at 778 (Stevens, J., dissenting) (arguing in the federalism context that should a state's highest court "disagree with this Court's provisional state-law holding," then the parties "will have been deprived of the opportunity to have [their] claims heard under the authoritative view of [the state's] law").

back to the relevant agency for a decision,[159] or whether doing so would give the agency an unfair litigating advantage.[160]

1. Invoking the Primary Jurisdiction Doctrine.—One possible interactive mechanism through which the courts could solicit agency views would involve referring the matter to the relevant agency pursuant to the "primary jurisdiction" doctrine.[161] Much like the various abstention doctrines used in the federalism context,[162] primary jurisdiction serves as a judge-made tool for allocating power between federal courts and agencies,[163] enabling "a court to stay its hand while allowing an agency to address issues within its ken."[164] The label "primary jurisdiction" is a bit of a misnomer because the doctrine does not seek to address those situations where the federal courts lack subject matter jurisdiction.[165] Rather, this prudential doctrine applies "when a claim is cognizable in federal court but requires resolution of an issue of first impression, or of a particularly complicated issue that Congress has committed to a regulatory agency."[166]

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[159] *Cf.* Teva Pharms. USA, Inc. v. FDA, 441 F.3d 1, 5 (D.C. Cir. 2006) (noting that the court generally will "remand for an agency to make the first interpretation of an ambiguous statutory term when" the agency is a party to a case challenging agency action but the agency has failed to weigh in on the meaning of the statute); PDK Labs., Inc. v. U.S. Drug Enforcement Admin., 362 F.3d 786, 798 (D.C. Cir. 2004) (allowing agency to construe statutory ambiguity on remand); Jordan, *supra* note 82, at 729 (arguing that if a court is not persuaded by an agency's construction of an ambiguous statutory provision, the court should remand the matter back to the agency where the agency is a party rather than simply deciding the matter for itself).

[160] Giving an agency two chances to articulate its views—once as a litigant and then again on remand—could give the agency a significant and arguably unfair litigating advantage.

[161] When a court decides to refer a matter to an agency pursuant to the primary jurisdiction doctrine, the referral "does not deprive the court of jurisdiction." Reiter v. Cooper, 507 U.S. 258, 268 (1993). Rather, the court either may retain jurisdiction while the agency decides the matter, or it may dismiss the case without prejudice. *Id.* at 268–69. In this sense, the primary jurisdiction doctrine operates in a similar fashion to some of the abstention doctrines utilized in the federalism context that allow a federal court to stay or dismiss its proceedings pending resolution of an issue by the state courts.

[162] *See generally* Sidney A. Shapiro, *Abstention and Primary Jurisdiction: Two Chips Off the Same Block?—A Comparative Analysis*, 60 CORNELL L. REV. 75 (1975) (noting similarities between abstention and primary jurisdiction).

[163] Syntek Semiconductor Co. v. Microchip Tech. Inc., 285 F.3d 857, 862 (9th Cir. 2002); TCG N.Y., Inc. v. City of White Plains, 305 F.3d 67, 74 (2d Cir. 2002); Mashpee Tribe v. New Seabury Corp., 592 F.2d 575, 580–81 & n.1 (1st Cir. 1979); *see also* RICHARD J. PIERCE, JR., 2 ADMINISTRATIVE LAW TREATISE § 14.1, at 917 (4th ed. 2002); Duffy, *supra* note 150, at 141.

[164] U.S. Pub. Interest Research Group v. Atl. Salmon of Maine, 339 F.3d 23, 34 (1st Cir. 2003); *see also* Nat'l Republican Cong. Comm. v. Legi-Tech. Corp., 795 F.2d 190, 193 (D.C. Cir. 1986).

[165] *See Mashpee Tribe*, 592 F.2d at 580 n.1; *Syntek Semiconductor Co.*, 285 F.3d at 862. *But see* Louis L. Jaffe, *Primary Jurisdiction*, 77 HARV. L. REV. 1037, 1038 (1964) ("Primary jurisdiction is pro tanto exclusive jurisdiction; insofar as the agency has jurisdiction it excludes the courts.").

[166] *Syntek Semiconductor Co.*, 285 F.3d at 862 (quoting Brown v. MCI WorldCom Network Servs., Inc., 277 F.3d 1166, 1172 (9th Cir. 2002)); *see also* New Eng. Legal Found. v. Mass. Port Auth., 883 F.2d 157, 171 (1st Cir. 1989) ("Whenever both the courts and an administrative agency appear to have jurisdiction over a particular controversy, the question arises as to which forum should speak first on the matter.").

There is "no fixed formula" that courts apply when deciding whether or not primary jurisdiction should be invoked.[167] Rather, courts generally analyze a variety of factors, including whether the agency determination lies at the heart of the task assigned to the agency, whether agency expertise is required to resolve the question, and whether a determination from the agency would materially aid the court.[168] Courts also may consider whether "the goal of national uniformity in the interpretation and application of a federal regulatory regime" would be furthered by permitting the agency to take a first look at the problem.[169] In addition, courts may consider whether referral to the agency would help "to avoid the possibility that a court's ruling might disturb or disrupt the regulatory regime of the agency in question."[170]

Both *Chevron* and primary jurisdiction aim to further similar values, including agency expertise and national uniformity.[171] A few courts, accordingly, have recognized the potential interplay between *Chevron* and primary jurisdiction.[172] In *American Automobile Manufacturers Association v. Massachusetts Department of Environmental Protection*,[173] for example, the First Circuit explained that "[w]hen the matter at issue is primarily one of statutory interpretation, referral of that matter to the agency with primary jurisdiction may also be generally advisable in precisely those circumstances in which a court would defer to the agency's interpretation pursuant to *Chevron*."[174]

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[167] *See* United States v. W. Pac. R.R. Co., 352 U.S. 59, 64 (1956).

[168] Am. Auto. Mfr. Ass'n v. Mass. Dep't of Envtl. Prot., 163 F.3d 74, 81 (1st Cir. 1998); *see also New Eng. Legal Found.*, 883 F.2d at 172.

[169] *Am. Auto. Mfr. Ass'n*, 163 F.3d at 81; *see also* TCG N.Y., Inc. v. City of White Plains, 305 F.3d 67, 74 (2d Cir. 2002); *New Eng. Legal Found.*, 883 F.2d at 175; Kiefer v. Paging Network, Inc., 50 F. Supp. 2d 681, 683–84 (E.D. Mich. 1999).

[170] *Am Auto. Mfr. Ass'n*, 163 F.3d at 81.

[171] *See* David M. Hasen, *The Ambiguous Basis of Judicial Deference to Administrative Rules*, 17 YALE J. ON REG. 327, 359 (2000).

[172] *See, e.g.*, *In re* StarNet, Inc., 355 F.3d 634, 639 (7th Cir. 2004) (invoking primary jurisdiction doctrine where agency's views, although they would ultimately be subject to review by the judiciary for reasonableness under *Chevron*, would be the "logical place for the judiciary to start"); Nw. Airlines, Inc. v. County of Kent, Mich., 510 U.S. 355, 366–67 & n.10 (6th Cir. 1994) (noting that because the Court lacked an agency view to which it could grant *Chevron* deference, referral pursuant to the primary jurisdiction doctrine might have been appropriate if the parties had briefed or argued the question); Nat'l Republican Cong. Comm. v. Legi-Tech Corp., 795 F.2d 190, 193–94 & n.7 (D.C. Cir. 1986) (noting the relationship between the primary jurisdiction doctrine and *Chevron*); *Kiefer*, 50 F. Supp. 2d at 686 ("Additional support for invoking the primary jurisdiction doctrine can be gleaned from the Supreme Court's decision in *Chevron* . . . .").

[173] 163 F.3d 74.

[174] *Id.* at 81. The First Circuit in that case ultimately determined that the case should be referred to the Environmental Protection Agency ("EPA") to allow the EPA to provide a uniform and nationally-applicable answer to the unresolved statutory issues facing the court. *Id.* at 85–86. The First Circuit, however, subsequently concluded that its referral to the EPA was "not a wise one" because it turned out

A recent Seventh Circuit decision authored by Judge Easterbrook, *In re StarNet, Inc.*,[175] provides another good example. In that case, the Seventh Circuit faced an ambiguous provision in the 1996 Telecommunications Act and its implementing regulations: the term "location."[176] Judge Easterbrook explained that "[i]nstead of trying to divine how the FCC would resolve the ambiguity created by the word 'location,'" the court thought "it best to send this matter to the Commission under the doctrine of primary jurisdiction."[177] The court noted that "[o]nly the FCC can disambiguate the word 'location'; all we could do would be to make an educated guess."[178] Although the court acknowledged that any views obtained from the FCC ultimately would be subject to review by the court for reasonableness (presumably under *Chevron*), the court determined that the agency's views nonetheless would be the "logical place for the judiciary to start."[179]

Despite the potential for interplay between primary jurisdiction and *Chevron*, primary jurisdiction has received relatively little attention from either the courts or scholars since the Court handed down *Chevron*.[180] The current editions of various leading administrative law casebooks, for example, devote no more than a few pages, if that, to the primary jurisdiction doctrine.[181] In addition, although the Supreme Court has hinted at the rela-

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that the EPA "was not in a position to [authoritatively] determine" any of the issues referred to it. Ass'n of Int'l Auto. Mfrs. v. Comm'r, Mass. Dep't of Envtl. Prot., 208 F.3d 1, 4–5 (1st Cir. 2000).

[175] 355 F.3d 634.

[176] *Id.* at 639.

[177] *Id.*

[178] *Id.*

[179] *Id.*

[180] This is not to say that no attention has been given to the intersection between *Chevron* and primary jurisdiction. Some scholars have noted the parallel. For example, prior to *Brand X* being decided, a few scholars considered whether the primary jurisdiction doctrine could prove useful in cases where issues of unresolved statutory ambiguity are involved. *See* Bamberger, *supra* note 20, at 1309–10; Polsky, *supra* note 29, at 206 n.121. Those scholars that have considered the relationship between *Chevron* and primary jurisdiction, however, generally have been dismissive of the doctrine. *See* Bamberger, *supra* note 20, at 1309–10 (rejecting the notion that widespread use of the primary jurisdiction doctrine could provide a solution to the ossification problem posed by *Mead*); Polsky, *supra* note 29, at 206 n.121 (arguing that the primary jurisdiction would not prove useful in the tax context). The one notable exception is provided by Richard J. Pierce, who devotes significant attention to the utility of the doctrine in his treatise. *See* RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE II, § 14.3, at 941 (4th ed. 2002) (arguing that "[o]ne of the many effects of *Chevron* is to increase the number of cases in which courts should refer issues to agencies under the primary jurisdiction doctrine").

[181] *See* GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 911–12 (3d ed. 2001) (including two short paragraphs on the primary jurisdiction doctrine); ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, ADMINISTRATIVE LAW 432–36 (2d ed. 2001) (providing just over four pages of materials on the primary jurisdiction doctrine); PETER L. STRAUSS, TODD D. RAKOFF & CYNTHIA R. FARINA, GELLHORN & BYSE'S ADMINISTRATIVE LAW CASES AND COMMENTS 1243–45 (rev. 10th ed. 2003) (devoting less than two pages to the topic). *But see* RICHARD J. PIERCE, JR., SIDNEY A. SHAPIRO & PAUL R. VERKUIL, ADMINISTRATIVE LAW AND PROCESS 212–23 (4th ed. 2004) (providing twelve pages of materials on the primary jurisdiction doctrine).

tionship between the two doctrines,[182] it has not applied primary jurisdiction to a case of statutory ambiguity since *Chevron*.[183]

Now that *Brand X* makes clear that judicial interpretations of ambiguous statutory provisions may merely serve as interim constructions, there are good grounds for arguing that the primary jurisdiction doctrine should be revitalized. Primary jurisdiction stands as a potentially useful tool to allow courts to adapt to their newly reduced role in the interpretive process post-*Brand X*. In particular, by invoking primary jurisdiction where there is unresolved statutory ambiguity that would affect the court's resolution of the case, the courts can obtain agency views prior to independently issuing a statutory construction—thereby minimizing the likelihood of agency overrides or interbranch conflict, reducing those situations where the courts will have to engage in policymaking to resolve statutory ambiguity, and furthering uniformity in the law.[184]

Imagine, for example, a suit between two private parties filed in federal district court that turns on the meaning of an ambiguous term in a statute that the Securities and Exchange Commission ("SEC") has been charged with interpreting. If the SEC has yet to interpret the ambiguous statutory term, the court could go ahead and impose its own independent construction on the statute (an interim construction that the SEC could later overturn using *Brand X*). Or the court—invoking the primary jurisdiction doctrine—could stay its proceedings and defer any decision in the action until the SEC has addressed the meaning of the ambiguous statutory term, for example, by issuing a substantive rule or a declaratory ruling.[185] Taking the latter approach would enable the court not only to draw on the agency's expertise but also would promote uniformity and accuracy.

Of course, much like abstention, which is used relatively sparingly in the federalism context, the benefits of primary jurisdiction will not always outweigh the costs of invoking the doctrine. In deciding whether primary jurisdiction will prove fruitful in a particular case, the courts will need to weigh several limiting aspects of the doctrine. First, "referral" pursuant to

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[182] *See* Nw. Airlines, Inc. v. County of Kent Mich., 510 U.S. 355, 366–67 & n.10 (1994) (noting that because the Court was lacking an agency view to which it could grant *Chevron* deference, referral pursuant to the primary jurisdiction doctrine might have been appropriate if the parties had briefed or argued the question); *see also* Pharm. Res. & Manuf. of Am. v. Walsh, 538 U.S. 644, 672–73 (2003) (Breyer, J., concurring).

[183] *See generally* Bamberger, *supra* note 20, at 1309 (noting that the Court has "recently confirmed the vitality of the traditional doctrine of 'primary jurisdiction,' though it has not applied the doctrine since before the *Chevron* decision.").

[184] *Cf.* Nat'l Republican Cong. Comm. v. Legi-Tech Corp., 795 F.2d 190, 193–94 & n.7 (D.C. Cir. 1986) (noting that by invoking the primary jurisdiction doctrine, the court could avoid having to construe the statute prior to the agency doing so and thus could eliminate the "untoward" possibility that the agency subsequently would reject the court's interpretation).

[185] In invoking the primary jurisdiction doctrine, the federal court would not be asking the parties to bring their action before the agency instead but rather the court merely would stay the federal case to allow the parties to seek out the agency's views on the discrete issue of statutory ambiguity.

primary jurisdiction will not guarantee a *Chevron*-eligible determination (or any determination, for that matter) from the relevant agency. This is because most regulatory statutes "contain[] no mechanism whereby a court can on its own authority demand or request a determination from the agency."[186] Rather, "a court invokes the doctrine of primary jurisdiction by staying its proceedings to allow one of the parties to file an administrative complaint seeking resolution of a particular issue."[187] The success of a referral of a case to an agency, therefore, rests in the hands of the parties, as well as the relevant agency, which must demonstrate a willingness to respond to a court's invitation for assistance.[188]

This aspect of primary jurisdiction, however, should not significantly detract from the utility of the doctrine as an interactive tool. Even though courts generally lack the statutory authority to force a recalcitrant agency into action,[189] agencies have shown a general willingness to decide matters premised on a referral pursuant to the primary jurisdiction doctrine. The Interstate Commerce Commission, for example, once noted that "petitions for issuance of a declaratory order premised on referral from a court are granted routinely."[190] Similarly, the Food and Drug Administration has expressed a desire to be able to make "the initial determination on issues within its statutory mandate," even when that may mean having a court dismiss or hold in abeyance judicial proceedings before it.[191] Accordingly, there is reason to expect that agencies will demonstrate a general willingness to respond to judicial referrals.

A second limiting aspect of the primary jurisdiction doctrine is that the doctrine generally will *not* apply where one of the parties before the court is the agency to which the matter would be referred.[192] Although this narrows the applicability of the primary jurisdiction doctrine, it does not detract from the benefits that could flow from invoking the doctrine in those cases where the agency is *not* a party to the case before the court.[193] After all, if

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[186] Reiter v. Cooper, 507 U.S. 258, 268 & n.3 (4th Cir. 1993); *see also* Palmer-Foundry, Inc. v. Delta-Ha, Inc., 319 F. Supp. 2d 110, 113 (D. Mass. 2004); MCI Telecomm. Corp. v. Dominican Comm. Corp., 984 F. Supp. 185, 189 n.3 (S.D.N.Y. 1997).

[187] *Palmer-Foundry, Inc.*, 319 F. Supp. 2d at 113.

[188] *Cf.* Reiter v. Cooper, 507 U.S. 258, 268 & n.3 (1993).

[189] *Cf.* Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 64–65 (10th Cir. 2004) (noting that 5 U.S.C. § 706(1) can be used to require agency action only where an agency has "failed to take a *discrete* agency action that it is *required to take*").

[190] Union Pacific Railroad Co. Petition for Declaratory Order, 58 Fed. Reg. 33,106–07 (June 15, 1993).

[191] 21 C.F.R. § 10.25(b) (1989).

[192] *See* Commonwealth of Mass. v. Blackstone Valley Elec. Co., 67 F.3d 981, 992 n.14 (1st Cir. 1995); U.S. v. Elrod, 627 F.2d 813, 817–18 (7th Cir. 1980); Austin Lakes Joint Venture v. Avon Utilities, Inc., 648 N.E.2d 641, 648 (Ind. 1995).

[193] *See, e.g.*, Kiefer v. Paging Network, Inc., 50 F. Supp.2d 681, 683–86 (E.D. Mich. 1999) (invoking primary jurisdiction doctrine in the context of a suit brought against a paging service provider by a customer); MCI Telecomm. Corp. v. Dominican Comm. Corp., 984 F. Supp. 185, 189–90 (S.D.N.Y.

the agency *is* a party to the case before the court, then the agency will be "present before the court to lend whatever accumulated special expertise it may possess,"[194] and the courts will not need to rely on any interactive tools to solicit agency views.[195]

A third potentially limiting aspect of the primary jurisdiction doctrine is its tendency to add to litigation costs and to create delay.[196] Much like the various abstention doctrines used in the federalism context, invocation of the primary jurisdiction doctrine may create additional costs and delay because the parties must initiate proceedings before the relevant agency and then return to federal court at the conclusion of the agency's proceedings.[197] If an agency merely issues an informal ruling, such as an advisory opinion or an interpretive rule, in response to a referral, then the agency might act relatively quickly and thereby minimize any delay. However, if the agency

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1997) (considering referral pursuant to the primary jurisdiction doctrine in the context of suit brought by a telephone interexchange carrier against long-distance telephone service resellers); Doe v. Anrig, 500 F. Supp. 802, 810–11 (D. Mass. 1980) (asking parties to consider whether the primary jurisdiction doctrine might be used to solicit the participation of the Department of Education).

[194] U.S. v. Elrod, 627 F.2d 813, 818 (7th Cir. 1980); *see also* Massachusetts v. Blackstone Valley Elec. Co., 67 F.3d 981, 992 n.14 (1st Cir. 1995).

[195] *See supra* note 165 and accompanying text.

[196] In addition to creating delay, an agency's decision to issue a legislative rule pursuant to section 553 might raise questions about whether the rule could then be given retroactive effect. *See* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988). The Court's decision in *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996), however, seems to resolve any such questions—making clear that no retroactivity problem would arise if an agency promulgated a regulation to resolve statutory ambiguity raised in an adjudication involving private parties. *Id.* In *Smiley*, a credit card holder brought suit against a bank, alleging that the bank charged excessive late fees on her account. *Id.* at 737–38. After the California Superior Court dismissed the suit and the California Supreme Court affirmed the dismissal, the Comptroller of the Currency decided to eliminate uncertainty and confusion surrounding the meaning of the term "interest" in the National Bank Act, and it adopted a regulation interpreting the term. *Id.* at 738–39. On appeal, the Supreme Court acknowledged that the litigation in the *Smiley* case itself helped prompt the Comptroller to promulgate the regulation but it nonetheless deferred to the Comptroller's interpretation under *Chevron*. *Id.* at 740–41. The Court made clear that doing so did not raise a retroactivity problem in violation of *Bowen*. *Id.* at 744 n.3. Specifically, the Court explained: "There might be substance to [a retroactivity argument] if the regulation replaced a prior agency interpretation. . . . Where, however, a court is addressing transactions that occurred at a time when there was no clear agency guidance, it would be absurd to ignore the agency's current authoritative pronouncement of what the statute means." *Id.* at 744 n.3. In other words, if a rule simply clarifies legal principles that were in effect when the complained of conduct occurred, application of the rule cannot be viewed as impermissibly retroactive.

[197] Adding to potential delay is the possibility that a decision rendered by an agency upon a referral will be appealed to another court before the federal district court can resume proceedings in the initial case. *See* United States v. Gen. Dynamics Corp., 828 F.2d 1356, 1360 (9th Cir. 1987) ("Where . . . a district court refers a case to an agency under the primary jurisdiction doctrine, and exclusive authority to review the agency's determination is granted to a court other than the referring district court, the district court is bound by determinations made in the collateral administrative proceedings and may not itself review the merits of the agency's decision."); *see also* Narragansett Elec. Co. v. E.P.A., 407 F.3d 1, 5, n.3 (1st Cir. 2005); Ass'n of Int'l Auto. Mfrs., Inc. v. Mass. Dep't of Envtl. Prot., 196 F.3d 302, 305 n.1 (1st Cir. 1999).

elects to promulgate a more formal interpretation in order to obtain *Chevron* deference—such as a notice-and-comment rule[198] or a declaratory ruling issued after soliciting public comments[199]—then the delay could be substantial.[200]

Concerns about the possibility of delay and added costs, however, should not lead courts to dismiss the utility of primary jurisdiction entirely. In some cases, the prejudice the parties may endure while being forced to wait for an agency determination may be minimized by the court. In *Commonwealth of Massachusetts v. Blackstone Valley Electric Co.*,[201] for example, the First Circuit ensured that the plaintiff's interest in recovering $5.8 million that it spent cleaning up a waste site would be protected while the federal case was held in abeyance by requiring the defendant to place $5.8 million into an interest bearing escrow account.[202]

Similarly, in invoking the primary jurisdiction doctrine to allow the FCC to "disambiguate" the meaning of the term "location,"[203] the Seventh Circuit in *In re StarNet* took care to restore the parties to their original positions in order to minimize any prejudice while waiting for the FCC to re-

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[198] *See* 5 U.S.C. § 553(b), (c) (2000) (setting forth procedures for agency rulemaking).

[199] *See* 5 U.S.C. § 554(e) (2000) (empowering agencies to issue declaratory orders to "terminate a controversy or remove uncertainty"); *see also* City of Chicago v. FCC, 199 F.3d 424, 429 (7th Cir. 1999) (determining that *Chevron* deference can be given to an agency's declaratory ruling); Jeffrey S. Lubbers and Blake D. Morant, *A Reexamination of Federal Agency Use of Declaratory Orders*, 56 ADMIN. L. REV. 1097, 1118–19 (2004) (noting that an agency's decision to issue a declaratory ruling may "raise lingering questions regarding" entitlement to *Chevron* deference).

[200] The First Circuit's experience in *Massachusetts v. Blackstone Valley Elec. Co.*, 67 F.3d 981 (1st Cir. 1995), provides a dramatic illustration of the substantial delay that can result from invocation of the primary jurisdiction doctrine. In that case, the Commonwealth of Massachusetts sued the Blackstone Valley Electric Co. to recover $5.8 million in response costs under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"). *Id.* at 983. The primary dispute in the case turned on the question of whether ferric ferrocyanide constitutes a "hazardous substance" within the meaning of CERCLA. *Id.* at 984. Because neither CERCLA itself nor regulations issued by the Environmental Protection Agency ("EPA") clearly resolved the question, the First Circuit determined that the matter should be referred to the EPA. *Id.* at 993. In justifying its decision to refer the matter to the EPA, the First Circuit explained that it "believe[d] it better to have the EPA resolve the issue nationwide" rather than "leave this matter to the risk of inconsistent outcomes before particular courts in different parts of the country." *Id.* at 992–93. Although the First Circuit issued its order calling for referral pursuant to the primary jurisdiction doctrine on October 6, 1995, it was not until January 25, 2001, that the EPA issued a preliminary administrative determination describing its opinion on the matter and welcoming public comments. *See* Preliminary Administrative Determination Document on the Question of Whether Ferric Ferrocyanide Is One of the "Cyanides" Within the Meaning of the List of Toxic Pollutants Under the Clean Water Act, 66 Fed. Reg. 7759 (Jan. 25, 2001). And it was not until October 6, 2003—eight years after the First Circuit decided that referral was appropriate—before the EPA issued a final administrative determination in the matter. *See* Final Administrative Determination Document on the Question of Whether Ferric Ferrocyanide Is One of the "Cyanides" Within the Meaning of the List of Toxic Pollutants Under the Clean Water Act, 68 Fed. Reg. 57,690 (Oct. 6, 2003).

[201] 67 F.3d 981.

[202] *Id.* at 993 n.16.

[203] *In re* Starnet, 355 F.3d 634, 639 (7th Cir. 2004).

solve the dispute.[204] Judge Easterbrook explained that by restoring the parties to their original position pending a decision from the FCC, the court could "curtail[] the losses to which [one party] was exposed without prospect of reimbursement, while protecting [the other party's] interest in receiving prices and terms offered by the current competitive market."[205] The Seventh Circuit, accordingly, sought the FCC's assistance while minimizing any potential prejudice to the parties.

In addition to ensuring that primary jurisdiction will be invoked only where the parties will not be significantly prejudiced, courts also can take steps to try to minimize any delay that might result. Courts, for example, could stay their proceedings for a specified amount of time.[206] If the relevant agency fails to act within the timeframe set by the court, then the court may go ahead without the agency's guidance. This was the approach taken by the First Circuit in *American Automobile Manufacturers Association v. Massachusetts Department of Environmental Protection.*[207] In that case, the court stayed federal proceedings for 180 days to afford the defendant "a reasonable opportunity to obtain a ruling from the EPA."[208] Because such an approach helps to define the amount of permissible delay at the outset, it could provide courts with a useful means of alleviating concern about having to wait indefinitely for agency action.[209]

In short, primary jurisdiction cannot serve as an across-the-board solution to the problems posed by *Brand X* given that invocation of the doctrine may create undue delay and will not always result in a determination from an agency. Nonetheless, the primary jurisdiction doctrine may prove useful in certain cases—namely, those cases where an unresolved issue of statutory ambiguity that can only be authoritatively construed by a *Chevron* eligible agency would impact the federal court's resolution of the case and where any resulting delay will not significantly prejudice the parties.[210] Courts should not, accordingly, dismiss primary jurisdiction as a relic of the past. Rather, as courts adapt to their newly reduced role in the interpretive process post-*Brand X*, primary jurisdiction should be kept in mind as a potentially useful interactive tool.

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[204] *Id.* at 639–40.

[205] *Id.* at 640.

[206] *See, e.g.*, Am. Auto. Mfrs Ass'n v. Mass. Dep't of Envtl. Prot., 163 F.3d 74, 86–87 (1st Cir. 1998); Wagner & Brown v. ANR Pipeline Co., 837 F.2d 199, 206 (5th Cir. 1988).

[207] 163 F.3d at 86–87.

[208] *Id.* at 86.

[209] A slightly different approach was taken by the district court in *Palmer Foundry, Inc. v. Delta-Ha, Inc.*, 319 F. Supp. 2d 110 (D. Mass. 2004). In that case, the district court ensured that it could monitor the progress being made pursuant to the referral by ordering the parties to submit status reports to the court every ninety days. *Id.* at 114–15.

[210] *Cf.* Bellotti v. Baird, 428 U.S. 132, 150–51 (1976) (noting in the federalism context that the propriety of abstention is limited by considerations of delay and expense).

2. Inviting Amicus Curiae Briefs.—A second and even more promising interactive tool involves the practice of inviting agencies to file amicus curiae briefs.[211] Just as state certification procedures in the federalism context "reduce[s] the substantial burdens of cost and delay that abstention places on litigants,"[212] the practice of inviting agency amicus briefs in the administrative law context may help to avoid concerns about the cost and delay of relying on primary jurisdiction.[213] This is because amicus briefs present the informal views of the agency and thus do not require the agency to go through notice-and-comment rulemaking or other time consuming procedures. Inviting an agency to file an amicus brief, therefore, could be particularly appropriate where a court wants to expeditiously solicit the views of an agency that has not previously set forth any views whatsoever, or where the court needs clarification about an informal interpretation issued by the agency in the past.

At the Supreme Court level, the Court regularly invites agencies to file amicus briefs through the Solicitor General of the United States.[214] The lower federal courts also invite amicus briefs from federal agencies from time to time.[215] Nonetheless, some lower federal courts have expressed re-

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[211] *See, e.g.*, Doe v. City of Butler, 892 F.2d 315, 324 (3d Cir. 1989) (suggesting that district court on remand may want to invite the views of the Department of Housing & Urban Development); DeBraska v. City of Milwaukee, 131 F. Supp. 2d 1032, 1033 (E.D. Wis. 2000) ("At this court's invitation, the Secretary of Labor has filed an amicus brief . . . ."). *See generally* RICHARD J. PIERCE JR., ADMINISTRATIVE LAW TREATISE II, § 14.6 (4th ed. 2002) (suggesting that rather than relying on the primary jurisdiction doctrine, courts might "obtain the agency's analysis of an issue before the court . . . by seeking an amicus brief from the agency").

[212] City of Houston v. Hill, 482 U.S. 451, 470 (1987).

[213] Distrigas of Mass. Corp. v. Boston Gas Co., 693 F.2d 1113, 1119 (1st Cir. 1983) (Breyer, J.) ("We think that [the relevant question] can be answered fully and quickly through amicus participation. If more elaborate agency proceedings are required, the agency can so inform us."); *see also* TCG N.Y., Inc. v. City of White Plains, 305 F.3d 67, 74 (2d Cir. 2002) ("Amicus briefs from an agency can serve much of the interest in consistency and uniformity of law that underlies the doctrine of primary jurisdiction, while avoiding some of the delay that sometimes results from dismissing on the ground of primary jurisdiction.").

[214] *See, e.g.*, Brief for the United States As *Amicus Curiae* Supporting Petitioners at 31, Texaco v. Dagher, 126 S. Ct. 1276 (2006) (Nos. 04-805, 04-814) (brief submitted at the invitation of the Court by the Acting Solicitor General and signed by the General Counsel of the FTC); Brief for the United States As *Amicus Curiae* Supporting Petitioners at 1, 29, Dura Pharm., Inc. v. Broudo, 544 U.S. 336 (2005) (No. 03-932) (brief signed by Solicitor General and SEC submitted in response to invitation of the Court); Brief for the United States As *Amicus Curiae* at 1, 20, Bates v. Dow Agrosciences LLC, 544 U.S. 431 (2005) (No. 03-338) (brief signed by Solicitor General and EPA submitted in response to Court's invitation); Brief for the United States As *Amicus Curiae* at 1, 19, Entergy La., Inc. v. La. Pub. Serv. Comm'n, 539 U.S. 39 (2003) (No. 02-299) (brief filed in response to Court's invitation by Solicitor General and FERC).

[215] *See, e.g.*, Dabit v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 395 F.3d 25, 34 n.6 (2d Cir. 2005); Cvelbar v. CBI Ill. Inc., 106 F.3d 1368, 1373 n.3 (7th Cir. 1997); Harden v. Raffensperger, Hughes & Co., Inc., 65 F.3d 1392 (7th Cir. 1995); Harris Trust & Savings Bank v. John Hancock Mut. Life Ins. Co., 970 F.2d 1138, 1140 (2d Cir. 1992); *In re* Network Assocs., Inc. Sec. Litig., 76 F. Supp. 2d 1017, 1040 (N.D. Cal. 1999); Country Aviation, Inc. v. Tinicum Twp., No. 92-3017, 1992 WL 396782, at *1 (E.D. Pa. Dec. 23, 1992).

luctance about inviting agency amicus briefs.[216] This reluctance has persisted even though the Supreme Court has encouraged the lower courts to invite agency views on more than one occasion. In *Mead v. Tilley*,[217] for example, the Court remanded a case involving ERISA because neither the agencies responsible for enforcing ERISA nor the Court of Appeals had weighed in on an issue of statutory construction facing the Court. In remanding the case, the Court noted that it was "reluctant to address [] complicated and important issues pertaining to the private pensions of millions of workers" without having "the views of the agencies responsible for enforcing ERISA,"[218] and it advised the Court of Appeals that it "should consider the views of the [Pension Benefit Guaranty Corporation] and the [Internal Revenue Service]" on remand.[219] The Court explained that "[f]or a court to attempt to answer these questions without the views of the agencies responsible for enforcing ERISA, would be to 'embar[k] upon a voyage without a compass.'"[220]

Similarly, in *Rosado v. Wyman*, the Court emphasized that "[w]henever possible the district courts should obtain the views of" the relevant federal agency where the agency has not already set forth its views or where it is unclear how the agency's standards might apply.[221] The Court explained that just because an issue is an appropriate one for judicial resolution does not mean that "the courts must therefore deny themselves the enlightenment which may be had from" obtaining and considering the views of the relevant agency.[222]

Given the benefits that could flow from increased judicial willingness to invite agency amicus briefs, an obvious question arises: why has the practice of inviting amicus briefs remained relatively rare at the lower court level? One explanation may be found in the Supreme Court's pronouncements that agency "litigating positions"—i.e., positions developed by agencies in the course of litigation and advanced as post hoc rationalizations to

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[216] *See, e.g.*, Matz v. Household Int'l Tax Reduction Inv. Plan, 388 F.3d 570, 578 (7th Cir. 2004) (considering inviting amicus brief from the Internal Revenue Service but declining to do so because of "the great age of the case"); Strasser v. Doorley, 432 F.2d 567, 569 (1st Cir. 1970) (suggesting that district court "should go slow in accepting, and even slower in inviting, an amicus brief"); Cox v. AA Check Cashiers Inc., 158 F. Supp. 2d 935, 936 n.1 (W.D. Ark. 2000) (refusing to invite the Federal Reserve Board to submit an amicus brief, noting that inviting amicus briefs is an "extraordinary" measure). *See generally* 2 JOANNE D'ALCOMO ET AL., APPELLATE PRACTICE IN MASSACHUSETTS ch. 17 (2004) (noting that the U.S. Court of Appeals for the First Circuit rarely invites amicus briefs and that only "[o]n a few occasions over the years, the First Circuit has requested an amicus brief from a particular government agency on a particular issue").

[217] 490 U.S. 714, 726 (1989).

[218] *Id.* at 726 n.11.

[219] *Id.* at 726.

[220] *Id.*

[221] 397 U.S. 397, 406–07 (1970).

[222] *Id.* at 397 & n.9 (quoting Sw. Sugar & Molasses Co., Inc. v. River Terminals Corp., 360 U.S. 411, 420 (1959)).

defend past agency action—do not deserve judicial deference.[223] These pronouncements, however, have little bearing on the utility of agency amicus briefs. Unlike a litigating position (which is developed by the agency in the course of a particular case to which the agency *is* a party), an agency's amicus views do not represent the agency's post hoc attempt to defend its action as a litigant but rather may well "reflect the agency's fair and considered judgment on the matter in question."[224] A position set forth in an amicus brief, therefore, should not be shunned simply because it comes to the court in the form of a brief.[225]

A second potential hurdle standing in the way of increased reliance on invited agency amicus briefs may be found in judicial concern that agency amicus briefs merely represent the views of agency counsel rather than the views of the agency head,[226] or that they may be "developed hastily, or under special pressure, or without an adequate opportunity for presentation of conflicting views."[227] These concerns, however, easily can be overcome. As the amicus experience of the Securities and Exchange Commission ("SEC") demonstrates, agencies can adopt internal operating procedures to ensure the validity and quality of amicus briefs. The SEC, for example, requires that the entire Commission review and approve the positions taken in SEC amicus briefs prior to the briefs being filed.[228] This ensures that positions taken in the SEC's amicus briefs "are not simply the work of the Commission's counsel" but rather "are the Commission's views."[229] The SEC also generally offers parties an opportunity to meet with agency officials to discuss the case while the SEC formulates its amicus position—thereby ensuring that amicus positions are not formulated without the opportunity for the presentation of conflicting views.[230] In addition, the SEC has centralized its brief drafting process in one office to assure "that it will

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[223] *See, e.g.*, Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212–13 (1988) ("Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate.").

[224] Auer v. Robbins, 519 U.S. 452, 462 (1997); *see also* Hertzberg v. Dignity Partners, Inc., 191 F.3d 1076, 1082 (9th Cir. 1999).

[225] *Auer*, 519 U.S. at 462.

[226] *See, e.g.*, Keys v. Barnhart, 347 F.3d 990, 993–94 (7th Cir. 2003) ("It is odd to think of agencies as making law by means of statements made in briefs, since agency briefs, at least below the Supreme Court level, normally are not reviewed by the members of the agency itself."); Jos. Schlitz Brewing Co. v. Milwaukee Brewery Workers' Pension Plan, 3 F.3d 994, 1003 (7th Cir. 1993) ("Only the agency, not its lawyers, exercises delegated power. Did that brief articulate the policy of the agency, or was it a concoction of appellate counsel?") (citation omitted); Fed. Labor Relations Auth. v. U.S. Dep't of Treasury, Fin. Mgmt. Serv., 884 F.2d 1446, 1455 (D.C. Cir. 1989) (noting concern that agency amicus briefs sometimes "may not reflect the views of the agency head(s)").

[227] *Fed. Labor Relations Auth.*, 884 F.2d at 1455.

[228] *See* Ruder, *supra* note 22, at 1180; *see also* Prezioso, *supra* note 22.

[229] Ruder, *supra* note 22, at 1180; *see also* Prezioso, *supra* note 22 ("Unlike staff statements, interpretative guidance and no-action letters, amicus briefs reflect the views of the Commission.").

[230] *See* Prezioso, *supra* note 22.

be making the same arguments in the Seventh Circuit that it makes in the Second or Ninth."[231] These relatively simple operating procedures, if adopted and followed by other agencies, could help to eliminate concerns that agency counsel will act as "'mavericks disembodied from the agency that they represent'" in filing amicus briefs.[232]

In addition, the courts themselves could help to minimize concerns that agency amicus briefs will be developed hastily by providing agencies with sufficient time to file thorough and well-considered amicus briefs. Giving agencies adequate time to draft well-considered briefs may delay a case slightly, but the cost of waiting is not great considering the benefits of enabling the court to obtain the agency's expert views on an issue of statutory interpretation that falls within the agency's delegated lawmaking sphere.[233] Moreover, concern that *some* agency views expressed through amicus briefs may be poorly considered or hastily drafted is not a valid ground for dismissing the usefulness of amicus briefs entirely.[234] Rather, concern about the validity or thoroughness of agency briefs should be addressed on a case-by-case basis when determining how much weight a court should give to a particular agency amicus brief when construing statutory ambiguity.[235]

A final potential hurdle standing in the way of increased reliance on agency amicus briefs is the courts' current inability to *demand* that agencies respond to their invitations to file amicus briefs. As in the primary jurisdiction context, most regulatory statutes contain no mechanism enabling the

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[231] Ruder, *supra* note 22, at 1180.

[232] Fed. Labor Relations Auth. v. U.S. Dep't of Treasury, 884 F.2d 1446, 1455 (D.C. Cir. 1989) (quoting Church of Scientology of Cal. v. IRS, 792 F.2d 153, 165 (D.C. Cir. 1986) (en banc) (Silberman, J., concurring)).

[233] *Cf.* Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 COLUM. L. REV. 1211, 1255–56 (2004) (noting that in the federalism context, state certification may create some delay and added expense, "but not a great deal, especially considering the benefits of obtaining an authoritative ruling"); Ira P. Robbins, *Interstate Certification of Questions of Law: A Valuable Process in Need of Reform*, 76 JUDICATURE 125, 128 (1992) ("Even if certification actions become somewhat slowed during the process, this seems a small price for correct resolution of the matter. Courts should be placing a premium on deciding cases well, not just quickly.").

[234] *Cf.* Huggins v. Isenbarger, 798 F.2d 203, 208 (7th Cir. 1986) (Easterbrook, J., concurring) ("Some views expressed in briefs may be poorly considered, but some views expressed in judicial opinions also are poorly considered.").

[235] The federal courts are not required to accept the views set forth in an agency amicus brief pursuant to *Chevron*. *See, e.g.*, Christensen v. Harris County, 529 U.S. 576, 586–88 (2000); Matz v. Household Int'l Tax Reduction Inv. Plan, 265 F.3d 572, 574 (7th Cir. 2001). *But see* Auer v. Robbins, 519 U.S. 452, 462 (1997). Agency amicus briefs, however, may nonetheless be given appropriate weight pursuant to *Skidmore* based on their power to persuade. *See* Skidmore v. Swift, 323 U.S. 134, 140 (1944); Ball v. Memphis Bar-B-Q Co., Inc., 228 F.3d 360, 365 (4th Cir. 2000); *see also infra* Part IV.B. For example, a brief that thoroughly describes the agency's position and explains the agency's reasoning would have greater persuasive value than one that simply arrives at a conclusion without providing support for the agency's reading of the statute.

courts to *order* a determination from an agency.[236] Thus, whether or not an agency decides to respond to a judicial invitation for an amicus brief likely will turn on a variety of factors,[237] ranging from political and strategic considerations to logistical considerations, such as the agency's workload and whether the agency would need to obtain the consent of the Department of Justice before filing a brief.[238] If an agency flatly refuses to accept a judicial invitation to file an amicus brief, the agency would be placed in the unpleasant situation of telling the court no, and the court might feel awkward about having to resolve the issue on its own after previously having decided that the agency's views were needed.[239] This means that in order to turn amicus briefs into a useful interactive tool, not only would judges need to become increasingly willing to invite amicus briefs, but agencies also would have to become increasingly willing to respond.

Agencies, of course, could demonstrate their willingness to respond to amicus invitations by voluntarily adopting rules governing the amicus process. These rules could borrow from procedural rules that agencies have adopted to govern the issuance of advisory opinions,[240] as well as from state

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[236] *Cf.* Reiter v. Cooper, 507 U.S. 258, 268 n.3 (1993) (noting that most regulatory statutes "contain[] no mechanism whereby a court can on its own authority demand" an agency determination).

[237] *See, e.g.*, Rosado v. Wyman, 397 U.S. 397, 407 (1970) (noting that the district court explored the possibility of having the Department of Health, Education & Welfare participate in the case as an amicus but that the "Department at that stage determined to remain aloof"); Echazabal v. Chevron, U.S.A., Inc., 213 F.3d 1098, 1104 n.7 (9th Cir. 2000) (noting that Equal Employment Opportunity Commission was invited to file brief but declined to do so); Harris Trust & Savings Bank v. John Hancock Mut. Life Ins. Co., 970 F.2d 1138, 1140–41 (2d Cir. 1992) (noting that agency declined to file amicus brief because "the need to fully consider all of the implications of these issues within the Department precludes our providing the Court with a brief within a foreseeable time frame"); Popkin v. Bishop, 464 F.2d 714, 719 n.15 (2d Cir. 1972) (noting that the SEC declined the court's invitation to file an amicus brief "due to the inability of the Commissioners to agree upon a position"); Burgess v. Garvin, No. 01 Civ. 10994 (GEL), 2004 WL 527053, at *4 n.2 (S.D.N.Y. Mar. 16, 2004) ("The Department of Justice declined this Court's invitation to provide an amicus brief on the issue; the Court therefore reaches its conclusions without the benefit of input from the agency charged with implementing the [statute]."); Sec. Indus. Ass'n v. Connolly, 703 F. Supp. 146, 155 n.16 (D. Mass. 1988), *aff'd* 883 F.2d 1114 (1st Cir. 1989) (noting that SEC declined invitation to file an amicus brief and recognizing that "various prudential and strategic considerations, including an interest in permitting the case law to ripen and a desire not to become committed even indirectly on an issue as yet unresolved within the agency[] may govern the decision whether to file an amicus brief").

[238] *See Harris Trust & Savings Bank*, 970 F.2d at 1140 (noting that agency requested additional time to file amicus brief because "approval of the Department of Justice was required"); Neal Devins, *Unitariness and Independence: Solicitor General Control over Independent Agency Litigation*, 82 CAL. L. REV. 255, 263–64 (1994) (discussing the power of the Department of Justice, under the direction of the Attorney General, to control aspects of agency litigation).

[239] *Cf.* Tunick v. Safir, 209 F.3d 67, 99 (2d Cir. 2000) (Van Graafeiland, J., dissenting) (noting in the state certification context that a state court's task of refusing to answer a certified question is "obviously unpleasant"); Kaye & Weissman, *supra* note 25, at 408–09 (discussing problems that can arise when a state court refuses a federal court's certification request).

[240] *See, e.g.*, 11 C.F.R. §§ 112.1–112.4 (2006) (setting forth the Federal Election Commission's procedural rules governing when the agency will respond to requests for advisory opinions); 16 C.F.R. § 1.1 (2006) (setting forth the Federal Trade Commission's procedural rules governing when the agency

laws allowing state courts to answer certified questions from the federal courts.[241] If agencies willingly adopt such procedural rules, the rules could help to define what factors an agency will take into account when deciding whether to respond to a judicial invitation and what procedural safeguards the agency will follow to ensure that any amicus positions are not only well considered but also representative of the views of the agency as a whole.[242]

Even in the absence of such rules, however, there is reason to expect that agencies generally would respond favorably to increased judicial invitations for assistance. Most notably, if an agency refuses to provide a court with its views and the court ultimately adopts a construction that the agency disagrees with, then the agency will have to expend considerable time and money engaging in notice-and-comment rulemaking or formal adjudication if it wants to overturn the court's ruling.[243] This is because *Brand X* indicates that an agency only can trump a court's own independent reading of a statute by promulgating a *Chevron*-eligible interpretation.[244] And *Christensen* and *Mead* hold that *Chevron* generally will apply only to binding interpretations, such as interpretations involving notice-and-comment rulemaking or formal adjudication.[245] Agencies, therefore, may well have an incentive in light of *Brand X* to expend a relatively small amount of time and money responding to a court's request for an amicus brief in order to decrease the likelihood of having to expend considerably more time and money later on.[246]

Further diffusing concerns that agencies will thwart judicial attempts to solicit agency amicus briefs is the fact that non-parties in other analogous contexts frequently cooperate with judicial requests for assistance. In the federalism context, for example, state courts often agree to answer ques-

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will respond to requests for advisory opinions); 16 C.F.R. § 1000.7 (2006) (setting forth procedural rules governing when the Consumer Product Safety Commission will respond to requests for advisory opinions).

[241] The language used in various state certification statutes could be instructive in terms of the language that agencies could adopt in drafting internal rules to govern agency's responses to judicial invitations to file amicus briefs. Most state statutes governing certification, for example, require that the question certified be "determinative" or that it "may be determinative" of the litigation. *See* GOLDSCHMIDT, *supra* note 137, at 18–19.

[242] *Cf.* Prezioso, *supra* note 22 (noting the need for the SEC to better inform litigants, judges and academics of the process the SEC uses in making amicus recommendations).

[243] In other words, agencies might actually have an incentive to file an informal amicus brief because doing so could enable them to avoid engaging in time-consuming notice-and-comment procedures in the first place. *See infra* notes 290–94 and accompanying text.

[244] Nat'l Cable Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982–83 (2005).

[245] United States v. Mead Corp., 533 U.S. 218, 226–27 (2001); Christensen v. Harris County, 529 U.S. 576, 587 (2000).

[246] It is possible that instead of expending time and money to promulgate a *Chevron*-eligible interpretation to undo a judicial construction with which it disagrees, an agency might instead simply choose not to acquiesce in the court's construction. *See generally* Estreicher & Revesz, *supra* note 120.

tions certified to them by the federal courts,[247] even though the federal courts cannot compel the state courts to answer certified questions.[248] Similarly, in the context of litigation before the United States Supreme Court, when the Court issues orders inviting the views of the Solicitor General, the Solicitor General responds.[249] Thus, there is reason to expect that agencies generally will cooperate with courts' requests for assistance.

In sum, inviting agency amicus briefs can enable the courts to obtain expert agency views in a relatively cost effective and expeditious manner. The practice of inviting amicus briefs, accordingly, stands as a significant interactive tool that the courts should become increasingly willing to utilize post-*Brand X*. In addition, the power of the tool could be increased if agencies—drawing on state certification procedures used in the federalism context—promulgate rules to govern the process of responding to amicus invitations.

B. Reconceptualizing Skidmore

If courts actively solicit agency views through the primary jurisdiction doctrine or by inviting agency amicus briefs, courts should be able to minimize those situations where they must construe statutory provisions in the absence of any agency views whatsoever. Merely soliciting an agency's views, however, will not always enable courts to entirely avoid the task of wading into questions of ambiguous regulatory law. This is because—unlike the binding views of a state's highest court solicited using state certi-

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[247] *See* GOLDSCHMIDT, *supra* note 137, at 46 (noting that state court justices who were surveyed were "overwhelmingly positive toward certification, with 85 [justices] (80%) stating their courts were either 'willing' or 'very willing' to answer questions certified to them and only 10 (10%) indicating their courts were either 'somewhat reluctant' or 'very reluctant' to answer certified questions"); *see also id.* at 34 (listing data showing that "states are generally not reluctant to answer certified questions").

[248] *See* Peter Jeremy Smith, *The Anticommandeering Principle and Congress's Power to Direct State Judicial Action: Congress's Power to Compel State Courts to Answer Certified Questions of State Law*, 31 CONN. L. REV. 649, 653 (1999) ("[A]ll state certification procedures give the state court discretion in deciding whether to answer a certified question, even after the certification provision's prerequisites have been met.").

[249] *See supra* note 214; *see also* Tony Mauro, *SG's Office Becoming a Good Friend of the Court*, THE RECORDER, May 22, 2003, at 3 (noting that when the Solicitor General's office is "invited" to file a brief with the Court, the Solicitor General views the invitation more as an order and will not decline to respond). Perhaps the Solicitor General's willingness to respond to the Court's invitations can be explained by the fact that the Solicitor General is a repeat player before the Court and thus has an incentive to comply with the Court's invitations. Because federal agencies are not necessarily repeat players before the same lower federal courts, this same incentive may not apply where an agency is invited by a lower court to file an amicus brief. Nonetheless, at least one federal agency has expressed a policy of trying to respond not only to requests from the Supreme Court but also "to virtually all [requests for amicus briefs] received from the courts of appeals where the securities laws are believed to be dispositive of the issue presented." Ruder, *supra* note 22, at 1176 & n.39; *see also* Prezioso, *supra* note 22 (noting that the SEC "virtually always" honors court requests for amicus briefs).

fication procedures in the federalism context[250]—agency views solicited by a federal court in the context of a particular case often will be set forth in an informal format, such as an amicus brief or an advisory opinion, ineligible for *Chevron*'s rule of mandatory deference.[251] A true shift away from the independent interpretive approach and toward an interactive approach in the administrative realm, accordingly, would require more than merely a judicial willingness to solicit agency views. The federal courts also would be required to take a second step: they would need to give teeth to *Skidmore*'s discretionary deference doctrine so that any non-binding agency views solicited during the course of a particular case receive due consideration.

Currently, the courts take diverging approaches when it comes to determining how much weight, if any, courts should give to an agency's non-binding views pursuant to *Skidmore*.[252] One approach, which the Supreme Court appears to have embraced in *Christensen v. Harris County*,[253] involves having the reviewing court take the agency's interpretation into ac-

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[250] *See, e.g.*, Grover v. Eli Lilly & Co., 33 F.3d 716, 719 (6th Cir. 1994) ("A federal court that certifies a question of state law should not be free to treat the answer as merely advisory unless the state court specifically contemplates that result."); Sifers v. Gen. Marine Catering Co., 892 F.2d 386, 391 (5th Cir. 1990) ("Ordinarily, a state court's answer to a certified question is final and binding upon the parties between whom the issue arose."); Robbins, *supra* note 233, at 130 ("On the federal-to-state level, the answer of the state's highest court binds all federal courts, and thus cannot be overturned even if an appeal occurs in the federal case.").

[251] *See* Christensen v. Harris County, 529 U.S. 576, 587 (2000) (stating that interpretations that "lack the force of law" do not warrant *Chevron* deference); Ball v. Memphis Bar-B-Q Co., 228 F.3d 360, 365 (4th Cir. 2000) (noting that positions taken in briefs during litigation are entitled only to *Skidmore* deference). *But see* Jones v. Am. Postal Workers Union, Nat'l, 192 F.3d 417, 427 (4th Cir. 1999) (according *Chevron* deference to an agency's amicus brief).

[252] Some lower federal courts, for example, have attempted to apply *Skidmore*'s totality-of-the-circumstances test by giving weight to an agency's informal views only when the agency's views are found to be "persuasive" and giving no weight where the agency's views are found unpersuasive. *See, e.g.*, Packard v. Pittsburgh Transp. Co., 418 F.3d 246, 252–53 (3d Cir. 2005); St. Mary's Hosp. of Rochester v. Leavitt, 416 F.3d 906, 914 (8th Cir. 2005); Lin v. U.S. Dep't of Justice, 416 F.3d 184, 191 (2d Cir. 2005); *In re* New Times Sec. Servs., Inc., 371 F.3d 68, 83 (2d Cir. 2004). In contrast, other lower federal courts—faced with uncertainty about *Skidmore*'s exact meaning—have tried to duck *Skidmore* entirely, concluding that they would reach the same result regardless of the amount of weight given to the relevant agency's views. *See, e.g.*, Nevada v. Dep't of Energy, 400 F.3d 9, 13 (D.C. Cir. 2005); SouthCo, Inc. v. Kanebridge Corp., 390 F.3d 276, 286, n.5 (3d Cir. 2004); Fed. Trade Comm'n v. Garvey, 383 F.3d 891, 903–04 (9th Cir. 2004); McCormick *ex rel.* McCormick v. School Dist. of Mamaroneck, 370 F.3d 275, 290 (2d Cir. 2004); Wildermuth, *supra* note 57, at 1897 (describing how some courts "have simply decided not to engage in the analysis where they would reach the same conclusion as the agency").

[253] In *Christensen v. Harris County*, 529 U.S. 576 (2000), the Court applied *Skidmore* in the context of a dispute that arose over the meaning of the term "compensatory time" found in the Fair Labor Standards Act. In addressing the issue, the Court reached its own independent reading of the statute before considering views that the Department of Labor had set forth in an opinion letter. When it did finally consider the Department of Labor's views, the Court's entire application of *Skidmore* consisted of the Court concluding in a single sentence that "we find unpersuasive the agency's interpretation of the statute at issue in this case." *Id.* at 587.

count only *after* the court reaches its own independent reading.[254] As one commentator has explained, "[o]bviously this is not deference at all."[255] Although "[d]eference is compatible with a court[] ultimately reaching a conclusion different from the agency's after weighing the agency's opinion," it is incompatible "with reviewing the agency's interpretation only after the court has already interpreted the statute, and rejecting the agency opinion if it does not coincide with the court's."[256]

Judicial willingness to take this "we defer if we agree" approach may be explained by the fact that *Skidmore* is seen as hinging on an expertise rationale. According to the expertise rationale, *Skidmore* calls for consideration to be given to non-binding agency views because agency views, even though not controlling on the courts, may be based "upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case."[257] Viewing *Skidmore* solely through the lens of the expertise rationale, however, threatens to turn *Skidmore* into a statement of the obvious: a judge should give weight to the views of expert observers with which the court agrees.[258] If *Skidmore* is to have any meaning—and if it is to have utility in terms of the interactive approach proposed here—it has to mean more than merely that the courts should give weight to agency views once a court independently reaches a result that happens to coincide with the agency's own expert views.

Skidmore instead should be read as requiring courts to take agency views into account as a relevant data point when independently construing statutory ambiguity (and therefore forbidding courts from ignoring agency views).[259] Moving *Skidmore* in this direction makes sense once one recognizes that *Skidmore* does *not* hinge entirely on the expertise rationale but

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[254] *See* Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon, 541 U.S. 1, 17–18 (2004) (noting only after the court reached its own construction that its construction accords with agency's informal views set forth in an advisory opinion); *see also* Womack, *supra* note 57, at 325–30 (discussing examples of where the lower federal courts have deferred to agency views only where the agency views happen to coincide with the court's own views).

[255] John F. Coverdale, Chevron*'s Reduced Domain: Judicial Review of Treasury Regulations and Revenue Rulings After* Mead, 55 ADMIN. L. REV. 39, 58 (2003).

[256] *Id.*; *see also* Cathedral Candle Co. v. U.S. Int'l Trade Comm'n, 400 F.3d 1352, 1366 (Fed. Cir. 2005) (noting that the Supreme Court could "not mean for [*Skidmore*] to reduce to the proposition that 'we defer if we agree'").

[257] Skidmore v. Swift & Co., 323 U.S. 134, 139 (1944).

[258] *Cf.* United States v. Mead Corp., 533 U.S. 218, 250 (2001) (Scalia, J., dissenting) ("Justice Jackson's eloquence notwithstanding, the rule of *Skidmore* deference is an empty truism and a trifling statement of the obvious: A judge should take into account the well-considered views of expert observers.").

[259] *See* Merrill & Hickman, *supra* note 7, at 855 ("*Skidmore* is properly regarded as a deference doctrine because the court cannot ignore the agency interpretation—the court must assess that interpretation against multiple factors and determine what weight they should be given."); *see also* Murphy, *supra* note 3, at 46 (noting that because *Skidmore* views carry only "'persuasive' weight, a court is free to reject those with which it disagrees after fair consideration; but it is equally true that courts are not free to ignore them").

also rests on the notion that resolving ambiguities in statutes may turn on competing policy choices.[260] When a statute's clear meaning cannot be resolved by resorting to statutory text, legislative history, or other tools of statutory construction, certain policy choices necessarily come into play. Where an agency has been given policymaking powers by Congress but has yet to exercise its delegated powers to resolve a particular question, it makes especially good sense for the courts to take the relevant agency's views into account as a pertinent data point when making a decision about how to resolve the statutory ambiguity.[261] If the court fails to do so, then the court may merely postpone application of the agency's legitimate views since the agency possesses congressionally-delegated power to override the court's construction.[262]

Viewing *Skidmore* in this way—such that federal courts would be required to take agency views into account pursuant to *Skidmore*—finds support in two other analogous contexts where policymaking is at play: (1) the federal courts' treatment of lower state court decisions in the federalism context; and (2) agency treatment of public comments received during rulemaking proceedings.

1. The Federalism Analogy: Giving Weight to Non-Binding Lower State Court Decisions in the Erie *Context.*—First, *Skidmore*'s meaning can be refocused by drawing on the federalism analogy. After *Erie* emerged, the federal courts were faced with developing rules for handling ambiguous questions of state law that had not been definitively resolved by the state's highest court. Where a *lower* state court but not the state's *highest* court had weighed in on an issue of indeterminate state law, the federal courts grappled with what type of weight to give to such lower court decisions. The rule that ultimately emerged is one that requires the federal courts to take any lower state court rulings into account when deciding an unresolved question of state law but does not mandate that the fed-

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[260] In *Skidmore* itself, for example, the Court concluded that some weight should be given to the views of the Administrator of the Wage and Hour Division because the Administrator had been given the task of setting policy to guide enforcement actions. 323 U.S. at 139–40; *see also* Murphy, *supra* note 3, at 43 (asserting that the "*Skidmore* construction process frequently requires courts to engage in policymaking of the sort *Chevron* reserves for agencies" because courts must frequently resolve the meaning of ambiguous statutory text); Jamie A. Yavelberg, *The Revival of* Skidmore v. Swift*: Judicial Deference to Agency Interpretations After* EEOC v. ARAMCO, 42 DUKE L.J. 166, 187 (1992) ("When, in a statute to be implemented by an agency, Congress creates an ambiguity that cannot be resolved by the text, the legislative history, or the 'traditional tools of statutory construction,' the resolution of that ambiguity necessarily involves policy judgment.").

[261] *See* Cleary *ex rel.* Cleary v. Waldman, 167 F.3d 801, 808 (3d Cir. 1999) (taking the fact that the agency had been delegated authority to administer the act into account when determining how much weight was owed to the agency's informal interpretation under *Skidmore*).

[262] *Cf.* Fed. Labor Relations Auth. v. U.S. Dep't of Treasury, 884 F.2d 1446, 1454 (D.C. Cir. 1989) (explaining that broad deference is given to an agency's construction of its own regulations because "the agency has the authority to amend the regulation itself" and thus "a court's refusal to defer may simply postpone application of the agency's legitimate view").

eral courts follow lower state court rulings.[263] In other words, a federal court *must consider* a lower state court ruling as relevant to the question of how the state's highest court would decide the issue, but the federal court need not necessarily *follow* the lower state court ruling. In addition, regardless of whether the federal court ultimately chooses to accept or to reject any relevant state court rulings, the federal court generally will explain its reasoning for doing so.[264]

Such an approach could prove useful in the administrative law context in terms of shedding light on how *Skidmore* might be given additional definition. Much like how the views of lower state courts do not necessarily bind the federal courts in the *Erie* context, agency interpretations that fall outside of *Chevron*'s rule of mandatory deference do not bind the federal courts in the administrative law context.[265] Yet simply because an agency's views are non-binding does not mean that a court should feel free to cast the agency's views aside without even so much as considering them. Rather, just as federal courts must at least consider the views of lower state courts in the *Erie* context, *Skidmore* should be read to require the federal courts to consider any relevant agency views when interpreting ambiguity in agency-

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[263] *See, e.g.*, Comm'r of Internal Revenue v. Estate of Bosch, 387 U.S. 456, 465 (1967) (stating that "federal authority may not be bound even by an intermediate state appellate court ruling"); West v. Am. Tel. & Tel. Co., 311 U.S. 223, 237 (1940) (stating that a decision by an intermediate appellate state court should not be "disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise"); Craven v. Univ. of Colo. Hosp. Auth., 260 F.3d 1260, 1267 (10th Cir. 2001) (quoted in Aspen Orthopaedics & Sports Medicine, LLC v. Aspen Valley Hosp. Dist., 353 F.3d 832, 840 n.5 (10th Cir. 2003) (internal quotes omitted) ("While not binding on this court, decisions by a state's intermediate appellate courts provide evidence of how the state's highest court would rule on the issue, and we can consider them as such.")); McGeshick v. Choucair, 9 F.3d 1229, 1232 (7th Cir. 1993) (stating that, "[w]e are obliged to consider the holdings of state appellate courts" but are not bound to follow such rulings "if we have good reasons for diverging from those decisions"); General Elec. Credit Corp. v. Ger-beck Mach. Co., 806 F.2d 1207, 1209 (3d Cir. 1986) (stating that intermediate appellate court decisions must be given "significant weight"); McKenna v. Ortho Pharm. Corp., 622 F.2d 657, 662 (3d Cir. 1980) (stating that, in ascertaining state law, federal courts should give "proper regard" but not "conclusive effect" to decisions of lower state courts); Hayfield v. Home Depot U.S.A., Inc., 168 F. Supp. 2d 436, 444 (E.D. Pa. 2001) ("Lower state court decisions are persuasive, but not binding, on the federal court's authority; if the State's highest court has not spoken on a particular issue, the 'federal authorities must apply what they find to be the state law after giving 'proper regard' to relevant rulings of other courts of the State.'" (quoting Smith v. Whitmore, 270 F.2d 741, 745 (3d Cir. 1959))).

[264] *See* Eljer Mfg., Inc. v. Liberty Mut. Ins. Co., 972 F.2d 805, 814 (7th Cir. 1992) (Posner, J.) ("Even when a state's intermediate appellate courts are uniform, . . . we are not bound by them. But we do need, in such a case, a reason for predicting that the state's supreme court will reject the intermediate decisions.") (citations omitted); Liberty Mut. Ins. Co. v. Triangle Indus., Inc., 957 F.2d 1153, 1157 (4th Cir. 1992) (providing reasons for rejecting lower state courts' views); Williams, McCarthy, Kinley, Rudy & Picha v. Nw. Nat'l Ins. Group, 750 F.2d 619, 624–25 (7th Cir. 1984) (explaining why court did not accept views of Illinois' intermediate appellate court); *cf.* Salve Regina Coll. v. Russell, 499 U.S. 225, 232–33 (1991) (explaining that although appellate courts review a federal court's determination of state law de novo, "an appropriately respectful application of de novo review should encourage a district court to explicate with care the basis for its legal conclusions").

[265] *See supra* notes 50–51 and accompanying text.

administered statutes. After considering an agency's views, the court could decide—pursuant to *Skidmore*'s multi-factor test—that the agency's views are entitled to significant weight, to some weight, or alternatively that they should be rejected completely.[266] The court, however, would be required to explain its treatment of the agency's views and thus could not ignore the agency's views entirely.

Viewing *Skidmore* in this way would carry a significant advantage: the federal courts could no longer render *Skidmore* a dead letter by "deferring" to an agency's views only where the agency's views happen to coincide with the court's own views.[267] Of course, requiring courts to give due consideration to non-binding agency views will not guarantee that a court ultimately will accept an agency's preferred interpretation, but it should increase the odds that the court will reach a conclusion in line with the agency's views and thus should minimize the likelihood of agency override or agency nonacquiescence. In addition, by requiring courts to both consider agency views *and* to explain why the agency's views were or were not accepted by the court,[268] the significant leeway that the lower courts currently exercise when applying *Skidmore* should be easier to keep in check.[269]

2. *The "Hard Look" Analogy: Giving Weight to Public Comments Solicited During the Rulemaking Process.*—In addition to the federalism analogy, support for framing *Skidmore* in a way that requires federal courts to take agency views into account also can be found by drawing on a well-established administrative law rule: that agencies cannot ignore public comments provided during a rulemaking's notice-and-comment pe-

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[266] United States v. Mead, 533 U.S. 218, 228 (2001) (noting that deference under *Skidmore* can range "from great respect on one end . . . to near indifference at the other") (citations omitted).

[267] As one commentator has explained,

> [i]t appears that many courts are now viewing *Skidmore* deference as a hollow doctrine that requires little respect from the courts. *Skidmore* deference has become no deference, with courts undertaking a de novo review of agency action once it has found *Chevron* inapplicable after the *Mead* inquiry. If after this de novo review the court finds that its interpretation is consistent with the agency's interpretation, then it grants deference. But "deference" is an inappropriate description of such an action. Instead, the court's decision to uphold the agency's interpretation should be characterized as a coincidence.

Womack, *supra* note 57, at 330.

[268] Requiring district courts to explain either in writing or orally on the record the basis for their decisions is not unheard of in other contexts. *See, e.g.*, 7TH CIR. R. 50 ("Whenever a district court resolves any claim or counterclaim on the merits, terminates the litigation in its court . . . or enters an interlocutory order that may be appealed to the courts of appeals, the judge shall give his or her reasons, either orally on the record or by written statement."); FED. R. APP. P. 9(a)(1) ("The district court must state in writing, or orally on the record, the reasons for an order regarding the release or detention of a defendant in a criminal case.").

[269] *Cf.* Merrill & Hickman, *supra* note 7, at 862 (noting that the discretionary nature of the *Skidmore* inquiry makes it "more difficult for the Supreme Court to rein in the courts of appeals, if they (or some of them) exhibit a tendency to interfere unduly with agency policymaking through aggressive statutory interpretation").

riod but rather must both consider and respond to public comments.[270] Pursuant to this rule, when an administrative agency receives public comments during a notice-and-comment period, the administrative agency need not respond to every single public comment regardless of its significance.[271] The agency, however, "must 'respond in a reasoned manner to the comments received, to explain how the agency resolved any significant problems raised by the comments, and to show how that resolution led the agency to the ultimate rule.'"[272] This rule not only ensures that public comments will factor into an agency's policymaking process but it also ensures that reviewing courts will have a basis for determining whether the agency took a "hard look" at relevant considerations and exercised its discretion based on reasoned decisionmaking.[273]

Subjecting courts to a similar rule—and using "hard look" review to shed light on the judiciary's own policymaking role—makes considerable sense.[274] Such a rule would *not* mean that the courts would be obligated to ultimately accept an agency's informal views (just as agencies are not required to ultimately accept public comments filed with them). Rather, it would ensure that the federal courts cannot ignore agency views when making policy choices that Congress has chosen to place in the hands of an agency. In other words, the federal courts would be required to take a "hard look" at any relevant agency views (using *Skidmore*'s factors) and to explain why the agency's views are or are not persuasive.[275]

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[270] *See* RICHARD J. PIERCE, JR., 1 ADMINISTRATIVE LAW TREATISE § 7.4, at 443–44 (4th ed. 2002) (discussing requirement that agencies respond to comments received during rulemaking process); *see also* Chem. Waste Mgmt., Inc. v. U.S. Envtl. Prot. Agency, 869 F.2d 1526, 1535 (D.C. Cir. 1989) ("[I]f the agency had ignored the comments it received . . . then it could not claim to have complied with the APA's notice and comment requirements.").

[271] Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 394 (D.C. Cir. 1973) (stating that "comments must be significant enough to step over a threshold requirement of materiality before any lack of agency response or consideration becomes of concern").

[272] Action on Smoking and Health v. Civil Aeronautics Bd., 699 F.2d 1209, 1216 (D.C. Cir. 1983) (quoting Rodway v. U.S. Dep't of Agric., 514 F.2d 809, 817 (D.C. Cir. 1975)).

[273] The "hard look" doctrine derives from *Motor Vehicles Manufacturing Ass'n v. State Farm Mutual Auto Insurance Co.*, 463 U.S. 29, 43 (1983). In that case, the Court explained that

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

Id.

[274] I am grateful to Tom Merrill for pointing this analogy out to me.

[275] At least one commentator has argued that "hard look" review should be used to shed light on *Skidmore*. *See* Rossi, *supra* note 54, at 1143–46. According to Rossi, *Skidmore*'s various factors can be viewed as analogous to those that courts consider in applying "hard look" review because *Skidmore*'s factors enable the courts to analyze whether an agency has considered relevant factors in formulating its policy determinations. *Id.* at 1143. In contrast to Rossi, I am not using "hard look" review to shed light on what factors *an agency* must consider in interpreting statutory ambiguity. Rather, I am suggesting

Consider, for example, the application of this proposed reading of *Skidmore* in the context of an amicus brief filed by the Environmental Protection Agency ("EPA"). Although the EPA's amicus views would not bind the court pursuant to *Chevron*, the court nonetheless would not be free to toss the agency's amicus brief aside without first giving the amicus brief due consideration pursuant to *Skidmore*'s factors—just as the EPA would not be free to toss aside comments filed by an environmental group in the context of a notice-and-comment rulemaking without first giving the comments consideration.

Not only would such a rule give teeth to *Skidmore*'s discretionary deference doctrine, but it would bring greater uniformity to the ad hoc approaches to *Skidmore* used by the federal courts.[276] In addition, such a rule would better reflect the notion that providing meaning to statutory ambiguity often involves competing policy choices—policy choices that agencies may be better suited to make than courts.

V. CONSIDERING OBJECTIONS TO AN INTERACTIVE MODEL

Because the courts currently tend to view interpretive authority as resting either with the courts or with the administering agency but not with both, the suggestion that courts move toward a more "interactive" or "shared" interpretive approach is open to opposition on several grounds. Four possible objections to the suggested interactive approach are considered here. This article concludes that none of these objections are fatal and that it would be beneficial to encourage courts and agencies to interact with each other in the wake of *Brand X*.

A. Should Concerns About Avoiding Agency Override Play a Role in the Interpretive Process?

A primary objection that could be levied against the interactive model is that concerns about avoiding agency override and interbranch friction should play no role in the judiciary's approach to statutory interpretation. The argument would proceed as follows: Courts frequently engage in statutory interpretation despite the fact that judicial constructions can be overridden by Congress.[277] Courts, therefore, should not change their interpretive approach (nor should they shy away from imposing their own

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that by analogizing to "hard look" review, it is possible to shed light on what factors *the courts* should consider in interpreting statutory ambiguity.

[276] *See* Womack, *supra* note 57, at 341 (noting that the Supreme Court "has decided to leave a question fundamental to the functioning of the administrative state in the hands of lower court judges who may come to hundreds of different decisions on a sliding scale of *Skidmore* deference"); *see also* Merrill & Hickman, *supra* note 7, at 862.

[277] *See, e.g.*, Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 557 (2005) (noting that Congress had enacted legislation to overrule one of the Court's prior judicial decisions); Ill. Brick Co. v. Illinois, 431 U.S. 720, 736 (1977) (quoted in Hubbard v. United States, 514 U.S. 695, 711–12 (1995) ("'[I]n the area of statutory construction[]' . . . Congress is free to change [the] Court's interpretation.")).

independent readings on agency-administered statutes) simply because *Brand X* holds that a judicial construction of a statute can be overridden by an agency.

This objection suffers from several flaws. First, as a purely factual matter, the central assumption underlying this objection—that courts do not alter their interpretive approach to avoid congressional overrides—rests on shaky ground. Various commentators have concluded that the Supreme Court does in fact take current congressional preferences into account when deciding cases.[278] William Eskridge, for example, has argued that one reason why Congress overrides Supreme Court decisions relatively infrequently is because "[t]he Court is attentive to current congressional (and . . . presidential) preferences when it interprets statutes."[279] In addition, Lee Epstein and Jack Knight have concluded that the "justices more than occasionally attend to the preferences/likely actions of other government actors."[280] One way that the Court may become aware of the views of members of Congress is through amicus curiae briefs filed with the Court.[281] Indeed, since October Term 1977, members of Congress have filed amicus briefs with the Court every single Term.[282] Although it is unclear how successful members of Congress are when attempting to influence the Court's decisionmaking process through amicus briefs, the Justices do occasionally cite congressional amicus briefs in their decisions.[283] Thus, far from deciding cases in a vacuum, the Court may consider congressional preferences to be a relevant factor.

Second, in terms of the normative objection that concerns about avoiding interbranch friction should play no role in the judiciary's approach to statutory interpretation in the administrative realm, it is important to note that courts construing ambiguous regulatory statutes generally are not performing traditional statutory construction. Rather, where a statutory term truly lacks clear meaning and is susceptible to multiple plausible readings, courts construing the statute in the absence of an authoritative agency opinion essentially must engage in policymaking to select one preferred reading

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[278] *See* LAWRENCE BAUM, THE PUZZLE OF JUDICIAL BEHAVIOR at 119 (1997) ("The predominant view [among scholars who have researched strategic behavior by the Supreme Court] is that justices regularly take the other branches into account when they set the Court's doctrine on statutory issues, voting strategically to minimize the chances that their decisions will be overridden."); *see also* LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 149–50 (1998); William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 378, 390–97 (1991).

[279] Eskridge, *supra* note 278, at 378.

[280] EPSTEIN & KNIGHT, *supra* note 278, at 149–50.

[281] *See* J. SCOURFIELD MCLAUCHLAN, CONGRESSIONAL PARTICIPATION AS *AMICUS CURIAE* BEFORE THE U.S. SUPREME COURT 79–138 (2005) (describing the types of cases in which members of Congress choose to file amicus briefs with the U.S. Supreme Court).

[282] *See id.* at 27.

[283] *See id.* at 167–71 ("Congressional briefs were cited by the Justices in approximately one in ten cases in which Members filed *amicus* briefs.").

over another. This quasi-legislative act arguably is better performed by agencies that—unlike the courts—possess the expertise and the tools to engage in policymaking and that can be held politically accountable for their policy decisions.[284] Thus, a more interactive approach that encourages courts to seek out agency views on questions of statutory ambiguity would not only help to reduce the likelihood of interbranch conflict between courts and agencies but it also would help to reduce judicial policymaking and to enable courts to draw on agency expertise, thereby increasing the quality of judicial decisions.

B. Would an Interactive Approach Muddle the Law of Deference or Lead to Manipulation?

A second objection that could be leveled against the suggested interactive model is that *Chevron*, *Christensen* and *Mead* already have significantly muddled the law of deference by creating a dichotomy between *Chevron* and *Skidmore* that the lower courts find exceedingly difficult to apply and that they sometimes manipulate to serve their own means.[285] Thus, if yet another interpretive approach is thrown into the mix, perhaps it will only further confuse matters.[286]

This objection ignores the nature of the interactive approach proposed here. I do not propose that an entirely new type of deference be added to the judiciary's vocabulary on top of *Chevron* and *Skidmore*. Rather, I suggest that when courts are faced with construing a statute in the absence of a binding agency interpretation, it makes sense to encourage the courts to solicit agency views and to require the courts to give those agency views due consideration. As *Brand X* itself demonstrates, statutory interpretation in the regulatory realm can no longer be viewed through an "either-or" lens whereby either the relevant agency possesses the power to interpret the statute or the courts retain that power.[287] Now statutory interpretation must be viewed as a shared enterprise: the courts may possess the power to define an ambiguous statutory term *initially* while the relevant agency retains

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[284] *Cf.* Amanda Frost, *Certifying Questions to Congress*, 101 NW. U. L. REV. 1 (2007) (arguing that courts should certify questions of statutory ambiguity to Congress because "[f]ederal judges, valued for their independence from politics and public opinion, have neither the expertise nor the authority to engage in the kind of substantive lawmaking that is required when they must apply a statute containing significant gaps").

[285] *See* Adrian Vermeule, Introduction, Mead *in the Trenches*, 71 GEO. WASH. L. REV. 347, 361 (2003) (referring to *Mead* as a "failed experiment" and arguing that the decision has led to confusion in the D.C. Circuit); Wildermuth, *supra* note 57, at 1888–99 (describing uncertainty that *Mead* has created); *see also* Lisa Schultz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1457–64 (2005); Womack, *supra* note 57, at 322.

[286] *Cf.* Vermeule, *supra* note 285, at 357 ("Judges can operate in a mode of deference, and in a mode of independent decision-making, but more refined, intermediate modes are either psychologically unattainable or nonexistent.").

[287] *See supra* Part II.C.

the *ultimate* power to adopt a different interpretation later on. Encouraging courts to recognize their reduced role in the interpretive process in light of *Brand X* by soliciting and considering agency views should not further confuse matters but rather should help courts to act in a way that reflects the proper relationships between courts and agencies in resolving conflicting statutory policies.

Of course, this all assumes that judges will voluntarily demonstrate a willingness to cede some of their interpretive powers to agencies post-*Brand X*—an assumption that remains open to question. In the federalism context, the federal courts have shown a general willingness to certify questions to state courts,[288] which suggests that the federal courts might demonstrate a similar willingness in the administrative law context post-*Brand X*. However, judges—especially judges concerned with maximizing their own policymaking powers—could instead refuse to view statutory interpretation as a shared enterprise post-*Brand X* and could choose to act strategically to try to keep the task of statutory interpretation within their domain. A court interpreting an ambiguous statutory provision for the first time, for example, might choose to invite the relevant agency's views only where the court thinks that the agency's views will match the court's own personal policy preferences. Or the court might take care to label its statutory interpretation as grounded in the "clear" text of the statute so as to lock its interpretation into place and to give the judicial precedent *stare decisis* effect. In turn, appellate courts reviewing statutory interpretations that they dislike could proclaim the statutory provisions to be "ambiguous"—thereby enabling the reviewing court to defer to agency interpretations that the court finds preferable.

Although this type of gaming certainly is a possibility post-*Brand X*,[289] it not only would be unseemly but it would thwart Congress's decision to delegate regulatory policymaking to agencies rather than the courts. A far more attractive alternative would be for courts—taking a cue from *Brand X*—to willingly recognize that statutory interpretation no longer can be seen as a purely judicial exercise and to move toward a more interactive approach that accepts agencies' central role in the interpretive process. If the lower courts are unwilling to take this step on their own, then perhaps a

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[288] *See* GOLDSCHMIDT, *supra* note 137, at 28 (reporting that the federal courts of appeals certified 192 questions, or 70% of all certification applications, from 1990 to 1994); *see also id.* at 43 (reporting that 54% of federal circuit judges surveyed indicated that they were "willing" or "very willing" to certify questions to state supreme courts).

[289] How much judging is driven by politics rather than "principled practice" is open to question. *See* Harry T. Edwards, *Collegiality and Decisionmaking on the D.C. Circuit*, 84 VA. L. REV. 1335, 1337 (1998). Some scholars, however, have concluded that politics drive courts' application of *Chevron*. *See, e.g.*, Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2168–73 (1998) (reporting results suggesting that "there is a significant political determinant to judicial decisionmaking, at least in *Chevron* review").

clear signal or two from the Supreme Court indicating that the lower courts should start thinking creatively about using agencies as the primary interpreters of statutory ambiguity will prod the lower courts to cede some of their interpretive power to agencies post-*Brand X*.

C. *Would an Interactive Approach Minimize Agency Incentives to Engage in Notice-and-Comment Rulemaking Procedures?*

Yet another criticism that could be raised against an interactive approach is that it would encourage agency gaming by minimizing incentives to engage in notice-and-comment rulemaking. Notice-and-comment rulemaking frequently forces agencies to expend significant sums and to spend years mired in the rulemaking process.[290] Thus, if agencies know that courts will solicit and consider their views prior to construing ambiguity in an agency-administered statute, will agencies have less incentive to engage in costly and time consuming notice-and-comment rulemaking in the first place?[291]

Certainly, agencies may have less of an incentive to engage in notice-and-comment rulemaking in light of *Brand X*.[292] This is because agencies now know that even if they elect not to engage in notice-and-comment rulemaking to resolve an issue of statutory ambiguity, they will not be foreclosed from doing so in the future.[293] Although the interactive approach proposed here might increase the risk of agency gaming to some extent, it should not significantly aggravate what *Brand X* already has done in terms of creating incentives for agencies to hold off on engaging in notice-and-comment rulemaking. Even if a court were to follow an interactive approach and to seek out an agency's views, there is no guarantee the court ultimately would accept the agency's views. Rather, any solicited agency views set forth in non-binding formats, such as agency amicus briefs, merely would receive the court's consideration pursuant to *Skidmore*—leaving open the possibility that the court might choose to reject the agency's views. In this sense, the interactive approach proposed here should not give agencies much more of an incentive to hold off on notice-and-comment rulemaking than does the very existence of *Skidmore* deference itself: *Skidmore*'s presence already offers agencies the option of earn-

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[290] *See generally* Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1387–90 (1992).

[291] *Cf.* Bamberger, *supra* note 20, at 1310 (arguing that widespread use of the primary jurisdiction doctrine would "create perverse incentives for agency inaction" because the "agency would not need to make a considered judgment on statutory construction during the normal course of policymaking to ensure that it would prevail in any particular case; it always would be given the chance to reach a deference-deserving interpretation before litigation was concluded").

[292] *See* Chevron *Deference*, *supra* note 103, at 403–04.

[293] *See id.* at 403 ("Because agencies will no longer be bound by prior judicial constructions of statutes, they have fewer reasons to engage in notice-and-comment procedures during the initial interpretation of a statute.").

ing some deference even if the agency chooses to forego issuing a binding interpretation, such as a notice-and-comment rule.

In addition, in deciding whether to sit back and await a court's invitation before offering up its views, the agency also will have to consider the possibility that courts may in some cases decide that it would be inappropriate or impractical to invite agency views. Nor would there be any guarantee that unresolved statutory ambiguity would reach the courts and be decided in a timeframe desired by the agency. Thus, agencies would have to decide whether to (1) engage in notice-and-comment rulemaking at the outset, or (2) wait for a court to face an issue and to invite the agency to provide its informal views. Although the first route (the notice-and-comment route) would force agencies to expend considerable time and money at the outset, the alternative route (the informal route) would not be free of its own attendant costs. Rather, in considering whether to avoid notice-and-comment rulemaking and to take the informal route, the relevant agency would have to consider the costs it would face if its informal views were rejected by the courts—forcing the agency to expend considerable resources promulgating (and later defending) a *Chevron*-eligible interpretation to overcome the courts' interpretation.[294]

In short, although some agencies may choose to refrain from engaging in notice-and-comment rulemaking if they know that courts will solicit agency views before interpreting statutory ambiguity on their own, the risk of this type of strategic gaming is offset to some extent by the costs that agencies may face if they delay notice-and-comment rulemaking. Furthermore, the benefits of enabling courts to seek out agency views and to rely on agency expertise rather than engaging in judicial policymaking are substantial and arguably outweigh the risk that some agencies may engage in strategic gaming.

D. Would an Interactive Approach Represent an Abdication of the Courts' Role in the Interpretive Process?

A final criticism that could be levied against the interactive approach deserves consideration: rather than promoting dialogue between courts and agencies, perhaps the interactive approach proposed here actually would have the effect of cutting off the courts' contributions to the interpretive process and thus would not result in any meaningful "interaction" at all.[295]

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[294] This could be costly to the agency because it might force the agency to participate in two separate proceedings. *Cf. id.* at 404 & n. 65 ("The inclination of agencies to promulgate interpretative rules under *Brand X* will be partially offset by the cost of having to litigate the interpretation in two separate proceedings—once under *Skidmore* deference and once under *Chevron* deference. Thus, agencies may often conclude that the potential cost of having to litigate twice outweighs the burdens of notice-and-comment procedures.").

[295] *Cf.* Martin H. Redish, *Supreme Court Review of State Court "Federal" Decisions: A Study in Interactive Federalism*, 19 GA. L. REV. 861, 900–02 (1985) (arguing that a true "interactive" model of

Given that Congress has empowered agencies to set regulatory policy through rulemaking and enforcement efforts but also has empowered the courts to interpret regulatory statutes in the context of private litigation,[296] is it appropriate to cut courts out of the interpretive process by essentially favoring agency views? Would Congress want courts to duck unresolved issues of statutory ambiguity in order to allow the relevant agency to act?

Analogous questions have been raised in the federalism context where some commentators have argued that state and federal courts actually may benefit from "intersystemic cross-pollination"[297] and that certification and abstention—rather than promoting interaction—actually tend to undermine this intersystemic interaction by cutting federal courts out of the interpretive process.[298] In addition, some commentators, such as Martin Redish, have argued that judge-made abstention doctrines used in the federalism context actually constitute "a judicial usurpation of legislative authority, in violation of the principle of separation of powers" because they enable the courts to effectively ignore Congress's decision to give the federal courts jurisdiction over cases raising state law questions.[299]

Such concerns, however, do not carry much force in the administrative law context. First, with respect to separation of powers concerns, *Chevron* compels courts to accept reasonable agency interpretations of ambiguous statutory provisions precisely because *Congress* has commanded that the courts do so.[300] Given *Chevron*'s premise that Congress intends agencies rather than courts to act as the authoritative interpreters of ambiguous statutory provisions,[301] it is difficult to see how a court would thwart congres-

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federalism occurs when federal and state courts engage in an interactive dialogue with the other court system about the proper shaping of the other system's laws).

[296] *See supra* notes 21–22 and accompanying text.

[297] Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and "The Martian Chronicles,"* 78 VA. L. REV. 1769, 1773 (1992); *cf.* Redish, *supra* note 295, at 901 (arguing that both state and federal systems "have much to gain from institution of a dialogue between the courts of both systems").

[298] *See* Friedman, *supra* note 233, at 1239 & n.69 ("Despite a general preference for resolving novel state law questions in state court, commentators occasionally express a competing interest in the 'cross-fertilization' or 'cross-pollenization' of state law by federal judges."); *see also* David L. Shapiro, *Federal Diversity Jurisdiction: A Survey and a Proposal*, 91 HARV. L. REV. 317, 325–26 (1977) (surveying various federal appellate court decisions and concluding that federal courts often make "useful contributions to developing state law" by "reconciling or distinguishing existing precedent" and "synthesizing and analyzing state law").

[299] Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 76 (1984).

[300] *See supra* note 49 and accompanying text.

[301] *Chevron* itself involved review of an agency rulemaking proceeding—not private litigation between two private parties initially brought in federal court. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, 467 U.S. 837, 841 (1984). Nonetheless, courts generally have assumed that *Chevron* applies in the private litigation context as well. *See, e.g.*, Wash. State Dep't of Soc. and Health Servs. v. Guardianship Estate of Keffeler, 537 U.S. 371 (2003) (granting *Chevron* deference to agency regulations in the context of a class action suit brought by children in foster care against state); Phillips Co. v. Den-

sional intent if the court were to leave the task of law declaration up to the relevant agency. Put another way, the delegation rationale underpinning *Chevron* seems to alleviate concerns that the courts—by inviting agencies to assist with the task of law declaration—would somehow thwart congressional intent or violate notions of separation of powers.[302]

Second, there is little reason to worry that the interactive approach proposed here would completely cut off useful dialogue between federal courts and agencies about the meaning of ambiguous regulatory provisions and turn federal courts into "ventriloquists' dummies"[303] for agencies. As discussed above,[304] absent a *Chevron*-eligible interpretation from the relevant agency, courts following the interactive approach would not be forced to function as passive receptacles for whatever views the relevant agency might feed to them. Rather, if a court utilized the interactive approach proposed here to solicit an agency's non-binding views, such as agency views set forth in an amicus curiae brief, then the court ultimately would remain free to reject the agency's views and to impose its own judicial interpretation pursuant to *Skidmore* after giving the agency's views due consideration.[305] The Courts, therefore, still could engage in useful dialogue with the relevant agency and could potentially help to shape the agency's future views.

CONCLUSION

The Court's recent decision in *Brand X* resolved the simmering conflict between *stare decisis* and *Chevron*, making clear that a court's own independent construction of statutory ambiguity will not freeze the meaning of a statute into place. *Brand X*, accordingly, created a solution to the "ossification" problem posed by *Mead*. In creating this solution, however, the Court's decision raised new questions about the proper allocation of interpretive authority between agencies and courts. In particular, because *Brand*

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ver & Rio Grande W. R.R. Co., 97 F.3d 1375, 1377 (10th Cir. 1996) (applying *Chevron* deference in a suit to quiet title between private parties); *cf.* Christensen v. Harris County, 529 U.S. 576 (2000) (considering a claim to *Chevron* deference in the context of a suit between a county and employees of the county sheriff department but ultimately finding *Chevron* inapplicable because the agency had not acted with the "force of law"); Krzalic v. Republic Title Co., 314 F.3d 875, 882 (7th Cir. 2002) (Easterbrook, J., concurring) (noting that in private litigation, *Chevron* gives force to an agency interpretation accompanied "by the formalities of rulemaking or administrative adjudication").

[302] Along these lines, it is important to note that if a court were to follow my proposed interactive approach and to invoke the primary jurisdiction doctrine or request an agency amicus curiae brief post-*Brand X*, the litigants would not be deprived of a judicial forum entirely. Rather, the federal court would still engage in law application and fact finding—asking the relevant agency to help only with the task of law declaration (a task that Congress has delegated to the agency rather than to the courts).

[303] Richardson v. Comm'n of Internal Revenue, 126 F.2d 562, 567 (2d Cir. 1942) (responding to charge that *Erie* turned the federal courts into the "ventriloquist's dummy to the courts of some particular state").

[304] *See supra* Part IV.B.

[305] *See supra* Part IV.B.

X announces that a court's independent construction of statutory ambiguity may merely serve as an interim construction, the Court's decision raises questions about whether the courts can and should minimize those situations where they independently resolve statutory ambiguity prior to the relevant agency weighing in on the issue.

The interactive approach proposed here, which draws on the interactive approach that emerged in the federalism context post-*Erie*, suggests a way that courts could cut back on those situations where a court will construe a statute one way only to have the relevant agency turn around and impose a contrary interpretation. Use of an interactive approach promises to further efficiency and uniformity in the law and to minimize the frequency of confrontational games between agencies and courts. In addition, an interactive approach would enable the courts to capitalize on agency expertise and to minimize judicial policymaking. Ultimately, however, the success of an interactive approach will rest in the hands of courts and agencies. Taking a cue from *Brand X*'s reallocation of interpretive power, courts must become willing to cede some of their interpretive power to agencies, and agencies must demonstrate a willingness to cooperate with the courts by responding to judicial invitations for assistance.