



NOTE

Did X Mark the Spot?: *Brand X* and the Scope of Agency Overrides of Judicial Decisions

Wesley Sze*

Abstract. In 2005, the Supreme Court issued a startling administrative law decision in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*. In *Brand X*, the Court held that agencies could override judicial constructions of ambiguous federal laws by promulgating their own conflicting, yet authoritative, interpretations. Justice Scalia dissented, arguing that the *Brand X* rule marked an unconstitutional threat to judicial supremacy and stare decisis. To date, the commentary surrounding *Brand X* has assumed that the decision had enormous repercussions on both agency statutory interpretation and the balance of powers between courts and agencies.

The intense reaction to the decision notwithstanding, this Note explores whether the *Brand X* decision has really mattered in practice. This Note employs a unique dataset of rulemakings from the *Federal Register* to empirically analyze the extent to which agencies have engaged in *Brand X*-type overrides. Contrary to the prevailing understanding about the decision's importance, this study finds that agencies rarely promulgate rules that conflict with established judicial precedent. Moreover, there is little evidence that *Brand X* actually changed agency behavior—agencies have not been more willing to disregard judicial precedent since the 2005 decision. Finally, where agencies have passed rules that displace judicial interpretations, this Note argues that they have done so in ways that are consistent with the institutional competencies and rationales underlying agency deference in the first place. These findings suggest that *Brand X* was not as momentous a decision as initially predicted, and that concern over its separation of powers implications lacks empirical support. Instead, the empirical evidence points to a more nuanced and balanced portrait of administrative agencies that see their role in partnership—and not in conflict—with the courts.

* J.D., Stanford Law School, 2015. I would like to thank Daniel E. Ho, who both introduced me to administrative law and provided his guidance and mentorship throughout my research. I am also grateful to Salvatore U. Bonaccorso and participants of the Stanford Legal Studies Workshop for their insightful comments and feedback on earlier drafts. And lastly, the editors of the *Stanford Law Review* should be recognized for their diligent editing—this Note is greatly improved due to their efforts. All errors are my own.

Table of Contents

Introduction.....	237
I. Doctrinal Background.....	241
II. Empirical Methodology	249
A. The Primary Source: <i>Federal Register</i> Rulemakings.....	250
B. Identifying Relevant Rulemakings.....	252
C. Selection Criteria.....	254
D. Coding of Variables	255
E. Methodological Limitations	256
III. Empirical Findings and Discussion	257
A. Frequency of <i>Brand X</i> Overrides.....	258
B. <i>Brand X</i> 's Effect.....	260
C. Features of <i>Brand X</i> Overrides.....	263
1. Frequency by agency	263
2. Frequency by court.....	264
3. Frequency by statute.....	266
4. Agency reasoning	267
IV. Typologies of Agency Overrides.....	270
A. Resolving Court Splits.....	271
B. Addressing Serial Litigation.....	273
C. Alternative to Direct Appeal	275
V. Implications.....	277
Conclusion.....	279

Introduction

Every so often the Supreme Court issues a decision that reshapes how we conceive of the balance of powers within our system of government. In 2005, the Court seemed to hand down one such decision in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*.¹ In *Brand X*, the Court held that agencies could override court precedent by displacing preexisting judicial interpretations of ambiguous statutes with their own independent interpretations of law.² When an agency disagrees with the judiciary's construction of a statute, *Brand X* allows an agency to pass its own conflicting—yet authoritative—interpretation and thereby annul the stare decisis effect of the judicial precedent.³

While the *Brand X* majority framed its rule as the inevitable outgrowth of the Court's long-established line of *Chevron* cases, the decision's retreat from the judiciary's authority "to say what the law is"⁴ did not go unnoticed. Justice Scalia dissented, arguing that the decision likely signaled an unconstitutional encroachment on judicial power.⁵ He feared that by making "judicial decisions subject to reversal by executive officers," *Brand X* would encourage agencies to ignore and even overturn judicial precedent.⁶ This, he remarked, was not only "bizarre," but also "probably unconstitutional."⁷

The Court's *Brand X* decision, augmented by Scalia's dissent, was instantly heralded as "the most significant" administrative law decision during the Supreme Court's "[Fall] quarter."⁸ There was "no doubt as to *Brand X*'s standing as a major administrative law case"⁹ that seemed destined to become a "watershed decision."¹⁰

1. 545 U.S. 967 (2005).

2. *Id.* at 982-83.

3. *Id.*

4. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

5. *Brand X*, 545 U.S. at 1005, 1016-17 (Scalia, J., dissenting).

6. *See id.* at 1016-17.

7. *Id.* at 1017.

8. Robin Kundis Craig, *Chevron and Federal Courts' Interpretations of Statutes*, 31 ADMIN. & REG. L. NEWS, Fall 2005, at 16, 16.

9. Randolph J. May, *Defining Deference Down: Independent Agencies and Chevron Deference*, 58 ADMIN. L. REV. 429, 431 (2006).

10. Kathryn A. Watts, *Adapting to Administrative Law's Erie Doctrine*, 101 NW. U. L. REV. 997, 999 (2007); *see also* *AARP v. EEOC*, 390 F. Supp. 2d 437, 442 (E.D. Pa. 2005) (explaining that *Brand X* "dramatically altered the respective roles of courts and agencies under *Chevron*").

Unsurprisingly (and true to Justice Scalia's prediction¹¹), the decision produced no shortage of scholarship analyzing its thorny implications.¹² Even ten years later, *Brand X* continues to attract attention. One scholar recently described the decision as a "'WOW' moment" that had "enormous repercussions" on the balance of power between agencies and courts.¹³ In addition, two present-day Supreme Court Justices—including the author of the opinion itself—have recently written separately to lambaste the *Chevron* doctrine upon which *Brand X* rests.¹⁴

But despite the intense reaction to the decision's purported implications on agency-court relations, it remains unclear whether *Brand X* was really a watershed moment that "recast"¹⁵ agency power. While much ink has been spilled over the decision's doctrinal implications, there has been no empirical understanding of whether it has actually lived up to its reputation as a landmark administrative law case. Only in the past decade have scholars begun to develop an empirical understanding of how administrative law doctrine shapes agency behavior.¹⁶ This is an area where "[m]uch more work needs to be done."¹⁷

-
11. In his dissent, Justice Scalia predicted that *Brand X* would create a "wonderful new world . . . full of promise for administrative-law professors in need of tenure articles." *Brand X*, 545 U.S. at 1019 (Scalia, J., dissenting).
 12. See, e.g., Mark Edwin Burge, *Without Precedent: Legal Analysis in the Age of Non-Judicial Dispute Resolution*, 15 CARDOZO J. CONFLICT RESOL. 143, 162-63 (2013); Daniel J. Gifford, *The Emerging Outlines of a Revised Chevron Doctrine: Congressional Intent, Judicial Judgment, and Administrative Autonomy*, 59 ADMIN. L. REV. 783, 825-33 (2007); Jonathan Masur, *Judicial Deference and the Credibility of Agency Commitments*, 60 VAND. L. REV. 1021, 1035-37 (2007); Shruti Rana, *Chevron Without the Courts?: The Supreme Court's Recent Chevron Jurisprudence Through an Immigration Lens*, 26 GEO. IMMIGR. L.J. 313, 340-42 (2012); Christopher J. Walker, *How to Win the Deference Lottery*, 91 TEX. L. REV. 73, 81 (2013) ("*Brand X* has breathtaking implications for how agencies play the deference lottery."); James Dawson, Note, *Retroactivity Analysis After Brand X*, 31 YALE J. ON REG. 219, 220 (2014) ("*Brand X* . . . has created a legal quagmire scarcely rivaled by any Supreme Court case from recent memory.").
 13. Abbe R. Gluck, *What 30 Years of Chevron Teach Us About the Rest of Statutory Interpretation*, 83 FORDHAM L. REV. 607, 625 (2014).
 14. See *Michigan v. EPA*, 135 S. Ct. 2699, 2712-13 (2015) (Thomas, J., concurring); *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1217-20 (2015) (Thomas, J., concurring in the judgment); *United States v. Home Concrete & Supply, LLC*, 132 S. Ct. 1836, 1846-47 (2012) (Scalia, J., concurring in part and concurring in the judgment); see also Brian Lipshutz, *Justice Thomas and the Originalist Turn in Administrative Law*, 125 YALE L.J.F. 94, 94 (2015) (highlighting six recent opinions by Justice Thomas that expound his originalist critique of modern administrative law doctrine).
 15. Gifford, *supra* note 12, at 834 (concluding that *Brand X* has "recast" the ability of agencies to promulgate their own authoritative interpretations of law); see also Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 456 (1989) (exploring the ways that *Chevron* "substantially recast[]" separation of powers and legitimacy principles).
 16. See Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501, 501-02 (2005) (writing ten
- footnote continued on next page*

This Note presents the first empirical analysis of *Brand X*-type agency overrides¹⁸ of judicial statutory interpretation decisions. It addresses whether *Brand X* has been as significant as its commentary would suggest, uncovering whether the decision's alleged "enormous repercussions" on separation of powers and judicial supremacy have actually changed the way agencies treat judicial precedent. More generally, this Note explores the broader question of how developments in administrative law doctrine influence the on-the-ground primary behavior of agency decision makers.

The empirical analysis utilizes a unique dataset of all rulemakings published in the *Federal Register* where agencies have adopted interpretations of federal statutes that supersede a prior judicial interpretation. It thus builds a catalogue of all rulemakings involving a *Brand X* override. By collecting information about these rulemakings along several dimensions, the dataset enables a systematic analysis of how agencies have wielded their interpretive authority to override judicial holdings, both before and after *Brand X*.

This methodology is unique in three main respects. First, instead of relying on a stated-preference approach (e.g., through surveys sent directly to agency officials), this Note uses a revealed-preference method by observing actual agency behavior.¹⁹ Although stated-preference studies can give direct insight into the internal thought processes of agency rule drafters, revealed-preference methods more accurately reflect real-world behavior by removing expectancy

years ago that "virtually no one has even asked, much less answered, some simple questions about agency statutory interpretation").

17. Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999, 1052 (2015); see also Matthew C. Stephenson, *Statutory Interpretation by Agencies*, in RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 285, 323 (Daniel A. Farber & Anne Joseph O'Connell eds., 2010) (concluding that greater attention should be paid to "how variations in legal doctrine might affect agency behavior"). The majority of empirical administrative law research has been largely limited to analyzing *Chevron* and its effects on judicial review. See, e.g., William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1089-90 (2008); Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 988-89.
18. This Note uses the term "override" to describe instances where an administrative agency uses rulemaking to displace a preexisting judicial statutory interpretation with its own conflicting construction, as contemplated by the *Brand X* decision. Characterizing such agency actions as "overrides" was first used in the *Brand X* opinion itself. See *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 983 (2005).
19. For examples of empirical studies utilizing stated-preference methods, see Walker, *supra* note 17, at 1013-15 (compiling dataset through surveys sent directly to agency rule drafters); and ROBERT J. HUME, *HOW COURTS IMPACT FEDERAL ADMINISTRATIVE BEHAVIOR* 127-32 (2009) (same).

bias and hypothetical bias.²⁰ Second, this study is comprehensive in its scope: it covers all agency rulemakings over a fifteen-year period, spanning the entire spectrum of the administrative state. Finally, rather than relying on judicial opinions (which provide only secondary insight into administrative lawmaking through judges' written opinions), this study relies on agencies' own primary source material published in the *Federal Register*.

The main empirical findings are as follows: First, contrary to what *Brand X*'s opponents have predicted, agencies have very rarely promulgated regulations that override judicial interpretations of federal law. Rather, agency rulemakings are overwhelmingly consistent with preexisting judicial precedent. Of all rulemakings published between 2000 and 2014, much less than one percent of them involved a *Brand X*-type override. Second, there is little evidence *Brand X* actually changed the ways agencies treat judicial precedent. Contrary to Justice Scalia's concerns, there is no empirical evidence that *Brand X* ushered in an era of outlaw agencies.²¹ Both pre- and post-*Brand X*, the rate of agency noncompliance with stare decisis has remained steadily low.

But this is not to say that agency rules never displace judicial interpretations—they have, albeit infrequently. And when they have engaged in *Brand X* overrides, this Note argues—consistent with the data—that they have done so within the context of broader, well-reasoned rulemakings that give appropriate respect to judicial precedent. Agencies have not used *Brand X* to thwart stare decisis. Instead, this study reveals that most *Brand X* overrides are implemented by a relatively small number of agencies to address complex, policy-heavy statutory schemes. And even in those cases, agencies still often explain their departure from judicial precedent by employing a full range of interpretive and policy rationales that reflect a reasoned and thoughtful decision to depart from stare decisis. Taken as a whole, the data suggest that *Brand X* is primarily invoked in circumstances where it is already appropriate, as a matter of policy and institutional competence, for an agency's determination of law to supersede a court's.

These findings suggest that the anxiety over *Brand X* is overblown. In recent years, there has been concern over a perceived ceding of judicial power

20. Expectancy bias occurs when a respondent's answer is shaped by what response she believes the researcher is expecting. In contrast, hypothetical bias arises when a respondent's answer is distorted because he is responding to hypothetical questions, rather than addressing an actual situation. For a seminal article examining the divergence of results between stated- and revealed-preference methodologies, see Peter Bohm, *Estimating Demand for Public Goods: An Experiment*, 3 EUR. ECON. REV. 111, 111-15 (1972). Similarly here, simply surveying agency rule drafters to comment on their own hypothetical behavior may not accurately reflect their true behavior. Studying their ex post behavior, as done in this Note's study, eliminates this hypothetical bias.

21. See *infra* notes 58-60 and accompanying text.

to the administrative state.²² This Note's findings do not necessarily refute that concern, as *Chevron* and its progeny may very well have limited the ability of courts to review agency interpretations.²³ Despite these concerns, this study argues that agencies do not actively seek to rebel against courts.²⁴ Instead, rule drafters continue to consider and incorporate judicial views into their rulemakings, even though *Brand X* created the theoretical possibility of discounting those precedents.

Part I of this Note presents a brief overview of the *Brand X* decision and the doctrinal background defining the allocation of interpretive authority between administrative officials and judicial actors leading up to the decision. Part II introduces this Note's empirical strategy, describing the methodology used to identify, categorize, and analyze the universe of agency actions that make up the unique dataset. Part III then reports the results of the empirical analysis. Based on these results, Part IV offers three typologies of agency overrides that illustrate key circumstances when *Brand X* overrides may be normatively desirable. Finally, Part V discusses the implications of these findings on our understanding of the balance of power between agencies and courts.

I. Doctrinal Background

Chief Justice Marshall famously wrote that it is “emphatically the province and duty of the judicial department to say what the law is.”²⁵ But he wrote those words more than two centuries ago—long before the rise of the modern administrative state. Today, the reality is that the judiciary is not the only government department authorized to “say what the law is.” Administrative agencies have since taken the helm as the “primary official interpreters of federal statutes” by promulgating their own authoritative constructions of federal law independent of the judicial process.²⁶ Even still, the vestiges of *Marbury v. Madison* have not been shed easily, and there remains some

22. See, e.g., *City of Arlington v. FCC*, 133 S. Ct. 1863, 1879 (2013) (Roberts, C.J., dissenting) (“It would be a bit much to describe the result as ‘the very definition of tyranny,’ but the danger posed by the growing power of the administrative state cannot be dismissed.” (quoting THE FEDERALIST NO. 47, at 324 (James Madison) (Jacob E. Cooke ed., 1961))); see also *supra* note 15.

23. See Cass R. Sunstein, *Beyond Marbury: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2595-96 (2006) (describing *Chevron* as “a kind of revolution”).

24. *But cf.* Nancy M. Modesitt, *The Hundred-Years War: The Ongoing Battle Between Courts and Agencies over the Right to Interpret Federal Law*, 74 MO. L. REV. 949, 964 & n.96 (2009) (describing a “battle” between agency statutory interpretation and judicial supremacy).

25. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

26. Mashaw, *supra* note 16, at 502-03.

uneasiness with the idea that administrative officials, and not judges, have the power to declare the law's meaning.²⁷

This struggle over the allocation of power between courts and agencies has been evident in a series of Supreme Court decisions that define each branch's interpretive authority. Beginning with the Court's seminal decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,²⁸ modern administrative law has shifted towards a model of deference to agency interpretations of the statutes they administer. *Chevron's* basic rule—that an agency's reasonable interpretation of an ambiguous statute that the agency administers is authoritative²⁹—is widely recognized as the source of the concentration of interpretive power in the administrative state.³⁰ The *Chevron* rule has been justified on a number of grounds,³¹ including consistency with congressional

-
27. See *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring) (warning that “*Chevron* deference raises serious separation-of-powers questions” because it “wrests from Courts the ultimate interpretive authority to ‘say what the law is’” (quoting *Marbury*, 5 U.S. (1 Cranch) at 177)).
28. 467 U.S. 837 (1984). *Chevron* is one of the most frequently discussed and written-about opinions of all time, and there is no dearth of commentary analyzing the decision. For fear of redundancy in this vast literature, this Note does not offer any theoretical analysis of *Chevron*. Rather, this Note accepts the *Chevron* doctrine as given, without expressing any normative view over its desirability as a matter of constitutional doctrine or policy. For notable analyses of the *Chevron* doctrine, see, for example, Evan J. Criddle, *Chevron's Consensus*, 88 B.U. L. REV. 1271 (2008) (arguing that the unanimous *Chevron* decision did not embrace a single theory of agency deference, but rather struck a balance between multiple competing rationales); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969 (1992) (arguing that *Chevron* has fallen short of establishing mandatory judicial deference to administrative precedent); Schuck & Elliott, *supra* note 17 (conducting an empirical survey of how courts have reviewed agency actions under the *Chevron* framework); and Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2076 (1990) (“*Chevron* is best defended as a sensible reconstruction of congressional instructions in light of the relevant institutional capacities . . .”).
29. *Chevron*, 467 U.S. at 843. Importantly, not all agency actions are eligible for *Chevron* deference. In *United States v. Mead Corp.*, 533 U.S. 218 (2001), the Supreme Court weighed in on when *Chevron* deference is appropriate. There, the majority held that United States Customs Service rule letters were “beyond the *Chevron* pale,” *id.* at 234, because, among other factors, they lacked the requisite formality needed to demonstrate that the agency was acting within its congressionally delegated authority to make rules “carrying the force of law,” *id.* at 227; see also *id.* at 231. *Mead* has proved to be a significant decision that reduced the universe of *Chevron*-eligible agency actions to those involving “relatively formal administrative procedure[s].” *Id.* at 230; see Thomas W. Merrill, *The Mead Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. 807, 807, 812 (2002).
30. Sunstein, *supra* note 29, at 2075 (“*Chevron* promises to be a pillar in administrative law for many years to come. It has become a kind of *Marbury*, or counter-*Marbury*, for the administrative state.”).
31. See, e.g., David M. Gossett, Comment, *Chevron, Take Two: Deference to Revised Agency Interpretations of Statutes*, 64 U. CHI. L. REV. 681, 688-90 (1997) (describing leading rationales for *Chevron* deference); Note, *Justifying the Chevron Doctrine: Insights from the Rule of Lenity*, 123 HARV. L. REV. 2043, 2045-49 (2010) (same).

intent,³² agencies' subject matter expertise,³³ and agencies' required flexibility to adapt to changing societal needs and shifting political climates.³⁴

Chevron has not been without its complications, however. One particularly contentious result has been its tension with stare decisis, one of the hallmarks of the Anglo-American legal system.³⁵ In its most basic form, stare decisis stands for the principle that "a court must follow earlier judicial decisions when the same points arise again in litigation."³⁶ The issue is this: Once a court has interpreted the meaning of a statute, does stare decisis also bind agencies to that same interpretation? Whereas stare decisis suggests that the prior judicial construction should prevail, *Chevron* counsels courts to defer to the agency's later interpretation, even if it conflicts with the existing judicial view.³⁷ But the notion that agency interpretations may deviate from judicial stare decisis is especially jarring because statutory interpretation had long been considered a distinct competency of the judiciary.³⁸ Separating the task of statutory construction from faithfulness to judicial precedent has been perceived as a threat to judicial supremacy.³⁹ Indeed, during the 1990s, the Supreme Court

32. See, e.g., Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516; see also Richard J. Pierce, Jr., *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U. L. REV. 1239, 1244-45 (1989) (discussing public choice theory).

33. See, e.g., Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283, 309-10 (1986).

34. See, e.g., Criddle, *supra* note 29, at 1279-83, 1288-90.

35. See *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 403 (1970) ("Very weighty considerations underlie the principle that courts should not lightly overrule past decisions."); BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 20 (1921) ("*Stare decisis* is at least the everyday working of our law."); William O. Douglas, Assoc. Justice, U.S. Supreme Court, *Stare Decisis*, Address Before the Association of the Bar of the City of New York (Apr. 12, 1949), in 49 COLUM. L. REV. 735, 736 (1949) ("*Stare decisis* serves to take the capricious element out of law and to give stability to a society.>").

36. *Stare Decisis*, BLACK'S LAW DICTIONARY (10th ed. 2014).

37. After *Chevron* was handed down, a flurry of literature and commentary opined on its interaction with stare decisis. See, e.g., Richard J. Pierce, Jr., *Reconciling Chevron and Stare Decisis*, 85 GEO. L.J. 2225 (1997); Rebecca Hanner White, *The Stare Decisis "Exception" to the Chevron Deference Rule*, 44 FLA. L. REV. 723 (1992); Paul A. Dame, Note, *Stare Decisis, Chevron, and Skidmore: Do Administrative Agencies Have the Power to Overrule Courts?*, 44 WM. & MARY L. REV. 405 (2002); Jahan Sharifi, Comment, *Precedents Construing Statutes Administered by Federal Agencies After the Chevron Decision: What Gives?*, 60 U. CHI. L. REV. 223 (1993).

38. See *Barlow v. Collins*, 397 U.S. 159, 166 (1970) ("[S]ince the only or principal dispute relates to the meaning of the statutory term, the controversy must ultimately be resolved, not on the basis of matters within the special competence of the [agency], but by judicial application of canons of statutory construction.>").

39. See, e.g., *Wiest v. Lynch*, 710 F.3d 121, 144 n.11 (3d Cir. 2013) (Jordan, J., dissenting) ("[Courts] are not required to follow—and arguably are constitutionally compelled to reject—an agency's reversal of course that contradicts prior judicial interpretations of a statute. . . . *Stare decisis* is not a straightjacket, but it must mean something more than 'this is the law until the executive branch unilaterally changes its mind.'"); Garfias-

footnote continued on next page

issued a trio of decisions that suggested—but did not hold outright—that agencies remained bound by stare decisis, notwithstanding the *Chevron* rule.⁴⁰

However, without clear Supreme Court guidance, lower courts continued to split over the stare decisis-*Chevron* conflict.⁴¹ Some courts favored a stare decisis “exception” to the *Chevron* doctrine.⁴² Still others argued for a stronger reading of *Chevron*, believing agencies should not remain bound by prior judicial interpretations of statutes Congress intended agencies to implement.⁴³

Rodriguez v. Holder, 702 F.3d 504, 544-46 (9th Cir. 2012) (en banc) (Paez, J., dissenting) (“It is axiomatic that Article III vests judicial power in the federal courts, not in agencies.”).

40. See *Neal v. United States*, 516 U.S. 284, 290, 295-96 (1996) (refusing to uphold a U.S. Sentencing Commission’s interpretation of a statute since it conflicted with the Court’s earlier interpretation); *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 536-37 (1992) (“Once we have determined a statute’s clear meaning, we adhere to that determination under the doctrine of stare decisis, and we judge the agency’s later interpretation of the statute against our prior determination of the statute’s meaning.” (quoting *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990))); *Maislin Indus.*, 497 U.S. at 130-31 (finding invalid an agency interpretation because it ran contrary to several earlier Court precedents); see also *Bowen v. Hood*, 202 F.3d 1211, 1226 & n.4 (9th Cir. 2000) (Thomas, J., concurring in part and dissenting in part) (noting it was “beyond cavil” that an agency could not adopt a statutory interpretation that had been foreclosed by the court); Gregg D. Polsky, *Can Treasury Overrule the Supreme Court?*, 84 B.U. L. REV. 185, 202 (2004) (“Essentially, this trilogy of decisions ending with *Neal* provides that when the Court has independently interpreted a term on a prior occasion, that interpretation becomes ‘incorporated’ into the statute and binds the executive branch.”).
41. While the Fourth, Eighth, Ninth, and Federal Circuits thought that judicial interpretations trumped subsequent conflicting agency interpretations, the Second, Third, Eleventh, and D.C. Circuits took the opposite view. Compare *Indus. Turnaround Corp. v. NLRB*, 115 F.3d 248, 254 (4th Cir. 1997); *BPS Guard Servs., Inc. v. NLRB*, 942 F.2d 519, 523-24 (8th Cir. 1991); *Brand X Internet Servs. v. FCC*, 345 F.3d 1120, 1131 (9th Cir. 2003); and *Bankers Trust N.Y. Corp. v. United States*, 225 F.3d 1368, 1376 (Fed. Cir. 2000), with *Schisler v. Sullivan*, 3 F.3d 563, 564-65 (2d Cir. 1993); *United States v. Joshua*, 976 F.2d 844, 855-56 (3d Cir. 1992); *Satellite Broad. & Commc’ns Ass’n of Am. v. Oman*, 17 F.3d 344, 345 (11th Cir. 1994); and *Chem. Waste Mgmt., Inc. v. EPA*, 873 F.2d 1477, 1481-82 (D.C. Cir. 1989). The reversal of the Ninth Circuit in *Brand X* resulted in the abrogation of the cases in the Fourth, Eighth, and Federal Circuits. See *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 982-83 (2005).
42. See, e.g., *Bankers Trust*, 225 F.3d at 1376 (relying on *Marbury v. Madison* to support the notion that the court would not give “any executive branch agency the power to overrule an established statutory construction of the court”); see also *United States v. Mead Corp.*, 533 U.S. 218, 248-49 (2001) (Scalia, J., dissenting) (“I know of no case, in the entire history of the federal courts, in which we have allowed a judicial interpretation of a statute to be set aside by an agency—or have allowed a lower court to render an interpretation of a statute subject to correction by an agency.”).
43. See, e.g., *Satellite Broad. & Commc’ns Ass’n*, 17 F.3d at 347 (concluding that *Chevron* compels deference to an agency’s statutory interpretation, even if that interpretation “is at odds with circuit precedent”); *Schisler*, 3 F.3d at 568 (interpreting *Chevron* to require upholding “[n]ew regulations at variance with prior judicial precedents” as long

footnote continued on next page

In 2005, the Supreme Court resolved the question in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*.⁴⁴ The case involved a Federal Communications Commission (FCC) declaratory rulemaking that defined “telecommunications services” under the Communications Act of 1934 to exclude Internet cable modem services.⁴⁵ But prior to the FCC action, a Ninth Circuit court had held that such Internet cable modem services did qualify as “telecommunications services” under the Act.⁴⁶ As such, numerous parties challenged the FCC action in federal court by arguing that the agency failed to follow circuit precedent. The Ninth Circuit agreed with the challengers and struck down the FCC’s action, finding that *stare decisis* did not allow the agency to deviate from the court’s prior construction of the Communications Act.⁴⁷

The Supreme Court reversed the Ninth Circuit. It held that the FCC’s regulation, which was entitled to *Chevron* deference, displaced the Ninth Circuit’s own interpretation of the Act.⁴⁸ In so doing, the Court addressed head-on the *stare decisis*-*Chevron* conflict, stating in no uncertain terms that agency interpretations were not bound by judicial *stare decisis*.⁴⁹ The Court explained:

Chevron established a “presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.” Yet allowing a judicial precedent to foreclose an agency from interpreting an ambiguous statute . . . would allow a court’s interpretation to override an agency’s. *Chevron*’s premise is that it is for agencies, not courts, to fill statutory gaps.⁵⁰

as the regulations are not arbitrary and capricious, or beyond the scope of the agency’s statutory authority).

44. 545 U.S. 967 (2005).

45. *Id.* at 977-78; see *Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, 17 F.C.C.R. 4798, 4824 (2002). The FCC’s declaratory rulemaking was also published in the *Federal Register*. See *Appropriate Regulatory Treatment for Broadband Access to the Internet over Cable Facilities*, 67 Fed. Reg. 18,848 (proposed Apr. 17, 2002) (to be codified at 47 C.F.R. pt. 76).

46. *AT&T Corp. v. City of Portland*, 216 F.3d 871, 878 (9th Cir. 2000).

47. *Brand X Internet Servs. v. FCC*, 345 F.3d 1120, 1132 (9th Cir. 2003), *rev’d sub nom.* *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

48. *Brand X*, 545 U.S. at 982, 986.

49. *Id.* at 982 (“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.”).

50. *Id.* (citation omitted) (quoting *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 740-41 (1996)); see also *United States v. Eurodif S.A.*, 555 U.S. 305, 315 (2009) (citing *Brand X* for the proposition that “a court’s choice of one reasonable reading of an ambiguous statute

footnote continued on next page

Thus, “[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.”⁵¹ The *Brand X* rule was born.

In one sense, the rule simply takes the *Chevron* doctrine to its logical conclusion. The issue is, however, that courts frequently interpret ambiguous federal statutes without the guidance of an authoritative agency interpretation.⁵² In those cases, courts engage in statutory interpretation as usual, attempting to interpret the law in a way most faithful to Congress’s intended meaning.⁵³ But even what a court determines to be the “best” reading

does not preclude an implementing agency from later adopting a different reasonable interpretation”).

51. *Brand X*, 545 U.S. at 982 (emphasis added). In effect, the *Brand X* rule required reviewing judges to determine whether a prior judicial interpretation was decided as a matter of *Chevron* Step One or Step Two. A Step One decision is one where a court finds that a statute unambiguously prescribes a single interpretation. But if a court finds that a statute’s language is ambiguous, then Step Two requires deference to the agency’s reasonable interpretation. See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). While this is a relatively easy task for prior decisions explicitly applying the *Chevron* framework, the task becomes quite a bit more difficult if the earlier opinion was decided pre-*Chevron*, or if the court was not explicit as to the footing for its interpretation. See Note, *Implementing Brand X: What Counts as a Step One Holding?*, 119 HARV. L. REV. 1532, 1532-33 (2006).
52. *Brand X* involved a prior interpretation set forth by a circuit court of appeals. Notably, the decision is silent with respect to whether it allows an agency to trump the stare decisis effect of a Supreme Court opinion. While the Court did not declare that *Brand X* would not apply to the Court’s own precedent, Justice Stevens wrote a concurrence that suggested a U.S. Supreme Court interpretation would “remove any pre-existing ambiguity” from a statute, and thus bind subsequent agencies. *Brand X*, 545 U.S. at 1003 (Stevens, J., concurring). Some lower courts have adopted this reasoning by refusing to apply *Brand X* to Supreme Court precedents. See, e.g., *Mass. Mut. Life. Ins. v. Residential Funding Co.*, 843 F. Supp. 2d 191, 207 (D. Mass. 2012) (“While an SEC regulation is, of course, entitled to consideration, it cannot countermand a contrary Supreme Court holding.”). But see *Bakersfield Energy Partners, LP v. Comm’r*, 568 F.3d 767, 778 (9th Cir. 2009) (“The IRS may have the authority to promulgate a reasonable reinterpretation of an ambiguous provision of the tax code, even if its interpretation runs contrary to the Supreme Court’s ‘opinion as to the best reading’ of the provision.” (quoting *Brand X*, 545 U.S. at 982-83)); *Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1248 (10th Cir. 2008) (“*Brand X* applies whether the judicial precedent at issue is that of a lower court or the Supreme Court.”); cf. *Watts*, *supra* note 10, at 1017 n.113 (noting that there was “no indication” that other members of the Court shared Justice Stevens’s view). For this Note’s empirical findings concerning this issue, see *infra* Part III.C.1 & Figure 3.
53. *Watts* has argued that in light of *Brand X*, courts presented with a new interpretive issue concerning an agency’s organic act should allow the agency “to weigh in before the court issues its own construction” on the ambiguity. See *Watts*, *supra* note 10, at 1023-25. Closely related is the doctrine of primary jurisdiction, which advises courts to stay proceedings that are more properly reserved for an administrative agency to resolve. See *United States v. W. Pac. R.R.*, 352 U.S. 59, 63-64 (1956).

of a statute is not final—if an agency later disagrees with the court’s “best” reading of the statute, *Brand X* allows the agency to promulgate its own superseding interpretation.⁵⁴ If *Chevron* teaches that the judiciary can get it wrong when it “says what the law is,” then *Brand X* goes further to endorse administrative agencies as the institutionally competent actor to correct those misinterpretations.

This consequence of *Brand X* was not overlooked. Justice Scalia dissented, arguing that the decision signaled an unconstitutional encroachment on the judicial power.⁵⁵ He described the Court’s new rule as a “breathtaking novelty: judicial decisions subject to reversal by executive officers.”⁵⁶ To illustrate, he revived the hypothetical renegade agency that he had originally discussed in his dissent in *United States v. Mead Corp.*⁵⁷ Suppose the Supreme Court strikes down an agency’s (non-*Chevron*-eligible) interpretation of its enabling statute, finding that the agency’s construction contradicted what the Court believed to be the best reading of the statute. Under *Brand X*, the agency would remain free to repromulgate that same interpretation and “take the action that the Supreme Court found unlawful,” as long as it did so under a *Chevron*-eligible method.⁵⁸ The upshot, then, was that *Brand X* enabled an administrative agency to nullify the stare decisis effect of a Supreme Court holding. This, Justice Scalia remarked, was not only “bizarre,” but also “probably unconstitutional.”⁵⁹

However, are judicial decisions subject to reversal by executive officers really that much of a “breathtaking novelty”? The idea that judicial decisions may be overruled by another branch of government is not new. For example, if Congress finds that a court misinterpreted a statute, it may amend the statute to better communicate its intended meaning, even though such an action would effectively “override” the judicial decision.⁶⁰ This type of legislative

54. *Brand X*, 545 U.S. at 980.

55. See *id.* at 1016-17 (Scalia, J., dissenting).

56. *Id.* at 1016.

57. See 533 U.S. 218, 247-50 (2001) (Scalia, J., dissenting). *Mead* is an important decision that clarified which agency actions are eligible for *Chevron* deference. See *supra* note 30.

58. *Brand X*, 545 U.S. at 1016-17 (Scalia, J., dissenting).

59. *Id.* at 1017. Justice Scalia’s constitutional concerns were rooted in a 1948 Supreme Court case, *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*, where the Court wrote that “[j]udgments within the powers vested in courts by the Judiciary Article of the Constitution may not lawfully be revised, overturned or refused faith and credit by another Department of Government.” 333 U.S. 103, 113 (1948); see *Brand X*, 545 U.S. at 1017 (Scalia, J., dissenting) (quoting *Waterman*, 333 U.S. at 113).

60. See Michael E. Solimine & James L. Walker, *The Next Word: Congressional Response to Supreme Court Statutory Decisions*, 65 TEMPLE L. REV. 425, 425 (1992); see also William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 336-41 (1991) (surveying congressional overrides of Supreme Court statutory interpretation precedents over a twenty-three-year period).

override of judicial decisionmaking is usually uncontroversial, and Congress regularly exercises such power.⁶¹

The question thus becomes whether *administrative agencies* should maintain similar oversight of judicial statutory interpretations. Of course, there is at least one key difference between agencies and Congress—Congress is constitutionally enabled to draft, create, and amend laws.⁶² In addition, Congress is uniquely accountable to the democratic process, thereby legitimizing its lawmaking functions. The same is not true for agencies, whose quasi-legislative power stems only from Congress’s delegation of that power.⁶³ But *Chevron’s* central premise is that statutory ambiguities represent implicit congressional delegations of interpretive power to agencies—not courts—to fill.⁶⁴ If this is true, then it becomes less clear why an agency *shouldn’t* be able to revise an offending judicial interpretation, which was not even authoritative in the first place.⁶⁵

Chevron’s reasoning leads to the conclusion that a court’s interpretation of an ambiguous statute may be incorrect inasmuch as it conflicts with what the administering agency believes is the best construction. Since there should be no reason why the mere fact that a court, rather than an agency, was the first to interpret a statute, *Brand X* reflects the proposition that an agency’s *Chevron*-eligible interpretation should supersede a conflicting judicial interpretation.⁶⁶

61. Between 1967 and 1990, Congress overrode 121 Supreme Court statutory decisions. Eskridge, *supra* note 61, at 344.

62. See generally Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 283 (1989) (examining the “commonplace notion” that courts are subordinate to legislatures in the context of statutory interpretation).

63. Agencies are authorized to issue administrative regulations, which generally have the same force as law. See *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001). However, agencies are still bound by their enabling statutes and cannot exist outside their statutory mandate. In this sense, only Congress creates law. See *id.* at 226-27.

64. See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) (“If . . . the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute . . . Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.” (emphasis added)).

65. See *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 983-84 (2005) (“The [court’s] precedent has not been ‘reversed’ by the agency, any more than a federal court’s interpretation of a State’s law can be said to have been ‘reversed’ by a state court that adopts a conflicting (yet authoritative) interpretation of state law.”); see also Final Revisions to the Clean Water Act Regulatory Definitions of “Fill Material” and “Discharge of Fill Material,” 67 Fed. Reg. 31,129, 31,137 (May 9, 2002) (codified at 40 C.F.R. pt. 232) (“To the extent today’s rule has the practical effect of ‘overriding’ this aspect of the court’s decision, . . . that is neither remarkable nor inappropriate, since it is entirely proper for agencies to consider and, if appropriate, revise their regulations in light of judicial interpretation of them.”).

66. For an argument supporting this proposition, see Doug Geyser, Note, *Courts Still “Say What the Law Is”: Explaining the Functions of the Judiciary and Agencies After Brand X*, *footnote continued on next page*

Under this view, a judicial interpretation made in the absence of an authoritative agency construction is perhaps best described as “provisional,”⁶⁷ and subject to an agency’s later revision.⁶⁸

Regardless of how one characterizes these agency actions, this Note moves the discussion beyond theoretical debate by grounding the *Brand X* doctrine on an empirical foundation.⁶⁹ This Note hopes to offer a firmer understanding of the scope and nature of the agency-court colloquy and give us a sense of the magnitude and seriousness of the separation of powers concerns that underlie the debate. Before providing these answers, the next Part first introduces this study’s empirical methodology.

II. Empirical Methodology

At the center of this Note’s analysis is a dataset—the first of its kind—that seeks to comprehensively identify and catalogue all rulemakings over a fifteen-year period that involve an administrative override of a judicial statutory interpretation precedent. This dataset enables a systematic study of the *Brand X*

106 COLUM. L. REV. 2129 (2006). For an argument that, notwithstanding *Chevron*, stare decisis should prohibit an agency from changing its interpretation of an ambiguous statute, see Harold M. Greenberg, *Why Agency Interpretations of Ambiguous Statutes Should Be Subject to Stare Decisis*, 79 TENN. L. REV. 573 (2012).

67. Kenneth A. Bamberger, *Provisional Precedent: Protecting Flexibility in Administrative Policymaking*, 77 N.Y.U. L. REV. 1272, 1310-11 (2002) (explaining that under a rule of provisional precedent, a court’s interpretation of an ambiguous statute would “constitute binding precedent only until an agency puts forth a different one in a manner deserving *Chevron* treatment”).

68. See *Brand X*, 545 U.S. at 983-84 (reasoning that agency overrides are “consistent” with a court’s holding because “a court’s opinion as to the best reading of an ambiguous statute . . . is not authoritative”); *Jian Hui Shao v. Bd. of Immigration Appeals*, 465 F.3d 497, 502 (2d Cir. 2006) (acknowledging that in light of *Chevron*, a court’s statutory interpretation “would be for nought” when an administrative agency subsequently reached its own differing construction). But see *Brand X*, 545 U.S. at 1017 n.12 (Scalia, J., dissenting) (arguing that a court’s de novo construction of a statute precludes an agency from adopting any different construction, which would no longer be consistent with the court’s holding).

69. Closely related to this Note’s analysis of the *Brand X* rule is the doctrine of agency nonacquiescence, “the refusal of administrative agencies to conduct their internal proceedings consistently with adverse rulings of the courts of appeals.” Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 681 (1989). However, studies of agency nonacquiescence typically have focused on a single agency’s practice, rather than addressing *Brand X*’s broader themes behind administrative oversight of the judiciary. See, e.g., Ralph H. Dwan, *Administrative Review of Judicial Decisions: Treasury Practice*, 46 COLUM. L. REV. 581 (1946) (Treasury Department); Estreicher & Revesz, *supra* (Social Security Administration and National Labor Relations Board). Moreover, there has been no recent scholarship on agency nonacquiescence since *Brand X*, and none offer a discussion based on more than anecdotal observations of the practice.

doctrine, revealing the frequency and nature by which agencies override adverse court decisions. Additionally, by capturing such data over an extended time period, the dataset reveals how agency behavior has evolved over time and addresses the fundamental question whether *Brand X* actually made any difference.

This Note's unique dataset includes all final rules published from 2000 to 2014 that displace judicial statutory interpretations in the manner contemplated by *Brand X*. Because there is no existing database that collects such rulemakings, I used a two-step process to identify and organize the relevant rulemakings from the universe of agency actions reported in the *Federal Register*. First, I parsed the text of the *Federal Register*'s published actions to flag entries that contained language or legal citations indicative of a *Brand X*-type action. In addition, I also included at this stage all agency actions that have been challenged under a *Brand X* framework, as applied in published cases. Second, I reviewed each flagged action to determine whether it actually contained a relevant agency-court conflict appropriate for inclusion in this study. These relevant rulemakings were then read, analyzed, and compiled into a final, comprehensive dataset. A detailed description of each step follows.⁷⁰

A. The Primary Source: *Federal Register* Rulemakings

Given the size of the administrative state, there is no simple definition for what constitutes an agency action. And unlike judicial opinions, for which there is an extensive reporter system in place, no single source contains comprehensive coverage of all administrative actions. Rather, each agency has its own system for the publication and dissemination of its actions. The result is a myriad of sources of primary agency materials.⁷¹ But this does not mean we are limited to anecdotal discussions about agency action; this Note engages in a more rigorous and systematic analysis to provide as complete a picture as possible. The *Federal Register*, as the administrative state's daily journal, is an ideal data source for studying agency behavior for four reasons.⁷²

70. This Note's methodology is adapted from Eskridge's approach to empirically analyzing congressional overrides of Supreme Court statutory precedents. See Eskridge, *supra* note 61, at 336-37, 418-20 (describing methodology).

71. See ROBERT C. BERRING & ELIZABETH A. EDINGER, FINDING THE LAW 230-31 (11th ed. 1999) ("The agencies are numerous, and each has its own practices and publications."); cf. *Administrative Decisions*, UNIV. OF VA. LIBRARY, http://guides.lib.virginia.edu/administrative_decisions (last visited Jan. 1, 2016) (providing links to numerous agencies' independent repositories).

72. For comparison, Eskridge used the *United States Code Congressional and Administrative News* (USCCAN) as the source for searching and identifying legislation affecting judicial decisions. Eskridge, *supra* note 61, at 336-37. Although the USCCAN also contains final agency regulations, unlike the *Federal Register*, it does not publish the relevant agency explanations and reasoning accompanying the promulgation of new regulations. Thus, the *Federal Register* provides a richer source of data for this Note's analysis.

First, the *Federal Register* is a complete source of the most important agency actions. Agencies are required to publish in the *Federal Register* all actions “hav[ing] general applicability and legal effect.”⁷³ These actions—usually rules or rulemakings—form the unit of analysis for this study.⁷⁴ Along with the actual text of the rules, agencies also publish preambles, which contain supplementary explanatory material outlining the reasoning, justifications, and objectives behind their actions.⁷⁵ These preambles put each rule into context and provide insight into the most important rationales motivating an agency’s decision.⁷⁶

Second, the *Federal Register* provides a rich source of the administrative record. Courts reviewing agency actions are required to take judicial notice of the contents of the *Federal Register*,⁷⁷ and they routinely cite to the language therein as authoritative indicia of an agency’s reasoning.⁷⁸ While there may be other factors that influence an agency’s substantive rule, the *Federal Register* likely contains the most important considerations in the agency’s rule-drafting process. Importantly, if there is a judicial opinion that is relevant to an agency’s rulemaking, the agency is likely to cite the relevant opinion in the preamble accompanying the final rule. An agency’s failure to discuss, or at least mention, a relevant and conflicting judicial precedent would put a rule or rulemaking at risk of being struck down as arbitrary and capricious.⁷⁹

73. 44 U.S.C. § 1505(a)(2) (2014); *see also* 5 U.S.C. § 552(a)(1)(D) (2014) (requiring that the *Federal Register* contain all of an agency’s “substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency”).

74. For both theoretical and practical reasons, only agency actions that resulted in final rules were considered in this study; agency interpretations developed through interpretive guidance or agency adjudications, for example, are beyond the scope of this analysis.

75. *See Hillsborough Cty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 718 (1985) (noting that agencies “speak through a variety of means, including regulations, preambles, interpretive statements, and responses to comments”); MAEVE P. CAREY, CONG. RESEARCH SERV., R43056, COUNTING REGULATIONS: AN OVERVIEW OF RULEMAKING, TYPES OF FEDERAL REGULATIONS, AND PAGES IN THE *FEDERAL REGISTER* 16 (2015).

76. It is worth noting that the *Federal Register* does not contain all agency actions where *Brand X* may be invoked. For example, *Brand X* is applicable to NLRB, FCC, and INS administrative adjudications, but these adjudications are generally not published in the *Federal Register*.

77. 44 U.S.C. § 1507.

78. *See, e.g., Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 874-80 (2000) (referring repeatedly to the Department of Transportation’s publications in the *Federal Register* as indicative of the agency’s reasoning).

79. *See Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983) (“[A]n agency rule would be arbitrary and capricious if the agency . . . entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency . . .”); *cf. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 863 (1984) (“[T]he agency, to engage in informed rulemaking, must consider varying interpretations . . .”).

Third, agency rulemakings published in the *Federal Register* presumptively receive *Chevron* deference as a “relatively formal administrative procedure” under *United States v. Mead Corp.*⁸⁰ Under the Administrative Procedure Act, rulemakings promulgated pursuant to the Act’s notice-and-comment provisions⁸¹ are generally entitled to receive *Chevron* deference.⁸² One of the Act’s requirements is publication in the *Federal Register*.⁸³ Thus, the *Federal Register* is a single source that provides complete coverage of the most prominent rules that are eligible for *Brand X*-type treatment.⁸⁴

Lastly, the complete text of the *Federal Register* over the 2000–2014 period is available and searchable through commercial electronic databases like WestlawNext and LexisNexis. This ensures that application of the study’s search methods is applied consistently across all primary source material.

B. Identifying Relevant Rulemakings

The first step in compiling the dataset involved filtering through the *Federal Register*’s thousands of published rules to identify those that involved a potential *Brand X*-type override. Since it was impractical to manually sort through the one million-plus pages of published text during the fifteen-year period, I used a multipronged strategy (discussed in further detail below) to automatically flag rules that were likely to be relevant for this study. These identification strategies, which involved parsing the text of the *Federal Register* and relying on published case law, whittled down the universe of rules to a manageable, yet overinclusive, subset of agency rules that could be individually read and analyzed for inclusion in this study.⁸⁵

Agency overrides can be either express or implied. Sometimes, an agency expressly states that its rule is intended to supersede a conflicting judicial

80. 533 U.S. 218, 230 (2001); *see supra* note 30.

81. 5 U.S.C. § 553 (2014).

82. *Mead*, 533 U.S. at 229 (“We have recognized a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed.”).

83. 5 U.S.C. § 552(1)(C).

84. These rules do not constitute the entire universe of *Chevron*-eligible agency actions. As the Supreme Court explained in *Mead*, any agency action carrying “the force of law” is entitled to *Chevron*’s protections—regardless of whether they are passed through notice-and-comment procedures or published in the *Federal Register*. *See Mead*, 533 U.S. at 221.

85. This first step of identifying potentially relevant agency overrides is intentionally overinclusive and captures many agency actions that do not actually represent any override of judicial precedent. This initial filtering of *Federal Register* entries is purposefully broad to minimize Type II errors. *See generally* BART L. WEATHINGTON ET AL., RESEARCH METHODS FOR THE BEHAVIORAL AND SOCIAL SCIENCES 282–83 (2010).

precedent.⁸⁶ These were the most straightforward cases to identify: I searched *Federal Register* entries for words and phrases indicative of negative treatment of a judicial precedent.⁸⁷ These search terms were reverse engineered from known instances of agency overrides and capture language that is indicative of negative treatment of case law. In addition, all *Federal Register* entries citing to the *Chevron*, *Mead*, and *Brand X* decisions were flagged at this stage of the data-gathering process.

Identifying implicit overrides was more challenging.⁸⁸ In these cases, the texts of the rulemakings themselves do not indicate that a precedent is being overridden. Finding these implicit overrides required using alternative identification strategies that did not rely on the *Federal Register*'s text. This Note exploits the fact that many of these rules are subsequently challenged through litigation—*Brand X* itself arose from such an instance. Thus, courts reviewing an agency's interpretation of a statute would likely cite to *Brand X* as the appropriate legal standard for resolving the case. This search strategy thus examined judicial opinions citing to *Brand X* to identify cases involving a challenge to a regulation that conflicted with a court precedent. Review of these opinions yielded references to the agency regulation and judicial precedent at issue. I then cross-referenced each regulation identified through this method to determine the corresponding *Federal Register* entry that accompanied promulgation of the rule, which I then flagged for inclusion in the dataset.

In addition, I similarly searched the *Federal Register*'s text for citations to the pre-*Brand X* circuit cases that articulated each circuit's rule governing the

86. See, e.g., Updating Regulations Issued Under the Fair Labor Standards Act, 76 Fed. Reg. 18,832, 18,838 (Apr. 5, 2011) (codified at 29 C.F.R. pt. 4) (“The Department believes that [its] interpretation is reasonable and *disagrees* with the Fourth Circuit’s conclusion in *Walton v. Greenbrier Ford, Inc.*” (emphasis added)); Medicare Program: Provider Reimbursement Determinations and Appeals, 73 Fed. Reg. 30,190, 30,197 (May 23, 2008) (codified at 42 C.F.R. pts. 405, 413, 417) (“We *respectfully* submit that the Ninth Circuit *erred* in its analysis. . . . The statute . . . is ambiguous, . . . and the Ninth Circuit should have accorded deference to the Secretary’s interpretation, particularly in light of the Secretary’s expertise in how the Medicare provider reimbursement process works.” (emphasis added)).

87. The Westlaw search was <adv: (“not agree” OR “disagree” OR “overrule” OR “respectfully” OR (decline /2 adopt) OR “not persuaded” OR “take issue”) /s (court OR precedent OR circuit OR case OR holding)) & DA(aft 12-31-1999 & bef(01-01-2014))>. A similar type of Boolean search strategy has been used in other empirical legal research projects. See, e.g., Eskridge, *supra* note 61, at 336-37 (searching the USSCAN for the terms “overruled,” “modified,” and “clarified”).

88. In these cases, the failure of the agency to cite to the judicial precedent risks being found arbitrary and capricious under *State Farm*. See *supra* note 80 and accompanying text. Even so, this Note identified a nonnegligible number of instances where agencies implicitly overrode judicial precedent without citing to the preexisting conflicting judicial precedent.

stare decisis-*Chevron* conflict,⁸⁹ as well as the trio of Supreme Court decisions that predated *Brand X*.⁹⁰

C. Selection Criteria

The second step of the data-gathering process involved reading and reviewing each of the flagged rulemakings for inclusion in the final dataset.⁹¹ This Note formally defines a *Brand X*-type agency override of a judicial statutory precedent as follows: (1) any final agency action⁹² (2) published in the *Federal Register* where the agency (3) adopts an interpretation of a federal statute (4) in a manner contrary⁹³ (5) to an Article III court's earlier construction of the same language.⁹⁴ Only *Federal Register* rulemakings satisfying these criteria were included in the final dataset. Table 1 tabulates the final resulting agency rulemakings yielded by each search method.⁹⁵

89. See *supra* note 42 (listing the eight circuit cases used as the basis for the search).

90. See *supra* note 41.

91. This step, while time consuming, was necessary to eliminate Type I errors. As Table 1 shows, the high rate of Type I errors is a consequence of the broad automated search strategies employed in the first step. See *supra* note 86 and accompanying text.

92. Most commonly, an agency's final action is labeled as a "Final Rule" or "Final Regulation." However, other classifications such as "Notice of Final Action" and "Statement of Policy" were also considered final agency actions for inclusion in the final dataset. In some instances, my search returned a nonfinal agency action, such as a notice of proposed rulemaking or interim rule. These nonfinal actions were then cross-referenced to a final regulation. If the final regulation did not substantively change the interpretation set forth in the nonfinal entry, the regulation was considered to satisfy the finality criterion.

93. A "conflict" exists whenever an agency promulgates an interpretation that, if applied to the circumstances presented by an earlier litigation, would result in a different outcome. In addition, an agency's negative treatment of a judicial precedent was considered a "conflict" for the purposes of this study.

94. In general, this also included situations where a court had interpreted a different, but sufficiently analogous, statutory provision than the one being interpreted by the agency. See, e.g., Prevention of Significant Deterioration, Nonattainment New Source Review, and Title V: Treatment of Certain Ethanol Production Facilities Under the "Major Emitting Facility" Definition, 72 Fed. Reg. 24,060, 24,074 (May 1, 2007) (codified at 40 C.F.R. pts. 51, 52, 70, 71).

95. Because some regulations were identified by more than one search method, the sum of the second column is greater than the total rulemakings in this dataset.

Table 1
Identification of *Brand X*-Type Overrides in *Federal Register* Regulations:
Search-Methods Summary

	Flagged Regulations	Relevant Regulations
Explicit: <i>Federal Register</i> Text		
WestlawNext Text Search	1038	41
Case Citations		
<i>Chevron</i>	262	13
<i>Mead</i>	31	3
<i>Brand X</i>	42	12
Implicit: Subsequent Litigation		
Pre- <i>Brand X</i> Circuit Precedent	399	1
Pre- <i>Brand X</i> Supreme Court Precedent	134	3
<i>Brand X</i>	548	26

D. Coding of Variables

Lastly, I read, analyzed, and coded each relevant rulemaking for subsequent empirical analysis. Forty-two variables were recorded for each rulemaking. These variables included general information about the rule, such as the title, date, implementing agency, and relevant statutory provision. I also recorded specific information regarding the particular details of the agency-court conflict, including a brief statement of the issue and the pertinent judicial precedent. Where a *Federal Register* entry addressed more than one discrete issue or cited to more than one judicial precedent, I coded each issue and case separately.

In addition, I also examined the qualitative aspects of agency reasoning accompanying the overrides. I read and analyzed the preamble and explanatory material accompanying each regulation to identify the various types of reasoning the agency used to justify its departure from *stare decisis*.⁹⁶ For example, while some agencies relied heavily on textualist arguments concerning statutory text and structure, others used agency expertise and policy rationales to justify their interpretation. Each feature was coded as a binary variable and given a positive value if the type of reasoning was present in a particular rulemaking.

In total, the final dataset included 72 rulemakings involving overrides of 123 judicial decisions.

⁹⁶ These variables were coded based only on the explanatory text provided by the agency, as articulated in the *Federal Register*.

E. Methodological Limitations

Although this methodology is designed to provide comprehensive and robust empirical observations, it is worth noting some limitations to this design.

First, this study only captures agency rulemakings that are published in the *Federal Register*. Agencies' actions can take the form of a variety of vehicles other than rulemakings. For example, many agencies (like the FCC, NLRB, and Social Security Administration) act primarily through adjudications rather than rulemakings. Even though these adjudications may involve *Brand X*-type overrides, they are not analyzed in this study. In this sense, this study is underinclusive of the actual scope of overrides. However, as discussed earlier, the focus on rulemakings is intentional for both practical and theoretical reasons.⁹⁷

Second, this study relies on external indicators of negative treatment of precedent, which may not adequately capture all relevant rules. For instance, it is possible for an agency to issue a rulemaking that does not contain any reference to an adverse judicial precedent. And if the *stare decisis* issue is never litigated, then it will not be captured in this study. Alternately, an agency may obscure its treatment of an adverse judicial opinion by using complex and oblique language. These rules, while relevant, are "unknown unknowns" that would be difficult to identify in any study.

Finally, this study's empirical approach does not account for the dynamic choices that agencies and courts may make in response to changing doctrine. This study models *Brand X* as an exogenous change to the agency rule-drafting process; the reality is, though, that *Brand X* may have also had effects other than directly influencing an agency's ultimate interpretive position (that is, the choice whether or not to comply with case precedent).⁹⁸ For example, post-*Brand X*, judges may be less likely to ground their precedents as *Chevron* Step Two holdings, knowing that *Brand X* made those precedents vulnerable to agency reversal. In addition, *Brand X* may have induced agencies to use rulemaking where it otherwise would not, knowing that *Mead* and *Brand X* would immunize their actions from judicial scrutiny.⁹⁹ Solely comparing the

97. See *supra* Part II.A.

98. This endogeneity problem is often unavoidable in any empirical study that tries to measure the impact of a judicial decision. The same issues have complicated empirical studies on *Chevron's* effect on judicial reversals of agency actions, see, e.g., Schuck & Elliott, *supra* note 17, at 1053, as well as other major Supreme Court cases' effect on pleading standards in civil procedure, see, e.g., William H.J. Hubbard, *Testing for Change in Procedural Standards with Application to Bell Atlantic v. Twombly*, 42 J. LEGAL STUD. 35, 38 (2013). Nonetheless, this is not to say that attempting to measure such effects is entirely without value, for it still provides *some* insight upon which further study can be built.

99. Cf. Ryan T. Holt, "Buy Stock in the GPO?": An Empirical Analysis of How *United States v. Mead Corp.* Increased the Use of Informal Rulemaking by Federal Agencies
footnote continued on next page

baseline rate of overrides before and after *Brand X*, as is done in this study, does not account for these strategic interactions. These complex dynamics are left for future study.¹⁰⁰

While no empirical study is without its limitations, the analysis in this Note still provides a base from which a more informed discussion can develop. The search methodology and analysis was designed to produce a dataset that accurately reflects the overall magnitude and composition of agency overrides. As the first analysis of its kind, this Note at the very least lays a foundation for subsequent research.

III. Empirical Findings and Discussion

This Part presents the key empirical findings of the study by outlining the contours of what agency overrides look like in practice. The findings are organized into three Subparts. The first Subpart provides data on the baseline rate of overrides—that is, how frequently we actually observe agencies using rulemakings to overturn adverse judicial precedent. Next, the second Subpart sheds light on whether *Brand X* had any real effect on agency rulemaking behavior. Finally, the third Subpart analyzes features of the overrides captured in this study, exploring which agencies, courts, and statutes are most often involved in *Brand X* actions.

The empirical observations can be summarized succinctly: agency overrides of judicial precedent are very infrequent. Moreover, it does not seem that *Brand X* has made any difference—there is no evidence that agencies were more willing to contravene precedent post-*Brand X*. And finally, even where agencies have engaged in *Brand X*-type overrides, they have generally done so in rulemakings concerning complex policy-driven issues in which exercises of their interpretive power are consistent with the rationales and institutional competencies underlying the *Chevron* doctrine. In short, the empirical data suggest that rule drafters continue to show an appropriate level of respect for—and in some cases even deference to—judicial views, even in a post-*Brand X* world.¹⁰¹

132-33 (Feb. 10, 2011) (unpublished manuscript), http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=ryan_holt (finding a statistically significant increase in informal rulemaking activity following *Mead* in cabinet departments, but not independent agencies).

100. In some ways, survey methods may be more effective than an empirical observational study to uncover these strategic choices that agencies may make in light of a decision like *Brand X*. Walker's pioneering survey of more than 100 agency rule drafters provides an excellent starting point. See Walker, *supra* note 17.

101. See, e.g., General Working Conditions in Shipyard Employment, 72 Fed. Reg. 72,452, 72,496 (proposed Dec. 20, 2007) (to be codified at 29 C.F.R. pts. 1910, 1915) (changing rule terminology in order to avoid a disagreement with a court).

Taken together, these findings suggest that *Brand X* did not actually usher in the “wonderful new world”¹⁰² that Justice Scalia predicted. In contrast to the decision’s much-hyped doctrinal significance, its practical effect on agency rulemaking behavior has been remarkably unremarkable.¹⁰³ However, this insight—that at least in practice, a decision like *Brand X* has not affected agencies’ observed behavior—is notable in its own right, for it points to a more nuanced understanding of the administrative state and its relationship to the judiciary.¹⁰⁴ This Part provides an in-depth summary of each empirical finding, followed by a discussion of how these findings are consistent with various normative hypotheses about agency-court interactions.

A. Frequency of *Brand X* Overrides

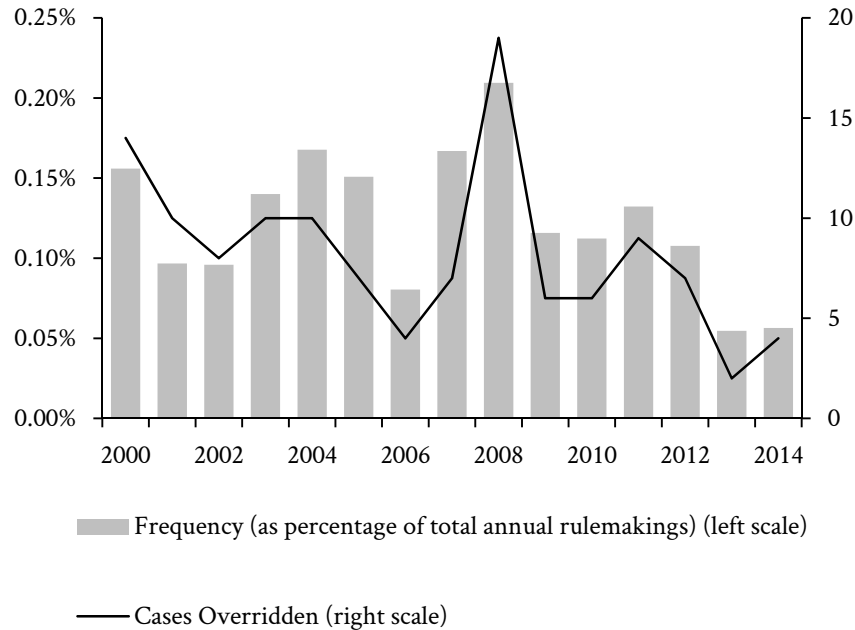
The first finding is that agency overrides of judicial precedent of the type envisioned by *Brand X* are exceedingly rare in rulemakings. Figure 1 graphically depicts the frequency of agency overrides from 2000 to 2014. Only 0.12%—less than one eighth of one percent—of all final rules involved a *Brand X*-type override. Not surprisingly, the absolute number of judicial precedents superseded by agency rulemaking has followed a similar trend, averaging approximately eight decisions per year. These low numbers suggest that agency rules rarely disagree with judicial precedent.

102. *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 1019 (Scalia, J., dissenting) (predicting that the Court’s decision would create a “wonderful new world”).

103. As a rough measure of the disparity between *Brand X*’s supposed doctrinal significance and actual, on-the-ground effect, consider that a Westlaw search reveals that the number of secondary sources citing to the decision (1141), far exceeds the number of citing judicial opinions (510) and administrative decisions (250). This suggests *Brand X* has been discussed more than it has been applied.

104. *Cf.* Schuck & Elliott, *supra* note 17, at 1061 (concluding that given our primitive understanding of how judicial doctrine influences agency behavior, even nonresults are “just as revealing and interesting [as] actual results”).

Figure 1
Frequency of Agency Overrides of Judicial Precedent
Through *Federal Register* Rulemakings, 2000-2014



The corollary is this: new agency rules are overwhelmingly consistent with preexisting judicial interpretations of law. Although it is not unusual for courts to overturn agency actions, agencies rarely use rulemaking as a means of overturning judicial precedent. While it is easy to characterize the agency-court relationship as a direct conflict over interpretive authority, this dataset suggests that administrative and judicial interpretations of ambiguous statutes are nearly always compatible. Even in instances where a court is the first to put forth a particular interpretation of law, agencies tend to agree with, rather than override, the judiciary's prevailing view when adopting their own interpretations. This could be for several reasons: that a court's interpretation "anchors" the set of permissible interpretations for the agency to adopt; that agencies and courts independently reach the same conclusions of law most of the time; that agencies wish to preserve their political capital to override only a small subset of the most important decisions; or that agencies are unwilling to override judicial precedent, despite their own preferred interpretation, because they do not believe the Constitution permits them to overrule the judiciary's view of "what the law is." *Brand X* may have called into doubt the last of these potential explanations, but agencies' observed rulemaking behavior suggests they have not read the decision so strongly.

In fact, the dataset contains several instances in which agencies conceded that they disagreed with a particular judicial interpretation, but nonetheless still adopted a rule consistent with the judicial view—notwithstanding what they saw as the “best” interpretation.¹⁰⁵ Even though it is precisely in these situations that *Brand X* authorizes agencies to substitute judicial interpretations with their own, agencies have not always chosen to do so.¹⁰⁶ Some of the potential reasons why are discussed in Subpart C below.

B. *Brand X*’s Effect

The second finding is that there is little evidence of any “*Brand X* effect” on agency behavior. Agencies have hardly invoked the *Brand X* principle in their rulemakings. In the nine years following the decision, agencies cited to *Brand X* in just 40 *Federal Register* rulemakings—making up less than 0.12% of the nearly 35,000 rules published since 2005.¹⁰⁷

Moreover, whereas one might expect to see an uptick in agency overrides after *Brand X*’s endorsement of the practice in 2005, the data shows no such trend in Figure 1. From 2000 to 2014, there has been no measurable change in the frequency of overrides, either measured as a relative share of total rulemakings, or with respect to the absolute number of judicial decisions overridden. Table 2 presents the results of two Welch’s *t*-tests comparing the average frequency of overrides in the years before and after *Brand X*. (This test analyzes the same data graphically depicted in Figure 1.) Both *t*-tests yield high *p*-values, confirming that there is no statistically significant difference in the average frequency of agency overrides between the time periods.

105. See, e.g., Prevention of Significant Deterioration, Nonattainment New Source Review, and New Source Performance Standards: Emissions Test for Electric Generating Units, 70 Fed. Reg. 61,081, 61,091 (proposed Oct. 20, 2005) (to be codified at 40 C.F.R. pts. 51, 52) (recognizing that even though the agency’s views are entitled to *Chevron* deference, the agency still must “promulgate a rule that is consistent with [the court’s] resolution of this issue”).

106. See, e.g., Compulsory License for Making and Distributing Phonorecords, Including Digital Phonorecord Deliveries, 73 Fed. Reg. 66,173, 66,177 (Nov. 7, 2008) (codified at 37 C.F.R. pts. 201, 255) (noting that uncertainty caused by a Second Circuit decision made it “inadvisable to engage in rulemaking activity”).

107. According to FederalRegister.gov, agencies promulgated 34,965 final rules between June 27, 2005 (the day the *Brand X* decision was issued) and December 31, 2014 (the closing date of this study’s analysis).

Table 2
Comparison of Average Frequencies of Agency Overrides,
Pre- and Post-*Brand X*

	Pre- <i>Brand X</i> Average (2000-2005)	Post- <i>Brand X</i> Average (2006-2014)	<i>p</i> -value
Percentage of Total Rulemakings	0.13%	0.12%	0.81
Number of Cases Superseded	9.83	7.11	0.91

In short, the data do not support the claim that *Brand X* emboldened agencies to disregard judicial precedent. There is no empirical support for the supposedly “wonderful new world” of agency rulemaking post-*Brand X*.

But what exactly does it mean to say that *Brand X* “did not matter”? The absence of any *Brand X* effect on the rate of overrides is consistent with at least three hypotheses. First, *Brand X* may not have mattered because agencies did not even take notice of *Brand X* in the first place, and thus did not have any opportunity to alter their behavior accordingly. This is consistent with some of the existing studies into administrative rule drafting finding that administrative staffers are not always fully aware of developments in the law or new substantive canons of interpretation. For example, in Walker’s survey of rule drafters, he found that one in four respondents either “disagreed” or “strongly disagreed” with the *Brand X* principle (without referring to the rule by name), suggesting that a nonnegligible number of rule drafters were not even aware of the rule.¹⁰⁸ Within this study’s dataset, even where agencies have dealt with adverse precedent in their rulemakings, only 19% of those rulemakings cited to the *Brand X* decision. (In contrast, 32% of those rulemakings cited to *Chevron*.)

Second, we may not observe any change in agency behavior if *Brand X* merely restated what agencies had already been doing all along. This is in line with Justice Thomas’s characterization of the decision, which explained that the *Brand X* principle “follow[ed] from *Chevron* itself.”¹⁰⁹ While the commentary surrounding *Brand X* suggests that the decision marked a significant *new* rule,¹¹⁰ it is possible agencies had already internalized the principle before the Supreme Court’s approval. Indeed, some circuits had already interpreted *Chevron* in this way.¹¹¹

108. See Walker, *supra* note 17, at 1052. This observation is also consistent with the notion that agency rule drafters are aware of, but disagree with, the *Brand X* principle. See *infra* notes 129-31 and accompanying text.

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

110. See *supra* note 15 and accompanying text.

111. See *supra* note 42 and accompanying text.

Finally, a third possibility is that even though agencies may have taken notice of *Brand X*, they nonetheless are “not quite as bullish” about whether reliance on the rule would actually withstand judicial review.¹¹² Judicial review continues to hold important influence over agency rule drafting. Agencies do not like being overruled by courts. As Walker has explained, “[t]he overwhelming majority of rule drafters surveyed recognized that judicial review plays a role in their interpretive efforts and that judicial views on the various interpretive tools also influence their rule-drafting process.”¹¹³ So even if agencies have understood the import of *Brand X*, they still may not be fully convinced that it really means what it means. In Walker’s words, “[p]erhaps there are more rule drafters who would agree with Justice Scalia’s dissent in *Brand X*.”¹¹⁴

It is not only some agency rule drafters who have expressed doubt over the import of *Brand X*—judges have also had mixed reactions to the decision.¹¹⁵ Even the Supreme Court itself backtracked from a strong reading of the *Brand X* principle in *United States v. Home Concrete & Supply, LLC*, where the Court’s majority dodged a *Brand X* issue by holding that a provision of the Internal Revenue Code was unambiguous, even though the Court had determined on a previous occasion that the statutory language at issue was “not ‘unambiguous.’”¹¹⁶ Perhaps underlying the Court’s odd result was a belief that *Brand X* should not be used to displace Supreme Court interpretations of law.¹¹⁷ And in recent years, several Justices have expressed skepticism over the entire premise of *Chevron* and *Brand X*.¹¹⁸ Decisions like these may only intensify the nervousness that agency rule drafters may have with promulgating rules that fly in the face of judicial views.

Of course, these hypotheses are not mutually exclusive, and may all be true to differing degrees. Regardless, looking back with the wisdom of hindsight

112. Walker, *supra* note 17, at 1052.

113. *Id.*; see also HUME, *supra* note 19, at 116 (“[A]dministrators emphasized the importance of maintaining healthy long-term relationships with courts.”).

114. Walker, *supra* note 17, at 1052.

115. See, e.g., *Metro. Hosp. v. U.S. Dep’t of Health & Human Servs.*, 712 F.3d 248, 271 & n.1 (6th Cir. 2013) (McKeague, J., dissenting); *Garfias-Rodriguez v. Holder*, 702 F.3d 504, 545-47 (9th Cir. 2012) (en banc) (Paez, J., dissenting).

116. 132 S. Ct. 1836, 1840-41 (2012) (quoting *Colony, Inc. v. Comm’r*, 357 U.S. 28, 33 (1958)). Justice Scalia was quick to point out the irony of the majority’s decision, which attempted to “evade *Brand X* and yet reaffirm [the Court’s prior holding].” *Id.* at 1847 (Scalia, J., concurring in part and concurring in the judgment).

117. *Cf. The Supreme Court, 2011 Term—Leading Cases*, 126 HARV. L. REV. 176, 376 & n.90 (2012) (noting that few future decisions would have to “thread the needle between two Court precedents”).

118. In particular, Justices Thomas and Scalia have hinted they have serious concerns over the constitutionality of *Chevron* and its progeny. See *supra* note 14 and accompanying text. It remains to be seen whether these opinions are indicative of an impending reexamination of agency interpretive power by the Court.

and with the clarity that only data can give, the answer is clear: *Brand X* has not brought about the much-feared consequences that some had so earnestly predicted.

C. Features of *Brand X* Overrides

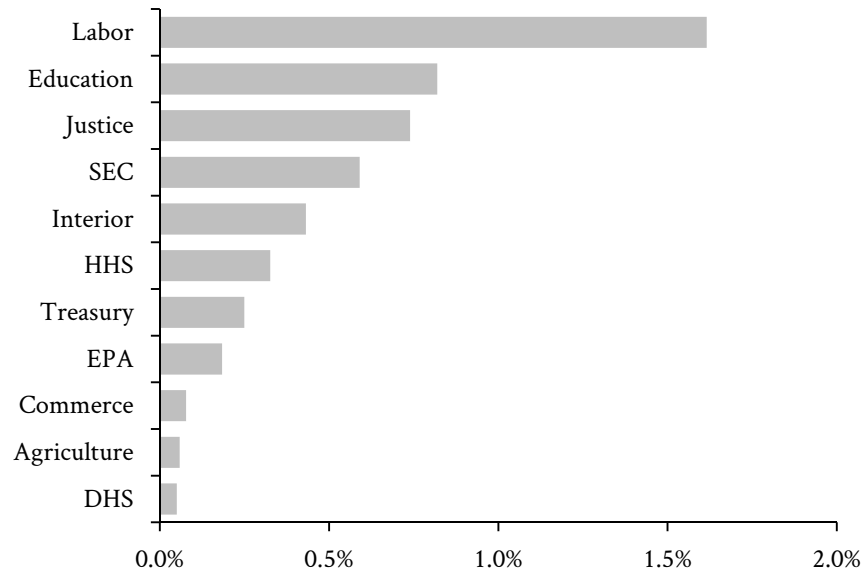
This is not to say that agencies have never used rulemaking to displace judicial precedent—they have, albeit rarely. This Subpart focuses on these actual exercises of *Brand X* overrides and outlines the features of these actions.

1. Frequency by agency

The first observation is that not all agencies engage in *Brand X*-type overrides with the same frequency. The data show that a relatively small subset of agencies seems to be most active in using rulemakings to override precedent. In other words, the *Brand X* rulemakings are not equally prevalent across the entire administrative state.

Figure 2 graphs the frequency of *Brand X*-type overrides categorized by agencies; only agencies with above-average rates are included in the figure. The Department of Labor (DOL) was by far the agency most actively overriding judicial precedent. While the absolute magnitude is still low (1.6%), the DOL promulgated *Brand X*-type rules thirteen times more frequently than the average. Other agencies with above-average use of overrides include the Department of Education (0.8%), the Department of Justice (0.7%), the Securities and Exchange Commission (0.6%), and the Department of the Interior (0.4%).

Figure 2
Frequency of Overrides by Agency, Expressed as a
Percentage of Each Agency's Total Rulemakings, 2000-2014



Note: To remove outliers, Figure 2 excludes agencies with 100 or fewer total rulemakings during the 2000-2014 period.

2. Frequency by court

This study also reveals which courts are most likely to be overruled by agency rulemaking. In *Brand X*, the Court considered whether an agency could override a circuit court's interpretation of law. However, the opinion's holding was couched in general terms, and it remains an open question as to whether *Brand X* provides the authority for agencies to displace Supreme Court interpretations of law.¹¹⁹ Justice Stevens, in his *Brand X* concurrence, suggested it does not,¹²⁰ and the Supreme Court has hinted as much in its 2012 *Home Concrete & Supply* decision.¹²¹ The constitutional concerns over *Brand X*'s separation of powers implications are perhaps most salient when a Supreme Court precedent is at issue.

The question, however, may not be that important in practice. In reality, it is uncommon for an agency to overrule a Supreme Court precedent via

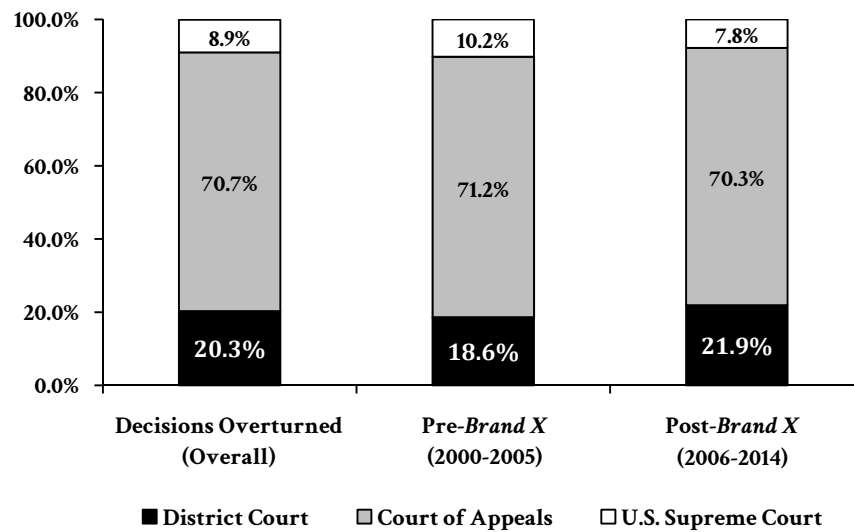
119. See *supra* note 53.

120. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1003 (2005) (Stevens, J., concurring).

121. See *supra* notes 117-18 and accompanying text.

rulemaking. Table 3 shows the proportion of district court, circuit court, and Supreme Court precedents that were displaced by rulemaking. Circuit court decisions formed the vast majority of precedents—71% of the overrides in the dataset involved a decision from the courts of appeals. In contrast, just 20% of the decisions were from district courts, and only 9% were from the Supreme Court. The relative infrequency of Supreme Court precedents in the dataset may reflect the holding of the *Home Concrete & Supply* decision, or perhaps indicate a recognition of the Supreme Court’s deeply-entrenched authority “to say what the law is.” As Figure 3 depicts, there is a slight downtick in the share of overridden Supreme Court precedents post-*Brand X* (10.2% versus 7.8%). However, this change is relatively minor and the overall composition of overridden precedent remained remarkably steady throughout the period.

Figure 3
Judicial Precedents Overridden, 2000-2014



The large portion of courts of appeals precedents should not be surprising. While appeals usually must first be brought in a federal district court, Congress has granted the courts of appeals subject matter jurisdiction to directly review the actions of many administrative agencies.¹²² This may be one explanation for the frequency of overrides of court of appeals decisions.

In addition to direct-appeal statutes, Table 3 also suggests that an agency’s choice of whether to override a court through rulemaking may be influenced

¹²² See, e.g., *Watts v. SEC*, 482 F.3d 501, 505 (D.C. Cir. 2007) (recognizing that Congress granted federal courts of appeals direct review of SEC “orders”).

by the level of the issuing court. Courts of appeals may be the best candidates for overruling by rulemaking under a cost-benefit assessment. Since courts of appeals have widespread precedential effect (both in terms of the jurisdictions bound by the ruling, as well as other jurisdictions that consider its persuasive value), there are significant benefits to an administrative override. And at the same time, agencies can avoid the complications and constitutional concerns of overriding a Supreme Court precedent. Also, multiple conflicting interpretations by different circuits may induce agencies to promulgate their own, unified interpretations of law.¹²³ In contrast, district court opinions may not have enough precedential effect to provoke an agency response through rulemaking, which entails considerable resources and political capital.¹²⁴ Direct appeal may serve as a more efficient vehicle to address an adverse decision for those cases.¹²⁵

3. Frequency by statute

This study also collects data on which statutory schemes were involved in each override. Table 3 tabulates the frequencies of the most commonly overridden statutes in the dataset. The breakdown reveals that *Brand X*-type overrides are not evenly spread across all acts. Rather, just six statutes—the Endangered Species Act, Clean Air Act, Social Security Act, Clean Water Act, Immigration and Nationality Act, and Internal Revenue Code—together make up almost sixty percent of all the overrides identified in this study.¹²⁶ These statutes may thus represent contentious issues where the policy preferences of courts and agencies diverge.

Notably, environmental statutes (i.e., the Clean Air Act, Endangered Species Act, and Clean Water Act) seemed to provide the subject matter ripest for agency overrides. This suggests that agencies feel most strongly about policy outcomes in these areas, and are willing to expend the resources and capital to ensure their policy outcomes are achieved. Interestingly enough, even though environmental statutes were by far the most common subject matter for agency overrides, overrides made up only 0.2% of the

123. See *infra* Part IV.A (characterizing agency rulemaking as a means of resolving circuit splits over statutory interpretation).

124. See Anne Joseph O’Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 917 (2008) (explaining that “[a]n agency’s choice of rulemaking process . . . is strategic” and that it “must weigh the costs and benefits of various procedures”).

125. See *infra* Part IV.C.3 (characterizing agency rulemaking as an alternative to a direct appeal).

126. Three of these—the Clean Air Act, Clean Water Act, and Endangered Species Act—are intended for implementation by the Environmental Protection Agency and the Department of the Interior (DOI). Both of these agencies also engage in *Brand X*-type overrides more frequently than the overall average. See *supra* Figure 2.

Environmental Protection Agency's (the agency charged with administering these statutes) total rulemaking activity.¹²⁷

Table 3
Most Commonly Overridden Statutes, 2000-2014 Summary

Statute	Number of Overrides	Percentage of Total
Endangered Species Act	8	12.7%
Clean Air Act	7	11.1%
Clean Water Act	7	11.1%
Social Security Act	7	11.1%
Immigration and Nationality Act	4	6.3%
Internal Revenue Code	4	6.3%
Black Lung Benefits Act	3	4.8%
Fair Labor Standards Act	2	3.2%
Food, Drug, and Cosmetic Act	2	3.2%
Indian Gaming Regulatory Act	2	3.2%
Individuals with Disabilities Education Act	2	3.2%
National Labor Relations Act	2	3.2%
Plant Quarantine Act	2	3.2%
Securities Exchange Act	2	3.2%
Other (one override only)	16	25.4%

4. Agency reasoning

Finally, this study also considers the types of interpretive reasoning featured in the agency rulemakings. Overrides ranged from short, one-sentence rejections of judicial precedents¹²⁸ to lengthy, multiparagraph explanations with in-depth supporting legal analysis.¹²⁹ Compiling such data on the depth and quality of interpretive reasoning thus helps reveal the seriousness judicial views assume in the agency rule-drafting process.

127. *See supra* Part III.C.1.

128. *See, e.g.*, Real Estate Settlement Procedures Act Statement of Policy 2001-1: Clarification of Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers, and Guidance Concerning Unearned Fees Under Section 8(b), 66 Fed. Reg. 53,052, 53,054-55 (Oct. 18, 2001) (codified at 24 C.F.R. pt. 3500) (providing a one-line statement that it simply “disagrees with the judicial interpretation,” without providing additional explanation).

129. *See, e.g.*, Final Revisions to the Clean Water Act Regulatory Definitions of “Fill Material” and “Discharge of Fill Material,” 67 Fed. Reg. 31,129, 31,136-38 (May 9, 2002) (codified at 40 C.F.R. pt. 232) (turning to a detailed analysis of statutory text, legislative history, case law, and technical expertise to distinguish its interpretation from adverse appellate court precedent).

Of the overrides identified by this study, roughly half used language expressly stating the agency’s disagreement with a court’s findings. Although judges are sometimes known to reprimand agencies in their opinions,¹³⁰ agencies tend not to be so bold even when they disagree with courts. Rather, agencies tend to couch their disagreement in respectful terms¹³¹ that regularly respond to the court’s reasoning in thoughtful ways—even if the court’s reasoning was ultimately unconvincing to the agency. As such, while it may be possible for an agency to override a precedent with nothing more than a cursory citation to *Brand X*, agencies frequently justify their position with supplementary reasoning and rationales to support their departure from judicial views. Table 4 summarizes the key types of interpretive reasoning offered by agencies in the *Federal Register* entries accompanying their overrides.

Table 4
Most Common Types of Reasoning Employed by
Agencies in *Brand X*-Type Overrides, 2000-2014

Type of Reasoning	Frequency (as percentage of all overrides)
Agency expertise	54.5%
Statutory text and structure	47.9%
Case holding distinguished or narrowed	46.3%
Deference	42.3%
Congressional intent	35.8%
Faulty judicial reasoning	25.2%

Over half (54.5%) of the rulemakings in the dataset included some reasoning based on agency expertise and policy. I defined agency expertise to include any instance where an agency introduced technical or specialized facts or know-how relating to the rule. In addition, agency expertise included circumstances where an agency explained that its rule would best enable them to effect the objectives of their statutory mandates. This type of reasoning is consistent with the traditional institutional competencies and strengths

130. *See, e.g., ARCO Oil & Gas Co. v. Fed. Energy Regulatory Comm’n*, 932 F.2d 1501, 1504 (D.C. Cir. 1991) (reprimanding an agency’s action as “worse than useless” that would impose an “utterly superfluous” regulatory burden).

131. When disagreeing with judicial precedent, agencies often qualify their disagreement with a “respectfully” adverb. *See, e.g., Medicare Program: Provider Reimbursement Determinations and Appeals*, 73 Fed. Reg. 30,190, 30,197 (May 23, 2008) (codified at 42 C.F.R. pts. 405, 413, 417) (“We respectfully submit that the Ninth Circuit erred in its analysis.”).

associated with agencies as the best-positioned actors to make complicated, policy-driven, and highly technical decisions.¹³²

Textualist approaches based on the statutory language and structure appeared in 47.9% of the entries.¹³³ These agencies engaged with statutory text and structure to support their interpretations. Some agencies went so far as to discuss and apply specific canons of statutory interpretation, whereas others presented textualist arguments couched in ordinary language. The emergence of this type of reasoning in agency rulemakings may be driven by the textualist revival in the courts.¹³⁴

Approximately 46% of the rulemakings also attempted to distinguish or narrow a court's adverse holding.¹³⁵ Sometimes, this analysis was genuine. But in other instances, the analysis appears strained. Nevertheless, agencies (like courts) routinely engaged in case analysis to reconcile conflicting precedents without having to admit outright disagreement. Agency rule drafters "respond faithfully to judicial decisions, paying careful attention to what the author of a majority opinion has written."¹³⁶ Indeed, promulgating a rule that overrides a judicial precedent is, by one drafter's own acknowledgement, "uncomfortable."¹³⁷

Just over 42% of the rulemakings also supplemented their position with legal arguments about agency deference. Though often without citation to a particular legal standard, these agencies strengthened their rulemakings by arguing that their interpretation was entitled to deference by the courts (perhaps in anticipation of subsequent judicial review). While this reasoning is somewhat circular, the fact that it appears in a substantial proportion of rules

132. See William N. Eskridge, Jr., *Expanding Chevron's Domain: A Comparative Institutional Analysis of the Relative Competence of Courts and Agencies to Interpret Statutes*, 2013 WISC. L. REV. 411, 421-22 ("[A]gency personnel develop expertise by gaining experience from their focus on particular problems . . .").

133. See, e.g., Draft Policy on Interpretation of the Phrase "Significant Portion of Its Range" in the Endangered Species Act's Definitions of "Endangered Species" and "Threatened Species," 76 Fed. Reg. 76,987, 76,993 (Dec. 9, 2011) (conducting a textualist analysis to determine the definition of "significant," including reliance on statutory structure, congressional intent, and dictionary definitions).

134. See generally William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 623-24 (1990) (describing and critiquing the rise of the so-called "new textualist" approach to statutory interpretation).

135. See, e.g., Medicare Program: Clarifying Policies Related to the Responsibilities of Medicare-Participating Hospitals in Treating Individuals with Emergency Medical Conditions, 68 Fed. Reg. 53,222, 53,246 (Sept. 9, 2003) (codified at 42 C.F.R. pts. 413, 482, 489) (reconciling an arguably adverse judicial precedent by interpreting the court's holding in a way that would not be "necessarily inconsistent" with the agency's position).

136. HUME, *supra* note 19, at 115.

137. Definitions: Electronic, Computer or Other Technologic Aid; Electronic or Electromechanical Facsimile; Game Similar to Bingo, 67 Fed. Reg. 41,166, 41,168 (June 17, 2002) (codified at 25 C.F.R. pt. 502).

demonstrates that rule drafters are certainly aware of the consequences of downstream judicial review.

Finally, a minority of agencies were bolder in their analysis and criticized the reasoning or validity of judicial precedent, explaining that the court's analysis was deficient or "unpersuasive."¹³⁸ This type of reasoning was less common, occurring in just 25.2% of the rules. Again, this may be because legally trained rule drafters may still consider outright negative treatment of judicial precedent disrespectful, improper, or unwise.

In sum, the rulemakings in this study were crafted remarkably similarly to judicial opinions, using the same techniques of statutory interpretation that one might expect from a well-reasoned judicial opinion. This may be one upshot of downstream judicial review. By adopting rules with reasoning and explanations that appeal to law-trained judges upfront,¹³⁹ an agency may be able to better insulate their policy decisions from reversal by judges. So while *Brand X* may appear to have given agencies much greater latitude to disregard precedent, this study has found that agencies continue to employ the full range of tools of statutory construction to arrive at what they believe to be the best effectuation of their administering statutes.

IV. Typologies of Agency Overrides

Against this empirical backdrop, this Part shifts to a normative discussion of *Brand X* overrides. One way of understanding the empirical findings is that even post-*Brand X*, agencies continue to demonstrate deference, thoughtfulness, and respect for the judiciary. Even when agencies ultimately do decide to depart from judicial precedent, they have done so in ways that are consistent with the unique institutional competencies that make their interpretive choices desirable. That is, at least in practice, *Brand X* reinforces—and does not subvert—appropriate exercises of agency power that are consistent with the rationales underlying the *Chevron* ideal.

To this end, I offer three typologies of agency overrides to help crystalize key instances where the *Brand X* rule comports with appropriate and normatively desirable agency action. Rooted in the data, these typologies offer a framework for thinking about *why* agencies may choose to depart from

138. Endangered and Threatened Wildlife and Plants: Final Rule to Identify the Western Great Lakes Populations of Gray Wolves as a Distinct Population Segment and to Revise the List of Endangered and Threatened Wildlife, 74 Fed. Reg. 15,070, 15,089 (Apr. 2, 2009) (codified at 50 C.F.R. pt. 17) ("We consider the court's interpretation to be unpersuasive, because the court did not explain why we could not employ another equally plausible definition of 'significant.'").

139. See, e.g., Indian and Federal Lands, 72 Fed. Reg. 20,672, 20,675 (Apr. 25, 2007) (supporting regulation's interpretation by citing to dictionaries as support to show consistency with plain language meaning).

judicial precedent: to resolve court splits, to efficiently address serial litigation, and to appeal a disfavored judicial interpretation of law.

A. Resolving Court Splits

In the absence of a binding interpretation from the Supreme Court, lower courts may adopt differing interpretations of the same federal law.¹⁴⁰ But it is often desirable to have a unified interpretation of law for all jurisdictions.¹⁴¹ Before *Brand X*, agencies could address court splits only by either adopting a policy of intercircuit nonacquiescence, or by petitioning for review from the Supreme Court. *Brand X* offers a superior alternative to both.

Under intercircuit nonacquiescence, agencies adopt separate and parallel policies that apply different interpretations to different jurisdictions in order to avoid any conflict with a particular circuit's precedent.¹⁴² However, this practice is suboptimal because it preserves—rather than resolves—the underlying split in the courts. Thus intercircuit nonacquiescence still requires an agency to enforce a patchwork of different interpretations based on what is supposedly a unified national scheme.

Alternatively, agencies can also resolve interpretive issues by escalating the question to a higher court, ultimately culminating in a binding Supreme Court decision. While such a decision would resolve a court split, the problem is that it takes the interpretive decision out of the hands of the agency and puts it into the hands of the courts. Before *Brand X*, the Supreme Court had yet to rule on whether agencies had the authority to resolve court splits. In fact, some agencies even considered inconsistency in the courts as a factor counseling *against* promulgation of a unified agency rule.¹⁴³ But if we accept *Chevron's* notion that Congress intends agencies to be the final interpreters of ambiguous statutes, then it would be entirely appropriate for agencies to assume the role of a higher court to resolve interpretive splits.¹⁴⁴

140. For the purposes of this study's analysis, a "court split" occurs whenever a court adopts an interpretation of statutory text different from another court. This included situations where district courts adopted different interpretations.

141. See *Ass'n of Battery Recyclers, Inc. v. U.S. EPA*, 208 F.3d 1047, 1052 (D.C. Cir. 2000) (noting a "complication" where administrative agencies are faced with "conflicting interpretations of the same statute from different circuits").

142. *Estreicher & Revesz, supra* note 70, at 687 (1989) ("[A]n agency engages in intercircuit nonacquiescence when it refuses to follow, in its administrative proceedings, the case law of a court of appeals other than the one that will review the agency's decision." (emphasis omitted)).

143. See, e.g., *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 69 Fed. Reg. 22,122, 22,156 (Apr. 23, 2004) (codified at 29 C.F.R. pt. 541) ("Because of the conflict in the courts, . . . the Department has decided not to modify its position on pilots at this time.").

144. See *Pope v. Shalala*, 998 F.2d 473, 486 (7th Cir. 1993) ("Tidying-up' a conflict in the circuits with a clarifying regulation 'permits a nationally uniform rule without the

footnote continued on next page

Brand X provides a more elegant solution to the problem of court splits by giving agencies a mechanism to establish their own authoritative interpretations of law. Unlike intercircuit nonacquiescence, *Brand X* allows for an agency to “overrule” deviating judicial interpretations in order to establish a national standard. And unlike a Supreme Court appeal, *Brand X* takes *Chevron* seriously by vesting ultimate interpretive authority in the agency itself. Indeed, in this Note’s dataset, agencies identified a court split in 35.4% of the instances in which they engaged in a *Brand X*-type override.¹⁴⁵ In many of these cases, agencies identified the inconsistent interpretations rendered by federal courts as a motivating reason for its rulemaking.¹⁴⁶ As one agency put it, “[u]niformity is needed”¹⁴⁷ for a national scheme to function effectively. This hypothesis is further supported by the court precedents overruled by the agency actions in the dataset: as discussed above in Figure 3, more than ninety percent of *Brand X* overrides deal with adverse precedent from lower courts where there is, by definition, no nationally binding interpretation from the Supreme Court. Moreover, where different courts have reached different conclusions with respect to a law’s meaning, the law is likely to be ambiguous as a matter of *Chevron* Step One.¹⁴⁸ Thus, these are situations in which it is especially sound for the agency’s view to prevail and override preexisting,

need for the Supreme Court to essay the meaning of every debatable regulation.” (quoting *Homemakers N. Shore, Inc. v. Bowen*, 832 F.2d 408, 412-13 (7th Cir. 1987)).

145. A “court split” was defined as any instance where an agency cited to at least two conflicting precedents in the rulemaking. While this was most frequently in reference to circuit court splits, there were some occasions where an agency cited to inconsistent district court opinions.
146. See, e.g., *Voluntary Departure: Effect of a Motion to Reopen or Reconsider or a Petition for Review*, 73 Fed. Reg. 76,927, 76,928 (Dec. 18, 2008) (codified at 8 C.F.R. pts. 1240, 1241) (explaining that “[t]he proposed rule sought to address [a] circuit split” in order to “promote a greater measure of uniformity and expedition in the administration of the immigration laws” (quoting *Voluntary Departure: Effect of a Motion to Reopen or Reconsider or a Petition for Review*, 72 Fed. Reg. 67,674, 67,678 (proposed Nov. 30, 2007) (to be codified at 8 C.F.R. pts. 1240, 1241))); *Engaged in the Business of Receiving Deposits Other than Trust Funds*, 66 Fed. Reg. 54,645, 54,646 (Oct. 30, 2001) (codified at 12 C.F.R. pt. 303) (explaining that a statutory requirement “should not be subject to differing and, perhaps, inconsistent judicial interpretations”); *Real Estate Settlement Procedures Act Statement of Policy 2001-1: Clarification of Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers, and Guidance Concerning Unearned Fees Under Section 8(b)*, 66 Fed. Reg. 53,052, 53,053 (Oct. 18, 2001) (codified at 24 C.F.R. pt. 3500) (“[B]ecause courts have now rendered conflicting decisions, [the agency] has an obligation to clarify its position . . .”).
147. *Engaged in the Business of Receiving Deposits Other than Trust Funds*, 66 Fed. Reg. at 54,646.
148. Under *Chevron* Step One, a court reviewing an agency’s interpretation of law must first ask whether Congress has unambiguously made its intent clear—if so, the inquiry ends, and the agency must give effect to the unambiguously expressed intent of Congress. See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

conflicting judicial decisions. As the EPA explained in a 2008 rule, “it is completely appropriate for an agency to issue a rule that has the effect of resolving a split in the circuit courts, so long as the agency’s interpretation of the statute is permissible.”¹⁴⁹ Viewed in this way, *Brand X* did not herald a new doctrine inasmuch as it was merely an extension of longstanding agency policies of nonacquiescence.

For example, the Department of Justice’s Executive Office for Immigration Review adopted this very position in a rule concerning the publication of precedential decisions by the Board of Immigration Appeals (BIA). The rule explicitly encouraged the publication of BIA opinions where “there is a need to . . . restore . . . uniformity of interpretation [of immigration laws] pursuant to interpretive authority recognized by the Supreme Court in *Brand X*.”¹⁵⁰

But despite *Brand X* and its potential to resolve court splits, many agencies are still wary of contradicting circuit precedent through rulemaking, and instead continue to adopt strategies of intercircuit nonacquiescence.¹⁵¹ One notable example of this practice is the Social Security Administration’s acquiescence rulings, where the agency formally states that it will comply with a circuit court precedent within that circuit, even though it disagrees with the court’s finding.¹⁵² The continuing viability of such intercircuit nonacquiescence policies underscores agencies’ restrained approach to *Brand X*.

B. Addressing Serial Litigation

Agencies have also used *Brand X*-type overrides to resolve large-scale, complicated, and recurring litigations. Meazell has termed these sprawling and protracted families of litigation “serial litigation” and has studied this growing phenomenon in administrative law.¹⁵³ Serial litigation often involves highly

149. Endangered and Threatened Wildlife and Plants: Revisions to the Regulations for Impact Analyses of Critical Habitat, 78 Fed. Reg. 53,058, 53,069 (Aug. 28, 2013) (codified at 50 C.F.R. pt. 424).

150. Board of Immigration Appeals: Affirmance Without Opinion, Referral for Panel Review, and Publication of Decisions as Precedents, 73 Fed. Reg. 34,654, 34,661-62 (proposed June 18, 2008) (to be codified at 8 C.F.R. pt. 1003).

151. *See, e.g.*, Waste Confidence Decision Update, 75 Fed. Reg. 81,037, 81,052 (Dec. 23, 2010) (codified at 10 C.F.R. pt. 51) (“[T]he Commission continues to disagree with the [circuit court] and believes that, outside of the [circuit], the environmental effects of a terrorist attack do not need to be considered in its . . . analyses.”).

152. *See, e.g.*, Social Security Acquiescence Ruling 05-1(9), 70 Fed. Reg. 55,656, 55,656 (Sept. 22, 2005). The Social Security Administration may then rescind these acquiescence rulings if they are successful on appeal to the Supreme Court. *See, e.g.*, Rescission of Social Security Acquiescence Ruling 05-1(9), 77 Fed. Reg. 67,724, 67,725 (Nov. 13, 2012); Rescission of Social Security Acquiescence Rulings 88-3(7), 92-6(10), 98-1(8), and 00-5(6), 67 Fed. Reg. 39,781, 39,782 (June 10, 2002).

153. Emily Hammond Meazell, *Deference and Dialogue in Administrative Law*, 111 COLUM. L. REV. 1722, 1723 (2011).

contentious issues and can produce multiple, overlapping lawsuits that span decades. Indeed, in 40.2% of the rules identified in this study, more than one adverse judicial precedent was cited by the agency, suggesting the rule involved an issue challenged in multiple litigations.

Rather than litigating each case through the courts, agency rulemaking provides an efficient vehicle for agencies to address serial litigation involving the interpretation of statutory language. *Brand X* permits agencies to establish the final meaning of a statute, without having to navigate through a complicated, time-consuming, and haphazard system of litigation.¹⁵⁴ Allowing agencies to promulgate regulations that entirely sidestep this process can be immensely more expedient and resource efficient.

It could be argued that these hotly debated, recurring legal questions are exactly the sort where agency overrides are most concerning. But in actuality, these complex and often highly technical and policy-based issues are exactly those that we *want* to have agencies, and not courts, decide. For example, *Brand X* arose from litigation that preceded the net neutrality debates, determining the threshold legal question of whether the FCC had statutory authority to regulate Internet service providers.¹⁵⁵ Other families of cases in which agencies have invoked *Brand X* overrides include litigation over key issues concerning the protection of endangered species (the *Defenders of Wildlife* litigations),¹⁵⁶ the regulation of air quality in clean air areas (the *Alabama Power* litigations),¹⁵⁷ and the implementation of the federal Medicare plan (the Medicare litigations).¹⁵⁸ Given these highly contested areas involving

154. And even if the agency receives a final judgment, only a Supreme Court decision is able to fully resolve these issues.

155. See *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 975 (2005).

156. In these litigations, environmental groups challenged whether the Secretary of the Interior could withdraw certain species of animals—including grizzly bears, horned lizards, and gray wolves—from being designated as threatened species under the Endangered Species Act (ESA). The groups argued that the DOI's definition of the ESA's operative language about a "significant portion of [a species'] range" was inconsistent with previous judicial decisions. See, e.g., *Endangered and Threatened Wildlife and Plants: Final Rule to Identify the Western Great Lakes Populations of Gray Wolves as a Distinct Population Segment and to Revise the List of Endangered and Threatened Wildlife*, 74 Fed. Reg. 15,070, 15,089 (Apr. 2, 2009) (codified at 50 C.F.R. pt. 17). Rather than directly appealing each litigation individually, the DOI used a set of rulemakings to explain its deviation from case law in its interpretation of the ESA. See *id.*

157. In these litigations, state governments and environmental groups challenged the EPA's definition of "any physical change" as used in the Clean Air Act. They argued that the EPA's definition contradicted prior judicial interpretations of when a modification of a source required agency review. See, e.g., *Prevention of Significant Deterioration (PSD) and Non-Attainment New Source Review (NSR): Equipment Replacement Provision of the Routine Maintenance, Repair and Replacement Exclusion*, 68 Fed. Reg. 61,248, 61,272 & n.14 (Oct. 27, 2003) (codified at 41 C.F.R. pts. 51, 52).

158. The Department of Health and Human Services regulations implementing the Medicare Acts have been subject to challenges on multiple occasions. See, e.g., Medicare
footnote continued on next page

significant public policy choices, there is little reason to think that civil litigation through the courts would achieve the most desirable policy outcome. Rather, agencies are better equipped with the expertise, technical know-how, and flexibility needed to handle these quasi-legislative decisions.¹⁵⁹

Finally, agency action through rulemaking is a more democratic and transparent means of establishing law. Section 553 notice-and-comment rulemaking, by design, gives an opportunity for the public's views to be incorporated into the rulemaking process—"the most transparent and participatory decision-making process used in any branch of the federal government."¹⁶⁰ Though some critics have suggested that meaningful public participation remains low in most agency rulemakings,¹⁶¹ the process is still more transparent and participatory than private civil litigation, for which participation is closed off from members of the public (save for a small number of powerful interest groups that can be represented as amici). What is more, agency heads are democratically accountable in ways that life-tenured judges are not.

C. Alternative to Direct Appeal

Lastly, agencies may also use rulemaking as a superior alternative to directly appealing adverse judicial decisions. Instead of congressional lobbying or judicial appeal, some agencies have used rulemaking (as legitimized by *Brand X*) to "cancel[] out any on-the-ground impact" of an adverse judicial decision.¹⁶² For instance, the Federal Election Commission pursued two parallel strategies after losing a case in the D.C. Circuit concerning the interpretation of the words "solicit" and "direct" in the Federal Election

Program: Provider Reimbursement Determinations and Appeals, 73 Fed. Reg. 30,190, 30,192 (May 23, 2008) (codified at 42 C.F.R. pts. 405, 413, 417).

159. See Watts, *supra* note 10, at 1049.

160. Cynthia R. Farina et al., *Rulemaking 2.0*, 65 U. MIAMI L. REV. 395, 402 (2011); see also KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* 283 (1970) (calling notice-and-comment rulemaking "one of the greatest inventions of modern government"); Michael Asimow, *On Pressing McNollgast to the Limits: The Problem of Regulatory Costs*, 57 LAW & CONTEMP. PROBLEMS 127, 129 (1994) ("[R]ulemaking procedures are refreshingly democratic . . .").

161. CORNELIUS M. KERWIN, *RULEMAKING: HOW AGENCIES WRITE LAW AND MAKE POLICY* 191-210 (1994); see also Nina A. Mendelson, *Foreword: Rulemaking, Democracy, and Torrents of E-mail*, 79 GEO. WASH. L. REV. 1343, 1380 (2011) (arguing that despite significant public participation, agencies fail to meaningfully incorporate public input into their rulemaking processes).

162. Revisions to Stormwater Regulations to Clarify that an NPDES Permit Is Not Required for Stormwater Discharges from Logging Roads, 77 Fed. Reg. 72,970, 72,973 (Dec. 7, 2012) (codified at 40 C.F.R. pt. 122).

Campaign Act.¹⁶³ The Commission simultaneously sought a rehearing en banc of the adverse decision, as well as initiated an informal rulemaking to promulgate its own interpretation of the Act, explaining that it would terminate the rulemaking proceedings if it prevailed on the rehearing.¹⁶⁴

In addition, direct appeal is not available when the agency is not a party to the case. While the agency was a litigant in 68.3% of the precedents examined in this study,¹⁶⁵ more than 30% of the time, agencies had no opportunity to have their views formally heard in the judicial proceedings. In these cases, agencies have turned to *Brand X* rulemaking as a way of addressing an adverse interpretation by a court, claiming they “are not bound by judicial precedent in cases [in] which [they are] not a party.”¹⁶⁶ Of course, one solution may be to solicit agency input in private disputes involving interpretations of federal laws, either through informal mechanisms (e.g., as special amici) or under the doctrine of primary jurisdiction.¹⁶⁷ But until such practices become commonplace, agencies will seek out alternative ways to ensure their interpretations are given appropriate effect.

To be sure, some may wince at the idea of extrajudicial workarounds to appellate review through the Article III courts. Even so, there are compelling reasons why *Brand X* offers an attractive alternative to direct appeal. First, appellate litigation can be costly and slow. The results can be unpredictable and leave significant policy decisions to the discretion of unelected judges. Second, if an agency loses at both the district and circuit court levels, the resolution of the issue is contingent on the Supreme Court’s granting of certiorari, which is speculative at best—and capricious at worst. Finally, rulemaking is a far more direct and predictable means of making policy. Rulemaking sidesteps the randomness of trial and the limitations of a court’s procedural rules by allowing agencies to take control of their own policy agenda.

163. See Definitions of “Solicit” and “Direct,” 70 Fed. Reg. at 56,599, 56,600 (proposed Sept. 28, 2005) (to be codified at 11 C.F.R. pt. 300).

164. *Id.*

165. This figure includes instances where an agency was represented as special amicus, often at the court’s request.

166. Medicare Program: Clarifying Policies Related to the Responsibilities of Medicare-Participating Hospitals in Treating Individuals with Emergency Medical Conditions, 68 Fed. Reg. 53,222, 53,246 (Sept. 9, 2003) (codified at 42 C.F.R. pts. 413, 482, 489); see also Real Estate Settlement Procedures Act Statement of Policy 2001-1: Clarification of Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers, and Guidance Concerning Unearned Fees Under Section 8(b), 66 Fed. Reg. 53,052, 53,054-55 (Oct. 18, 2001) (codified at 42 C.F.R. pt. 3500) (“[The agency] was not a party to the case and disagrees with the judicial interpretation . . .”).

167. See *supra* note 54. Some courts have already acknowledged that agencies may respond to an opinion through rulemaking. See, e.g., *William Bros. v. Pate*, 833 F.2d 261, 265 (11th Cir. 1987) (“If the Secretary has a position he wishes to express, he can do it through the proper forum, i.e., the implementation of new, clarifying regulations.”).

Justice Scalia's *Brand X* dissent implies that direct appeal through the judicial process is the most desirable means of deciding a statutory interpretation issue,¹⁶⁸ suggesting that rulemaking is a second-best backstop procedure for defeated agencies. But *Brand X* should give pause to whether such a characterization is fair, at least in situations concerning interpretations of ambiguous federal laws. Indeed, perhaps there is a better way.

V. Implications

This study's findings by no means put an end to the conversation surrounding *Brand X* and the treatment of *stare decisis* in agency rulemaking. The ongoing vitality of *Brand X* will still be important, if not in practice, then at least in theory, as it sets a marker around which the doctrine will continue to evolve. This study's observations should inform our discussion of broader themes regarding the role of agencies and courts in statutory interpretation.

The prevailing view, implicit in Justice Scalia's *Brand X* dissent, is that agencies and courts are embroiled in a battle over who gets the final word over the law's meaning. This view likens statutory interpretation to a zero-sum game where there is only room for one actor's view to prevail (and *Brand X* seemed to rule decisively for agencies).¹⁶⁹ But this account of dueling lawmakers misses what is really happening. The evidence simply is not consistent with an administrative state that seeks to undermine judicial authority. Rather, what we observe is self-regulating agencies whose actions continue to be informed by judicial views.¹⁷⁰ Critics argue that the judiciary—and only the judiciary—is the branch institutionally competent to authoritatively interpret statutes.¹⁷¹ However, this Note has argued that agency rule drafters are equally (and perhaps even more) capable of statutory interpretation. Even after the apparent enlargement of administrative power post-*Brand X*, agency rule drafters have not aggressively internalized or

168. See *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 1017 (2005) (Scalia, J., dissenting) ("Judgments within the powers vested in courts by the Judiciary Article of the Constitution may not lawfully be revised, overturned or refused faith and credit by another Department of Government." (quoting *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948))).

169. Cf. Ross E. Davies, *Remedial Nonacquiescence*, 89 IOWA L. REV. 65, 79 (2003) (characterizing an agency's nonacquiescence to judicial precedent as an "agency-court duel").

170. See Elizabeth Magill, *Foreword: Agency Self-Regulation*, 77 GEO. WASH. L. REV. 859, 860 (2009) ("[A]dministrative agencies routinely 'self-regulate.'").

171. See, e.g., *Michigan v. EPA*, 135 S. Ct. 2699, 2713 (2015) (Thomas, J., concurring) (arguing that agency rulemaking authority "is used not to find the best meaning of the text, but to formulate legally binding rules to fill in gaps based on policy judgments made by the agency rather than Congress").

invoked the rule in practice; rather, “they *voluntarily* constrain their discretion.”¹⁷²

Notwithstanding a decision like *Brand X*, the more accurate view is that agencies and courts are engaged in a colloquy over statutory meaning.¹⁷³ Agencies’ interpretations continue to be influenced by judicial views, regardless of whether the doctrine requires it. This observation dovetails nicely with existing research into the administrative statutory interpretation process, which suggests that agency rule drafters do take into account judicial views when formulating their own interpretations of law.¹⁷⁴ As one administrator put it, “[a] court’s interpretation could make it difficult to have a different interpretation.”¹⁷⁵

What this points to, then, is a divide between how statutory interpretation works in the books versus on the ground. This disconnect may stem from the fact that those who draft administrative rules are not the same people defending those rules in court.¹⁷⁶ One reading a decision like *Brand X* in isolation may, justifiably, be alarmed at its potentially far-reaching consequences. But even important decisions like *Brand X* may not trickle down to the rule-drafting stage, or even if they do, they do not change the way rule drafters view their interpretive role. If anything, the evidence suggests that agencies still see their interpretive role as working in tandem with the courts.

This conclusion reflects a recurring theme that comes up time and time again in administrative law: changes in legal doctrine—even those that are heralded as momentous and noteworthy—do not always translate to real-world impact. For example, empirically speaking, even a watershed decision such as *Chevron* may not have had much effect on judicial review of agency interpretations at the highest level.¹⁷⁷ *Brand X* may be very much the same.

172. Magill, *supra* note 171, at 860.

173. See HUME, *supra* note 19, at 5-6 (finding that agency drafters “do read judicial opinions” and “take the words seriously”).

174. See, e.g., Walker, *supra* note 17, at 1052 (“The overwhelming majority of rule drafters surveyed recognized that judicial review plays a role in their interpretive efforts and that judicial views on the various interpretive tools also influence their rule-drafting process.”).

175. *Id.* at 1052 n.251 (quoting survey response (on file with author)).

176. For example, whereas agencies are the ones drafting regulations, it is a separate body—usually the Department of Justice—that defends those actions if challenged in the courts. See Christopher J. Walker, *Chevron Inside the Regulatory State: An Empirical Assessment*, 83 FORDHAM L. REV. 703, 728 (2014) (“[A]gency rule drafters and litigators are often not closely connected.”).

177. See Eskridge & Baer, *supra* note 17 at 1090 (concluding that, based on an empirical analysis, “there has not been a *Chevron* ‘revolution’ at the Supreme Court level”).

Conclusion

Sometimes a decision may seem unremarkable in the moment but later unexpectedly achieve landmark status.¹⁷⁸ Other times a decision may seem remarkable in the moment but be forgotten once the dust settles.

And so this Note ends with the question first posed: Has *Brand X* mattered? This Note's empirical analysis suggests that it has not—at least not in its impact on the way agencies make rules. This hypothesis is consistent with a growing body of empirical research suggesting that judicial views continue to influence agency action, notwithstanding doctrinal changes to the contrary. Moreover, even where agencies have decided to create rules inapposite to established judicial views, this Note argues that agencies do so in ways that reinforce, rather than subvert, their unique institutional competencies.

In a world where the regulatory state seems to have more power than ever before, it should be reassuring to know that rule drafters continue to hold fast to the virtues of restraint, thoughtfulness, and due respect for the judicial process. Courts need not fear agencies, even in a post-*Brand X* era. Indeed, the case may have had all the hallmarks of a momentous decision: a provocative holding, a sharp dissent, and a wealth of commentary—but perhaps in the end, *Brand X* has left no mark at all.

178. This is the story of the Court's now-infamous *Chevron* decision. Justice Stevens, who penned the Court's opinion, never intended for the decision to be as revolutionary and significant as it has turned out to be. See Thomas W. Merrill, *Justice Stevens and the Chevron Puzzle*, 106 NW. U. L. REV. 551, 553 (2012) ("The disconnect between *Chevron* and the revealed values of its author has led commentators to search for some metaprinciple that would square things up between Justice Stevens and his famous progeny.").