UNITED STATES V. HOME CONCRETE & SUPPLY, LLC: MAKING "AMBIGUOUS" AMBIGUOUS

ABSTRACT

Courts have long given some amount of deference to executive agencies charged with administering bodies of law. When a statute is ambiguous, the agency charged with administering the statute may be better positioned than the courts to interpret it. But when is a statute ambiguous? How does a modern court determine whether a prior court thought a statute was ambiguous? Does a Supreme Court interpretation of an ambiguous statute remove the ambiguity? These are the questions that faced the Supreme Court in *United States v. Home Concrete & Supply, LLC*.

The 1984 Supreme Court decision *Chevron, U.S.A., Inc. v. Natural Resource Defense Council, Inc.* ushered in a new era of increased deference to agencies by replacing the previous circumstantial standard with a presumption of deference to agency interpretations of ambiguous statutes. *Chevron*'s policy was obvious but its limits were vague. In *United States v. Mead Corp.*, the Supreme Court drew a procedural line beyond which deference to agencies was inappropriate in order to ensure due process. *National Cable & Telecommunications Ass'n v. Brand X Internet Services* made administrative law more consistent by giving *Chevron* deference to all proper agency interpretations of ambiguous statutes, regardless of whether courts had already interpreted those statutes. *Home Concrete* is the Supreme Court's most recent effort to adjust the standard for *Chevron* deference.

This Comment analyzes *Home Concrete* on two levels: (1) by reviewing the case-specific issues that primarily controlled *Home Concrete*, and (2) by considering the decision's broader effects on administrative-deference law. The Comment suggests that the Supreme Court wrongly decided *Home Concrete* on the micro-level and unwisely retreated from the deferential approach of *Chevron* and *Brand X* on the macro level.

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INTRODUCTION

In 1984, the Supreme Court in *Chevron, U.S.A., Inc. v. Natural Resource Defense Council, Inc.*[1] held that courts should defer to an agency's interpretation of a law it administers when (1) Congress was silent or ambiguous on the issue, and (2) the agency interpretation is reasonable.[2] This presumptively deferential approach stood in stark contrast to the traditional circumstantial analysis of *Skidmore v. Swift & Co.*[3]

In *United States v. Mead Corp.*,[4] however, the Supreme Court narrowed the *Chevron* analysis, limiting application only to those circumstances where Congress intended to allow agencies to resolve statutory ambiguities with the force of law.[5] Where Congress had delegated such authority to agencies, *National Cable & Telecommunications Ass'n v. Brand X Internet Services*[6] recognized that agencies were entitled to *Chevron* deference even in the face of a conflicting appellate court decision.[7] *United States v. Home Concrete & Supply, LLC*[8] is the Supreme Court's most recent effort to revise administrative-deference law, in which a plurality of Justices redefined what constitutes "ambiguous" congressional intent.[9]

This Comment explores the flaws of *Home Concrete* and frames the case as a retreat from the deferential doctrine of *Chevron* and *Brand X*.

1. 467 U.S. 837 (1984).
2. *See id.* at 842–45.
3. 323 U.S. 134, 140 (1944).
4. 533 U.S. 218 (2001).
5. *Id.* at 226–27 (holding that "*Chevron* deference" applies only "when it appears that Congress delegated authority to the agency" to interpret with the force of law and the agency interpretation was an "exercise of that authority").
6. 545 U.S. 967 (2005).
7. *Id.* at 982 (holding that an agency interpretation "otherwise entitled to *Chevron* deference" trumps a prior judicial interpretation of an ambiguous statute).
8. 132 S. Ct. 1836 (2012).
9. *See id.* at 1843–44 (plurality opinion) (suggesting that congressional intent is only ambiguous when Congress "left a gap to fill").

Part I of this Comment briefly describes the history of Supreme Court administrative-deference jurisprudence. Part II summarizes the facts, procedural history, and opinions of *Home Concrete*. Part III criticizes *Home Concrete* for unnecessarily confusing *Brand X* application, destabilizing the meaning of "ambiguity" in the context of *Chevron*, and failing to address two administrative-deference issues that have vexed lower courts. This Comment concludes that *Home Concrete* was wrongly decided and will negatively affect administrative-deference law going forward.

I. BACKGROUND

The Supreme Court has long recognized the need for deference to executive agencies on interpretations of laws administered by those same agencies.[10] Prior to the landmark *Chevron* ruling, courts applied a case-by-case analysis as prescribed by *Skidmore* to determine proper deference,[11] varying the range and weight of factors considered.[12] Enactment of the Administrative Procedure Act of 1946 (APA) reduced this variance by articulating the procedures by which agencies could make and interpret rules, though it did not directly address the judicial framework for deference.[13]

Chevron brought a sweeping change with its two-step framework, creating a presumption of deference to the administering agency when a statute is ambiguous and the agency interpretation is reasonable.[14] The Court subsequently sought to clarify when *Chevron* applies in *Mead*,[15] though the clarity of that holding is debated.[16] Later, *Brand X* controversially extended *Chevron* deference to agency interpretations that directly contradicted prior judicial interpretations of ambiguous statutes.[17] More recently, *Mayo Foundation for Medical Education & Research v. United States*[18] made clear that *Chevron* applies to Treasury regulations.[19]

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10. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations.").

11. *See* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516 (1989) (discussing pre-*Chevron* statute-by-statute analysis).

12. *See* Leandra Lederman, *The Fight Over "Fighting Regs" and Judicial Deference in Tax Litigation*, 92 B.U. L. REV. 643, 649–60 (2012) (describing variations of factors considered over the history of tax law deference).

13. *Id.* at 649–50, 653–56, 658 (describing the APA and its effects on tax-law deference).

14. *Chevron*, 467 U.S. at 842–44.

15. United States v. Mead Corp., 533 U.S. 218, 226–27 (2001).

16. *Id.* at 240–41 (Scalia, J., dissenting) (criticizing majority for creating uncertainty by abandoning *Chevron*'s presumption of delegation for a requirement of affirmative legislative intent to delegate).

17. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005).

18. 131 S. Ct. 704 (2011).

19. *Id.* at 713 (rejecting a subject-specific deference standard and adopting the more general *Chevron* standard for tax law). The Court also rejected the concept that deference varied based on whether the grant of authority to the agency was general or specific. *Id.* at 713–14.

A. Skidmore *and Early Approaches to Administrative Deference*

In the 1944 *Skidmore* case, the Supreme Court recognized that agency interpretations may be worthy of significant persuasive weight though they "lack[] power to control."[20] In *Skidmore*, plaintiffs brought suit under the Fair Labor Standards Act of 1938 seeking overtime and associated damages for nights spent on call in the company fire hall.[21] The Administrator of the Wage and Hour Division had previously put forth his view that "the problems presented by inactive duty require a flexible solution" depending on the circumstances.[22] In *Skidmore*, the Administrator filed a brief amicus curiae explaining that his policies "point[ed] to the exclusion of sleeping and eating time of these employees from the work-week and the inclusion of all other on-call time."[23] However, the trial court denied the employees any recovery by ruling as a matter of law that waiting time is not work, and the Fifth Circuit affirmed.[24]

The Supreme Court granted certiorari and reversed, holding that weight should be given to agency interpretations based on a non-exclusive set of factors and that standards of agencies and courts should differ "only where justified by very good reasons."[25] The Court reasoned that agency interpretations deserve persuasive weight because agencies have specialized experience and breadth of knowledge in their respective fields and because agencies determine the policy that guides enforcement.[26] The factors affecting the weight given to an agency interpretation, the Court concluded, should include its thoroughness, reasoning, and consistency with other pronouncements.[27]

For the next forty years, courts generally applied some version of the *Skidmore* case-by-case approach to agency deference while also considering guidance from the APA.[28] In addition to the *Skidmore* factors, courts gauged their deference based on whether an interpretation was legislative or interpretative,[29] whether the interpretation was triggered by litigation,[30] whether the regulation incorporated common law concepts,[31]

20. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).
21. *Id.* at 135.
22. *Id.* at 138.
23. *Id.* at 139.
24. *Id.* at 136.
25. *Id.* at 140.
26. *Id.* at 139–40.
27. *Id.* at 140.
28. *See* Scalia, *supra* note 11.
29. *See* Lederman, *supra* note 12, at 649–54 (explaining that interpretive rules received less deference than legislative rules both before and after the 1946 enactment of the APA).
30. *See id.* at 675–78 (explaining that courts prior to *Chevron* were "concern[ed] about regulations promulgated during litigation").
31. *See* Jeffrey A. Pojanowski, *Reason and Reasonableness in Review of Agency Decisions*, 104 NW. U. L. REV. 799, 806–13 (2010) (explaining the problem of deferring to agency interpretations of statutes that include common law phrases, arguably well within the judiciary's proper domain).

which agency made the interpretation,[32] and whether congressional delegation to the agency was general or specific.[33]

B. Modern Administrative Deference: Chevron

The *Chevron* Court announced a new standard for administrative deference based on a presumption that Congress intended to delegate interpretation to the administering agency when Congress's intent on the specific matter was not directly expressed.[34] In *Chevron*, the National Resources Defense Council filed a petition in the D.C. Circuit for review of an Environmental Protection Agency (EPA) regulation that defined the term "stationary source" from the Clean Air Act Amendments of 1977.[35] At issue was whether stationary source of pollution in the Clean Air Act permit program referred to a facility as a whole (the "plant-wide" definition) or to each individual polluting device in a facility.[36] The EPA under Reagan had issued regulations establishing the plant-wide definition, reversing course from the EPA under Carter.[37] Despite observing that Congress's intent regarding the definition was ambiguous, the D.C. Circuit set aside the regulations because it found the plant-wide definition inconsistent with the purpose of the program.[38]

The *Chevron* Court granted certiorari and reversed, deferring to the EPA's plant-wide definition because Congress was silent on the issue and the plant-wide definition was reasonable.[39] The holding established a two-step test requiring deference to an agency's construction of a statute the agency administers when (1) Congress has not "directly spoken to the precise question at issue" and (2) the agency's view is reasonable.[40] Furthermore, the new standard applied whether Congress left a gap unfilled either intentionally *or inadvertently*.[41] The Court stressed agencies' political accountability and expertise as reasons for this broad deference and rejected the notion that an agency's change in interpretation over time precluded deference.[42]

32. *See* Mayo Found. for Med. Educ. & Research v. United States, 131 S. Ct. 704, 712–13 (2011) (noting the Treasury-specific standard of *Nat'l Muffler Dealers Ass'n v. United States*, 440 U.S. 472 (1978)).

33. Lederman, *supra* note 12, at 656 ("Prior to the APA, there was an understanding specific to tax law that general-authority regulations were interpretive and that specific-authority regulations were legislative.").

34. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–44 (1984).

35. *Id.* at 840–41.

36. *Id.*

37. *Id.* at 853, 857–58.

38. *Id.* at 841–42.

39. *Id.* at 862, 866.

40. *Id.* at 842–43, 845.

41. *Id.* at 865–66.

42. *Id.* at 863–66.

C. Mead *Limits* Chevron *"Step Zero"*[43]

Mead pulled back from *Chevron*'s broad standard, limiting application of *Chevron* deference to situations where Congress has shown intent to grant agency authority to make rules with the force of law and the interpretation in question is an exercise of that authority.[44] In *Mead*, the plaintiff challenged a Customs Headquarters ruling that reclassified its three-ring binders as diaries, subjecting them to a tariff.[45] The Court of International Trade granted summary judgment to the government without addressing deference.[46] The Federal Circuit reversed, holding that Customs rulings should not receive *Chevron* deference because they are not subject to notice-and-comment procedures under the APA and do not apply beyond the specific case.[47]

Affirming this limitation, the Supreme Court held that classification rulings were not subject to *Chevron* deference because they were not an exercise of authority delegated by Congress to make rules with the force of law. The Court reasoned that because classification rulings are case-specific and are "being churned out at a rate of 10,000 a year at . . . 46 scattered offices," such rulings are so informal that Congress could not have intended for them to carry the force of law.[48] Rather than presuming delegation, the Court required indications of legislative delegation such as express authorization of rulemaking or authority to use formal procedures more worthy of the force of law.[49] Additionally, when *Chevron* deference is not merited, the Court noted, an agency interpretation may still be persuasive under *Skidmore*.[50]

In lone dissent, Justice Scalia criticized the majority's "avulsive" change as abandoning *Chevron*'s clear presumption of agency authority.[51] Further, he emphasized that the majority ruling was unfaithful to the policies behind *Chevron* and would lead to uncertainty and ossification of previously flexible administered laws.[52]

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43. Pojanowski, *supra* note 31, at 803 ("Much of the copious ink spilt over *Chevron*, however, runs toward *Chevron*'s so-called 'Step Zero'—the threshold determination about which agency interpretations should be eligible for the two-step inquiry.").

44. United States v. Mead Corp., 533 U.S. 218, 226–27 (2001).

45. *Id.* at 225.

46. *Id.*

47. *Id.* at 225–26.

48. *Id.* at 232–34.

49. *Id.* at 229–30.

50. *See id.* at 234.

51. *Id.* at 239 (Scalia, J., dissenting).

52. *Id.* at 241–42, 244–45, 247–49 (conceding that ossification of administered laws could be remedied by allowing agencies to readopt their interpretation through an approved procedure following a contrary judicial ruling, but rejecting that concept as a "landmark abdication of judicial power").

D. Brand X *Extends* Chevron

Although *Mead* limited the applicability of *Chevron* deference, the Supreme Court in *Brand X* broadened the reach of such deference when it did apply.[53] Where Congress left an ambiguity in a statute for determination by an agency, the agency interpretation was entitled to deference even when conflicting with a prior judicial interpretation.[54] After *Brand X*, "[o]nly a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction."[55]

In *Brand X*, digital-subscriber-line (DSL) broadband providers challenged the Federal Communications Commission (FCC) classification of cable broadband services as information services instead of telecommunications services, thus allowing cable companies to avoid mandatory common-carrier regulations that burdened DSL companies.[56] The Ninth Circuit vacated the classification and remanded on principles of stare decisis because it had previously held that cable broadband was a telecommunications service.[57]

The Supreme Court granted certiorari and reversed, holding that Congress's intent for the meaning of the terms "telecommunications service" and "information service" was ambiguous and the FCC's formal classification of cable broadband providers as information services was reasonable.[58] The majority reasoned that a court's interpretation of an ambiguous statute should not bind an agency just because the court's ruling happened to come first, noting that to hold otherwise would lead to ossification of administered law.[59] Dissenting again, Justice Scalia warned that the holding made "judicial decisions subject to reversal by executive officers."[60]

II. *UNITED STATES V. HOME CONCRETE & SUPPLY, LLC*

A. Facts

Pursuant to 26 U.S.C. § 6501(a),[61] the statute of limitations for the Internal Revenue Service (IRS) to assess income taxes is generally three years, but that period is extended to six years by 26 U.S.C. § 6501(e)(1)(A)(i) when the taxpayer "omits from gross income an amount properly includible therein [which] is in excess of 25 percent of

53. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005).
54. *Id.*
55. *Id.* at 982–83.
56. *Id.* at 975–80.
57. *Id.* at 979–80.
58. *Id.* at 989, 1000–01, 1003.
59. *Id.* at 983.
60. *Id.* at 1016 (Scalia, J., dissenting).
61. 26 U.S.C. § 6501(a) (2006).

the amount of gross income stated in the return."[62] In its 1999 tax return, Home Concrete & Supply, LLC listed income from the sale of certain property but overstated the basis for that property resulting in an understatement of income greater than the statute's 25% threshold.[63] The IRS assessed this deficiency after the three-year period but before the six-year period.[64]

Section 6501 of the Internal Revenue Code was enacted in 1954.[65] A provision materially identical to § 6501 existed in the Internal Revenue Code of 1939.[66] However, the 1954 version contains two subsections not present in the 1939 version, one of which defines "gross income" for a trade or business as the total received from the sale of goods or services prior to the diminution of the cost.[67] The 1954 Code also made an estate-tax-omission rule, but that version used the phrase "omits . . . items"[68] as opposed to the phrase "omi[ts] . . . amount" in the income-tax-omission rule.[69]

In 1958, the Supreme Court decided *Colony, Inc. v. Commissioner*,[70] which addressed the issue at play in *Home Concrete*: whether an overstatement of basis resulting in an understatement of income constituted an omission of an amount from gross income.[71] Although the 1954 Code was already enacted at the time of *Colony*, the 1939 Code applied in *Colony* because the income in question was from 1946 and 1947.[72] The Court held that an overstatement of basis did not constitute an omission for purposes of the 1939 version,[73] but it observed that the new 1954 version "resolved [this issue] for the future"[74] with "unambiguous language."[75] Though noting that the language of the 1939 provision was not "unambiguous" on the issue,[76] the Court found in the legislative history "persuasive indications" that Congress intended application only for omission of entire items, rather than for all understatements of income.[77] In making its holding, the Court *inferred* that Congress's purpose was to

62. *Id.* § 6501(e)(1)(A)(i).
63. United States v. Home Concrete & Supply, LLC, 132 S. Ct. 1836, 1839 (2012).
64. *Id.*
65. *Id.* at 1840.
66. *Id.* ("The Code provision applicable to this case, adopted in 1954, contains materially indistinguishable language [to the 1939 code]." (citing 26 U.S.C. § 6501(e)(1)(A))).
67. *Id.* at 1841 (citing 26 U.S.C. § 6501(e)(1)(A)(i)).
68. 26 U.S.C. § 6501(e)(2).
69. *Home Concrete*, 132 S. Ct. at 1851 (Kennedy, J., dissenting) (internal quotation marks omitted).
70. 357 U.S. 28 (1958).
71. *Id.* at 29–30.
72. *Id.* at 30.
73. *Id.* at 36.
74. *Id.* at 32.
75. *Id.* at 37.
76. *Id.* at 33.
77. *Id.* at 35.

prevent the IRS from being disadvantaged at detecting errors by the absence of an item.[78]

B. Procedural History

Home Concrete brought suit in the Eastern District of North Carolina, seeking to recover taxes it had paid based on an adjustment that was issued after the default three-year period expired.[79] The district court granted summary judgment to the IRS, finding the taxpayer's understatement of income resulting from its basis overstatement to be an omission of gross income that triggered the extended six-year statute of limitations.[80]

On appeal, the Fourth Circuit reversed, holding that, per *Colony*, an understatement of income resulting from overstatement of basis is not an omission from gross income.[81] The court was not persuaded that the additional subsections in the 1954 Code altered the meaning of the controlling provision.[82] The IRS also argued that Treasury Regulation 301.6501(e)-1, finalized in 2010, overturned *Colony* by expressly including understatements of income resulting from overstatements of basis as omissions from income, and the regulation should have been applied retroactively in *Home Concrete* because the case was not finally resolved.[83] The court rejected this argument, holding that the regulation could not be applied retroactively and, further, that *Colony* could not be overturned because it resolved an unambiguous statute.[84] The Supreme Court granted certiorari to determine whether the three-year or the six-year statute of limitations should apply.[85]

C. Majority Opinion

Justice Breyer delivered the opinion of the Court, joined by Chief Justice Roberts and Justices Thomas, Alito, and Scalia.[86] The majority affirmed, holding that the six-year statute of limitations did not apply on the grounds of stare decisis.[87] *Colony* controlled because its Court determined the intent of Congress in the 1939 Code and because there was no clear indication that Congress had changed the treatment of overstatements in relation to income omissions in the 1954 Code.[88] A plurality

78. *Id.* at 36. This stated purpose was not clear from the legislative history but rather from what the Court thought Congress manifested. *See id.*

79. Home Concrete & Supply, LLC v. United States, 634 F.3d 249, 252–53 (4th Cir. 2011), *aff'd*, 132 S. Ct. 1836 (2012).

80. *Id.* at 253.

81. *Id.* at 258.

82. *Id.* at 255.

83. *Id.* at 255–56.

84. *Id.* at 257–58.

85. United States v. Home Concrete & Supply, LLC, 132 S. Ct. 1836, 1839 (2012).

86. *Id.* at 1838.

87. *Id.* at 1844.

88. *Id.* at 1841.

went on to clarify that the 2010 Treasury Department regulation could not overturn *Colony* because *Brand X* only applied when Congress "left a gap to fill."[89] Justice Scalia declined to join that portion of the opinion, suggesting instead that *Brand X* should be abandoned.[90]

The majority began by summarizing *Colony* and then proceeded to dismiss the dissent's reasons that the changes in the 1954 Code affected the overstatement-of-basis issue.[91] First, the Court reasoned that there were potential congressional motives for adding the new subsections to § 6501(e)(1)(A) beyond changing the general rule on overstatements of basis.[92] Second, the addition of the phrase "omits . . . items" to the estate-tax-omissions rule did not have sufficient strength to overturn *Colony*'s careful interpretation of the phrase "omits . . . amount" in the income-tax-omissions rule.[93]

In considering whether the IRS regulations overturned *Colony*, Justice Breyer's plurality found that the decision left no room for agency interpretation.[94] Although acknowledging that ambiguous language constituted "at least a presumptive indication that Congress did delegate . . . gap-filling-authority" to an agency, Justice Breyer disregarded the *Colony* Court's characterization of the statute as ambiguous.[95] Justice Breyer pointed to the *Colony* Court's use of legislative history, characterization of the taxpayer's argument as the "better side of the textual [analysis],"[96] and observation that ruling for the government would result in a "patent incongruity in the tax law."[97] As a result, finding "every reason to believe that the [*Colony*] Court thought that Congress had 'directly spoken to the question at hand,' and thus left '[no] gap for the agency to fill,'"[98] the Court concluded that *Brand X* did not apply; therefore *Colony*'s interpretation was binding.[99]

D. Concurring Opinion

Concurring in part and in the judgment, Justice Scalia renewed his staunch objection to *Brand X*.[100] In doing so, Justice Scalia underscored the impracticality of trying to determine whether a pre-*Chevron* Court, to

89. *Id.* at 1844 (plurality opinion).
90. *Id.* at 1848 (Scalia, J., concurring).
91. *Id.* at 1839–42 (majority opinion).
92. *Id.*
93. *Id.*
94. *Id.* at 1843 (plurality opinion).
95. *Id. Colony* stated, "[I]t cannot be said that the language is unambiguous." Colony, Inc. v. Comm'r, 357 U.S. 28, 33 (1958).
96. *Home Concrete*, 132 S. Ct. at 1844. *Colony* stated, "[W]e are inclined to think that the statute on its face lends itself more plausibly to the taxpayer's interpretation." *Colony*, 357 U.S. at 33.
97. *Home Concrete*, 132 S. Ct. at 1844 (citing *Colony*, 357 U.S. at 33, 35–37).
98. *Id.* (quoting Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984)).
99. *Id.*
100. *Id.* at 1846 (Scalia, J., concurring).

whom the label "ambiguous" had no relevance, thought a statute was ambiguous.[101] Assuming, arguendo, the validity of *Brand X*, he criticized the majority's gap-to-fill requirement as unnecessarily[102] confusing administrative-deference law "*yet again*."[103] Citing the vague references to congressional intent from *Colony*, Justice Scalia explained that in this case congressional intent was still very much ambiguous and thus the majority should have found that *Brand X* applied.[104]

E. Dissenting Opinion

Justice Kennedy's dissenting opinion, joined by Justices Ginsburg, Sotomayor, and Kagan, explained that the changes to the 1954 Code made the already ambiguous exclusion of overstatements of basis[105] even more ambiguous,[106] thereby effectively making § 6501 a new statute subject to *Chevron* and not controlled by *Colony*.[107] Without the need to deal with *Colony*, the analysis in *Brand X* had no bearing on the decision, so the Treasury was free to adopt its own interpretation.[108]

Justice Kennedy enumerated the additions to the 1954 version that indicated congressional intent to include basis overstatements in income-tax omissions. First, the addition of § 6501(e)(1)(A)(i) expressly excluded overstatements of basis from omissions of income in special circumstances, implying that the general rule included overstatements.[109] Second, the continued use of the word "amount" for income-tax omissions despite the deliberate use of the word "items" for estate-tax omissions implied that income-tax omissions did not just apply to entire items.[110] Additionally, the dissent stressed that *Colony* "never purported to interpret" the 1954 version.[111]

Because the IRS's interpretation of § 6501 was at least reasonable, perhaps even the best interpretation, the dissent concluded that such interpretation deserved deference.[112] The dissent declined to suggest that

101. *Id.* at 1846–48.

102. *Id.* at 1847 (observing other more appropriate means of protecting taxpayers' justified reliance).

103. *Id.* (referring to criticism of United States v. Mead Corp., 533 U.S. 218 (2001)); *see also supra* Part I.C (describing Justice Scalia's dissent in *Mead*).

104. *Home Concrete*, 123 S. Ct. at 1848 (Scalia, J., concurring).

105. *Id.* at 1849 (Kennedy, J., dissenting) (noting *Colony*'s description of the 1939 language as ambiguous).

106. *Id.* ("Although the main text of the statute remained the same, Congress added new provisions leading to the permissible conclusion that it would have a different meaning going forward.").

107. *Id.* at 1851.

108. *Id.* at 1852 ("The Treasury Department's regulations were promulgated in light of [the 1954] revisions, which were not at issue in *Colony*.").

109. *Id.* at 1850–51.

110. *Id.* at 1851.

111. *Id.* at 1852–53 (quoting Intermountain Ins. Serv. v. Comm'r, 650 F.3d 691, 705–06 (D.C. Cir. 2011)) (internal quotation marks omitted).

112. *Id.*

the 2010 Treasury Department regulation overturned *Colony* under *Brand X*, dismissing such an issue as "not implicated here."[113]

III. ANALYSIS

The *Home Concrete* majority erred by holding, in the face of compelling contrary evidence, that *Colony*'s interpretation of the 1939 tax code applied to the 1954 tax code. The plurality followed by misapplying *Brand X* in several significant ways. First, the plurality chose a difficult hypothetical-based test for *Brand X* applicability that will generate unpredictable results in administrative-deference cases. Second, the plurality blurred the meaning of ambiguity in a shift away from the deferential approach of *Chevron* and *Brand X*. Third, the Court missed an opportunity to address two unresolved issues in administrative law: (1) *Brand X* applicability to prior Supreme Court interpretations, and (2) whether agencies should be able to reverse litigation by creating new interpretations after the litigation and retroactively applying those interpretations to individuals to whom the courts have already given relief.

A. Home Concrete *Improperly Applied* Colony *to a New Statute*

The *Colony* Court never intended that its interpretation of the 1939 tax code apply to the 1954 tax code. Congress's intent to include overstatements of basis in income omissions in the 1954 version is apparent from the statutory text, the context in which the 1954 version was written, and the *Colony* Court's comments in recognition of that intent. Nevertheless, the *Home Concrete* majority found otherwise, impractically assigning itself a *Brand X* analysis and reopening a tax loophole that Congress closed in 1954.

As the *Home Concrete* dissent explained, Congress made several textual additions to the 1954 tax code indicating that overstatements of basis should be included in omissions from income.[114] First, Congress added two subsections to the income-omissions provision, one expressly announcing that overstatements of basis do not count as omissions in the particular case of trade or business.

> In the case of a trade or business, the term "gross income" means the total of the amounts received or accrued from the sale of goods or services (if such amounts are required to be shown on the return) *prior to diminution by the cost* of such sales or services . . . .[115]

The dissent reasoned that this exception for goods sold by businesses excluding overstatements of basis implied that the general rule included

113. *Id.* at 1851–52.
114. *Id.* at 1849–51.
115. 26 U.S.C. § 6501(e)(1)(B)(i) (2006) (emphasis added).

overstatements.[116] The majority maintained that Congress "could well have" intended only to specify the overstatement rule for sale of goods by businesses, leaving the general rule to be decided by the courts.[117] It also noted that the subsection had an additional reasonable purpose unrelated to overstatements of basis.[118]

Second, Congress used the language "omits . . . items" in the estate-tax-omissions provision, but used the language "omits . . . amount" in the income-tax-omissions provision.[119] These provisions serve identical purposes for two different types of tax, are phrased in otherwise very similar language, and are adjacent subsections of the same tax-code section.[120] The dissent suggested that this distinction shows deliberate congressional intent to include overstatements for income-tax omissions but not for estate-tax omissions.[121] The majority conceded that the language was new, but belittled the change as insufficient proof of congressional intent.[122]

The majority's reasoning manifests its error: it should have been reviewing the textual changes for an introduction of ambiguity, not for a change in the best interpretation. By noting that "one *plausible reason* why Congress *might* have added clause (i)" is that Congress "*could well have*" intended something else, the majority conceded that the new text is ambiguous.[123] Such ambiguity should have triggered a new *Chevron* analysis, rendering *Colony* irrelevant.

The context of the writing of the 1954 Code also supports a finding of congressional intent to change the overstatement issue. Preceding the new tax code, federal circuits were split on the overstatement issue regarding the 1939 version; Congress had a motive to resolve this issue in the 1954 version.[124] Congress could not have intended, through silence, "to convey an established meaning from prior judicial and regulatory interpretations" because there was no established meaning.[125]

116. *Home Concrete*, 132 S. Ct. at 1851 (Kennedy, J., dissenting) ("The revised statute's special treatment of these costs suggests that overstatements of basis in other cases could have the effect of extending the limitations period.").

117. *Id.* at 1841 (majority opinion).

118. *Id.* at 1841–42.

119. *Compare* 26 U.S.C. § 6501(e)(2), *with* § 6501(e)(1)(A).

120. *Compare* 26 U.S.C. § 6501(e)(1)(A) (extending the statute of limitations for assessing income taxes when there are omissions in income), *with* § 6501(e)(2) (extending the statute of limitations for assessing estate taxes when there are omissions in inheritance income).

121. *Home Concrete*, 132 S. Ct. at 1851 (Kennedy, J., dissenting).

122. *Id.* at 1842 (majority opinion) ("But to rely in the case before us on this solitary word change in a different subsection is like hoping that a new batboy will change the outcome of the World Series.").

123. *Id.* at 1841 (emphasis added).

124. Russell R. Young, *D.C. Circuit in* Intermountain *Sets Stage for Supreme Court Consideration of* Home Concrete, 116 J. TAX'N 33, 36 (2012).

125. *Id.*

The Court in *Colony* noted the circuit split on the issue and recognized that Congress had resolved the issue for the future with the 1954 Code.[126] The Court believed that Congress had addressed the issue and changed it in the text; this is evident from its contrasting descriptions of the two versions. The Court noted that "it cannot be said that the [1939] language is unambiguous,"[127] but maintained that its ruling was "in harmony with the unambiguous language of [the 1954 Code]."[128]

Aside from being textually and contextually unsupportable, the majority's refusal to interpret the 1954 statute under *Chevron* is neither justified by policy nor practical. Stare decisis is a non-issue; the new interpretation would be of a different statute so it would not conflict with *Colony*. Protecting taxpayer expectations here is unnecessary; expectations are sufficiently protected by the processes required by *Mead*,[129] the reasonableness standard of *Chevron*,[130] and the "arbitrary and capricious" standard of the APA.[131] Judicial efficiency as a basis also falls flat. Spending time conducting a *Chevron* analysis of the statute is not wasteful because the alternative is spending time conducting a *Brand X* analysis of the prior judicial construction.

Holding that the 1954 Code did not affect the overstatement issue was poorly reasoned and unjustified. Taxpayers who underpay taxes by overstating bases for sales, whether intentionally or not, will benefit at the expense of all other taxpayers. Congress, which has already addressed the issue once, will have to spend time resolving it once again in order to correct the Court's error.

B. The Plurality's Implementation of the Brand X *Test Unnecessarily Creates Uncertainty*

The *Home Concrete* plurality put forth a daunting test for *Brand X* applicability to pre-*Chevron* judicial interpretations—Would the prior court have found that Congress's intent was unambiguous by *Chevron* standards *if it had considered the issue*? The plurality selected this test

126. Colony, Inc. v. Comm'r, 357 U.S. 28, 31–32 (1958) ("We granted certiorari because this decision conflicted with rulings in other Courts of Appeals on the same issue, and because the question as to the proper scope of [the 1939 Code], although resolved for the future by [the 1954 Code], remains one of substantial importance in the administration of the income-tax laws for earlier taxable years." (citations omitted)).

127. *Id.* at 33.

128. *Id.* at 37.

129. *See* Lisa Schultz Bressman, *How* Mead *has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1478–81 (2005) (describing the protections offered to individuals by notice-and-comment rulemaking and formal adjudication).

130. Note, *Implementing* Brand X*: What Counts as a Step One Holding?*, 119 HARV. L. REV. 1532, 1551 (2006) ("Under the [*Chevron*] doctrine of hard look review, courts can block change if the agency has not rationally considered, weighed, and addressed the reliance interests of regulated parties.").

131. *See* Lederman, *supra* note 12, at 697 (suggesting that Treasury Department "fighting regulations"—those created for the purpose of affecting ongoing litigation by changing the law retroactively—should be dealt with using the arbitrary and capricious check).

over the more practical "if necessary" test suggested by *Brand X*.[132] This decision will result in a standard that is difficult to follow for courts, and it will lead to uncertainty and unpredictability for agencies that administer laws and for individuals governed by them.[133]

The difficulty presented by *Brand X* is predominantly limited to cases decided before *Chevron*. After *Chevron*, most courts knew to make their decisions clear by uttering the "magic words" that their "construction follows from the unambiguous terms of the statute" and citing *Brand X*.[134] Pre-*Chevron* courts, like *Colony*, however, pose more of a dilemma. These courts had no reason to determine whether congressional intent was clear enough to merit the *Chevron* "unambiguous" label.[135] Instead, pre-*Chevron* courts only needed to determine what was *most likely* Congress's intent. These courts interpreted administered statutes virtually the same as they interpreted any other statute: with a de novo review to determine the *best interpretation*.[136]

This was the question facing *Home Concrete*—How should a court best determine whether a pre-*Chevron* court held that its interpretation is the only one permissible, when that court had no reason to make that holding? The plurality answered that a court should take its best guess at what the prior court *would* have done, hypothetically, *had* it considered the *Chevron* question.[137] A better answer is that a court should *never* try to make such a determination. Rather, a court should find that a pre-*Chevron* decision held that the statute was unambiguous only "if [it was] necessary"[138] to do so, such as when the prior court applied some "other

132. *See* Note, *supra* note 130, at 1540 ("The [if necessary] test finds a Step One holding when the previous court, due to another interpretive doctrine (the rule of lenity, a clear statement rule, the canon of avoidance, etc.), could have reached the result it did only by holding that its interpretation was the only reasonable one."). The Court suggested this test in *Brand X*. *Id.* at 1540–42; Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005) ("A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior decision *holds* that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." (emphasis added)).

133. *See* United States v. Home Concrete & Supply, LLC, 132 S. Ct. 1836, 1847 (2012) (Scalia, J., concurring) ("[T]he plurality . . . revis[es] . . . the meaning of *Chevron* . . . in a direction that will create confusion and uncertainty.").

134. Note, *supra* note 130, at 1537. Courts between *Chevron* and *Brand X* would have instead used *Chevron*'s "magic words" and cited *Chevron*, except for those with no agency interpretation to defer to. *See id.* at 1537–38.

135. *See Home Concrete*, 132 S. Ct. at 1846 (Scalia, J., concurring) ("Indeed, the Court was unaware of even the utility (much less the necessity) of making the ambiguous/nonambiguous determination in cases decided pre-*Chevron*.").

136. Doug Geyser, *Courts Still "Say What the Law is": Explaining the Functions of the Judiciary and Agencies After* Brand X, 106 COLUM. L. REV. 2129, 2129 (2006) (noting that "precedent had only supplied a 'best' meaning").

137. *See Home Concrete*, 132 S. Ct. at 1844 (plurality opinion). The plurality gave this answer by example; it considered the entire text of the *Colony* opinion, which did not require a holding that the statute left no gap to fill, and found that "the opinion . . . makes clear that it did not [leave a gap to fill]." *Id.*

138. *See* Note, *supra* note 130, at 1540 (explaining the if necessary test).

rule of construction (such as the rule of lenity) *requiring it to conclude that the statute was unambiguous* to reach its judgment."[139]

The plurality's choice of this hypothetical-*Chevron* test over the if necessary test is impractical[140] and lacks support in *Brand X*.[141] Aside from the plain difficulty of surmising a prior court's beliefs on an issue from language written for a different purpose, this textual-review exercise has other less obvious pitfalls. "[L]abels like 'clear' and 'ambiguous' took on new meaning after *Chevron*,"[142] but prior courts may have used them more casually when they just colored dicta and lacked this heightened significance.[143] The presence of the labels could mean everything or nothing, as could their absence. Tellingly, the *Home Concrete* plurality itself had to deal with this precise issue in order to reach its holding.[144]

The text of *Brand X* supports a clearer, more practical test.[145] The Court only required a determination of whether the earlier interpretation was the "*only permissible* reading of the statute."[146] In addition, *Brand X* at least implied that dicta should not factor into the test.[147] Moreover, in applying its own principles to its case at hand, *Brand X* did not recite the prior court's findings to fish for indications of the answer to a hypothetical question,[148] but rather simply noted that no rule of construction had forced the prior court's holding.[149]

In applying the test, the *Home Concrete* plurality provided no clear guidance. Justice Breyer purported to rely on *Colony*'s use of the "*traditional tools of statutory construction*" to ascertain the intention of Con-

139. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 985 (2005).

140. *Home Concrete*, 132 S. Ct. at 1846–47 (Scalia, J., concurring) ("For many of those earlier cases, therefore, it will be incredibly difficult to determine whether the decision purported to be giving meaning to an ambiguous, or rather an unambiguous, statute.").

141. *See* Note, *supra* note 130, at 1540–42 (considering the support provided by *Brand X* for each type of test).

142. *Id.* at 1537.

143. *Id.* at 1537–38 ("[C]ourts were probably less cautious in calling statutes 'clear' when it did nothing other than sway readers impressed by adjectives."); *see also Home Concrete*, 132 S. Ct. at 1846 (Scalia, J., concurring) ("In cases decided pre-*Brand X*, the Court had no inkling that it *must* utter the magic words 'ambiguous' or 'unambiguous' in order to (poof!) expand or abridge executive power, and (poof!) enable or disable administrative contradiction of the Supreme Court.").

144. *Home Concrete*, 132 S. Ct. at 1844 (plurality opinion) ("As the Government points out, the Court in *Colony* stated that the statutory language at issue is not 'unambiguous.' But the Court decided that case nearly 30 years before it decided *Chevron*. There is no reason to believe the linguistic ambiguity noted by *Colony* reflects a post-*Chevron* conclusion that Congress had delegated gap-filling power to the agency." (citations omitted)).

145. Note, *supra* note 130, at 1540–42 (considering the support provided by *Brand X* for each type of test).

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

147. *See* Note, *supra* note 130, at 1540–42 (noting that the *Brand X* Court focused on "what the precedent did and did not hold" (citing *Brand X*, 545 U.S. at 983–86)).

148. *Id.* at 1540–41 ("*Brand X* contains very little of the play-by-play analysis one would expect of a court applying [the hypothetical-*Chevron*] standard."). The Court did, however, cite the prior court's full analysis. *See Brand X*, 545 U.S. at 984.

149. *Brand X*, 545 U.S. at 985.

gress in determining the meaning of the statute.[150] As Justice Scalia noted, however, "[T]hese are the sorts of arguments that courts *always* use in *resolving* ambiguities."[151] The plurality even conceded, "It may be that judges today would use other methods to determine whether Congress left a gap to fill."[152]

When it chose the hypothetical-*Chevron* test, the plurality suggested a standard that lower courts will be unable to follow with any consistency. The if necessary test would have been far easier to apply and is favored by *Brand X*. The plurality's decision will result in protracted confusion and uncertainty about "what the law is" for both agencies and governed individuals.

C. Home Concrete *Abandons* Chevron*'s Presumption of Ambiguity*

By finding unambiguous congressional intent in *Colony*'s review of vague bits of legislative history,[153] the *Home Concrete* plurality dangerously damaged *Chevron*'s clear deferential standard that ambiguity exists where congressional intent on the issue is not clear.[154] To do so, the plurality reversed *Chevron*'s presumption of ambiguity, thus reducing deference and departing from *Chevron*'s wise policy.

In *Home Concrete*, the plurality searched the text of *Colony* to determine whether the *Colony* Court would have found congressional intent to be unambiguous if it had considered the issue.[155] The plurality observed that the *Colony* Court (1) believed "the taxpayer had the better side of the textual argument," (2) found "'persuasive indications' that Congress intended overstatements of basis to fall outside the statute's scope," and (3) thought the IRS interpretation "would 'create a patent incongruity in the tax law.'"[156] However, the plurality inferred from these observations that the *Colony* Court "thought that Congress had '*directly* spoken to the question at hand.'"[157]

This inference involved a logical leap that is inconsistent with *Chevron*. *Chevron*'s instruction was that ambiguity exists where Con-

150. United States v. Home Concrete & Supply, LLC, 132 S. Ct. 1836, 1844 (2012) (plurality opinion) (quoting Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984)).

151. *Id.* at 1848 (Scalia, J., concurring).

152. *Id.* at 1844 (plurality opinion).

153. *See id.* at 1848 (Scalia, J., concurring) (noting paucity of evidence from *Colony* on which the plurality found unambiguous congressional intent to exclude overstatements of basis from the provision).

154. *Chevron*, 467 U.S. at 842–43 ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

155. *See supra* Part III.B (referring to the hypothetical-*Chevron* test applied by the plurality).

156. *Home Concrete*, 132 S. Ct. at 1844 (plurality opinion) (citing Colony, Inc. v. Comm'r, 357 U.S. 28, 33, 35–36, 37 (1958)).

157. *Id.* (emphasis added) (quoting *Chevron*, 467 U.S. at 842).

gress had not "directly spoken to the precise question at issue."[158] This instruction was written in terms of a requirement for unambiguity (i.e., clear congressional intent), effectively creating a presumption of ambiguity. Absent an affirmative showing that Congress clearly had an intention on the issue, ambiguity exists. So how did the plurality find unambiguous intent in *Colony*'s remarks about Congress's *indirect* statements? It reversed *Chevron*'s presumption of ambiguity.[159]

Rather than overturn revered *Chevron* by announcing this reversal overtly, the plurality effectively accomplished this by subtly shifting the language of the longstanding *Chevron* test from a positive to a negative. Where *Chevron* found ambiguity absent an affirmative showing that Congress "directly spoke[] to the precise question at issue,"[160] the *Home Concrete* plurality found unambiguity absent an affirmative showing that Congress "left a gap to fill."[161] The phrase "left a gap to fill" is not a *Home Concrete* creation; it was used in both *Chevron*[162] and *Brand X*,[163] where, admittedly, it described what Congress must have done before an agency interpretation could fill that gap. However, *Chevron*[164] and *Brand X*[165] made plain that finding Congress left a gap to fill was a *conclusion* reached by a court after failing to find that Congress had directly spoken to the issue. The *Home Concrete* plurality put the cart before the horse when it concluded that Congress had "directly spoken to the question at issue" by failing to find that Congress "left a gap to fill."

To require an affirmative finding that Congress "left a gap to fill" is to ignore what a functional definition of "ambiguous" must mean in the context of *Chevron*.[166] Ambiguity will almost never be found if it is held

158. *Chevron*, 467 U.S. at 842.

159. *Home Concrete*, 132 S. Ct. at 1847 (Scalia, J., concurring) ("But in order to evade *Brand X* and yet reaffirm *Colony*, the plurality would add yet another lopsided story . . . : To trigger the *Brand X* power of an authorized 'gap-filling' agency to give content to an ambiguous text, a pre-*Chevron* determination that language is ambiguous does not alone suffice; the pre-*Chevron* Court must in addition have found that Congress wanted *the particular ambiguity in question* to be resolved by the agency."). Justice Scalia referred to the text itself rather than to legislative history, but his comments are still accurate when applied to congressional intent.

160. *Chevron*, 467 U.S. at 842.

161. *See Home Concrete*, 132 S. Ct. at 1843–44 (plurality opinion) (summarizing *Chevron*'s "underlying interpretive problem" as deciding when a statute "delegates to an agency the power to fill a gap").

162. *Chevron*, 467 U.S. at 843–44 ("If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency . . . .").

163. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982–83 (2005) ("Only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction.").

164. *Chevron*, 467 U.S. at 843–44 (noting that a gap may be inferred from an ambiguous statute).

165. *Brand X*, 545 U.S. at 982–83 ("[A] judicial precedent holding that the statute unambiguously forecloses the agency's interpretation . . . *therefore* contains no gap for the agency to fill . . . ." (emphasis added)).

166. *See* Scalia, *supra* note 11, at 520 (discussing the impracticality of a definition of "ambiguous" that only applies to various interpretations that "are in absolute equipoise").

to mean that alternative interpretations are equally likely, without the slightest probability that one interpretation is more likely Congress's intent than the other.[167] Ambiguity must therefore be "when two or more reasonable, though not necessarily equally valid, interpretations exist."[168] Clearly, *Colony* found that the taxpayer's interpretation was better than the IRS interpretation,[169] but it is not clear at all from *Colony* that the Court considered the IRS interpretation unreasonable.

Home Concrete's reversal of *Chevron*'s presumption of ambiguity, like *Mead*'s reversal of *Chevron*'s presumption of delegation,[170] will result in less judicial deference to agencies. The *Mead* Court, though, had a policy basis for limiting *Chevron* deference: such limiting guaranteed that due process would not be compromised when agencies made law in statutory gaps—that the laws were made with sufficient deliberation, oversight, and process.[171] The *Home Concrete* plurality's decision to limit deference by changing the ambiguity standard goes against *Chevron*'s deferential policies without reason.

Chevron's shift towards administrative deference was based on the Court's understanding that courts, agencies, and society usually benefit when agencies that are charged with administering laws are allowed to fill gaps in those laws. The administrative state is larger than ever now, and administrative law is frequently complex and subject-specific;[172] agencies have expertise in the laws they administer[173] and more resources than the overburdened courts.[174] As part of the Executive Branch, agencies are politically accountable and thus are more properly positioned than courts to make decisions that involve policy.[175] Perhaps most signif-

167. *Id.*

168. *Id.*

169. Colony, Inc. v. Comm'r, 357 U.S. 28, 33 (1958) ("[W]e are inclined to think that the statute on its face lends itself more plausibly to the taxpayer's interpretation . . . .").

170. United States v. Mead Corp., 533 U.S. 218, 226–27 (2001) (holding that *Chevron* deference only applies "when it appears that Congress delegated authority to the agency" to interpret with the force of law and the agency interpretation was an "exercise of that authority").

171. *See* Bressman, *supra* note 129, at 1479–80 (explaining that *Mead* delivered procedural formalities required by the Constitution "to promote predictable and fair lawmaking").

172. *Mead*, 533 U.S. at 250 (Scalia, J., dissenting) (noting the modern "era when federal statutory law administered by federal agencies is pervasive").

173. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) (noting that deference has been given where understanding "has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations"); *id.* at 865 ("Judges are not experts in the field . . . .").

174. *See* Scalia, *supra* note 11, at 516–17 (noting the "sheer number" of agencies and the "sheer volume of modern dockets").

175. *Chevron*, 467 U.S. at 865 ("While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices . . . ."); *id.* at 866 ("The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: Our Constitution vests such responsibilities in the political branches." (internal quotation marks omitted)).

icantly, agencies require flexibility to execute efficiently the laws they administer as society and policies change over time.[176]

Home Concrete will put more policy decisions in the hands of the less knowledgeable, overburdened, and unaccountable Judiciary. If courts hold more often to precedent rather than defer to agencies' newer interpretations, the law will become static and agencies will be robbed of needed flexibility.[177] The traditionally recognized benefit of reducing agency deference in favor of judicial interpretations is an increase in stability and predictability that arguably comes from courts' common, learned methods of analysis and their reliance on precedent.[178] Unfortunately, these benefits will not be delivered by *Home Concrete*'s presumption of unambiguity because it is accompanied by the plurality's new, unpredictable hypothetical-*Chevron* test.

When the *Home Concrete* plurality suggested that a court should consider a statute unambiguous unless the court affirmatively determines that Congress "left a gap to fill," it reversed *Chevron*'s presumption of ambiguity. The costs will include lay interpretations of expert matters, inefficient allocation of government resources, unaccountable policy making, and ossification of administered laws. The benefits will be scant.

D. Home Concrete *Failed to Answer Open Deference Questions*

Home Concrete presented two additional unresolved issues in administrative-deference law: (1) whether *Brand X* allowed agency interpretations to trump prior *Supreme Court* interpretations, and (2) how courts should treat retroactive application of litigation-induced interpretations. The Treasury regulation at issue in *Home Concrete* was induced by litigation, retroactively applied, and used to trump a prior Supreme Court interpretation. By conducting a *Brand X* analysis in *Home Concrete*, the plurality implicitly took these issues up, but it remained silent on them, leaving lower courts with more questions than answers.

Justice Stevens concurred in *Brand X* to add the caveat that "[*Brand X*'s reasoning] would not necessarily be applicable to a decision by *this Court* that would presumably remove any pre-existing ambiguity."[179] *Home Concrete* presented a conflict between an agency interpretation and a prior *Supreme Court* interpretation, representing the first time this issue had come before the Supreme Court since *Brand X*. However, the

176. *Id.* at 863–64 ("[T]he agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis.").

177. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 983 (2005) ("[P]recluding agencies from revising unwise judicial constructions of ambiguous statutes" "would 'lead to the ossification of large portions of our statutory law.'" (quoting *Mead*, 533 U.S. at 247 (Scalia, J., dissenting))).

178. *See* Pojanowski, *supra* note 31, at 821–31.

179. *Brand X*, 545 U.S. at 1003 (Stevens, J., concurring) (emphasis added).

plurality chose not to address the issue directly.[180] Instead, the plurality entertained the government's *Brand X* argument but dismissed it on other previously mentioned grounds,[181] thus allowing an inference of *Brand X* applicability to Supreme Court decisions but not making it clear.[182] In his concurrence, Justice Scalia suggested that *Brand X* would have to allow agency interpretations to trump the Supreme Court's interpretations, by rejecting Justice Stevens's idea that "an ambiguity resolved is an ambiguity that never existed in the first place."[183] The dissent mentioned this unresolved issue just before indicating that it would not address the government's *Brand X* argument,[184] perhaps revealing its motive for avoiding the argument.

The Court did previously address *Brand X* applicability to litigation-induced regulations,[185] but questions have since arisen about the limits of this application based on concerns for protecting governed individuals' justified expectations. Before the Supreme Court granted certiorari, the Fourth Circuit held in *Home Concrete* that the government's retroactive application of the regulation to the taxpayer was an alternative ground for ruling in favor of the taxpayer.[186] However, there is no mention of the retroactive-application issue in any of the Supreme Court *Home Concrete* opinions.

There are potential explanations for the Court's silence on these issues. By holding on step-one grounds that the agency interpretation did not trump *Colony*, the Court was not required to address these additional potentially constitutional issues, so judicial restraint[187] suggests its silence was appropriate. Additionally, the Court might have considered the

180. *See* United States v. Home Concrete & Supply, LLC, 132 S. Ct. 1836, 1843–44 (2012) (plurality opinion) (failing to mention relevance of fact that prior interpretation was made by the Supreme Court).

181. *Id.* The previously mentioned grounds are that the *Colony* Court found congressional intent unambiguous.

182. One could infer support for the idea that a Supreme Court interpretation resolves ambiguity, thus foreclosing *Brand X* application, from one majority statement: "In our view, *Colony* has already interpreted the statute, and there is no longer any different construction that is consistent with *Colony* and available for adoption by the agency." *Id.* at 1843 (majority opinion). It is more likely that the Court intended no such inference, but was attempting to phrase a general rejection of the government's argument in a way that was consistent with both the plurality's *Brand X* analysis and Justice Scalia's concurrence.

183. *Id.* at 1848 (Scalia, J., concurring).

184. *Id.* at 1851–52 (Kennedy, J., dissenting) ("There has been no opportunity to decide whether the analysis would be any different if an agency sought to interpret an ambiguous statute in a way that was inconsistent with this Court's own, earlier reading of the law." (citing *Brand X*, 545 U.S. at 1003 (Stevens, J., concurring))).

185. Mayo Found. for Med. Educ. & Research v. United States, 131 S. Ct. 704, 712 (2011) ("[W]e have found it immaterial to our analysis that a 'regulation was prompted by litigation.'" (quoting Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 741 (1996))).

186. *See* Home Concrete & Supply, LLC v. United States, 634 F.3d 249, 257 (4th Cir. 2011), *aff'd*, 132 S. Ct. 1836 (2012).

187. *See* Camreta v. Greene, 131 S. Ct. 2020, 2031 (2011) ("[A] 'longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them.'" (quoting Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 445 (1988))).

retroactivity issue sufficiently addressed by its prior instruction that whether an agency interpretation was induced by litigation is immaterial to the deference analysis. However, these are insufficient bases for Supreme Court silence when lower courts require direction.[188]

Like *Home Concrete*'s confusion of ambiguity, its silence on *Brand X*'s applicability to the Supreme Court and to retroactive litigation-induced regulations creates more questions than it answers. And like the ambiguity issue, these will leave lower courts, agencies, and affected individuals in legal limbo.

CONCLUSION

The Supreme Court made great leaps forward in administrative-deference law with *Chevron*, wisely abandoning the unpredictable case-by-case approach of *Skidmore* for a general presumption that courts should defer to agency interpretations. While giving agencies a predictable grant of flexibility in administration of their respective bodies of law, *Chevron* reserved appropriate judicial standards to prevent abuse of agency discretion. *Brand X* appropriately extended *Chevron* deference to agency interpretations of ambiguous statutes that had already been interpreted by courts, thus preventing an anomalous race for authority between courts and agencies.

Home Concrete errantly reached a *Brand X* analysis by undervaluing congressional changes to the tax code. Through misapplication of *Brand X*, *Home Concrete*'s plurality damaged the test for *Brand X* applicability and casted doubt on *Chevron*'s clear meaning of "ambiguous." The Court also stirred controversy into several open issues of administrative-deference law by ignoring them without explanation. Considering the Court's flawed reasoning and missed opportunities, *Home Concrete* was wrongly decided and signaled an unwise retreat from *Chevron*'s deferential doctrine.

W. Matthew Pierce[*]

188. *See Brand X*, 545 U.S. at 985–86 (referring to need for Supreme Court to resolve "genuine confusion in the lower courts" even when resolution is not "logically necessary").

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