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Judicial Deference and the Credibility of Agency Commitments

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Judicial Deference and the Credibility of Agency Commitments

Jonathan Masur[*]

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INTRODUCTION

Consider the following situation: In late 2004, towards the end of President George W. Bush's first term, the National Highway Transportation Safety Administration ("NHTSA"), pursuant to its congressionally delegated authority, promulgates a rule that would relax inspection and testing regimes for automobile manufacturers—thereby saving those firms substantial amounts of money—if the manufacturers independently deployed cutting-edge vehicle safety technology. The research and development of this technology will require significant up-front expenditures, and automobile manufacturers must decide whether to invest the funds necessary to bring the technology to market. However, the cost-benefit analysis is not so straightforward. The predicament, as the automobile firms understand it, is that this regulatory regime may not last long enough to result in long-term cost savings. Several of the potential Democratic nominees for the 2004 presidential campaign oppose this regulation, and, if President Bush were to lose the election, the incoming administration would possess the unilateral authority to discard this new rule in favor of the previous status quo (or any other reasonable arrangement).[1] In light of this uncertainty, automobile manufacturers rationally may decide to decline the offer implicit in NHTSA's new rule and not invest in the costly (but socially productive) new technology, frustrating the agency's regulatory aims.

Now consider the following situation: In late 2004, towards the end of President George W. Bush's first term, a consensus emerges

1. *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

that poorly functioning markets have caused prescription drug prices to spiral drastically out of control. While all parties agree that something must be done, Congress—lacking crucial information regarding the functioning of the prescription drug markets—is unable to reach internal agreement on which policy to pursue. Confronted by a technical issue about which they possess little expertise, a majority of members of Congress decides that the best available legislative option is to delegate authority to the Food and Drug Administration ("FDA") under the Federal Food, Drug, and Cosmetic Act[2] to take steps to reduce prices, including the authority to impose price controls. However, a large number of congressional Republicans, whose votes are needed to pass this delegatory legislation, are willing to confer such broad governmental authority upon the FDA only if they can be assured that the agency will adhere to whatever regulations the Republican-controlled FDA initially adopts. They fear the steps the FDA might later take if it falls under the control of a Democratic president. Uncertain about who will win the 2004 presidential election, these members balk at handing such an expansive grant of power to unknown future administrations. Thus, the problem of rising prescription drug prices remains unaddressed.

What unifies these two hypothetical examples is the inability of an administrative agency to convince a recalcitrant third party—in the former case, a private regulated party; in the latter, Congress—to take action necessary to accomplish the agency's regulatory mission. In both cases, the agencies' difficulties stem from the simple fact that they cannot credibly commit to consistent, stable policies. The agencies possess no mechanism by which to assure the outside actor that future administrations will remain true to the current agency's regulatory choices. Just as market transactions would sputter if parties lacked the power to write enforceable contracts upon which they could then rely, so too is the administrative state hampered by its incapacity to induce socially profitable reliance.

Scholars have long believed that flexibility—the ability to adjust policies (and statutory interpretations) in accordance with technological or economic advancements—is essential to the effective operation of administrative agencies.[3] Consonant with this understanding, over the past two decades the Supreme Court has

2. 21 U.S.C. §§ 301-99 (2007).

3. *See, e.g.*, Kenneth A. Bamberger, *Provisional Precedent: Protecting Flexibility in Administrative Policymaking*, 77 N.Y.U. L. REV. 1272, 1302 (2002); Yoav Dotan, *Making Consistency Consistent*, 57 ADMIN. L. REV. 995, 1004-05 (2005); Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 912 (2001); Richard J. Pierce, Jr., *Reconciling* Chevron *and Stare Decisis*, 85 GEO. L.J. 2225, 2232 (1997); Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2088-89 (1990).

afforded administrative agencies ever greater authority to adapt regulations to changing circumstances. Agencies may shift policy midstream[4] and are permitted to revise their interpretations of ambiguous statutes—pursuant to the famous deference framework enunciated in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[5]—when a former interpretation will not accommodate a novel policy. This progression towards greater flexibility reached its high water mark in 2005 in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*.[6] There, the Supreme Court held for the first time that *Chevron* deference effectively "trumped" stare decisis: If an agency is entitled to *Chevron* deference in its interpretation of a statute, the existence of a prior judicial decision will not diminish either the agency's entitlement to deference or, crucially, its freedom to select a new statutory interpretation.

Agencies, and the public at large, have undoubtedly benefited significantly from these enhancements in flexibility.[7] But while courts and scholars have occasionally remarked upon the harm that agency reversals may do to regulated parties' reliance interests, the threat that plenary flexibility may pose to an agency's own interests has passed unnoticed. The consequences of the Supreme Court's latest step will not be uniformly positive. By abolishing the settling effect of judicial decisions, the Court has eliminated the only, albeit crude, method by which Congress, a regulated party, or even an agency itself could have fixed a policy or interpretation in place. Administrative agencies thus have been stripped of the last remaining mechanism by which they might have credibly committed themselves to a course of policy and thereby induced skeptical outsiders to rely on the stability of the governing regulatory framework.

As described in the examples above, the demise of this administrative "safe harbor" likely will prove detrimental to agency operations in two respects, both of which sound in a type of "contract theory" of administrative law. First, an agency will have difficulty convincing regulated parties to invest resources or take other actions that may well be critical to the success of a regulatory initiative when it cannot assure the private actor that the agency rule—upon which these investments depend—will remain in place for an appreciable amount of time. Second, Congress will be wary of delegating too much discretionary authority to an agency whose regulatory decisions can always be undone by future incarnations of the agency itself.

4. *See, e.g.*, *State Farm*, 463 U.S. at 34, 42.

5. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

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

7. *See* Sunstein, *supra* note 3, at 2088.

Congress's power to control agencies is asymmetric: it requires only a simple majority to delegate authority but—assuming a presidential veto—a two-thirds majority to revoke that authority and reassert control. *Brand X*'s extension of flexibility thus forces Congress to gamble on the uncertain actions of all possible future agencies, as it will have trouble controlling those agencies once it has delegated power. Moreover, the value of this additional flexibility accrues principally to *future* presidents, not to any one party to the current legislative bargain. In combination, amplified uncertainty and this externalization of benefits will likely result in Congress abstaining from many socially worthwhile legislative delegations.

Thus, a mechanism is needed by which an administrative agency could opt to signal credibly its intention to retain a consistent statutory interpretation or policy in a particular case, without generally sacrificing valuable flexibility in circumstances where reliance is less important. This Article therefore suggests that Congress consider passing legislation empowering administrative agencies to create so-called "permanent regulations." Unlike a traditional regulation, an agency could specify that elements of a "permanent regulation"—certain interpretations of a statute, particular policy choices, or decisions at any level of precision—remain frozen in place, unalterable by the agency once issued. An agency would be capable of inducing hesitant third parties (including Congress) to rely on the durability of its regulations when it deemed such reliance necessary to the success of its administrative policy. And it would be the agency—the institution trusted to make the correct regulatory decisions in the first instance—who would control the switch.

This Article proceeds in three parts. Part I describes the Supreme Court's trend—predating even *Chevron*—towards providing agencies with ever greater temporal flexibility in policymaking and scrutinizes the qualitative leap the Court took in *Brand X*. Part II analyzes the difficulties that agencies likely will confront as a consequence of their inability to commit credibly to a stable policy or interpretation. This Part draws upon analogous insights relating to credibility and reliance within the law of contracts. Part III then suggests legislation affording agencies the option to promulgate permanent regulations as a means of encouraging beneficial reliance from hesitant third parties.

I. ADMINISTRATIVE FLEXIBILITY: TEMPORAL ADJUSTMENTS AND JUDICIAL ENTRENCHMENT

Administrative agencies cannot function effectively if they do not possess substantial discretion to set agency policy. Agencies exist in large degree as institutional mechanisms for solving policy questions whose intricacies and difficulties exceeded the capacities of Congress itself. An agency that lacked the freedom to choose between competing policy solutions or the flexibility to adjust its regulations in the face of scientific or economic progress would be little more than a rigid executor of Congress's will, stripped of the expertise that made it an attractive repository of policy-making authority in the first instance. Consequently, a growing consensus of administrative law scholars has long favored granting agencies ever-greater authority to enact policy changes in concert with developments in the relevant markets and technologies.[8]

Pursuant to this rationale, the Supreme Court has afforded agencies broad authority to alter extant regulations or select new policy courses. Under well-established law, an agency may discard a long-standing policy in favor of a novel one, provided that it offers a coherent rationale for its decision.[9] And if an agency's current interpretation of its empowering statute is not sufficiently capacious to permit the agency to pursue this new policy, the agency may adopt a reasonable new interpretation of an old statute without relinquishing the deference that it is due under *Chevron*'s famous two-step formulation.[10]

Yet, in the two decades after *Chevron,* one significant obstacle remained to an agency's ability to re-interpret ambiguous statutes and adapt to changing circumstances. Until 2005, the Supreme Court treated its statutory interpretation precedents—no matter the context and regardless of whether they had involved an agency interpretation and a judicial grant of *Chevron* deference—as absolute and decisive. Once a court had interpreted a statute, regardless of whether the agency had already had the opportunity to proffer its own interpretation, stare decisis controlled. An agency could only re-interpret if a court had never passed on the original interpretation, or if the agency could convince the court that the court had erred in its original interpretation, without reference to *Chevron*.

In 2005, the Supreme Court eliminated this final impediment. While deciding an otherwise mundane issue of statutory

8. *See* sources cited *supra* note 3.

9. *See State Farm*, 463 U.S. at 44-45, 57.

10. *See* Rust v. Sullivan, 500 U.S. 173, 186-87 (1991); *Chevron*, 467 U.S. at 842-43.

interpretation in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, the Court announced that *Chevron* henceforth would trump stare decisis: an interpretation of an ambiguous statute that ordinarily would be entitled to deference under *Chevron* would still receive that deference—and an agency would be permitted to revise a prior statutory interpretation—irrespective of anything that a court had ever said on the subject. Ambiguous statutes had become forever ambiguous; no court could settle their meaning.[11]

A. Temporal Flexibility

Congress delegates power to agencies for a wide variety of reasons. Congress may find it politically infeasible to make some necessary decision because of significant negative political ramifications, and as a result it might seek to foist responsibility off on some other actor. Alternatively, there may be a faction within Congress that hopes to accomplish via the executive branch what it cannot achieve legislatively.[12]

But Congress may also delegate power in order to harness the superior expertise of an agency actor and to bring to bear on a problem a set of scientific and technological knowledge and a breadth of experience that Congress does not possess.[13] In order for this delegation to be successful—indeed, in order for it to be meaningfully a "delegation"—it must afford the recipient agency some degree of "substantive flexibility": the agency must have the freedom, when analyzing the subject matter at the heart of the delegation, to choose from among a range of acceptable policies the one that it believes is best. Accordingly, the Supreme Court has granted administrative agencies wide substantive leeway to select among competing statutory interpretations—and thus among competing policies—via the familiar two-step process set forth in *Chevron*, pursuant to which courts must defer to reasonable agency interpretations of ambiguous statutes.[14]

Moreover, courts and commentators have long realized that agencies possess comparative institutional advantages over Congress that surpass the mere application of expertise. By shifting policymaking responsibility outside of the legislative branch, Congress is also able to avail itself of the greater agility of administrative agencies in responding to changed circumstances or adapting to new

11. *Brand X*, 545 U.S. at 982-83.
12. *See infra* Section II.B.
13. *See* Sunstein, *supra* note 3, at 2088.
14. *Chevron*, 467 U.S. at 842-43.

policy concerns. Legislation is costly and time-consuming to enact, and Congress cannot always rapidly change course when confronted with novel problems or the imminent obsolescence of old solutions.[15] Agencies are more willing and able than Congress to tweak their policy agendas. Especially in the high-technology areas, this alacrity is invaluable to agencies' ability to act in the public interest.

In order to act effectively, then, agencies must possess flexibility not only in the substantive sense described above, but also in the "temporal" sense: They must be free to alter policies over time and adapt to changes in relevant technologies and markets.[16] Much like substantive flexibility (deference, really), temporal flexibility (which I will refer to simply as "flexibility") is the lifeblood of successful agency operation. Even minor changes in technology or markets can obsolete pre-existing regulatory regimes, and it likely would be prohibitively costly for Congress to respond to every minor circumstance by amending an agency's authorizing legislation.[17] Agencies need the authority to adjust policies in order to maintain their currency and efficacy,[18] and unwise judicial doctrines that deny agencies all significant policy flexibility would undoubtedly lead to regulatory stagnation.[19]

In light of this obvious need, the Supreme Court has moved, over the past two decades, toward affording agencies ever greater regulatory flexibility. In its 1983 decision in *Motor Vehicles Manufacturers Association of the U.S., Inc. v. State Farm Mutual Automobile Insurance Company*[20]—a case better known as a source of agency constraint rather than empowerment—the Supreme Court explained that an agency may switch policies as long as it explains and justifies the move, noting that agencies "must be given ample

15. This is not even to speak of the fact that Congress may not realize that such problems exist for the same reason that it delegates in the first place: it lacks the expertise to comprehend the fine-grained nature of a prohlem or the fact that an extant regulatory response has become inadequate.

16. Substantive and temporal flexibility are of course simply two dimensions of the same phenomenon.

17. *See* Sunstein, *supra* note 3, at 2088 ("New developments involving technological capacity, economics, the international situation, or even law may affect regulatory performance. Congress is unable to amend every statute to account for these changes . . . [and] administrators are in a far better position than courts to interpret ambiguous statutes in a way that takes account of new conditions.").

18. Maislin Indus., U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 134 (1990) ("[T]he Commission has both the authority and expertise generally to adopt new policies when faced with new developments in the industry."); NLRB v. J. Weingarten, Inc., 420 U.S. 251, 266 (1975) ("The responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board.").

19. *See* Bamberger, *supra* note 3, at 1302.

20. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).

latitude to 'adapt their rules and policies to the demands of changing circumstances.' "[21] As *State Farm* concerned the logic behind a policy choice, not whether that policy was consistent with the delegatory statute, the type of policy change at issue was one that the agency could legally make within the confines of a single statutory interpretation.

A year later the Court extended this framework, holding in *Chevron* that it would not deny deference to an agency's statutory interpretation merely because that interpretation conflicted with prior agency policy.[22] The Court thus sanctioned shifts between alternative, reasonable statutory interpretations. This move was a natural outgrowth of the principles that underscored *Chevron* itself: Once statutes are conceived of as delegations of policymaking authority, rather than rigid textual commands, it is logical to permit an agency to shift "statutory" policies, just as it was permitted under *State Farm* to shift policies within the confines of a single statutory meaning.[23]

For several decades after *Chevron* the Court vacillated on this pro-flexibility stance, occasionally indicating that a novel agency interpretation deserves less deference.[24] On other occasions, however, the Court reiterated (counterfactually) that it "ha[d] rejected the argument that an agency's interpretation 'is not entitled to deference because it represents a sharp break with prior interpretations.' "[25]

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21. *Id.* at 42 (quoting *In re* Permian Basin Area Rate Cases, 390 U.S. 747, 784 (1968)). The Court nonetheless displayed a minor preference for stable administrative policies and refused to treat alterations in agency rules as equivalent to the establishment of new rules: "[A]n agency changing its course by rescinding a rule," explained the Court, "is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance." *Id.*

22. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 863-64 (1984). There was no judicial interpretation of the Clean Air Act's "stationary source" language predating *Chevron*, which is why the *Brand X* question remained unaddressed.

23. *See* Dotan, *supra* note 3, at 1033 ("The Court introduced the presumption that statutory ambiguity reflects congressional intent to delegate interpretive power to administrative agencies, discarding the distinction between interpretation and policymaking."); Sunstein, *supra* note 3, at 2093, 2103.

24. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 446 n.30 (1987) ("An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." (quoting Watt v. Alaska, 451 U.S. 259, 273 (1981))); *see also* Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 515 (1994); Good Samaritan Hosp. v. Shalala, 508 U.S. 402, 417 (1993); Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 698 (1991); Mullins Coal Co. v. Dir., Office of Workers' Comp. Programs, U.S. Dep't of Labor, 484 U.S. 135, 159-60 (1987); Dotan, *supra* note 3, at 1025.

25. Rust v. Sullivan, 500 U.S. 173, 186 (1991) (quoting *Chevron*, 467 U.S. at 862). The *Rust* Court noted, consistent with its *Chevron* jurisprudence, "[a]n agency is not required to establish rules of conduct to last forever, but rather must be given ample latitude to adapt its rules and policies to the demands of changing circumstances." *Rust*, 500 U.S. at 186-87 (citations omitted); *see also* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 156-57 (2000); Smiley v.

Nevertheless, by 2005 it appeared to be relatively settled law that fluctuations in an agency's positions did not affect *Chevron* deference, and thus an agency could adjust regulations over time without sacrificing its valuable entitlement to deference.[26]

B. Chevron *and Stare Decisis*

Despite the broad grants of temporal flexibility bestowed upon agencies in *State Farm* and *Chevron*, as late as 2005 there remained one significant obstacle to agencies' ability to adjust and adapt policies over time. The stare decisis effect of a judicial decision regarding even an *ambiguous* statute's meaning—whether the court was merely ratifying an interpretation proffered by an agency (pursuant to *Chevron*) or undertaking its own de novo statutory interpretation—served to entrench that statutory meaning. Once an agency had been taken to court, it would be effectively stripped of the ability to revisit its statutory interpretation. It was this last barrier that the Supreme Court confronted in *Brand X*.

1. The Supremacy of Judicial Precedent

As one might expect of any decision of its magnitude, *Chevron* left many important questions in its wake.[27] These issues ranged from the self-evidently crucial[28] to the apparently mundane,[29] and many of

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Citibank (S.D.), N.A., 517 U.S. 735, 742 (1996); Dotan, *supra* note 3, at 1027 n.110 (collecting cases).

26. One scholar has proposed that the most sensible way to rationalize the courts' back-and-forth pronouncements on the question was through an examination of tbe procedures employed by an agency in arriving at its most recent interpretation. *See* Dotan, *supra* note 3, at 1029, 1043-46. A court should award deference, according to Professor Dotan, if and only if an agency arrived at its newer interpretation pursuant to procedures that are at least as formal and as general (meaning that they resemble a rulemaking, rather than an adjudication) as the procedures from which the previous interpretation derived. *See id.* at 1030-46. This is an interesting approach but one that is largely orthogonal to the present issue. After *United States v. Mead Corp.*, 533 U.S. 218 (2001), and *Brand X*, the vast majority of new statutory interpretations that can command *Chevron* deference and override a prior judicial pronouncement—and especially the vast majority of interpretations that announce significant policy shifts and thus form the core concern of this Article—will come via notice-and-comment rulemaking.

27. *See generally* Merrill & Hickman, *supra* note 3.

28. For instance, the question of which agency interpretations were entitled to *Chevron* deference remained. *See, e.g.*, United States v. Mead Corp., 533 U.S. 218, 229-31 (2001) (holding that a U.S. Customs Service ruling was not entitled to *Chevron* deference); Christensen v. Harris County, 529 U.S. 576, 587 (2000) (holding that opinion letters are not entitled to *Chevron* deference).

29. Merrill and Hickman catalogue fourteen questions of varying degrees of importance, including such relatively banal issues as whether *Chevron* applies to "cross-referenced statutes, as when a general statute cross-references a statute that an agency is charged with

them involved the interaction between *Chevron* deference and traditional judicial mechanisms of statutory interpretation, such as statutory canons[30] and, of greatest relevance here, stare decisis.[31] These latter issues of statutory interpretation would appear to concern only the level of deference (meaning substantive flexibility) that an agency will receive. They apply most obviously to the question of when a court will find a statute unambiguous at *Chevron*'s Step One, and thus to the issue of when an agency's interpretation will stand.

But the relationship between stare decisis and *Chevron* deference has importance far outstripping its impact upon the interpretation of particular statutes as ambiguous or unambiguous. Stare decisis is, of course, a temporal phenomenon: A first case is decided at some moment in time, and the result in that case binds subsequent outcomes. Consequently, if stare decisis were to function in typical fashion, *Chevron* notwithstanding, every extant judicial decision would curtail an agency's temporal flexibility. A judicial interpretation of a statute—whether or not that initial interpretation was the agency's to which the earlier court had deferred[32]—would effectively fix the meaning of that statute in place, binding an agency until either Congress chose to amend the statute or the court agreed to overturn its prior holding.

Imagine, for instance, an agency that decides to initiate a rulemaking process pursuant to an empowering statute. The agency issues a rule (that necessarily involves interpreting some portion of the governing statute) and third parties immediately challenge the rule. Assume that a court holds that the statute is ambiguous, defers to the agency under *Chevron*, and upholds the agency's statutory interpretation. Under a rigid stare decisis regime, this statutory interpretation would be cast in stone; the agency would not later be able to amend its interpretation and pursue an alternative policy course without convincing the court to overturn its prior ruling.

In view of the many questions of statutory construction the Supreme Court has already addressed and decided, this would be no small constraint; stare decisis would place a significant swath of

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administering, or when a statute an agency is charged with administering cross-references a general statute or general principles of common law." Merrill & Hickman, *supra* note 3, at 849-52.

30. *See* Russell L. Weaver, *Some Realism About* Chevron, 58 MO. L. REV. 129, 162 & n.223 (1993).

31. Merrill & Hickman, *supra* note 3, at 852; Pierce, *supra* note 3.

32. *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 863-84 (1984); Skidmore v. Swift & Co., 323 U.S. 134, 136-37, 140 (1944).

administrative law beyond the reach of agency alteration.[33] Such a rigid approach to stare decisis could result in an "ossification" of regulatory policymaking on a scale rivaling that of doctrines (such as hard look review) that are traditionally blamed for inducing such paralysis.[34]

The impact of stare decisis upon agencies' temporal flexibility revolves crucially around courts' treatment of ambiguous statutes—those statutes that would normally trigger agency deference at *Chevron*'s Step One. Recall that if a court determines that a statute is unambiguous, the agency is entitled to no deference and thus no flexibility.[35] Under those circumstances, the court determines the meaning of the statute[36] and this judicial construction is subject to the stare decisis in the same manner as any other legal decision.[37] But if a statute is ambiguous, a court must afford deference to a valid agency interpretation *and* must allow the agency the flexibility to adjust its interpretation over time[38]—stare decisis trumps *Chevron*, in which case a pre-existing judicial decision would lock a statute's interpretation in place.

In the aftermath of *Chevron*, the Supreme Court appeared to signal that judicial precedent—or at least *its own* judicial precedent—would indeed override both an agency's right to *Chevron* deference and

33. The set of significant cases that the Supreme Court and lower courts have decided in the agency's favor pursuant to *Chevron* deference is indeed vast; for a small sampling of the most momentous Supreme Court cases, see, e.g., Utah v. Evans, 536 U.S. 452 (2002) (congressional reapportionment); Barnhart v. Walton, 535 U.S. 212 (2002) (eligibility for Social Security Disability payments); Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125 (2002) (public housing evictions); New York v. FERC, 535 U.S. 1 (2002) (open access to electric transmission lines); United States v. O'Hagan, 521 U.S. 642 (1997) (insider trading rules); PUD No. 1 of Jefferson County v. Wash. Dep't. of Ecology, 511 U.S. 700 (1994) (state clean water regulation); Rust v. Sullivan, 500 U.S. 173 (1991) (family planning gag rule); United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) (jurisdiction to regulate water pollution under the Clean Water Act).

34. *See, e.g.*, STEPHEN G. BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION 48 (1993); JERRY L. MASHAW & DAVID L. HARFST, THE STRUGGLE FOR AUTO SAFETY 225-55 (1990); Thomas O. McGarrity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 TEX. L. REV. 525, 533-36 (1997); Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1419, 1444 (1992); Richard J. Pierce, Jr., *The APA and Regulatory Reform*, 10 ADMIN. L.J. AM. U. 81, 82-83 (1996)

35. *Chevron*, 467 U.S. at 842-43.

36. *Id.*

37. This is not to mention the fact that courts have typically treated stare decisis as a more rigid command when interpreting statutes than when interpreting a constitution under the assumption that Congress has the ability to correct the court's interpretation of the former in the event that it disagrees with it. Hilton v. S.C. Pub. Rys. Comm'n, 502 U.S. 197, 202 (1991) ("Considerations of stare decisis have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done." (citation omitted)).

38. *Chevron*, 467 U.S. at 843, 864.

its concomitant ability to shift statutory interpretations over time. In a series of four cases, the Court consistently refused to permit an agency to alter its interpretation of a statute where the Court had previously spoken to the question of statutory interpretation at hand.[39] Moreover, though the opinions are opaque in important respects, in none of these cases did the result appear to hinge on the Court having previously held the statutes at issue to be unambiguous. On the contrary, the Supreme Court extended the dominance of stare decisis to ambiguous statutes whose constructions would be otherwise subject to *Chevron* deference.

The first of these four cases, *Golden State Transit Corporation v. Los Angeles*,[40] is also the Court's most explicit statement on the subject. In *Golden State*, the agency's statutory interpretation normally would have been entitled to *Chevron* deference were it reaching the Court for the first time.[41] Nonetheless, the Supreme Court announced that it would adhere to its contrary precedent, the relevant statute's admitted ambiguity notwithstanding:

> A rule of law that is the product of judicial interpretation of a vague, ambiguous, or incomplete statutory provision is no less binding than a rule that is based on the plain meaning of a statute. The violation of a federal right that has been found to be implicit in a statute's language and structure is as much a "direct violation" of a rigbt as is the violation of a right that is clearly set forth in the text of the statute.[42]

Several years later, in *Neal v. United States*,[43] the Court confirmed this view:

> In these circumstances, we need not decide what, if any, deference is owed the Commission in order to reject its alleged contrary interpretation. 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.[44]

On two other occasions the Supreme Court's explanation of the operative rule has been substantially less unequivocal. At first glance, *Maislin Industries, U.S., Inc v. Primary Steel, Inc.*[45] and *Lechmere, Inc v. NLRB*[46] support a distinction between the precedential effect of a holding that rests on a statute's lack of ambiguity and a pre-*Chevron* judicial interpretation of an ambiguous statute. In *Maislin*, the Supreme Court wrote, "[o]nce we have determined a statute's *clear*

39. RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 3.6, at 184-85 (4th ed. 2002).
40. Golden State Transit Corp. v. Los Angeles, 493 U.S. 103 (1989).
41. Pierce, *supra* note 3, at 2248-49.
42. *Golden State*, 493 U.S. at 112.
43. Neal v. United States, 516 U.S. 294 (1996).
44. *Id.* at 295.
45. Maislin Indus., U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116 (1990).
46. Lechmere, Inc. v. NLRB, 502 U.S. 527 (1992).

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."[47] The Court's explanation is heavy with the negative pregnant; if the statute is ambiguous, stare decisis may hold no purchase on the agency. But the decisions that predated and constrained *Maislin*[48] and *Lechmere*[49] hardly involved unambiguous statutes,[50] much less statutes that the Supreme Court had already *held* unambiguous (recall that stare decisis only operates meaningfully if the *prior* decision has determined that the statutory meaning is clear).[51] For example, the statutory question at issue in *Lechmere* was whether a store owner's decision to prohibit the distribution of union literature in the store's parking lot constituted an "unfair labor practice" that "interfere[d] with, restrain[ed], or coerce[d] employees."[52] As one commentator noted, the Court's decision "may be good public policy" but surely does not represent the statute's only possible meaning.[53]

As of 2005, then, the weight of authority appeared to favor the view that stare decisis trumped an agency's entitlement to *Chevron* deference and to temporal flexibility,[54] though this point was not without controversy.[55] The Court's position was one of immoderate anti-skepticism; it believed in its own power to settle a law's meaning, irrespective of inherent ambiguity. In the words of Judge Kozinski,

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47. *Maislin*, 497 U.S. at 131 (emphasis added); *see also Lechmere*, 502 U.S. at 536-37.

48. *See* Louisville & Nashville R.R. Co. v. Maxwell, 237 U.S. 94 (1915); Tex. & Pac. Ry. Co. v. Mugg, 202 U.S. 242 (1906); Gulf, Colo. & Santa Fe Ry. Co. v. Hefley, 158 U.S. 98, 101 (1895).

49. *See* NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956).

50. *See* Pierce, *supra* note 3, at 2249-50.

51. After all, tbese earlier decisions predated *Chevron*. The Court therefore had had no reason to announce whether its constructions were mandated by the statutory language or were merely the best interpretations—the distinction was irrelevant.

52. 29 U.S.C. § 158(a)(1) (2007); *Lechmere*, 502 U.S. at 531-32.

53. *See* Pierce, *supra* note 3, at 2249.

54. It is worth noting that the Supreme Court did not treat circuit court precedent in the same fashion, granting *Chevron* deference to agencies and overruling inconsistent circuit court precedent on several occasions. *See, e.g.*, Sutton v. United Air Lines, 527 U.S. 471 (1999); Cent. Bank of Denver v. First Interstate Bank, 511 U.S. 164 (1994). This discrepancy is most likely due to the fact that the Supreme Court is not bound by circuit precedent, rather than anything inherent to the relative values of *Chevron* deference and circuit court precedent.

55. The majority of contemporary scholarly commentary seemed to support the notion that stare decisis trumped *Chevron* deference before *Brand X*. *See* Bamberger, *supra* note 3, at 1293-94; Pierce, *supra* note 3, at 2251 ("[T]he Supreme Court has created a simple, mechanical, rule, strictly adhered to by the lower courts, that its own precedents must prevail over *Chevron*'s command."); Gregg D. Polsky, *Can Treasury Overrule the Supreme Court?*, 84 B.U. L. REV. 185, 202 (2004); Paul A. Dame, Note, *Stare Decisis,* Chevron, *and* Skidmore*: Do Administrative Agencies Have the Power to Overrule Courts?*, 44 WM. & MARY L. REV. 405, 424 (2002); *see also* Merrill & Hickman, *supra* note 3, at 915-17.

> Statutory meaning is not a matter of hopes or wishes; it is a fact. In settling on a particular interpretation of a statute, the court is saying: "This is the meaning that was actually conferred upon this statute by Congress." . . . A change in the agency's view . . . may motivate a reviewing court to reconsider the soundness of its prior interpretation. But a change in an agency's position cannot automatically alter the meaning Congress gave the statute years earlier.[56]

Crucially, this anti-skeptical position seemed to apply regardless of whether, in the prior existing precedent, the court had offered its own interpretation of an ambiguous statute *or merely ratified an agency's interpretation* (pursuant to *Chevron* deference).[57] Stare decisis served to entrench both judicial and agency interpretations, ensconcing whichever institutional view happened to make its way into court first. It was this view of precedent that the Court undertook to reconsider in *Brand X*.

2. *Brand X* and the Dominance of Agency Interpretation

Brand X arose from a ruling by the FCC—pursuant to delegated notice-and-comment rulemaking authority—that cable television companies that provided broadband internet service (so-called "cable modem service") were not offering a "telecommunications service" and thus were not subject to mandatory regulation under Title II of the Telecommunications Act.[58] This otherwise quotidian issue of statutory interpretation and *Chevron* deference was complicated by the fact that the Ninth Circuit had in an earlier case, *AT&T Corp. v. Portland*,[59] interpreted the statutory phrase "telecommunications service" to include cable modem internet service, contradicting the FCC's subsequent interpretation at issue in *Brand X*. Critically, the Ninth Circuit in *Portland* had not found the key statutory language unambiguous, though neither had it arrived at its statutory interpretation after granting *Chevron* deference to the agency's view. Rather, in *Portland* the FCC had "declined, both in its regulatory capacity and as amicus curiae, to address the issue," forcing the Ninth Circuit to undertake a de novo interpretation of the statute. Pursuant to this pre-existing interpretation, in *Brand X* the Ninth Circuit concluded that *Portland*'s stare decisis effect trumped

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56. Mesa Verde Const. Co. v. N. Cal. Dist. Council of Laborers, 861 F.2d 1124, 1147 (9th Cir. 1988) (en banc) (Kozinski, J., dissenting), *replaced by* 895 F.2d 816 (9th Cir. 1990).

57. No case is explicit on this point, but neither do they make any distinction with respect to the source of the prior interpretation granted stare decisis effect. *See supra* text accompanying notes 39-52 and cases cited therein. The most logical interpretation is that the Court intended stare decisis to operate across the board; indeed, the case for applying stare decisis is, if anything, *stronger* when the relevant agency has already availed itself of one opportunity to interpret a delegatory statute.

58. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 973-74 (2005).

59. AT&T Corp. v. Portland, 216 F.3d 871 (9th Cir. 2000).

the agency's right to *Chevron* deference and controlled the case, and held that the court's prior interpretation of the statutory language must prevail, the agency's contrary interpretation notwithstanding.

The Supreme Court did not only reverse the Ninth Circuit's substantive ruling. More importantly, the Court reversed the Ninth Circuit's holding as to the interaction between *Chevron* and precedent.[60] The Court explained:

> 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.[61]

In other words, if an agency has been delegated the authority to interpret a statute per *Chevron*, the meaning of that statute can be fixed by a court's prior ruling only if that court holds[62] that the statute is unambiguous—only, that is, if there is no delegation of interpretive authority to the agency in the first place.[63] Because the *Portland* court had not held the terms of the statute unambiguous, its prior decision did not control the FCC, and the agency's subsequent interpretation was entitled to *Chevron* deference.[64]

Nowhere in *Brand X* does the Supreme Court state specifically whether *Chevron*'s trump of stare decisis applies even if an agency has already once construed a statute pursuant to *Chevron*—if the agency has already had "one bite at the apple"—and then subsequently sought to amend its interpretation.[65] Indeed, in *Brand X* the FCC had never before had the opportunity to offer its own definition in a judicial proceeding.[66] Nonetheless, it is readily apparent that *Brand X* and *Chevron* will apply regardless of how many prior interpretations of a statute an agency has already offered, or how many times those interpretations have been litigated, afforded *Chevron* deference, and resulted in judicial validation of an agency's construction. The *Brand X* Court displayed full willingness to accept shifts in agency policy as

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60. The Court's actions were both predicted and urged two years earlier by Kenneth Bamberger, though the Court did not cite his seminal article. *See* Bamberger, *supra* note 3, at 1293-94.

61. *Brand X*, 545 U.S. at 982.

62. The question of what constitutes a "holding" that "follow[ed] from the unambiguous terms of the statute" has already drawn some attention. *See* Note, *Implementing* Brand X*: What Counts as a Step One Holding?*, 119 HARV. L. REV. 1532, 1536-42 (2006) (suggesting that a holding satisfies *Brand X*'s condition if and only if the court could not have reached the outcome it did without concluding that the statute was unambiguous).

63. United States v. Mead Corp., 533 U.S. 218, 229-31 (2001).

64. *Brand X*, 545 U.S. at 984-85.

65. *See supra* note 57.

66. *Brand X*, 545 U.S. at 984-85.

readily as it sanctioned agency overrides of judicial constructions;[67] after all, "*Chevron*'s premise is that it is for agencies, not courts, to fill statutory gaps."[68] *Brand X* replaced a legal regime in which a judicial decision regarding an ambiguous statute would *always* entrench that statute's meaning (whether or not the agency had yet passed on the statute) into one in which such a decision would *never* entrench statutory meaning.[69] Once a statute has been deemed ambiguous, an agency forever possesses the freedom to select any "reasonable" statutory interpretation[70] and, within that interpretation, any non-arbitrary policy.[71]

II. AN END TO AGENCY CREDIBILITY: THE DELETERIOUS EFFECTS OF DIMINISHED LEGAL STABILITY

Brand X represents the most recent step in a nearly unblemished trend towards greater agency flexibility in policymaking. Undoubtedly, as described above, this shift in many ways augurs improved regulatory consequences. Agencies will have greater ability to "revis[e] unwise judicial constructions of ambiguous statutes,"[72] adjust policies and programs to keep pace with the technological and economic vanguard, and generally exercise more effectively the expertise that served as the original raison d'être for agency delegation.[73]

By eliminating the threat that stare decisis may tie an agency to a statutory interpretation before the agency is able to exercise the deference due under *Chevron*, *Brand X* will produce other ancillary benefits. For instance, agencies and courts will no longer be engaged in a "race to interpret," with the level of deference determined by whether an agency has an opportunity to undertake the formal procedures required by *Mead* before a court has an opportunity to pass

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67. *Id.* at 978-85.

68. *Id.* at 982.

69. I do not mean to obscure the existence of contrary views regarding the state of the law prior to *Brand X*. In the end, agreement as to the precise import of *Golden Gate* and *Neal* is not essential to the principal thrust of this paper. What matters most is the final point made in this section: at least as of 2005, no judicial decision of any sort can entrench the meaning of an ambiguous statute.

70. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).

71. Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 41 (1983).

72. *Brand X*, 125 U.S. at 983. The Court does not mention that agencies will also be able to revise *their own* unwise—or simply no longer desirable—interpretations.

73. Sunstein, *supra* note 3, at 2088.

on the statutory language.[74] This would seem to be an unalloyed good; it is difficult to imagine why deference should turn on the vagaries of litigation timing or the "anomaly" of whether a court or an agency managed to reach the question first.[75]

Among other things, such a shift will allow an agency to continue to develop statutory interpretations via a case-by-case or "evolutional approach,"[76] rather than having to fear that if it first undertakes a few, tentative adjudications, instead of a decisive act of notice-and-comment rulemaking, a court will swoop in and decide the statutory question before the agency can avail itself of *Chevron*. An agency can no longer run out of time to interpret a statute and gain deference or "use up" its opportunity to do so. Much ink has been spilled in arguing the benefits of greater agency authority generally,[77] and not surprisingly a preponderance of voices has favored the Supreme Court's moves towards increased administrative flexibility.[78]

Yet scholars simultaneously have overlooked the deleterious effects that *Brand X*'s extension of agency flexibility may have upon both outside parties and *the agencies'* ability to accomplish their own regulatory objectives. *Brand X* adds an element of flexibility—and therefore instability—to agency authority[79] that is qualitatively different than the discretion that agencies enjoyed under *Chevron* and the other pre-existing doctrines. Before *Brand X*, a judicial interpretation of a statute—whether or not that interpretation came pursuant to a grant of *Chevron* or *Skidmore* deference—would effectively fix the meaning of that statute, binding it in place until either Congress chose to amend the statute or the court agreed to overturn its prior holding.

Certainly, as described above, this functioned in many respects as an unhealthy check on an agency's ability to adjust policy to changed circumstances. At the same time, though, the judiciary's ability to settle statutory meaning served as the last resort for outside

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74. This situation might arise if an agency were to interpret a statute in the course of an informal adjudicatory procedure, rather than moving straight to notice-and-comment rulemaking, and that case were to reach the courts. *See* United States v. Mead Corp., 533 U.S. 218, 229-30 (2001).

75. *See* Bamberger, *supra* note 3, at 1299. This is the principal normative justification offered by the *Brand X* Court itself. *See Brand X*, 125 U.S. at 982-83.

76. NLRB v. J. Weingarten, Inc., 420 U.S. 251, 265-66 (1975).

77. *See* sources cited *supra* note 3.

78. *See, e.g.*, Bamberger, *supra* note 3, at 1299-1318; Dotan, *supra* note 3, at 1004-05; Sunstein, *supra* note 3, at 2088. *See generally* Pierce, *supra* note 3.

79. This flexibility applies, of course, only in the presence of ambiguous statutory language. Unambiguous language is construed by the courts at *Chevron*'s Step 1 and remains fixed until altered by Congress. *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984).

actors—Congress, regulated firms, and other interested third parties—seeking some degree of predictability and stability within the law. Judicial interpretations of statutes—whether pursuant to *Chevron* deference, *Skidmore* deference,[80] or no deference at all—operated as a very clumsy sort of "safe harbor." Once a question of statutory interpretation had been decided by a court, outside parties could assume that the interpretation would remain relatively stable, alterable only by Congress or a superseding judicial decision, not by unilateral executive action.[81] Agencies would still possess the authority to shift policy.[82] But their regulatory options would be confined within the parameters of a single, enduring statutory interpretation, eliminating the possibility of drastic or broad adjustments in course that could only be accommodated within a re-interpreted statutory framework.[83]

This "safe harbor" was undoubtedly a very crude mechanism for generating regulatory stability. It relied upon the self-serving decision of a party with standing[84] to bring an action in court, and upon the vagaries of the litigation process to bring forth a judicial decision (and in particular, an appellate decision) from that action. The process was neither consistent nor predictable, but it did exist.[85] Crucially, it could have been adopted by either an interested third party seeking regulatory stability *or an agency that wishes to bind itself to a particular statutory interpretation.* Indeed, as the following sections will demonstrate, the value of this mechanism lay in the agency's power to initiate a legal action that it knew would result in a constraining judicial decision, thus credibly committing itself to a given policy.

After *Brand X*, such a safe harbor no longer exists. At no point can an agency's statutory interpretation become fixed; neither a court nor an agency can render an ambiguous statute unambiguous or

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80. United States v. Mead Corp., 533 U.S. 218, 234 (2001); Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

81. Judicial revisions to statutory interpretations will come very rarely. Stare decisis carries additional weight with respect to precedents interpreting statutes, as Congress remains at liberty to undo the court's results if it does not agree with them. *See* Shepard v. United States, 544 U.S. 13, 23 (2005); Patterson v. McLean Credit Union, 491 U.S. 164, 172-73 (1989) ("Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done.").

82. *See* Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983).

83. *See supra* Part I.A.

84. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

85. *See supra* note 33.

permanently anchor its meaning.[86] As long as an agency interpretation would be entitled to *Chevron* deference (per the rule set forth in *Mead*[87]), the agency will always have the ability to advance an entirely novel interpretation that would override any previous construction, and to which courts would be required to defer. A statutory interpretation (and the accompanying policy) will now remain stable only until an agency undertakes a subsequent rulemaking to alter them. This permanent instability—a feature heretofore unknown to the administrative landscape—will powerfully impact the behavior of Congress and private parties under the post-*Brand X* legal regime.[88]

Brand X—and more generally, the absence of any type of agency safe harbor—is likely to impair the functioning of agencies with respect to two outside groups: regulated parties (and other private interests) and Congress. Because of the nature of the administrative malfunction at issue—agencies' inability to commit credibly to a particular position—the dilemma sounds in a type of "contract theory" of administrative law. First, because neither agencies nor private parties can ever definitively settle or anchor the law, agencies will have great difficulty persuading private parties to

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86. Justice Stevens concurred in *Brand X* in order to add the caveat that, in his view, an agency's ability to override a judicial construction of a statute "would not necessarily be applicable to a decision by this Court that would presumably remove any pre-existing ambiguity." Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1003 (2005) (Stevens, J., concurring). Justice Stevens, like Judge Kozinski, *see supra* note 56, thus seems to believe that there is a point at which ambiguity ceases to exist, and that there are steps that a court—or at least his court—could take to remove the ambiguity from a statute that was ambiguous at its inception. It is difficult to see how this view could be consistent either with the majority holding in *Brand X* or its broad animating principle that ambiguity is meant as a grant of discretion to agencies and cannot be usurped by courts. Nonetheless, at least one member of the *Brand X* majority has shied away from complete evisceration of the possibility of a statutory safe harbor that existed before *Brand X.*

87. *See* United States v. Mead Corp., 533 U.S. 218, 237 (2001); Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 191 (2006).

88. The epistemologically radically skeptical stance that the *Brand X* Court assumes towards statutory interpretation is worthy of remark. After *Brand X,* a statute is either linguistically determinate or permanently ambiguous. That is, neither any measure that a court can take nor the passage of time can shrink statutory ambiguity. A statute that begins its life teetering on the edge of ambiguity will remain ambiguous forever. This decision represents not merely a recognition that statutory interpretation inherently involves policy judgments, *see* Sunstein, *supra* note 3, at 2078, but also a renunciation of the courts' ability to settle a statute's meaning. *Contra* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 867 (1992) ("It is the dimension present whenever the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution."); Mesa Verde Const. Co. v. N. Cal. Dist. Council of Laborers, 861 F.2d 1124, 1146-47 (9th Cir. 1988) (en banc) (Kozinski, J., dissenting) ("In settling on a particular interpretation of a statute, the court is saying: 'This is the meaning that was actually conferred upon this statute by Congress.' "), *replaced by* 895 F.2d 816 (9th Cir. 1990). Shyness in the face of competing political demands is a new posture for the Supreme Court.

rely on agency interpretations. It is fundamental to contract law that the consumer of some good may be unable to induce the supplier to produce if the consumer will not (or cannot) sign a contract agreeing to purchase the good.[89] So too might agencies encounter resistance when attempting to coerce regulated parties to produce "regulatory goods" if the agency cannot reliably promise that those goods will retain value. Second, Congress will be chary of delegating too much power to agencies that it knows can shift their statutory interpretations at any time in the future—especially after a change in administration—and regulatory problems that could be profitably addressed through agency delegations may go unsolved. Moreover, the elimination of any temporal constraint on agency revisions will transfer some of the value from any legislative agreement to future executives, making every bargain less profitable—and less likely—for the parties who must negotiate it.

A. Third Parties and Induced Reliance

Scholars and courts long have noted the damage that shifts in regulatory policy may exact upon reliance interests.[90] Any change in the background regulatory rules governing an industry is likely to upset the settled expectations of the firms and interested groups working in the affected field, leading to disruptions and increased costs as pre-existing programs become unworkable and new projects become necessary.[91] More importantly, fluid agency interpretations and re-interpretations make it more costly for affected entities or other stakeholders to adjust their conduct to conform to agency rules, and thus regulated actors may refrain from making costly investments or embarking upon new projects that may be endorsed under one regulatory regime but prohibited under another one that could be soon forthcoming.

89. *See* CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION 11 (1981).

90. *See, e.g.*, Bamberger, *supra* note 3, at 1317-18; Dotan, *supra* note 3, at 1001 & n.19; Levin, *supra* note 3, at 1088; *see also* Smiley v. Citibank, 517 U.S. 735, 742 (1996) ("Sudden and unexplained change, or change that does not take account of legitimate reliance on prior interpretation, may be arbitrary, capricious, or an abuse of discretion." (citation omitted)).

91. The disruption of settled expectations can affect interested parties whose conduct is not directly regulated just as it harms regulated industries. For instance, an environmental group may invest money in beautifying a seashore and opening it to recreational users on the assumption that nearby industries will not be permitted to discharge certain pollutants, only to see its investment bankrupted when an agency alters the rule to permit polluting. *Cf.* Lujan v. Defenders of Wildlife, 504 U.S. 555, 568-71 (1992) (finding that an environmental group could not bring suit because it failed to meet the redressability and causation requirements for standing). Or it may expend resources to detect violations of a regulation and enforce the rule against violators, only to have the agency repeal the rule midstream.

In expanding the policy flexibility available to agencies and eliminating the possibility of a regulatory safe harbor, *Brand X* exacerbates this effect. Because an agency no longer can be bound by its (or a court's) prior pronouncements, private parties now must confront a far less predictable regulatory landscape. After *Brand X*, there is no passage of time and no formal judicial mechanism that can entrench a statute's meaning; an agency will always possess unilateral authority to re-interpret a statute and engage in a concomitantly significant shift in policy. Without a regulatory safe harbor, a regulated party is forced into a permanent state of uncertainty. The party will never enjoy settled expectations and cannot be certain that future projects will not be frustrated by significant alterations in the regulatory landscape. This boundless ambiguity is likely to compel risk- and uncertainty-averse industries to forego potentially productive investments and lead to avoidable negative outcomes.[92]

Nonetheless, these types of concerns have gained little purchase. Commentators have correctly noted that private parties have no *right* to demand consistency from regulators and protection of their reliance interests—just as they have no right to make similar demands upon legislators.[93] This argument has largely overwhelmed the more modest point that forcing an agency to adhere to prior commitments might, in some cases, simply amount to good policy.[94]

92. *See* Mark Seidenfeld, *Bending the Rules: Flexible Regulation and Constraints on Agency Discretion*, 51 ADMIN. L. REV. 429, 434-35 (1999).

93. *See* Bamberger, *supra* note 3, at 1317-18; David M. Gossett, Comment, Chevron, *Take Two: Deference to Revised Agency Interpretations of Statutes*, 64 U. CHI. L. REV. 681, 706 (1997). Gossett claims that "the strongest argument against deferring to revised agency interpretations is that parties have a right to rely on agency interpretations of statutes" before attacking this argument on the grounds that "agencies are not courts, and are not subject to stare decisis"; an agency acts as a "stand-in" for Congress, and of course there is no requirement that Congress remain consistent. *Id.*

94. Thomas Merrill has recently addressed similar concerns in the context of the requirement that agencies adhere to the terms of their own regulations. *See* Thomas W. Merrill, *The* Accardi *Principle*, 74 GEO. WASH. L. REV. 569, 592 (2006). By contrast, David Gossett's analysis, described above, overlooks the fact that, even for courts, stare decisis is a "principle of policy" rather than an "inexorable command." *See* Gossett, *supra* note 93, at 693 ("The main reason for the stare decisis exception is the institutional relationship between Congress and the courts."). Adherence to prior decisions is motivated by the fact that consistency in the law will facilitate better private ordering. *See* Payne v. Tennessee, 501 U.S. 808, 828 (1991). There may be occasions when it is appropriate for courts to press agencies to adhere to prior policies or statutory interpretations on the theory that change may be socially unproductive. *See* Sunstein, *supra* note 3, at 2104. Sunstein argues that "new departures" from prior agency interpretations deserve "somewhat less deference than longstanding agency interpretations, for reasons analogous to those that justify stare decisis in the judicial context," by which he presumably means reasons relating to reliance interests. *Id.* The Court has not adopted a similar position. *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 863-64 (1984) ("[T]he

But what has gone overlooked amidst this back-and-forth is the importance to *agencies* and *their* regulatory missions of the ability to credibly bind themselves to policies or statutory interpretations. After *Brand X*, an agency possesses no mechanism by which it can commit itself to a statutory interpretation, and so it cannot cajole private parties into relying upon the stability of a regulation even under circumstances in which the agency is willing to sacrifice flexibility to do so.

The well-documented difficulties that arise in private law when one party cannot credibly commit to a position are equally present here.[95] For instance, if a consumer of some specialized good cannot reliably promise to purchase that good once it is produced, the manufacturer may opt not to produce in the first place for fear of losing its investment. Firms overcome this problem by writing binding contracts that guarantee either a market for a good or damages for breach.[96] In parallel fashion, if an administrative agency cannot commit to a particular set of regulations, regulated industries may refrain from making investments or taking other actions whose value is contingent on the existence of that regulatory regime. Yet unlike private firms, agencies now lack broad-based commitment mechanisms.[97] The result is that the agency's *judicially mandated* unlimited flexibility could significantly inhibit the very regulatory objectives it was attempting to promote by making the agency unable to persuade a firm to undertake certain socially productive projects.

Consider, for instance, a regulation designed to reduce air pollution. There are two primary types of methods that agencies employ to control pollution: command-and-control systems and cap-and-trade systems.[98] Under a command-and-control apparatus, each polluter must obtain a permit, and each polluter must abide by an independent and discrete limitation on how much pollutant it can release into the air.[99] Pursuant to a cap-and-trade system, the regulatory agency sets national or regional air quality goals that are

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agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis.").

95. *See* OLIVER HART, FIRMS, CONTRACTS AND FINANCIAL STRUCTURE 73-88 (1995); OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM 163-205 (1985); Thomas C. Schelling, *An Essay on Bargaining*, 46 AM. ECON. REV. 281, 282-87 (1956).

96. *See generally* Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416 (1989).

97. Agencies have a few other options at their disposal. *See infra* Section III.A. For reasons that will be discussed, however, each of these alternatives is inadequate.

98. *See generally* A. DENNY ELLERMAN ET AL., MARKETS FOR CLEAN AIR: THE U.S. ACID RAIN PROGRAM 154-66, 253-96 (2000).

99. *See* Robert N. Stavins, *Vintage-Differentiated Environmental Regulation*, 25 STAN. ENVTL. L.J. 29, 33 (2006).

measured in terms of the total amount of pollution that all sources will release and issues "credits" to each polluting source representing the fraction of that total that the source is entitled to emit.[100] Polluters can sell or trade the credits among one another, with the intention that lower-cost pollution avoiders will reduce their emissions below the necessary level and then sell their excess credits to higher-cost pollution avoiders, thus achieving air quality improvement equivalent to a command-and-control system at lower cost.[101]

Imagine now that Congress has passed a statute directing the EPA to reduce nationwide carbon dioxide emissions "in a cost-effective manner."[102] The EPA decides that a cap-and-trade system will best accomplish this goal and promulgates a rule imposing cap-and-trade regulation on factories that emit carbon dioxide. This rule might be challenged in court (by industry or environmental groups), and a court likely will uphold the agency's statutory interpretation—that a cap-and-trade system is "cost-effective"—under *Chevron*. Before *Brand X*, regulated parties could then be relatively confident in the stability of the EPA's rule, and those polluters able to reduce their emissions most cheaply could begin implementing emissions-reducing technology and selling their excess pollution credits. But after *Brand X* there is nothing to stop the EPA from reversing course and deciding instead on a command-and-control regulatory regime, as "cost-effective" is likely a sufficiently capacious phrase to encompass typical permit-based regulatory systems. In light of this uncertainty, a risk-averse factory owner might (rationally) choose not to invest fully in emissions-controlling technologies for fear that if it can no longer trade unused pollution credits, it will have scrubbed its own smokestacks cleaner than needed (and at higher cost) with no recompense to the firm. The agency's inability to bind itself to a policy choice will thus stunt the success of its own regulatory initiative.

Scenarios in which unsettled expectations may lead to suboptimal activity on the part of regulated third parties are not merely a matter of conjecture. Were *Chevron* itself decided today, this could very well be the result. Recall that the substantive question at

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100. *See* Robert N. Stavins, *Market-Based Environmental Policies*, *in* PUBLIC POLICIES FOR ENVIRONMENTAL PROTECTION 35-55 (Paul R. Portnoy & Robert N. Stavins eds., 2000).

101. *See* Cass R. Sunstein, *The Arithmetic of Arsenic*, 90 GEO. L.J. 2255, 2297-99 (2002) (describing the putative advantages of a cap-and-trade system).

102. This example is only hypothetical in part. In *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007), the Supreme Court held that the Clean Air Act, 42 U.S.C. § 7521(a)(1), obligates the EPA to eitber regulate carbon dioxide emissions as a greenhouse gas or provide an explanation as to why prevailing scientific uncertainty prevents it from doing so. The Clean Air Act does not contain the "in a cost-effect manner" language employed here, but it is hardly a stretch to imagine Congress amending the statute or the EPA interpreting the statute in such a fashion.

issue in *Chevron* was whether, per the Clean Air Act, the EPA could choose to regulate only the total quantity of pollution emanating from a localized collection of polluting devices—an "industrial grouping"—rather than placing individual limits on each individual polluter.[103] This "bubble" approach, like the cap-and-trade system described above, gives regulated parties an incentive to develop and employ low-cost devices that reduce pollution even below the ceilings set by the EPA. If a firm wishes to alter a factory such that its pollution will increase, it need not necessarily find offsetting ways of reducing pollution from that same factory. The firm can accommodate the increased pollution in one factory by simply reducing pollution from the factory adjoining it, if it is cheaper to do so; the "bubble" rule effectively allows polluters to trade pollution among different emitting entities within an industrial grouping.[104]

After *Brand X*, and in a fashion parallel to the move from a command-and-control system to a cap-and-trade regime described above, these investments become extremely risky for the firm if it has no confidence that the rule will remain in place for any length of time. A return to the prior system of individualized treatment would leave the firm with one factory that polluted too much and one factory that polluted "too little," necessitating a costly reallocation of emissions-reducing technologies. *Chevron* itself demonstrates the transience of these types of regulations and the risks that firms face when relying upon them. In August of 1980, at the tail end of the Carter Administration, the EPA promulgated a regulation that limited the "bubble" rule to very particular circumstances.[105] But that decision was not to last long. As the *Chevron* Court explained, "[i]n 1981 a new administration took office and initiated a 'Government-wide reexamination of regulatory burdens and complexities.' "[106] To say that the Reagan Administration "initiated a . . . reexamination" in 1981 is to undersell what took place; by *March* of 1981, a mere seven months after the EPA's original interpretation and only two months after President Reagan took office, the EPA had already proposed a rule extending the "bubble" approach to all new sources.[107] That rule became final in October 1981,[108] though of course it was a fait accompli long before then.[109]

103. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 840 (1984).

104. Emission Offset Interpretative Ruling, 40 C.F.R. § 51 app. S (2006).

105. *See Chevron*, 467 U.S. at 857.

106. *Id.* (citing Emission Offset Interpretative Ruling, 40 C.F.R. § 51 app. S (2006)).

107. 40 C.F.R. § 51 app. S.

108. *Id.*

109. This time scale belies to some extent the frequent claim that notice-and-comment rulemaking is inevitably tortuous and costly for agencies to undertake. *See, e.g.*, Jody Freeman,

The Reagan Administration's new "bubble" rule may or may not have been the wiser policy;[110] more important are its impermanence and the President's unilateral ability to alter it. After the Supreme Court placed its imprimatur on this statutory interpretation in *Chevron*—and particularly after *INS v. Cardoza-Fonseca*[111]—a regulated party could be relatively confident that this policy would remain stable and could act accordingly in reliance upon the rule. Now, however, if a similar situation were to arise a firm would be forced to contemplate the possibility that a regulation would last only as long as George W. Bush's presidency. An agency therefore might have a significant amount of difficulty convincing a firm to take socially productive steps if it cannot guarantee that the relevant regulation will outlive the current Administration. Such is the unsettling effect of *Brand X*'s grant of executive authority and agency flexibility.

The astute reader may by this point be objecting that of course no policy choice is ever fully permanent. *Brand X* has not altered Congress's ability to set a statutory meaning or override an agency regulation, and after *Chevron* a polluter could not be certain that Congress would step in and restore the Carter Administration's old rule. But congressional action is both costlier (and therefore rarer) than agency rulemaking, and crucially requires the acquiescence of the President and both Houses of Congress (or veto-proof majorities in both Houses). A congressional override of agency policy thus will require far greater political accord—or a far more substantial political shift—than simply a unilateral reversal of course. For instance, *Chevron*'s new "bubble" rule likely could not have passed Congress in 1981 because the Democrats retained a majority in the House of Representatives after the 1980 elections.[112] There may even have been

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The Private Rule in Public Governance, 75 N.Y.U. L. REV. 543, 639 (2000); Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 27, 108 (2003); *see also supra* note 34. The Reagan Administration decided quite quickly that it intended to overturn the previous new source rule, and adhering to the procedural formalities of a rule-making required only a few months. Even the protracted litigation that resulted lasted less than three years—and obviously very few agency actions reach the Supreme Court. (The Court of Appeals had rendered an opinion in August of 1982, less than a year after the publication of the final rule. *See* Natural Res. Def. Council, Inc. v. Gorsuch, 685 F.2d 718 (D.C. Cir. 1982), *rev'd sub nom. Chevron*, 467 U.S. 837). There are indications that an aggressive agency, empowered with substantial legal flexibility, can undertake informal rulemaking witb reasonable alacrity.

110. *See* RICHARD A. LIROFF, REFORMING AIR POLLUTION REGULATION: THE TOIL AND TROUBLE OF EPA'S BUBBLE 97-103 (1986); THOMAS H. TIETENBERG, EMISSIONS TRADING: AN EXERCISE IN REFORMING POLLUTION POLICY 188-202 (1985); Sunstein, *supra* note 3, at 2084.

111. *See supra* note 24.

112. *See* THE DIRKSEN CONGRESSIONAL CENTER, CONGRESSIONAL ELECTIONS ARE WORTH THE TIME AND ATTENTION, http://www.congresslink.org/print_lp_electionsim_worth.htm (last visited Mar. 25, 2007) (discussing the importance of Congressional elections in affecting history,

a majority in both Houses that favored overturning the rule, though this is more doubtful. In any case, the point is academic; having been delegated the authority to enact a new source rule, the President would have used his veto power to avoid surrendering it.[113]

B. Congress and the Future of Uncertain Delegations

Chevron and its progeny are typically understood to transfer power away from politically unaccountable courts and towards more democratically attuned executive agencies. More importantly, the court's deference doctrines also effectuate a transfer of power from Congress to the executive. Courts are political actors whose ideological commitments influence their decisions—including their statutory interpretations.[114] Nonetheless, courts' stated objective when construing laws de novo is to carry out the will of Congress as expressed through the language of the statute.[115] All else being equal, courts that attempt to find the "best interpretation"[116] will arrive at a result closer to Congress's preferences than courts that defer to any reasonable agency interpretation in the presence of statutory ambiguity.[117] By establishing a default rule that transmutes statutory ambiguity into executive authority,[118] rather than merely attempting to ascertain Congress's most likely intent (or the best reading of the statute), the Court has placed its thumb firmly on the President's side of the scale.

Courts have accommodated this transfer of power from Congress to the President by tying the grant of deference to Congress's

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and noting that "Ronald Reagan was able to pass his economic program" because of the "congressional elections of 1980 that gave the Republicans a majority in the Senate and increased their numbers in the House.").

113. *See infra* Part III.B.1.

114. *See* Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy?: An Empirical Investigation of* Chevron, 73 U. CHI. L. REV. 823, 825-26 (2006) ("Whatever *Chevron* may say, the data reveal a strong relationship between the justices' ideological predispositions and the probability that they will validate agency determinations."); Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. Rev. 32, 40 (2005).

115. *See, e.g.*, Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 570 (1982) ("Our task is to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive." (citation omitted)).

116. *See* Atl. Mut. Ins. Co. v. Comm'r, 523 U.S. 382, 389 (1998) ("Since the term 'reserve strengthening' is ambiguous, the task that confronts us is to decide, not whether the Treasury Regulation represents the best interpretation of the statute, but whether it represents a reasonable one.").

117. After all, an agency will not likely be concerned with adhering to the best interpretation of Congress's intent. Rather, the executive (and therefore the agency) is likely to simply select whatever policy best matches its own preferences and comports with a reasonable interpretation of the statute.

118. Elizabeth Garrett, *Legislating* Chevron, 101 MICH. L. REV. 2637, 2638 n.6 (2003).

explicit or implicit intent.[119] The Supreme Court most prominently made this move in *United States v. Mead Corp.*,[120] *Chevron*'s successor case. After *Mead*, a court will decide whether or not to award *Chevron* deference to an agency interpretation by asking whether Congress appears to have intended that the court defer to the agency's reasonable interpretation.[121] Yet the *Mead* rationale is little more than a legal fiction.[122] Congress rarely (if ever) provides an explicit statement of its actual intentions.

In the shadow of this legal fiction lies the genuine judgment widely acknowledged to be at the heart of *Chevron* and *Mead*, viz., that statutory interpretation involves political and policy choices that agencies are far better equipped—as a matter of institutional competence—to make than courts.[123] Support for *Chevron* thus rests on the belief—likely correct—that this doctrine of judicial deference will lead to better regulatory outcomes overall, the transfer of power from Congress to the President notwithstanding.[124]

However, *Brand X*'s elimination of any judicial safe harbor exacerbates the already arduous task facing Congress if it wishes to maintain control over administrative action. The effect may well be to stunt congressional policymaking—to ossify the *legislative* process.[125] Beyond even attempting to write less ambiguous statutes, Congress may refrain from legislating at all in certain areas for fear of

119. *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).

120. United States v. Mead Corp., 533 U.S. 218 (2001).

121. *Id.* at 229.

122. *See* William R. Anderson, *Against* Chevron—*A Modest Proposal*, 56 ADMIN. L. REV. 957, 963 (2004) ("Few believe, however, there is any actual intentional delegation in these cases—we are dealing instead with a convenient fiction."); David J. Barron & Elena Kagan, Cbevron's *Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 203 (2001) ("Given the difficulty of determining actual congressional intent, some version of constructive—or perhaps more frankly said, fictional—intent must operate in judicial efforts to delineate the scope of *Chevron*."); Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986) ("For the most part, courts have used 'legislative intent to delegate the law-interpreting function' as a kind of legal fiction."); Ronald J. Krotoszynski, Jr., *Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of* Skidmore, 54 ADMIN. L. REV. 735, 737 (2002); Ronald M. Levin, Mead *and the Prospective Exercise of Discretion*, 54 ADMIN. L. REV. 771, 792 (2002); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517 ("[A]ny rule adopted in this field represents merely a fictional, presumed intent, and operates principally as a background rule of law against which Congress can legislate.").

123. *Chevron*, 467 U.S. at 865 ("Judges are not experts in the field, and are not part of either political branch of the Government."); Dotan, *supra* note 3, at 1022 ("Agencies are preferred to courts since they have expertise, and are politically accountable, and the resolution of ambiguities in statutes is often as much a question of policy as a question of law.").

124. *See* Sunstein, *supra* note 3, at 2102-03 ("[B]ecause of their fact-finding capacities, electoral accountability, and continuing attention to changed circumstances, agencies are far better situated tban courts to soften statutory rigidities or to adapt their terms to unanticipated conditions.").

125. *Cf.* BREYER, *supra* note 34, at 48; McGarrity, *supra* note 34, at 533.

conferring too much flexible authority upon present and future agencies.

In the sections that follow I adopt the model of legislative interaction between Congress and the President employed by David Epstein and Sharyn O'Halloran in their empirical study of legislative delegation, *Delegating Powers*.[126] According to this model, the President and all Members of Congress are self-interested political actors, organized into committees and other leadership structures, subject to outside pressures from interest groups and constituencies, and possessing non-isomorphic preferences—principally among them the desire for re-election—that they seek to satisfy.[127] Any given piece of legislation will involve some distribution of costs and benefits, and each legislator will seek to allocate those costs and benefits according to the legislator's own preference function.[128]

Administrative agencies—and here I focus on executive-branch agencies, rather than independent bodies such as the FCC or Federal Reserve Bank—are substantially under presidential control.[129] There are undoubtedly agency costs that complicate the President's ability to impose her will upon the administrative apparatus, but (following Epstein and O'Halloran) I treat executive-branch agencies as mimicking the President's preferences.

Members of Congress legislate under conditions of uncertainty, both as to the expected outcome of any policy choice and as to which policy will best satisfy their individual preferences. In the presence of this uncertainty, Congress faces a "make or buy" decision akin to the choice that confronts private firms: Congress may elect to invest in information and decide upon the best policy course of its own accord, or it may choose to delegate the decision to an executive-branch administrative agency.[130] Congress's choice of policymaking forum thus will depend on the comparative resources available to it and to

126. *See generally* DAVID EPSTEIN & SHARYN O'HALLORAN, DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS (1999).

127. *See generally id.*

128. That is to say, legislators are likely to support legislation that promises far greater benefits than costs, while support for legislation that offers relatively balanced costs and benefits is likely to depend substantially upon the distribution of those costs and benefits. For another similar—and largely consistent—model of legislation and inter-governmental interaction, *see, e.g.*, Kenneth A. Shepsle, *Congress is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239, 241-49 (1992).

129. *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2252 (2001).

130. *See* EPSTEIN & O'HALLORAN, *supra* note 126, at 7-8; *cf.* Ronald H. Coase, *The Nature of thc Firm*, 4 ECONOMICA 386, 388, 393-94 (1937).

the executive, and will rest ultimately on how members believe that they can best satisfy their own political preferences.[131]

With respect to statutes that delegate power to an administrative agency, the relationship between Congress and the executive functions as a type of two-stage game. At the first stage, Congress and the President negotiate a statute delegating power to an agency.[132] Congress and the executive are essentially agreeing upon a contract. Each may have particular policy preferences or goals that it wishes to accomplish, and each would prefer a certain range of legislative outcomes to the status quo. If there is any overlap between these ranges, then there exists at least one legislative solution that each side would prefer to the (no legislation) status quo.[133]

At the second stage, the executive branch—via the agency administrator—interprets the statute and undertakes the concomitant policy.[134] Congress's negotiations with the President at stage one thus occur within the shadow of the President's subsequent authority over the statute at stage two; as Congress bargains with the executive it must consider the interpretation that the administration will likely attach to the resultant legislation.[135] Consequently, Congress will be more likely to pass broad agency delegations when its policy interests are well-aligned with the President's—that is, when it can reasonably expect the agency's subsequent gloss on the statute to comport with and further Congress's own preferences—and less likely to confer uninhibited authority when its interests diverge from those of the

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131. Legislative delegations that designate the executive branch as the locus for policy will also have the effect of transferring both credit and blame for eventual outcomes away from Congress, and thus may be additionally attractive or unattractive for that reason.

132. In the interests of simplifying even further, for present purposes I will use "Congress" to denote the legislative branch in its entirety, though of course that branch negotiates policy at the level of the law-making body, the party, or even the individual member.

133. I put to one side possibilities of log-rolling, vote-trading, and other mechanisms for reaching agreement when one side may prefer the status quo to the legislation under consideration. A more complicated picture of voting and legislative preference would only strengthen the argument here.

134. I do not mean to imply that one necessarily precedes the other; it is entirely likely that typical agency practice is to interpret statutes to fit whatever policy choice has already been made. The analysis is independent of this question.

135. *Cf.* Rachel Brewster, *Rule-Based Dispute Resolution in International Trade*, 92 VA. L. REV. 251, 263-68 (2006) (discussing a similar model in the context of international trade law). This, of course, requires that Congress be aware of *Chevron* and understand the interpretive power that it confers upon the executive. This fact has by no means been uncontrovertibly established, but there is at least reasonable anecdotal evidence to support it. *See* Garrett, *supra* note 118, at 2656-57; Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congrcssional Case Study*, 77 N.Y.U. L. REV. 575, 601 (2002) (surveying staff members on the Senate Judiciary Committee).

President.[136] Rigorous empirical testing has borne out this expectation.[137]

1. Legislation Under Conditions of Uncertainty

After *Brand X* even a Congress blessed with a felicitous executive will be wary of very broad delegations of power. Any favorable interpretation by the current executive can be just as easily undone by a subsequent administration. The eventual result of any congressional delegation—over any time frame longer than the tenure of the current administration—will be uncertain. Congress will, in essence, be placing bets not only on the current executive, but on the entire universe of possible future executives.[138]

The difficulty for Congress is that its power to influence regulatory policy is asymmetric in the face of variations in administrations. Congress needs only a simple majority to pass legislation favored by the current executive, but if a subsequent administration wrenches policy in a disfavored direction, Congress will need a two-thirds majority to re-establish control. This increases both the risk to Congress that a delegation will go substantially awry and (by a dramatic margin) the uncertainty[139] that Congress will face in attempting to predict outcomes from putative legislation. In turn, risk aversion[140] and uncertainty aversion[141] will weigh upon members of Congress and bias their preferences against further agency delegations. As long as a sufficient number of members (or sufficiently

136. *See generally* EPSTEIN & O'HALLORAN, *supra* note 126.

137. *See id.* at 75.

138. Note that the first agency interpretation of a statute will occur relatively early in the life cycle of a regulation's promulgation and defense in court. Under the *Chenery* doctrine, an agency may only defend its actions in court with reference to rationales—including statutory interpretations—that the agency relied upon earlier in the administrative process. *See* SEC v. Chenery Corp., 332 U.S. 194, 196 (1947) ("[A] reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency."). An agency's definitive statutory interpretation will thus come to the fore not when an appellate court hears a challenge to a regulation, or even when the agency is first sued, but when the agency first offers a proposed regulation for notice and comment. When litigation served to "lock in" this initial interpretation, as it did before *Brand X*, Congress could be relatively certain as to which administration would be engaging in the act of statutory interpretation. After *Brand X*, this early agency interpretation is of course non-binding on future administrations.

139. *See generally* FRANK H. KNIGHT, RISK, UNCERTAINTY, AND PROFIT 19-21 (1933) (discussing the differences between "risk" and "uncertainty").

140. *See generally* Cass R. Sunstein, *Behavioral Law and Economics: A Progress Report*, 1 AM. L. & ECON. REV. 115, 131-35 (1999) (discussing risk aversion).

141. *See* Daniel Ellsberg, *Risk, Ambiguity and the Savage Axioms*, 75 Q.J. ECON. 643, 656-69 (1961); *see also* Dotan, *supra* note 3, at 1003; William Samuelson & Richard Zeckhauser, *Status Quo Bias in Decision Making*, 1 J. RISK & UNCERTAINTY 7, 7-11, 33-41 (1988) (discussing the "status quo bias").

well-placed members) prefer the status quo to a regulatory policy administered by a President of the other party, uncertainty may diminish the production of useful legislation.

Rather than refraining entirely from legislating, Congress may choose to make policy through very limited tax programs instead of regulatory delegations.[142] Congress undoubtedly makes such choices for a number of reasons, but among them is the fact that tax programs provide the executive branch with far less flexible authority.[143] There is no invitation to craft more effective or innovative policy solutions; the IRS is expected simply to enforce the program's particulars, and indeed the agency sees its primary mission generally as tax enforcement, not the creation of new policy. The tax program thus serves as one method by which Congress can implement its chosen regulatory policy when its preferences diverge from those of the executive.[144]

If there is an extant social problem that calls for a solution, a tax program will in most cases he preferable to congressional inaction. But tax programs are decidedly inferior to administrative delegations along a number of important dimensions. Congress delegates authority to agencies in order to take advantage of their comparative advantage in policymaking, or to reach compromises and craft solutions that would not be politically feasible for Congress to undertake on its own.[145] A tax program accomplishes neither of these things—it is the best solution that Congress can fashion on its own, delegating only enforcement authority, not decisional authority, to the executive branch. By driving Congress to substitute crude tax programs for administrative delegations, *Brand X* may have the opposite effect than presumably was intended, robbing agencies of the flexibility to design workable policy and depriving the government of its most potent source of regulatory expertise. Whether Congress chooses the status quo or a tax program as a substitute for an agency

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142. *See* David A. Weisbach & Jacob Nussim, *The Integration of Tax and Spending Programs*, 113 YALE L.J. 955, 955-67 (2004).

143. *See* David A. Weisbach, *Tax Expenditures, Principal Agent Problems, and Redundancy* 7 (Olin Working Paper No. 299, 2006), *available at* http://ssrn.com/abstract_id=912735 (last visited Mar. 25, 2007).

144. *Cf.* John D. Huber & Charles R. Shipan, *Politics, Delegation, and Bureaucracy*, *in* THE OXFORD HANDBOOK OF POLITICAL ECONOMY 256 (Barry R. Weingast & Donald Wittman eds., 2006).

145. *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 131-32 (1980) ("[O]n most hard issues our representatives quite shrewdly prefer not to have to stand up and be counted but rather to let some executive-branch bureaucrat, or perhaps some independent regulatory commission, 'take the inevitable political heat.' "); EPSTEIN & O'HALLORAN, *supra* note 126, at 9 ("Legislators will prefer to make policy themselves as long as the political benefits they derive from doing so outweigh the political costs; otherwise, they will delegate . . . .").

delegation, the refusal to delegate represents a failure of the administrative state.

2. Externalized Benefits

Worse still, *Brand X* and the elimination of the last regulatory safe harbor diminishes the aggregate value to Congress and the President of passing new ambiguous legislation, narrowing the window in which the two parties can bargain and lowering the probability that they will reach agreement on a statute. In a contractual setting (such as stage one of the previously discussed two-stage game), the total amount that both sides have to gain over the status quo is called the "contractual surplus." To take a very simple example, imagine a producer ("*P*") and a consumer ("*C*") of widgets. *P* produces at a cost of $100 per widget, and *C* desires 100 widgets and values them at $500 each. A transaction between *P* and *C* would produce a contractual surplus of $40,000 (100 × ($500 – $100)), and if *P* and *C* can locate and agree upon a price that divides this surplus between the two of them at a transaction cost lower than the value of the surplus, a deal will result. This surplus is quite large, and the window for acceptable bargains is equivalently large, so a mutually beneficial deal seems likely.[146]

Now imagine that it instead costs *P* $490 to produce each widget. A deal between *P* and *C* would produce a surplus of only $1000 (100 × ($500 – $490)). Under these circumstances, a contract is less likely. *P* and *C* may be uncertain as to their precise costs or valuation (and believe the surplus to be zero), or transaction costs might overwhelm the surplus. As the contractual surplus shrinks, so too does the window for bargaining and, correspondingly, the probability of a successful deal.[147]

Similarly, the amount that Congress and the President have to gain collectively from passing legislation might be thought of as the "legislative surplus." If the parties can locate a point of accord that all prefer to the status quo, and if the costs of negotiating legislation do

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146. With a spectrum of acceptable options the parties to the negotiation must still select some point within the range that will satisfy both sides (but might favor one or the other)—this is known as the "bilateral negotiation" problem, and is the source of additional costs to the negotiation. *Cf.* Robert Cooter, *The Cost of Coase*, 11 J. LEGAL STUD. 1, 23 (1982) (suggesting that the battle over how to divide a contractual surplus—and the negotiation costs that would result—may sometimes prevent parties from reaching agreement, even when there are net benefits to be realized from doing so).

147. Richard H. McAdams, *Group Norms, Gossip, and Blackmail*, 144 U. PA. L. REV. 2237, 2274 (1996) ("Obviously, the outcome depends in part on the size of each transaction cost relative to the corresponding contractual surplus—there being no gains from trade if the former exceeds the latter.").

not overwhelm the benefits the parties expect to derive from it, then a successfully passed statute will likely result. The broader the range of preference overlap—in other words, the greater the legislative surplus—the more room there is for agreement, and thus the likelier it is that Congress and the President will find a workable solution. Consider Congress's and the President's preferences as intervals on a linear scale.[148] (The scale represents any one of the tradeoffs that are typical of legislation, and each branch's true preferences is a combination of n of these linear intervals arrayed in n–space.) In Figure 1 below, the shaded interval within the linear scale represents a hypothetical range of options that branch of government prefers to the status quo—the range in which that branch would be willing to strike a deal. The overlap between these ranges is the available bargaining window; and the larger the overlap, the greater the chance that Congress and the President will reach agreement on legislation.

Figure 1: Baseline Congressional-Executive Negotiation Interval

Congress:

President:

Agreement:

As in any contractual situation, the size and distribution of this legislative surplus may be affected by the background legal rules governing the bargain between Congress and the President. By way of illustration, consider the impact of *Chevron*. Compared with the legal regime that preceded it, *Chevron* transfers some interpretive authority

148. For a discussion of the power of a one-dimensional model and the differences between one-dimensional and multi-dimensional legislative constructs, see EPSTEIN & O'HALLORAN, *supra* note 126, at 54 n.1.

(and therefore some value) from Congress to the executive, because the President will gain the benefit of *Chevron*'s default rule when the statute is interpreted. Congress will require some corresponding recompense for this loss of control over policy. Thus, after *Chevron*, one would expect Congress to demand a better bargain from the executive on the substantive terms of any statutory delegation. But this should not necessarily make it more difficult for Congress and the President to reach agreement on legislation. Congress and the President are still able to capture all of the benefits from enacting a statute: The element of interpretive control that Congress loses—because a neutral arbiter is no longer attempting to determine its most likely intention—is transferred part and parcel to the President, who reaps its full benefit. In other words, the executive and the legislature remain collectively able to internalize the full "legislative surplus," and so the two parties still will have the same range of freedom to negotiate and settle upon on a workable compromise,[149] with or without *Chevron* as a background rule.[150]

Unlike with *Chevron*, what *Brand X* appropriates from Congress is not bestowed upon any current President. By eliminating the settling function of judicial interpretation, *Brand X* transfers power to a future executive who can later reverse an agency decision, and thus decreases the value of any legislative bargain to the current President and Congress who must negotiate it. Faced with the loss of some interpretive stability, Congress is likely to demand compensating concessions from the executive. Yet *Brand X* confers only very minimal additional benefit upon the current President. The vast majority of this newfound policy flexibility and interpretive authority is captured by future executives who may not agree with the contemporary administration's choices. The current President is unlikely to be interested in the fate of subsequent administrations and

149. The distribution of benefits between Congress and the President may change, depending on their relative negotiating strengths and situations.

150. It is possihle that *Chevron* may lead to a slight decrease in value due to the fact that the President and Congress will have difficulty valuing their respective loss and gain in interpretive control, especially when compared with the more certain (and more familiar) pre-*Chevron* system of judicial interpretation. Uncertainty in valuations can lead to difficulties in negotiations as risk-averse parties seek to avoid unknown outcomes or insure—in this case, by adhering to the status quo—against significant losses. *Cf.* Douglas G. Baird & Donald S. Bernstein, *Absolute Priority, Valuation Uncertainty, and the Reorganization Bargain*, 115 YALE L.J. 1930, 1935 (2006) (stating, with respect to the law of bankruptcy, the similar proposition that "uncertainty inherent in valuing a large corporation in financial distress creates a bargaining dynamic that accounts for many of the puzzling departures from absolute priority that the standard model cannot explain").

so will not value *Brand X*'s transfer of authority to any appreciable degree.[151]

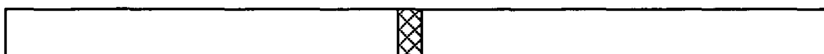
The elimination of any interpretive safe harbor will thus reduce the legislative surplus that the governmental parties to a statutory negotiation are capable of internalizing, as some of the benefits (in policy flexibility) will accrue to these non-party future executives. A smaller legislative surplus tightens the window for successful bargaining and diminishes the probability that the parties will succeed in passing legislation.[152] The result of this accumulation of costs will likely be less legislative delegation, and agency ossification of a different kind: rather than courts tying agencies in knots, *Brand X*'s version of deference may discourage legislatures from passing legislation that enables agencies to implement policy solutions in the first place. Per the same graphical representation, *Brand X* will narrow Congress's range of acceptable statutory outcomes, thereby constricting the domain of overlap between Congress and the President and diminishing the possibility that they will come to a successful accord on new legislation. Figure 2 illustrates this effect:

Figure 2: Reduced Negotiation Interval After *Brand X*

Congress, after *Brand X*:

President:

Reduced window of agreement:



151. The current President may even dislike the fact that future executives will be able to alter his interpretation of an administrative statute and thereby undo his legacy. Consequently, the President may demand a better substantive bargain *from Congress* (though he will be loath to forego the statutory ambiguity that would allow him the flexibility to make policy according to his preferences), narrowing the range of acceptable options even further and making agreement even less likely.

152. *Cf.* McAdams, *supra* note 147, at 2274 (stating that asymmetry in transaction costs can lead to inefficient results (excessive silence), using a private market for blackmail as an example).

3. Time Horizons and Congressional Defenses

At least three possible objections to the foregoing analysis immediately present themselves. Members of Congress may have extremely high discount rates and ignore the long-term consequences of agency delegations, no matter how uncertain. This would render future agency flexibility essentially irrelevant to their present calculations. Congress may also shift to less ambiguous statutes as a way of reasserting control, rather than refusing to delegate entirely. Or Congress may simply remove *Chevron* (or *Brand X*) deference directly.

a. Discount Rates

It is conceivable that members of Congress have very short time horizons or very high discount rates. If members do not expect to be in office for long stretches of time or if their own futures are sufficiently murky, then the actions of future administrations will play only minimal roles in their calculations.[153] However, many members serve for far longer than one presidential term.[154] During the 109th Congress, which spans the years 2005-2007, the average House member was serving her sixth term, corresponding to more than ten years in office.[155] The average Senator was in the middle of her third term, indicating a term in office of twelve to eighteen years.[156] The average lengths of service in both Houses of Congress are thus already equivalent to at least three presidential terms, and Congressional tenure has been rising over the past century and will likely continue to increase.[157]

In addition, the most powerful members of Congress, committee and subcommittee chairmen and members of the party leadership—those whose votes are most important to the passage of legislation, particularly broad agency delegations—are likely to have

153. *See generally* David Laibson, *Golden Eggs and Hyperbolic Discounting*, 112 Q.J. ECON. 443, 446-47 (1997).

154. The following discussion assumes that Members of Congress cease to care substantially about the results of their legislation once they leave office. This is by no means necessarily the case, and ongoing preferences post-departure would only strengthen the argument made here.

155. ROGER H. DAVIDSON & WALTER J. OLESZEK, CONGRESS AND ITS MEMBERS 32 (10th ed. 2006).

156. *Id.*; *see also* CSPAN.ORG, THE 108TH CONGRESS: A PROFILE, http://www.cspan.org/resources/fyi/108_profile.asp (last visited Mar. 25, 2007) (describing similar tenure lengths for members of the 108th Congress).

157. *See* DAVIDSON & OLESZEK, *supra* note 155, at 32. The average number of terms served in the House of Representatives from 1789 to 1901 was 2.1; from 1901 to 1995 was 4.8; from 1995 to 2005 was 5.3; and from 2005 to 2007 (the 109th Congress) was 6.2. In the Senate, those figures are 1.5, 2.2, 2.6, and 3.0, respectively. *Id.*

even longer tenures (and greater expectations of remaining in office).[158] It is the amassing of seniority via length of time in office that entitles these members to hold important posts in the first place.[159] In sum, members of Congress are already likely to have sufficiently great time horizons and sufficiently small discount rates. As the average tenures of officeholders increase, their time horizons likely will lengthen and their discount rates should be expected to shrink, as well. Thus, these members will care greatly about the actions of future presidential administrations and will be stymied by their uncertainty about future presidential treatment of statutory delegations.

b. Unambiguous Statutes

Congress always retains the power to erase potential uneasiness about future executives' treatment of agency delegations by drafting more highly specified statutes that leave fewer ambiguities and less interpretive space to exploit.[160] But this process will be costly; Congressional delegations of power are analogous to incomplete contracts, and only at significant expense can statutory drafters provide for every conceivable contingency.[161] In addition, statutes are negotiated at multiple levels: internally within the House and Senate, between the House and Senate, and between Congress and the President. The price of unambiguous statutory language, then, is not merely the cost of drafting it or reaching bilateral agreement, but also the cost of negotiating it among a multitude of different parties. As a result, it is not surprising that unambiguous statutes are relatively rare.[162]

Though entirely unambiguous statutes may be impossible or overly costly, Congress might still draft ambiguous statutes that

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158. *See id.* at 196.

159. *See id.* ("The majority party member with the most years of continuous service on a committee virtually always became its chairman.").

160. *See* Garrett, *supra* note 118, at 2663.

161. *See* Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 595 (2003) (noting the "conventional view . . . that, but for the cost, parties would write complete contracts.").

162. Miles and Sunstein's data reveal that of the past 84 *Chevron* cases to reach the Supreme Court, on only 20 occasions did the Court hold the statutory language at issue unambiguous. *See* Miles & Sunstein, *supra* note 114, at 825. (I thank Tom Miles for his help in recompiling the data in this fashion.) The drawing of conclusions based on this collection of Supreme Court cases is obviously fraught with peril, since the sample is heavily influenced by selection effects. Only certain types of cases reach the Supreme Court (or are even litigated in the first place), and unquestionably ambiguous and unambiguous statutes are likely filtered out at lower levels of the process. As a snapshot, though, this figure conveys an approximate sense of the rate at which Congress is writing statutes that the courts have found unambiguous.

present a smaller interpretive frame of ambiguity.[163] In theory, then, even if a court did not find a statute ambiguous at *Chevron*'s Step 1, it might still cabin agency discretion by ruling an agency interpretation out of bounds at Step 2.[164] In practice, however, courts almost never decide a case adverse to an agency at *Chevron*'s Step Two; the Supreme Court has only ruled against an agency once at step two in the post-*Chevron* era.[165] This is, of course, not to say that ambiguous statutes do not limit agency discretion in important ways,[166] but the numerical predominance of *Chevron* Step One decisions is a useful indication of the relative power of unambiguous statutes in constraining agency actions.

c. *Stripping* Chevron *Deference*

Of course, Congress could remove *Chevron* deference (or *Brand X*'s extra-temporal freedom) with respect to a particular agency delegation (or even across the board);[167] *Chevron* is merely a default rule.[168] However, undoing this default rule is itself costly, and it is for this reason that there is every reason to expect that the default rule will be very sticky in administrative law, just as it is in other contexts.[169]

Furthermore, a legislature that seeks to strip an agency of *Chevron* deference is confronted with a host of unpalatable choices. The agency could strip deference from an entire statutory delegation—

163. *Cf.* HANS KELSEN, PURE THEORY OF LAW 351 (Max Knight trans., University of California Press 1967) (1934) ("[T]he law to be applied constitutes only a frame within which several applications are possible . . . .").

164. *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-83 (1984) (describing the two-step formulation).

165. *See* AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 397 (1999); Miles & Sunstein, *supra* note 114, at 823. From 1990 through 2004, circuit courts invalidated EPA and NLRB actions (Miles and Sunstein chose this subset of cases for its political salience) on eighty-six of 227 occasions; however, only fifteen of these eighty-six invalidations (6.6% of the total cases) came at Step Two. *Id.*

166. And again, it is difficult to draw firm conclusions from the data because of selection biases.

167. Senator Dale Bumpers proposed a similar idea in 1975, advocating full, de novo judicial review of all agency decisions more than a decade before *Chevron*. Senator Bumpers argued, not unreasonably, that "courts would ensure greater fidelity to congressional desires, whereas agencies would follow the lead of the president or implement their own policy goals notwithstanding congressional intent." Garrett, *supra* note 118, at 2670 (citing 121 CONG. REC. 29956, 29957 (1975) (statement of Sen. Bumpers)). The so-called Bumpers Amendment nearly succeeded in passing Congress.

168. Garrett, *supra* note 118, at 2638, 2638 n.6.

169. *See* Robert E. Scott, *Is Article 2 the Best We Can Do?*, 52 HASTINGS L.J. 677, 686 (2001) (discussing contracts); Cass R. Sunstein, *Human Behavior and the Law of Work*, 87 VA. L. REV. 205, 206-07 (2001) (discussing labor-management relations).

or perhaps even to an entire agency—and risk overinclusively sacrificing far more agency expertise than is necessary. Or it could attempt to selectively deny *Chevron* deference and temporal flexibility with respect to a few key statutory provisions. The agency would then be forced to confront both the cost of negotiating these elisions and the difficulty of predicting in advance precisely which statutory provisions will turn out to be crucial. Agencies avail themselves of temporal flexibility and the freedom to shift policies particularly where rapid technological change makes ex ante judgments about the importance of certain provisions difficult. After all, it is Congress's inability to anticipate future regulatory needs that makes delegation attractive in the first instance. Congress thus will be forced to undertake costly negotiations to strip *Brand X* or *Chevron* deference under conditions of great uncertainty as to where the tying of agency hands will ultimately become productive or relevant. Selective denial of deference will operate as an expensive guessing game.[170] Predictably, Congress has never explicitly stripped an agency of *Chevron* deference.[171]

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Without a mechanism for credibly guaranteeing that a particular policy will remain stable, administrative agencies will have difficulty convincing risk-averse industries to undertake investments that may be necessary to the success of the operative regulatory scheme. Similarly, Congress may be wary of delegating authority to agencies when it cannot guarantee that it will know—and can constrain—how the agency will employ that authority in the future. Absent a reliable self-commitment mechanism, administrative agencies may find themselves hamstrung and unable to avail themselves of the full panoply of regulatory options.

III. TOWARD FLEXIBLE CREDIBILITY

The problems that administrative agencies will face in attempting to induce reliance, while significant, are not insurmountable. A number of potential mechanisms exist by which Congress might empower agencies to make credible commitments to third parties, including to Congress itself. In the sections that follow, I

170. The solution that holds perhaps the most promise would be for Congress to set a date at which an agency's *Chevron* deference expires—at the end of the current presidential term, for instance. But this solution also carries a number of potentially decisive obstacles, among them that it will only function with respect to second-term presidents.

171. Courts have, on occasion, discerned indicators within the statutory text that Congress did not intend for an agency to receive *Chevron* deference on a particular issue. *See, e.g.*, Gonzales v. Oregon, 546 U.S. 243, 126 S. Ct. 904, 914-15 (2006).

briefly sketch a thought experiment in which Congress bestows upon an agency the power to create "permanent regulations," regulations that the agency cannot alter unilaterally. The discussion that follows is necessarily incomplete, and significant work remains to be done in fleshing out the advantages and disadvantages of an administrative self-binding mechanism. But the permanent regulation may indeed be a viable alternative to the current state of regulatory uncertainty and third-party paralysis.

A. An Alternative to Brand X*: The Agency Option*

The deleterious consequences stemming from *Brand X*'s erosion of an agency's ability to credibly commit to a position are not reversed easily. There is no reliable substitute within administrative law that produces some element of judicially enforced consistency, and it will be difficult to recapture the loss of ability to encourage reliance on the part of private parties and Congress without some method of legally binding agencies. At the same time, there are good reasons to bid a final farewell to the pre-*Brand X* race to interpret ambiguous statutory language and the stochastic process that led to an under- and over-inclusive set of statutory meanings becoming fixed via stare decisis.

What is needed is a mechanism for agencies to credibly signal their intention to retain consistent statutory interpretations or policies, and one that does not rely upon the vagaries of litigation and the choices of potentially self-interested third parties. To borrow again from contract law, agencies need an effective, enforceable method for either contracting with outside parties (including Congress) or unilaterally signaling that they will adhere to a particular interpretation (or, at a greater level of detail, to a particular policy).

The former option—a mechanism for writing binding contracts—might well serve as a complete solution to the reliance problems of private parties. An agency could simply write enforceable contracts with regulated industries that provide for the maintenance of a particular regulatory regime, solving the reliance problems that might plague, for instance, implementation of a cap-and-trade system.[172] The Supreme Court has begun moving in this direction, holding enforceable certain types of contract-like agreements between regulated parties and the United States.[173] Alternatively, an

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172. *See supra* Part II.A. However, this contracting process could be extremely expensive, if (for instance) the EPA were forced to separately negotiate the terms of a contract with every regulated producer of carbon dioxide.

173. *See* United States v. Winstar Corp., 518 U.S. 839, 843 (1996).

extremely robust doctrine of regulatory takings might fulfill a similar role.[174] This approach would require, at minimum, a sea change in constitutional law, which limits the doctrine of regulatory takings to situations "where regulation denies all economically beneficial or productive use of land."[175]

Yet, although these approaches might successfully solve the reliance problem as applied to private actors, it is difficult to imagine either of them functioning as a successful bargaining mechanism between executive-branch agencies and Congress. A structural device that would allow the President and Congress to strike a judicially enforceable bargain during a legislative negotiation is rather far afield from traditional constitutional arrangements. A court would likely view the validity of such an agreement as a non-justiciable political question,[176] and in this realm of shifting political commitments enforceability is the sine qua non of credibility. This is not even to mention the difficulty of setting damages for an agency breach of agreement with Congress.

But what of the possibility of creating a binding, unilateral agency signal? Consider as a thought experiment a statute that permitted agencies to select the option during notice-and-comment rulemaking of promulgating "permanent regulations," a sub-species of typical agency regulations.[177] An agency could identify elements of a "permanent regulation"—certain interpretations of a statute, particular policy choices, or decisions at any level of precision—as irreversible and unalterable by the agency once issued, unless struck down by a court. Alternatively, if an agency promulgated a typical regulation that it later wished to entrench, it could simply commence another abbreviated rulemaking to designate chosen portions of the previous regulation as immutable. If an agency subsequently attempted to alter a permanent regulation, a court could review the agency's action for consistency with its earlier guarantee.[178]

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174. *See* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 7-8 (1985).

175. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992).

176. *Cf.* Nixon v. United States, 506 U.S. 224, 228 (1993) (discussing nonjusticiable political questions); City of Rome v. United States, 446 U.S. 156, 182 (1980); Baker v. Carr, 369 U.S. 186, 217 (1962); Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 140-51 (1912).

177. I employ the phrase "permanent regulation" to distinguisb it from a "final rule," the end result of notice-and-comment or formal rulemaking. *See* New York v. FERC, 535 U.S. 1, 24 (2002).

178. Eric Posner and Adrian Vermeule suggest an internal agency voting rule—requiring a supermajority vote to make certain types of policy changes—as a mechanism by which an agency might credibly commit to a stable course of policy. Eric. A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665, 1701-02 (2002) (describing the benefits to the national legislature of a similar self-binding mechanism). Posner and Vermeule's

An agency thus would have within its power the ability to induce reliance by third parties when it deemed that reliance necessary to fulfill its regulatory goals, as in the "cap-and-trade" pollution credit example described above.[179] In addition, the very fact that an agency had the option of making a regulation permanent would be a useful signal to regulated parties attempting to gauge the temporal stability of a given rule. For example, an agency's refusal to make a regulation permanent could rationally be viewed as a sign that the current administration envisioned modifying the regulation in the foreseeable future. Moreover, the agency itself would be capable of engaging this option precisely when it believed that a fixed policy would facilitate regulatory achievements.[180] Agencies would no longer have to fear the haphazard entrenchment of the pre-*Brand X* world.

1. Permanent Regulations and Inter-Branch Negotiations

The foregoing analysis addresses only the issue of private-party reliance on regulatory stability. The application of permanent regulations to the Congress-Executive interaction is not so straightforward. An agency still could not credibly pre-commit to a course of action while Congress was drafting and negotiating a statute. In many cases, an agency will not know if a permanent regulation is appropriate until it examines the subject matter at hand, something it cannot do until Congress has delegated it the authority (and the necessary funds). But because Congress and the President will be repeat players in the two-stage game of legislating and interpreting, it is possible that they will be able to come to a socially productive accord even absent a rigid pre-legislation enforcement mechanism.

Here is how such a scenario might play out. Once Congress has taken up a particular issue and effectively has broached the subject of

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suggestion depends on a particular agency structure and may not be aimed as comprehensively as the proposal here, though it is much in the same vein. *See id.*

179. *See supra* Part II.A. The agency would simply promulgate a permanent regulation, thereby guaranteeing some measure of stability for its regulatory initiative, and market participants could rely upon that guarantee and invest in pollution-reducing equipment without fear that the pollution credits they create might suddenly lose their value.

180. It is conceivable that two agencies, both charged witb the enforcement of disparate aspects of the same statute, could engage in a race amongst themselves to interpret a key statutory provision or set a firm policy agenda. This sort of contest could very well have deleterious consequences. But in this era of "Presidential Administration," in which policy decisions—especially significant ones—flow predominantly through the President and the Office of Management and Budget, it is more likely that a centralized decision-maker will exert ultimate authority over which policy or interpretation will become entrenched and avert any putative inter-agency competition. *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2246-47 (2001).

delegation, the administration will announce whether it envisions promulgating a traditional flexible rule or a permanent rule under the authority Congress is considering delegating. Congress will then decide whether to pass legislation or refrain from doing so. If Congress decides to act, the executive then has the option of adhering to its ex ante promise or breaking its word and promulgating an unfixed regulation.[181]

In some instances, the payoffs to Congress from legislating will be so high or so low that it will decide whether or not to pass a statute irrespective of the executive's stated guarantee. But on other occasions, Congress will be willing to legislate if and only if the President (credibly) promises to promulgate a permanent regulation. In other words, under these circumstances, the optimal result for Congress is the passage of legislation followed by the executive adhering to its promise to promulgate a permanent regulation. Congress's second-best alternative is to refuse to pass legislation in the first place if it believes that it cannot rely on the executive to keep its word. The least attractive outcome for Congress would be to legislate in reliance on the executive's promise to cooperate, only to see the executive later refuse to adhere to its promise to tie its own hands.[182]

There are many occasions when a President will view an unfixed regulation as more valuable than a permanent one—such as when the President is just beginning her term—while Congress prefers a fixed regulation. Conversely, there may be occasions when Congress is willing to delegate authority only if the President agrees *not* to promulgate a fixed regulation—if, for instance, it believes that future executive preferences will likely comport better with its own—and in which cases the President might actually prefer to disregard Congress's wishes and tie its own hands. In either case, the President's dominant strategy would be to strike a bargain with Congress and then defect from her promise.

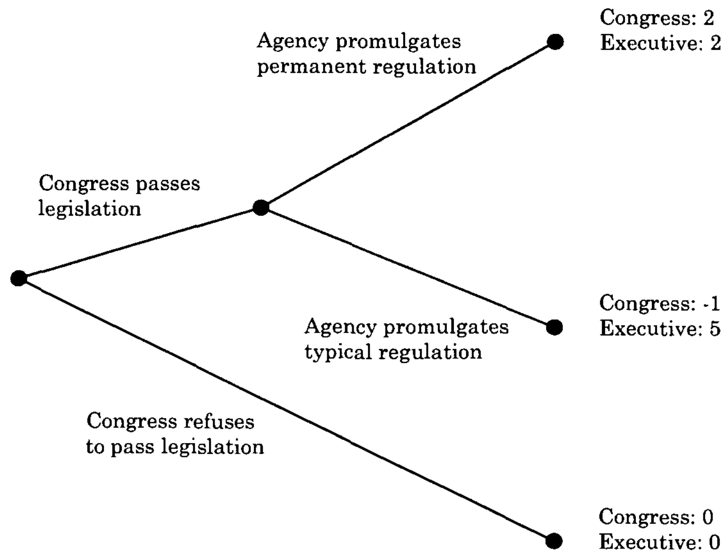
Figure 3 models the case of a President who prefers a typical regulation and a Congress that prefers a permanent regulation as an extensive form game with hypothetical payoffs. After negotiating with

181. Limited evidence already exists to support the conclusion that reductions in uncertainty can fuel the production of legislation. Epstein and O'Halloran found that Congress was more likely to pass legislation when the President took a position on that legislation prior to the vote. *See* EPSTEIN & O'HALLORAN, *supra* note 126, at 145. This result suffers from a potential selection bias, a flaw that the authors readily admit. Nevertheless, it offers some indication of the value of certainty to legislators.

182. *See generally* Douglas R. Hofstadter, *The Prisoner's Dilemma and Other Tournament Games* (1983), *reprinted in* DOUGLAS R. HOFSTADTER, METAMAGICAL THEMAS: QUESTING FOR THE ESSENCE OF THE MIND 715-34 (1985).

the President, Congress must first decide whether or not to pass legislation. Assuming that the negotiation is successful (the President has agreed that the agency will promulgate a permanent regulation) and Congress legislates, the Executive must then decide whether to abide by the agreement (permanent regulation) or defect (typical regulation). The figure describes the hypothetical payoffs to Congress and the Executive from each of these choices. Similar to the classical model of a prisoner's dilemma, overall social value is greatest when Congress and the Executive cooperate; legislation, particularly constructively negotiated legislation, is socially productive.[183]

Figure 3: Representation of Hypothetical Two-Stage Legislative Process



In a standard game, Congress would comprehend ex ante that the President's best strategy is to promise cooperation, induce the passage of a statute, and then defect. Congress would act with this strategy in mind and would refuse to legislate in the first place, leading (sub-optimally) to an underproduction of necessary legislation.[184] But Congress and the President are not playing this game only once. Rather, the two branches of government will engage in this game repeatedly over the course of the President's term in

183. *See* JAMES D. MORROW, GAME THEORY FOR POLITICAL SCIENTISTS 78-80 (1994).

184. ANATOL RAPOPORT & ALBERT M. CHAMMAH, PRISONER"S DILEMMA: A STUDY IN CONFLICT AND COOPERATION 135-40 (1965).

office, giving Congress the opportunity to punish the President on subsequent occasions (by not passing valuable legislation on other topics) if she defects from a promise to cooperate.[185] As with the classic iterated prisoner's dilemma, it is possible that the parties will understand that their interests lie in reaching agreement to the greatest extent possible, and thus that the parties will achieve an equilibrium of continued cooperation—the optimal outcome.[186] Because of the threat of future punishments, Congress will pass legislation, and the President will adhere to her prior agreements to promulgate permanent regulations.[187]

2. Alternatives and Safety Valves

The discussion of permanent regulations thus far has described the agency's option as binary: the agency must choose between promulgating a regulation that it may modify unilaterally and creating one that it may never alter. In reality, however, there is nothing to prevent Congress from offering a menu of entrenchment options. Agencies might be permitted to select between entrenching a regulation permanently, fixing it for a term of years, or simply grandfathering some aspect of a regulatory program, such as guaranteeing the value of tradable pollution credits. This approach would also afford Congress greater latitude in calibrating an agency's procedural tools to the markets and technologies over which those agencies have jurisdiction. For instance, Congress may not have any information regarding whether or to what extent it is important for the FDA to be capable of inducing reliance from pharmaceutical companies, but it might understand in broad strokes that biotechnology advances too rapidly to justify an administrative entrenchment for longer than five or ten years. Congress then could limit the FDA's self-commitment powers accordingly.

185. Alternatively, Congress could simply pass a statute that permits an agency to promulgate *only* permanent regulations, writing the binding agreement into the terms of the legislation. This would have essentially identical effect, largely transforming bargaining costs into drafting costs. Congress should therefore be able to achieve its objectives using either a generalized statute (and relying on tbe President's behavior within the prisoner's dilemma game theoretic) or particular enactments.

186. *See* MARTIN J. OSBORNE & ARIEL RUBINSTEIN, A COURSE IN GAME THEORY 16 (1994); *see also* DOUGLAS G. BAIRD ET AL., GAME THEORY AND THE LAW 191-95 (1994). There are, of course, otber equilibrium solutions; I mean only to suggest that this is one likely possibility.

187. In typical iterated prisoner's dilemma games with known stopping points, the parties will rationally defect on the final iteration, as there will be no future opportunity for one to punish the other. In this type of game, tbe endpoint will come when the President's term in office is over. Even then, however, the President will have no incentive to defect—flexibility is presumably worthless to him if he is about to leave office.

In addition to the value conferred by the very fact of proliferating options, a menu of entrenchment possibilities would possess the virtue—well-known in contract law—of reducing the transaction costs surrounding agency decisions to commit. Menus would diminish the costs of negotiating and drafting permanent regulations[188] and could provide a focal point for selecting the appropriate length or terms of agency entrenchment.[189]

It is worth noting, in addition, that no permanent regulation can truly be permanent. Agencies are capable only of binding themselves; they cannot tie Congress's hands as well. This limits the degree to which any agency entrenchment can successfully induce private-party reliance, but in many regulatory domains this problem is not likely to significantly inhibit the effectiveness of permanent regulations in inducing reliance; legislation is comparatively protracted and expensive, and Congress acts comparatively rarely.[190] More importantly, the possibility of Congressional action provides a safety valve in the event that an administrative entrenchment becomes cumbersome, out of date, or otherwise suboptimal. If a permanent regulation's disutility is so evident that both houses of Congress and the President agree it should be undone, Congress need only pass a one-sentence law to effect the change.

B. Potential Objections

The foregoing Section described the affirmative case for empowering agencies to promulgate permanent regulations. The subsequent sections aim to address the most serious objections to this approach. Without question, a great deal of uncertainty surrounds the costs and benefits of this proposal, and much work remains to be done in quantifying those costs and benefits to some reasonable degree of precision. Nonetheless, as the following sections illustrate, there is reason to be optimistic that the benefits that accrue from affording agencies this option will exceed the harms that may result.

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188. YAIR JASON LISTOKIN, JOHN M. OLIN CTR. FOR STUDIES IN LAW, ECON., AND PUB. POLICY, WHAT DO CORPORATE DEFAULT RULES AND MENUS DO? AN EMPIRICAL INVESTIGATION 1-2 (2006), http://papers.ssrn.com/abstract_id=924578 (last visited Mar. 25, 2007). After all, it will rarely be wise for an agency to entrench itself without entering into consultations with the relevant third parties that indicate that such entrenchment is necessary or desirable.

189. Marcel Kahan & Michael Klausner, *Standardization and Innovation in Corporate Contracting (or " 'The Economics of Boilerplate' ")*, 83 VA. L. REV. 713, 716-18 (1997); Michael Klausner, *Corporations, Corporate Law, and Networks of Contracts*, 81 VA. L. REV. 757, 762-63 (1995).

190. *See supra* Part II.B.

1. Administrative Over-Entrenchment

Among the canonical objections to legislative entrenchment is that it affords "the past too much power over the present."[191] Such a concern is similarly present in the context of a mechanism for administrative entrenchment, though it might be more usefully stated in instrumentalist terms: a President who seeks to preserve her legacy[192]—or distrusts the motives or competence of her successor—might over-entrench agency regulations, imposing costs on future generations that she does not internalize. This concern is best understood as a threat that a President will engage in "eleventh-hour" entrenchment, locking policies into place on her way out the door, at a moment when the costs—both political and policy-oriented—would be at a minimum. Any mechanism for rendering regulations permanent, then, would seem to threaten a type of administrative self-ossification.

The threat from such an overuse of the entrenchment mechanism cannot be gainsaid, and subsequent research may be required in order to place reliable bounds on the magnitude of these harms. At this point—and particularly in the absence of empirical data—it is impossible to show definitively that these costs are negligible. But there remain several reasons to believe that the costs of over-entrenchment will not overwhelm the benefits.

First, the President's incentives at the conclusion of her term in office are mitigated in both directions. On the one hand, the President has the ability to deliver private benefits (such as a permanent regulation favored by political allies) without incurring the typical public harm of diminished prospects for reelection. At the same time, however, the value of these private benefits is itself marginalized—the President has no remaining political races to run or programs to promote, and so she cannot extract value from the conveyance of these private benefits to the extent that she might while a significant term in office remained. Certainly the President may have ideological reasons for preferring that a policy remain in place, or she may wish to use permanent regulations to confer ongoing benefits upon her successor. But these interests, while potentially substantial, will be less important than the President's own desire for political survival.

Moreover, the same reputational concerns that might induce a President to entrench her administrative programs and secure her legacy will militate against overzealous or overinclusive abuse of permanent regulations. A President who attempted to ensconce her

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191. Posner & Vermeule, *supra* note 178, at 1673.

192. By which I mean, in functionalist terms, accrue ongoing reputational benefits via the simple preservation of his projects and programs.

regulatory achievements at the expense of future generations (and to the detriment of her duly elected successor) would suffer politically for the apparent act of hubris. The American public has become quite adept at exacting a political price for the last-minute actions of an outgoing President, actions that might heretofore have flown under the political radar; witness the damage that President Clinton did to his legacy with a series of eleventh-hour executive pardons[193] that came to be viewed as self-interested political acts, despite the fact that such pardons have very little practical negative effect upon the polity. An ill-conceived permanent regulation that promised to significantly diminish social welfare would likely be greeted with even greater disapprobation.[194]

Second, unlike with a pardon or recess appointment,[195] a President could not simply enact a permanent regulation with the stroke of a pen. Per the terms of this thought experiment, permanent regulations (or hybrid versions thereof) would require notice-and-comment rulemaking; after all, such regulatory mast-tying is appropriate only when necessary to induce cooperation from a third party. Consequently, a President would require some appreciable amount of time—a matter of months, most likely—before she could place a permanent regulation into effect. A President could not deploy this mechanism between November and January, pursuant to the outcome of a particular election; an agency would need to initiate regulatory action well in advance of known political results. This diminishes the potential for abuse quite substantially. It is therefore little wonder that the prototypical "eleventh-hour" executive actions are those that the President can undertake unilaterally and instantaneously.

Third, and perhaps most importantly, this new legal mechanism would hardly represent the only manner in which one administration might take significant actions that future executives could not reverse.[196] Each time the EPA allows a factory to expel some

193. *See, e.g.*, Eric Lipton, *Officials Criticize Clinton's Pardon of an Ex-Terrorist*, N.Y. TIMES, Jan. 22, 2001, at B4.

194. The political price a President might pay for an eleventh-hour action undoubtedly has much to do with the political salience of that action. The point here is simply that if presidential pardons, which affect few people and are not typically noteworthy events, can develop substantial political significance—either organically or through the efforts of interest groups that seek to use the pardons to their advantage—then surely major regulatory action can capture public attention to at least the same degree.

195. *See* HARRY B. HOGUE, CRS REPORT FOR CONG., RECESS APPOINTMENTS: FREQUENTLY ASKED QUESTIONS 1 (2007), http://www.senate.gov/reference/resources/pdf/RS21308.pdf (last visited Mar. 25, 2007).

196. *Cf.* Posner & Vermeule, *supra* note 178, at 1691-92 (noting that similar dangers exist irrespective of whether a legislature is empowered to entrench itself).

pollutants into the surrounding environment, it sanctions an action that is orders of magnitude more costly to undo than it was to allow. If, for instance, one president were to allow petroleum companies to drill in the Arctic National Wildlife Refuge and an oil spill were to occur, subsequent presidents could not nullify the resulting environmental damage without tremendous expenditures—costs far outstripping what is required to pass a statute overturning a permanent regulation. Nonetheless, existing procedural and political controls are viewed as adequate restraints on an executive's incentives and ability to take such actions; no one seriously suggests that courts should tailor their level of scrutiny to the extent to which an agency regulation will lead to irremediable consequences. We have grown comfortable with substantively irreversible agency actions; there seems little reason to discordantly distrust procedural entrenchments that are merely difficult to invalidate.

Under any administrative scheme, the threat that the President—or the agencies themselves—will act for their own benefit, rather than for that of the public, is omnipresent.[197] The possibility of administrative entrenchment may provide another avenue for an outgoing President to do harm, but it does not alter this fundamental calculus.

2. Standard Error Costs

Though an agency in many cases may wield its authority to bind future incarnations of itself to productive effect, an agency's decisions may not always prove to be accurate or wise. Indeed, the set of cases in which an agency elects to promulgate a permanent regulation may be underinclusive, overinclusive, or both. Instances of underuse are not properly tabulated as a "cost" of permitting agencies to promulgate permanent regulations; a "failure" to promulgate a permanent regulation is functionally equivalent to the state of not possessing the power to enact one in the first place. Overuse of this power, on the other hand, may impose costs on agencies, Congress, and the public if permanent regulations serve to entrench policies that were either misguided at their inception or have become obsolete. The previous sub-section considered the more serious threat that agencies would undertake such action deliberately; here I turn to the possibility of unintentional errors of overinclusion, or what one might call "standard" (as distinct from biased) error costs.

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197. *See generally* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1670 (1975).

Consider the actions of an agency *A* at times t_1 and t_2. At time t_1, the agency promulgates a permanent regulation, enacting what it believes to be the best policy. This judgment, of course, may or may not be correct. At time t_2, the agency revisits this policy and concludes that it has become outdated, or was unwise when promulgated, or otherwise should be altered. The error cost from *A*'s actions is the sum of two factors. First, *A* might be correct in believing that the regulation should be altered at t_2; the error cost is based on the difference between the agency's probability of enacting the optimal regulation at t_2 minus the agency's probability of enacting the optimal regulation at t_1—in other words, the gain in information and accuracy that the agency achieves between t_1 and t_2. Second, the agency might have been correct at t_1, and the regulation simply might have become obsolete due to the passage of time, in which case the error cost is driven by the probability that the agency will realize the regulatory obsolescence at t_2. Importantly, error costs are not determined solely by the likelihood that an agency will seek to alter a regulation at t_2; circumstances must change, or the agency must acquire useful information in the interim.

Agency attempts to regulate industries and markets characterized by rapid advancements with permanent regulations—and permanent regulations that operate on the vanguard of technology—thus hold the possibility of catalyzing significant error costs if the regulatory terrain shifts quickly. Yet these are precisely the circumstances under which an agency's expertise is of greatest value, and in which agencies have the greatest institutional advantages vis à vis other decisionmaking bodies. Courts and scholars have moved to provide agencies with increasing policy authority—and deference—largely because of their perceived capacity to deal with these types of rapidly changing fields. It would be incoherent to trust agencies to regulate intelligently but simultaneously view with suspicion their abilities to discern when it would be appropriate or beneficial to insert permanent regulations into a transitioning market. There is thus reason to believe that agencies will enact injudicious permanent regulations only rarely.

In the event that an agency errs in cementing a regulation that later becomes obsolete, the agency could attempt to reverse its mistake by convincing Congress to pass legislation unlocking the imprudent regulation and restoring the agency's self-sacrificed flexibility. Thus, the total cost of such an error is equivalent to either the cost of passing legislation to overturn the permanent regulation or

the loss to society if the agency is unable to convince Congress to unfasten its regulatory authority.[198]

The first of these two costs will likely be moderate. Statutes are unquestionably costly and time-consuming to negotiate and pass,[199] but the statute required to unwind a permanent regulation holds the virtue of simplicity. Congress need not decide upon a particular policy or specify particular administrative powers or responsibilities; it need only vacate the permanency of a regulation already in existence and restore to an agency the same power it has already delegated. The predominant procedural costs of passing such a statute will not come through its drafting and negotiation, but rather through the difficulty an agency may face in convincing Congress to act in the first instance—namely the second of these possible sources of loss.

The Administration's ability to convince Congress to free it from a prior commitment will inevitably depend upon the party affiliations of Congress and the President, the provenance of the preexisting regulation, and any number of other political concerns. It is undeniable that in some instances—and particularly in the presence of divided government—Congress will simply refuse to accede to an agency's desire to modify a permanent regulation.[200] Yet Congress will pay a political price at the hands of its own national constituency if it fails to respond to a perceived need for agency action in the face of an inoperative regulatory status quo.[201] Congressional inaction will not be lightly tolerated, and thus should not be regularly expected.

In sum, it is impossible to conclude with any great certainty that the standard error costs stemming from an agency power to promulgate permanent regulations will be negligible. Consonant, however, with the trust placed generally in agencies to employ their delegated authority wisely, the gains that agencies will be able to achieve via enhanced credibility will, in all probability, dominate the costs they incur through these standard errors.

198. The President and the relevant agency may not have the proper incentives to expend sufficient capital convincing Congress to undo a given permanent regulation simply because they will be unable to internalize fully the benefits from promulgating a new regulation.

199. *See supra* Part II.B.

200. The issue is exacerbated by the fact that affirmative steps would be required of Congress, placing third parties with vested interests in maintaining the status quo in the position of having only to acquire a blocking position in Congress in order to frustrate agency intentions.

201. *See* Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 UCLA L. REV. 1217, 1254 (2006).

3. Divided Government

Just as the possibility of demanding an irreversible statutory interpretation may encourage the legislature to act when its preferences are reasonably well aligned with the current executive, so might the *threat* of a permanent regulation deter delegation in cases of divided government when executive and legislative preferences are poorly aligned.[202] Broad administrative delegations are rare in times of divided government, but they do occasionally take place.[203] Granting the President the ability to entrench a regulation (and thus deny future Presidents the opportunity to shape the regulatory agenda in a fashion more to Congress's liking) might chill what remained of Congress's desire to delegate to an uncongenial President.

Nonetheless, a number of factors exist that will substantially mitigate the losses that such a prospect might entail. First, Congress has the ability to bargain for a "temporary" (traditional) regulation, much as it does for a permanent one. Pursuant to the same game theoretic model, the President will comply with Congress's wishes (particularly in cases of divided government) for fear of discouraging future delegations.

Second, even if these attempts to bargain fail or become too costly to be practicable, the threat of unwanted entrenchment will only discourage legislation when it was unlikely from the start. The beneficial effects of permanent regulations will exceed their detrimental impact simply because a proportionate increase of a large quantity will be greater in magnitude than the same decrease of a smaller quantity. In more concrete terms: imagine that when Congress and the Presidency are controlled by the same party and generally share the same preferences, Congress will delegate authority to an agency with 60% probability. In an instance of divided government, Congress may choose to delegate with regard to the same issue only 30% of the time. Assuming that government is divided half of the time and unified half of the time, Congress will delegate (on average) with 45% probability. If an agency's ability to promulgate a permanent regulation affected the probability of legislation by one third (increasing it cases of unified government, decreasing when government is divided), Congress would then be 80% likely to delegate in times of unified government and 20% likely to delegate when government is divided, for an overall average 50% probability. The result will be more delegatory legislation simply by virtue of the fact that one third of 60% is greater than one third of 30%.

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202. *See* EPSTEIN & O'HALLORAN, *supra* note 126, at 189.
203. *See generally id.*

Third, even if the effect of a permanent regulation in instances of divided government were identical and congruent to its effect when legislative and executive preferences are unified, in either case the permanent regulation would diminish the uncertainty attendant any legislative delegation. This drop in uncertainty across the board—accompanied by a decline in risk—would bias the overall outcome in favor of more legislation, irrespective of the chilling effect on divided government. Thus, under even these worst-case assumptions the possibility of promulgating a permanent regulation should exert a positive force upon the rate of legislative delegations.

4. Unconstitutionality

There exists an obvious parallel between this solution and the constitutional axiom that "one legislature may not bind the legislative authority of its successors."[204] Here, tying the hands of its future self is precisely what an agency is being empowered—and asked—to do. But unlike with Congress, whose freedom to act notwithstanding the actions of previous Congresses is endemic to the constitutional structure, there is no apparent reason why a current agency should not be allowed to limit the options of its future selves.[205] At the most basic level, it is certainly the case that 1) Congress can bind an agency to a specific policy or interpretation, and 2) Congress can delegate legislative authority to an agency. These two premises alone seem to compel the conclusion that an agency can be granted the power to tie its own hands.[206]

Furthermore, agencies are fully the creations of statutes, endowed with whatever powers Congress affords them (and nothing more). If Congress chooses to establish the rules of the game such that an agency is able to limit its own future policy choices, the agency cannot be heard to complain that these are unfair existential terms.

Finally, one very practical problem that would arise if one Congress were able to constrain future Congresses is that no mechanism—short of a constitutional amendment—would exist for later voiding those constraints if they were to become unworkable.

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204. United States v. Winstar Corp., 518 U.S. 839, 872 (1996) (citing WILLIAM BLACKSTONE, 1 COMMENTARIES *90); *see also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 124-25 n.1 (3d ed. 2000).

205. Some scholars believe that even the axiom prohibiting one Congress from binding future Congresses should be discarded. *See* Posner & Vermeule, *supra* note 178, at 1665.

206. For a slightly longer exegesis on this point, see Doug Geyser, Note, *Courts Still Say "What the Law Is": Explaining the Functions of the Judiciary After* Brand X, 106 COLUM. L. REV. 2129, 2160-63 (2006).

With respect to self-constrained agencies, the solution is much simpler; all that is required is a subsequent act of Congress.

C. Sourcing the Administrative Option

As the foregoing paragraphs indicate, this solution to *Brand X*'s erosion of legal determinism must likely take the form of a legislative enactment, rather than a judge-made rule. After *Vermont Yankee Nuclear Power Corp. v. NRDC*,[207] the judiciary has little power to create new procedural mechanisms for agencies out of whole cloth, and it is difficult to imagine an extant statutory basis for imposing such a rule. Without question, the efforts of Congress and the President to pass such legislation will be fraught with the same difficulties and transaction costs that accompany any legislative endeavor. But this solution is likely to succeed where others would fail for two reasons. First, unlike particularized solutions, Congress can achieve its objective with one simple piece of legislation. It need not negotiate specialized provisions to accompany specific delegations. Second, unlike other "one statute" solutions—a statute overturning *Chevron*, for instance—this legislative fix is not a crude, one-size-fits-all approach to agency governance that sacrifices adaptability in the name of legislative convenience.[208] Rather, it would provide agencies with *more options* and more ways to achieve their regulatory goals, preserving flexibility and avoiding improper and unnecessary constraints on agency action.

As with any measure that eliminates some degree of policy flexibility, this solution would undoubtedly diminish agencies' abilities to regulate at the very vanguard of technological and economic progress. From time to time, agencies would find that they had bound themselves to policies that were no longer optimal and would be forced to seek new organic legislation from Congress; and legislative solutions, even widely accepted and approved ones, inevitably are slower and more costly than unilateral agency rulemakings. But this type of "legislation-forcing" mechanism has, in other contexts, been highly valued for its ability to induce political accountability.[209] Cass Sunstein has suggested that courts, when confronted with difficult constitutional questions of executive power, should issue legislation-

207. Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978) (holding that courts may not append additional procedures to those specified in the statutes governing agency action).

208. *See supra* Part II.B.

209. *See* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 317 (2000) ("The nondelegation canons represent a salutary kind of democracy-forcing minimalism, designed to ensure that certain choices are made by an institution with a superior democratic pedigree.").

forcing decisions that press Congress into service as an authorizing body, thereby deploying an additional—and superior—political constraint against potentially injurious executive action.[210] With respect to executive agencies, the principle is the same.

CONCLUSION

Administrative law—indeed, the entire theory of institutions—is founded upon the notion that particular bodies or groups are better equipped than others to decide certain types of difficult questions. It is this philosophy that has formed the intellectual backbone of the movement towards endowing administrative agencies with ever-greater flexibility and freedom, transferring an increasing proportion of the responsibility for formulating contemporary regulatory policy from inexpert courts and the ponderous legislature to adroit and agile agencies.

Yet, as this Article has demonstrated, flexibility—when conferred without limits—can impair, rather than further, the effective functioning of the administrative state. It may well be that courts and Congress could divine when these instances will arise and act accordingly, if either of them were made the sole repository of the authority to curb agency flexibility. In accordance with the principles that underlie administrative law, however, it is the agencies themselves who are most profitably entrusted with this power. Agencies are best positioned to evaluate their own need to induce third-party reliance and to balance that need against the value of their foregone interpretive freedom, just as they are best positioned to decide the antecedent scientific and economic questions that motivated the initial decision to commence regulatory action. It is perhaps ironic that the solution to an overabundance of administrative flexibility is to provide agencies with yet another policymaking tool. Nevertheless, private law theorists have long understood the value of simply providing parties with greater numbers of options and allowing them to bargain to optimal results. Administrative law would do well to incorporate similar wisdom.

210. *See* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 4 (1999) (describing the value of legislation-forcing rulings).