A *BRAND X* PRIMER

by Stephen Manning, Lory Rosenberg, and Mary Kenney[*]

It has been only three years since the U.S. Supreme Court decided *National Cable & Telecommunications Ass'n v. Brand X Internet Services (Brand X)*,[1] but the shorthand reference to the case already has come into common usage, suggesting the significance of the Court's ruling. In the immediate aftermath of *Brand X*, agencies, litigators, and judges have begun carving out its province and recognizing the implications of the decision for immigration law. These initial efforts have only begun to bring into focus the many unresolved legal and circumstantial issues that can be expected to arise from the application of the *Brand X* decision to individual cases.

This article examines the *Brand X* decision, including its underpinnings in *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*,[2] as it applies to immigration law. The article discusses the many immigration-related judicial and agency decisions in which *Brand X* has been cited and applied, and offers practitioners commentary and guidance concerning potential *Brand X* issues and applications yet to arise.

FUNDAMENTAL RELATIONSHIP BETWEEN COURTS AND AGENCIES

It is now established that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[3] It is equally accepted that a court "must presume that Congress acts with deliberation, not inadvertence, when it drafts a statute."[4] Accordingly, agencies ordinarily acquiesce to rulings of the federal circuit courts that pronounce interpretations of the law, and they may be bound to do so when statutory language is plain.[5] An agency is also presumed to have particular insight and expertise with regard to the statute it administers. In cases that depend on an agency's interpretation and application of a governing statute, a federal court is expected to defer to a reasonable agency interpretation.

The Immigration and Nationality Act[6] (INA) provides that "[t]he Secretary of Homeland Security shall be charged with the administration and enforcement of [the statute]" and that the "determination and ruling by the Attorney General with respect to all questions of law shall be controlling."[7] Moreover, the Supreme Court has repeatedly stated that "judicial deference to the Executive Branch is especially appropriate in the immi-

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[1] 545 U.S. 967, 982 (2005).

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

[3] *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803).

[4] *United States v. Motamedi*, 767 F.2d 1403, 1406 (9th Cir. 1985) (interpreting the Bail Reform Act).

[5] *Matter of Anselmo,* 20 I&N Dec. 25, 31(BIA 1989).

[6] Immigration and Nationality Act of 1952 (INA), Pub. L. No. 82-414, 66 Stat. 163.

[7] Immigration and Nationality Act §103(a)(1).

gration context where officials 'exercise especially sensitive political functions that implicate questions of foreign relations.'"[8]

But there are limits on deference to an agency. The Supreme Court has emphasized consistently that an agency's authority "to prescribe rules and regulations [to administer a statute] . . . is not the power to *make* law . . . but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute."[9] Accordingly, "a regulation may not serve to amend a statute,"[10] and an agency interpretation that adds to the statute "something which is not there" cannot stand, for such an interpretation is considered to be ultra vires.[11] And a regulation may be considered ultra vires where it "directly conflicts not only with the specific statute on point . . . but creates absurd results when viewed in light of the larger statutory scheme."[12]

Prior to the Supreme Court's decision in *Brand X*, the circuit courts had accommodated the deference to which agency adjudications are entitled while upholding the principles of acquiescence that are due judicial precedent. According to these accepted principles, the U.S. Court of Appeals for the Ninth Circuit had recognized that although agency decisions generally were entitled to deference under *Chevron,* "[i]n interpreting the Immigration and Nationality Act, the BIA is bound by this circuit's earlier decisions in cases originating within this circuit."[13] Likewise, the Third Circuit had emphasized that "[a] decision by this court, not overruled by the United States Supreme Court, is . . . binding on all inferior courts and litigants in the [circuit], and also on administrative agencies."[14]

Indeed, prior to *Brand X*, administrative agencies were not free to refuse to follow circuit court precedent in cases originating within the circuit unless the agency had a good faith intention to seek review of the particular proceeding by the Supreme Court.[15] The advent of *Brand X* marks a change in these principles but does not nullify them in their entirety.

CHEVRON AND PROGENY

Pre-*Chevron* Deference under *Skidmore*

Prior to *Chevron*, general deference was extended to an agency's persuasive interpretation of the statute that it administered. The Supreme Court recognized that the "power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress."[16] Under *Skidmore v. Swift & Co.*,[17] however, an agency's interpretation was not accorded deference as a matter of right.[18] It merely received "respect" to the extent that the agency's reasoning had the power to persuade the court.[19] In part, the Court's decision in *Chevron* was important because it represented a major departure from such past practice.

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[8] *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) (quoting *Immigration & Naturalization Service v. Abudu*, 485 U.S. 94, 110 (1988)).

[9] *Manhattan Gen. Equip. Co. v. Comm'r,* 297 U.S. 129, 134 (1936) (emphasis added).

[10] *Koshland v. Helvering*, 298 U.S. 441, 447(1936).

[11] *United States v. Calamaro*, 354 U.S. 351, 359 (1957).

[12] *See, e.g., Bona v. Gonzales*, 425 F.3d 663, 671 (9th Cir. 2005) (citing *Succar v. Ashcroft*, 394 F.3d 8 (1st Cir. 2005) (involving the eligibility of parolees for adjustment of status under the statute).

[13] *Singh v. Ilchert,* 63 F.3d 1501, 1508 (9th Cir. 1995) (citing *NLRB v. Ashkenazy Prop. Mgmt. Corp.,* 817 F.2d 74, 75 (9th Cir. 1987)).

[14] *Allegheny General Hospital v. NLRB,* 608 F.2d 965, 970 (3d Cir. 1979).

[15] *Lopez v. Heckler,* 572 F. Supp. 26, 30 (C.D. Cal. 1983), *aff'd in part* and *rev'd in part*, 725 F.2d 1489, 1503 (9th Cir.), vacated and remanded, 469 U.S. 1082 (1984).

[16] *Morton v. Ruiz,* 415 U.S. 199, 231 (1974).

[17] 323 U.S. 134, 139–40 (1944).

[18] *Air Brake Sys., Inc. v. Mineta,* 357 F.3d 632, 643 (6th Cir. 2004).

[19] *Madison v. Res. for Human Dev., Inc.,* 233 F.3d 175, 186 (3d Cir. 2000).

Chevron Doctrine and Its Two-Step Analysis

The current principle of deference to a federal agency's interpretation of the statute it administers was articulated definitively in 1984 in the two-step analysis contained in *Chevron*. In *Chevron,* the Court wrote:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, 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, as would be necessary in the absence of an administrative interpretation. *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.* [20]

The Court introduced a framework to structure judicial review while preserving the legitimate authority of an agency and, ultimately, Congress. *Chevron* "has steadily grown in importance since it was handed down in 1984."[21] The *Chevron* doctrine "has thousands [of case citations and] . . . has generated a huge volume of law review literature."[22]

The two steps articulated by the Court in *Chevron* have been reiterated consistently in *Chevron*'s progeny over the past 25 years.[23] In *INS v. Cardoza-Fonseca*, decided three years after *Chevro*n, the Supreme Court explained that "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent."[24] Examining how used different language to define the standards governing asylum and withholding of deportation, the Court concluded that "Congress did not intend the two [statutory] standards to be identical," and rejected the interpretation that had been adopted by the Board of Immigration Appeals (BIA) in favor of its own reading.[25]

Thus a court determines, "at what is customarily called step one, whether the intent of Congress is expressed in the statute's plain language. If it is, that intent must be given effect.[26] Step one under *Chevron* plainly contemplates that Article III courts will engage in statutory interpretation. Furthermore, the Supreme Court has emphasized that to ascertain Congress' intent in the plain language of the statute, the provision at issue should be considered in the context of the statute as a whole.[27]

But when Congress has "explicitly left a gap for the agency to fill," a court must proceed to step two to inquiry whether Congress was silent or used language that is ambiguous. If so, "the agency's [interpretation] is 'given controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute.'"[28] The premise underlying step two is that courts are ill-equipped to make the policy decisions necessary to fill the gaps that may have been left by Congress. The standard that governs the agency interpretation under step two has been defined as one of reasonableness.[29]

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[20] *Id.* at 842–843 (emphasis added).

[21] Antonin Scalia, "Judicial Deference to Administrative Interpretations of Law," 1989 *Duke L.J.* 511, 512 (1989).

[22] *Id. Chevron* is not without its critics, however. *See, e.g.,* Cass Sunstein, "Chevron Step Zero," 92 *Va. L. Rev*. 187, 189 (2006) ("But shortly after it appeared, *Chevron* was quickly taken to establish a new approach to judicial review of agency interpretations of law, going so far as to create a kind of counter-*Marbury* for the administrative state. *Chevron* seemed to declare that in the face of ambiguity, it is emphatically the province and duty of the administrative department to say what the law is.") (internal citations omitted).

[23] *See, e.g., Household Credit Servs. Inc. v. Pfennig*, 541 U.S. 232, 239 (2004).

[24] 480 U.S. 421, 447–448 (1987) (citing cases).

[25] *Id.,* quoting *Chevron* at 843, n.9 ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect") (citations omitted).

[26] *Chen v. Ashcroft*, 381 F.3d 221, 223–24 (3d Cir. 2004) (quoting *Chevron*, 467 U.S. at 843–44).

[27] *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987); *INS v. Phinpathya*, 464 U.S. 183, 189 (1984).

[28] *Chen v. Ashcroft*, 381 F.3d at 223–24 (second brackets in original) (quoting *Chevron*, 467 U.S. at 843–44).

[29] *See Chevron*, 467 U.S. at 845, 865, 866.

Known as the *Chevron* doctrine, this two-step analysis is essential to the operation of *Brand X.* In short, if authority is not delegated to an agency, *Chevron* does not apply at all, *Brand X* will not apply. Likewise, if the language of the statute in question is determined to be plain and there is no gap for the agency to fill, the analysis stops at step one and *Brand X* does not apply. Only if the statutory language is ambiguous or silent, leaving a gap to be filled by the agency's interpretation of Congress' intent, will the rule articulated in *Brand X* potentially apply.

Mead and "Step Zero"

Over the 25 years following its decision in *Chevron*, the Supreme Court has refined the applicability of the two-pronged *Chevron* doctrine.[30] According to the Court's 2001 decision in *United States v. Mead Corp*.,[31] not all agency interpretations warrant *Chevron* deference—only those issued when an agency has been delegated the appropriate authority to make rules and puts forth such rules with the requisite degree of formality. The Third Circuit explained in *Chen v. Ashcroft*: "*Chevron* applies when "it appears that Congress delegated authority to . . . [an administrative] agency . . . to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."[32]

This preliminary determination was first teased out of the *Chevron* doctrine by the Supreme Court in 2001, in the *Mead* case, and has come to be known colloquially as "step zero." Congress's delegation of authority to the agency "may be shown in a variety of ways, such as by an agency's having power to engage in adjudication or notice-and-comment rule making, or by some other indication of a comparable congressional intent."[33] In the immigration context, Congress has extended various authorities to the secretary of the Department of Homeland Security (DHS) and the U.S. attorney general (AG) (and the BIA as the AG's delegate) in sections 103(g)(2) and 103(a)(1) of the INA. Similarly, the AG has regulatory authority to issue precedent decisions.

These authorities create limits as well as license. For example, neither of the INA sections grants the AG authority to interpret federal criminal law provisions or civil statutes with criminal applications, and the agency has no special expertise in this area.[34] Furthermore, because *Mead* mandates that agency interpretations be promulgated in the exercise of the agency's congressionally delegated authority, adjudications that lack the formality of en banc BIA precedent decisions are not entitled to the deference that would be due a precedent.

In the end, if there is no explicit or implicit delegation and no formal procedure, *Mead* supports the conclusion that *Chevron* is inapplicable and the degree of deference owed to the agency is minimal or nonexistent.

***CHEVRON* DOCTRINE TWO-STEP ANALYSIS**	
Step Zero:	Has Congress delegated authority to the agency to construe the statute and fill gaps in it? Has the agency done so formally, in the context of its authority?
Step One:	Has Congress directly spoken to the precise question at issue? Does the plain language express the intent of Congress?
Step Two:	Is the statute silent or ambiguous, and is the agency interpretation a permissible and reasonable one?

Brand X

It was against this backdrop that the Supreme Court decided *Brand X* in 2005. The legal issues in *National Cable & Telecommunications Assn. v. Brand X Internet Services* revolve around an agency interpretation of

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[30] *Cf.* Sunstein, *supra* note 22, contending that the *Chevron* doctrine has become less clear with time, and that the focus currently is on step zero.

[31] 533 U.S. 218, 226–27 (2001).

[32] 381 F.3d at 223–24 (citing *Mead*, 533 U.S. *supra*).

[33] *Mead*, 533 U.S. at 227.

[34] *See, e.g., Garcia-Lopez v. INS*, 334 F.3d 840, 843 (9th Cir. 2003) ("We accord deference to the INS's . . . 'construction of the statute which it administers.' The instant case, however, involves . . . the California Penal Code . . . not a statute which the BIA administers or has any particular expertise in interpreting, [so] no deference is accorded to the BIA's interpretation").

the Communications Act of 1934 as amended by the Federal Communications Commission (FCC).[35] The substantive question before the commission was whether cable companies providing cable modem service are providing a "telecommunications service" in addition to an "information service"—a matter of statutory interpretation. The jurisprudential issue overshadowing that question was whether the principle of stare decisis, which led the Ninth Circuit Court of Appeals to reject the agency's position in favor of a prior decision of a panel of the circuit, must yield to principles of "*Chevron* deference."

The Court examined the relationship between the stare decisis effect of an appellate court's statutory interpretation and an administrative agency's subsequent, but contrary, interpretation. Reiterating that "*Chevron*'s premise is that it is for agencies, not courts, to fill statutory gaps," the Court concluded that the applicability of *Chevron* should not "turn on the order in which the [judicial and agency] interpretations issue."[36] Accordingly, the Court held that "[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."[37]

Reasoning that "allowing a judicial precedent to foreclose an agency from interpreting an ambiguous statute . . . would allow a court's interpretation to override an agency's," contrary to the *Chevron* doctrine, the Court held:

> The better rule is to hold judicial interpretations contained in precedents to the same demanding *Chevron* step one standard that applies if the court is reviewing the agency's construction on a blank slate: Only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction.[38]

In response, circuit courts of appeal have clarified that *Chevron*'s step one remains in force after *Brand X*, so that "if the court has previously held that Congress has spoken directly to the precise question at issue, 'that is the end of the matter,' and no amount of *Chevron* step two posturing on the part of the agency will undo the court's interpretation."[39] Courts have found that *Brand X* does not require a court to "say in so many magic words that its holding is the only permissible interpretation of the statute in order for that holding to be binding on an agency," particularly where courts were operating without the guidance of *Brand X*, and "the exercise of statutory interpretation makes clear the court's view that the plain language of the statute was controlling and that there existed no room for contrary agency interpretation."[40]

Of course, *Brand X* in no way calls into doubt the many previous judicial interpretations that rested on the unambiguous words of a statute. The implications of finding that a statute contains plain language expressing the intent of Congress, as well as other issues to be explored in light of *Brand X*, are addressed in the remainder of this article.

REVIEW OF CASE LAW

The courts and the BIA have applied principles of deference in immigration cases in various ways. This section first examines cases where no deference is due the BIA's interpretation of a statute, either at step zero or step one of *Chevron*. It then reviews immigration cases in which *Brand X* has been applied. Finally, it discusses cases that the courts have remanded to allow the BIA to be the first to interpret an ambiguous statutory provision in an attempt to avoid a future *Brand X* situation.

No Deference Warranted

There are a number of situations in which a court is not required to defer to an agency's interpretation of a statute. The most frequent is where, at step one of the *Chevron* analysis, a court determines that the statute is not

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[35] 545 U.S. 967.

[36] *Id.* at 982, 983.

[37] *Id.* at 982.

[38] *Id.* at 983.

[39] *See Puentes Fernandez v. Keisler,* 502 F.3d 337, 347 (4th Cir. 2007) (quoting *Chevron*, 467 U.S. at 842).

[40] *Id.*

ambiguous and the intent of Congress is clear. Courts are free to use many of the tools of statutory construction to determine whether a statute's meaning is clear.[41] Immigration cases in which courts have determined that a statute's meaning is clear are numerous, and can be found in all federal circuits.[42]

There are four situations where a court may determine that deference is not appropriate before ever engaging in the *Chevron* analysis.

First, certain forms of agency interpretations are not subject to deference. For *Chevron* deference to apply, an agency must not only have the authority to interpret the statute but also issue a rule or interpretation with the "force of law" pursuant to its authority.[43] Courts have held that decisions of immigration judges are not entitled to *Chevron* deference because, inter alia, these decisions are not "binding on future parties, on [other immigration judges], or on the BIA."[44] These decisions do not constitute a "'rule' carrying the force of law—because one of the hallmarks of a legal 'rule' is that it will, in fact, apply equally in all cases of a similar kind."[45]

The same is true of unpublished BIA decisions, which cannot be cited in other cases, have no precedential value, and are not binding beyond the parties to the case. Several courts have therefore held that unpublished BIA decisions are not entitled to *Chevron* deference.[46]

Second, certain subject matter is exempt from *Chevron* deference. For example, deference is never due an agency's interpretation of a statute that it has no authority to interpret and that is outside its area of expertise; in such a case, the court must interpret the statute, even if ambiguous. In immigration cases courts will not defer to the BIA's interpretation of criminal statutes.[47] Similarly, because the BIA has no authority or expertise with respect to federal court jurisdiction, courts have held that they will not defer to the BIA's interpretation of federal court jurisdictional provisions. One district court explained: "[T]he determination of jurisdiction is exclusively for the courts to decide."[48] For the same reason, courts also do not defer to the BIA on the threshold question of whether an immigration statute is plain or ambiguous. Pure questions of statutory construction are for the courts to decide.[49]

Third, "[a]n exception to the general rule of *Chevron* arises [ ] where Congress, by the terms of the statute itself, instructs the courts to apply a less deferential standard of review as to a particular issue of statutory interpretation."[50] Where a court determines that Congress specifically gave the courts, rather than an agency, the full authority to interpret the statute, a court will not defer to an agency interpretation even where the statute is ambiguous. For example, several courts have held that INA §242(b)(5) "explicitly placed the determi-

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[41] For more on how tools of statutory construction fit within the *Chevron* analysis, *see infra*.

[42] *See, e.g., Cardoza-Fonseca,* 480 U.S. at 449 (interpreting plain language of the asylum and withholding of removal provisions); *Succar,* 394 F.3d 8 (holding that regulatory bar on "arriving aliens" adjusting status violated plain language of the adjustment statue).

[43] *See Mead,* 533 U.S. at 226–27 (2001).

[44] *Lin v. U.S. DOJ,* 416 F.3d 184, 190 (2d Cir. 2005).

[45] *Id.* (citing *Black's Law Dictionary* 1357 (8th ed. 2004)).

[46] *See, e.g., Adjin v. Bureau of Citizenship & Immigration Service,* 437 F.3d 261, 264–65 (2d Cir. 2006) (per curiam) ("[U]npublished opinions of the BIA have no precedential value"); *Garcia-Quintero v. Gonzales,* 455 F.3d 1006 (9th Cir. 2006) (refusing to apply *Chevron* deference to unpublished BIA decision, but instead applying more limited deference).

[47] *Leocal v. Ashcroft,* 543 U.S. 1 (2004) (finding BIA interpretation of a criminal statute not entitled to deference).

[48] *Nehme v. INS,* 252 F.3d 415, 421 (5th Cir. 2001).

[49] *INS v. Cardoza-Fonseca,* 480 U.S. 421, 446 (1987); *see also Lin v. U.S. DOJ,* 494 F.3d 296, 304 (2d Cir. 2007) (Rejecting BIA's conclusion that statutory language was unambiguous). Of course, under *Chevron,* once a court determines that a statute is ambiguous, the agency's reasonable interpretation of it will be subject to deference.

[50] *Alwan v. Ashcroft,* 388 F.3d 507, 510 (5th Cir. 2004).

nation of nationality claims in the hands of the courts." [51] As a result, these courts determined the meaning of the ambiguous definition of the term *national* without deferring to the BIA's interpretation.

Fourth, the Supreme Court has made clear that the doctrine of constitutional avoidance prohibits an agency from interpreting an ambiguous statute where such interpretation raises serious concerns about the constitutional validity of the statute. In *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council,* the Court rejected an agency interpretation of an ambiguous statute because the agency decision raised serious concerns about the validity of the statute under the First Amendment.[52] Normally, since the statute was both ambiguous and one that the agency was empowered to administer, the agency interpretation would have been subject to deference by the courts. Because of the constitutional concerns, however, the court held that it would not defer to the agency interpretation but would instead consider whether there were other permissible interpretations of the statute that would not raise the constitutional concern.[53]

The Tenth Circuit U.S. Court of Appeals has discussed the interplay between the doctrine of constitutional avoidance and deference under *Brand X.* In *Hernandez-Carrera v. Carlson*[54] the court speculated that there will be cases in which a court rejects an agency interpretation under the doctrine of constitutional avoidance and is then faced with more than one permissible interpretation that would avoid the constitutional issue. The Tenth Circuit indicated that in such a case the court could choose among the alternative interpretations but the agency could subsequently adopt a position different from the court's. As long as the agency's interpretation was permissible, the court concluded that it should be deferred to under *Brand X*. The court's speculative discussion would require that a statutory provision be subject to three or more possible interpretations, a situation that is unlikely to be rare.

The Application of *Brand X* in Immigration Cases

Brand X *and Supreme Court Precedent*

In his concurrence in *Brand X*, Justice Stevens questioned whether the principle of *Brand X* would apply where it was the Supreme Court that had issued an interpretation of an ambiguous statute.[55] In particular, Justice Stevens stated that the *Brand X* principle—that an agency could adopt a different interpretation of an ambiguous statute from that adopted by a court of appeals—would not necessarily apply to a decision by the Supreme Court. His reason was that the Supreme Court's decision "would presumably remove any preexisting ambiguity."[56]

To date, only the Tenth Circuit has considered this issue. In *Hernandez-Carrera* the court held that *Brand X* applied even where it was the Supreme Court that originally interpreted an ambiguous statutory provision.[57] At issue in *Hernandez-Carrera* was whether the Supreme Court's decisions[58] construing INA §241(a)(6), which addresses detention beyond the 90-day removal period, foreclosed the BIA's contrary interpretation of this provision in subsequent regulations. The Tenth Circuit held that deference was to be accorded the subsequent agency regulations under *Brand X*, provided they were reasonable. The court found that all the reasons for applying *Brand X* to a lower court's interpretation of an ambiguous statutory provision applied equally to the Supreme Court's interpretation of such a provision. It concluded that a contrary rule with respect to Supreme Court decisions would "disregard the central premise of both *Chevron* and *Brand X*: that consistent with congressional

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[51] *Id.*; *see also Perdomo-Padilla v. Ashcroft*, 333 F.3d 964 (9th Cir. 2003) (same); *Sebastian-Soler v. United States Attorney General*, 409 F.3d 1280 (11th Cir. 2005) (per curiam) (same); *but see Fernandez v. Keisler,* 502 F.3d 337 (4th Cir. 2007) (holding that BIA does have authority to interpret nationality claims and deferring to the BIA under *Brand X*).

[52] 485 U.S. 568, 575 (1988).

[53] *Id.,* 485 U.S. at 575–77.

[54] *Hernandez-Carrera v. Carlson,* 547 F.3d 1237, 1250 (10th Cir. 2008).

[55] *Brand X,* 545 U.S. at 1002 (Stevens, J., concurring).

[56] *Id.*

[57] 547 F.3d at 1246–49.

[58] *Zadvydas v. Davis,* 533 U.S. 678 (2001) and *Clark v. Martinez,* 543 U.S. 371 (2005).

intent in these cases, 'it is for agencies, not courts, to fill statutory gaps.'"[59] Note, however, that a petition for rehearing was filed in *Carrera*, arguing, among other things, that the court erred in deferring to the regulation because it was an interim regulation and not subject to notice and comment.

Application of* Brand X *to Federal Courts of Appeals Decisions in Immigration Cases

As of this writing, only four courts of appeals have applied *Brand X* in immigration cases in which the BIA's position conflicts with decisions of the courts of appeals.

The Fourth Circuit U.S. Court of Appeals, in *Fernandez v. Keisler*,[60] applied *Brand X* to conclude that the petitioner did not qualify as a "national of the United States." In an earlier decision, the court had held that a lawful permanent resident who had applied for U.S. citizenship had demonstrated "permanent allegiance to the United States" and was therefore a U.S. national under the statutory definition. The BIA subsequently issued *Matter of Navas-Acosta*,[61] holding that nationality may only be acquired through birth or naturalization. In *Fernandez* the court found that the interpretation in its earlier decision was not based on the unambiguous statutory definition of "national." Therefore, the court concluded that under *Brand X,* it must defer to a reasonable BIA interpretation of the nationality provisions. The court examined the history of the term "national" and the text and structure of the INA, and found that the BIA's interpretation was reasonable.

In *Zhang v. Mukasey*[62] the Sixth Circuit U.S. Court of Appeals deferred to the BIA's decision that the petitioner, who was under a final order of removal, was barred from filing a second application for asylum independent of a motion to reopen the removal proceedings. The BIA interpreted two conflicting provisions of the INA that addressed when a noncitizen could file a second asylum application. On review, the court found these provisions ambiguous and the BIA's interpretation reasonable, thus warranting deference. The Sixth Circuit also considered whether its prior precedent, which suggested a different interpretation than that reached by the BIA, precluded deference to the BIA's interpretation. The court found that under *Brand X* it did not.

The Seventh Circuit U.S. Court of Appeals, in *Ali v. Mukasey,*[63] deferred to the BIA on the kind of evidence that could be considered when determining if a certain crime involved moral turpitude. The court's earlier precedent had applied the "categorical approach" to determine whether a conviction constitutes a deportable offense; under this approach an immigration judge and the BIA may only refer to the "record of conviction." But in *Matter of Babaisakov*[64] the BIA contradicted this precedent and outlined circumstances in which evidence outside the record of conviction could be considered. Citing *Brand X*, the court in *Ali* concluded that its earlier cases "require reexamination now that the Board has fully developed its own position" because "administrative discretion belongs to the agency rather than the court."[65] The court found that its earlier cases did not foreclose other interpretations by the BIA, and thus upheld the application of *Babaisakov* to the petitioner's case with the result that his removal order was sustained.

In *Duran Gonzales v. DHS,*[66] the Ninth Circuit applied *Brand X* and deferred to *Matter of Torres-Garcia,*[67] overruling its earlier conflicting interpretation of the relevant statutes in *Perez-Gonzalez v. Ashcroft.*[68] In *Perez-Gonzalez* the court had held that under certain limited circumstances a previously removed person unlawfully present in the United States could adjust his status under §245(i) with a waiver. Subsequently, in *Matter of Torres-Garcia*, the BIA held, contrary to *Perez-Gonzalez,* that such a person is ineligible for adjustment of status if

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[59] *Hernandez-Carrera,* 547 F.3d at 1247 (quoting *Brand X,* 545 U.S. at 983).

[60] 502 F.3d 337 (4th Cir. 2007).

[61] 23 I&N Dec. 586 (BIA 2003).

[62] 543 F.3d 851 (6th Cir. 2008).

[63] 521 F.3d 737 (7th Cir. 2008).

[64] 24 I&N Dec. 306 (2007).

[65] *Ali,* 521 F.3d at 742–43.

[66] 508 F.3d 1227 (9th Cir. 2007).

[67] 23 I&N Dec. 866 (BIA 2006).

[68] 379 F.3d 783 (9th Cir. 2004).

ten years have not passed since the date of the person's last departure from the United States. In *Duran* the Ninth Circuit held that *Perez-Gonzalez* was based on a finding of statutory ambiguity. The court therefore concluded that it must defer to the BIA's interpretation of this statutory ambiguity, if reasonable. The court then found that the BIA's construction was reasonable and entitled to *Chevron* deference under *Brand X*.

In *Anaya-Ortiz v. Mukasey*[69] the Ninth Circuit deferred to the BIA's most recent precedent decision on evidence that may be used to determine whether an offense is a "particularly serious crime" for purposes of withholding of removal, even though the BIA's interpretation conflicted with the earlier Ninth Circuit decision in *Morales v. Gonzales*.[70] In *Morales* the Ninth Circuit determined that the statutory term "particularly serious crime" was ambiguous and deferred to its understanding of the BIA's then-existing precedent on the issue. The *Morales* court interpreted this BIA decision as limiting the determination of whether a crime was particularly serious to a review of the record of conviction. The BIA subsequently issued a second precedent decision correcting what it found to be the Ninth Circuit's misconstruction of its earlier decision. In this second case the BIA held that evidence outside the record of conviction could be considered as part of the final determination of whether an offense constituted a particularly serious crime.[71] It was this second BIA precedent to which the court in *Anaya-Ortiz* deferred under *Brand X*. The court noted that such deference was required because it had already found the statutory term to be ambiguous and now found the BIA's interpretation to be reasonable.

Application of* Brand X *in BIA and Attorney General Decisions

The BIA has cited to *Brand X* in several dozen published and unpublished cases. In several published decisions the Board has relied on *Brand X* to reject precedent of the courts of appeals and reach its own—more restrictive—interpretation of statutory provisions. The attorney general has also relied on *Brand X* for this purpose. Moreover, the Executive Office for Immigration Review (EOIR) has made clear its interest in using *Brand X* aggressively, stating that *Brand X* "offers an important opportunity for the Attorney General and the Board to be able to reclaim *Chevron* deference with respect to the interpretation of ambiguous statutory provisions in the immigration laws, notwithstanding contrary judicial interpretations."[72]

In one case, the Board correctly recognized that it is bound by circuit precedent finding a statutory provision unambiguous. In *Matter of Velasquez-Herrera,*[73] DHS urged, on policy grounds, that the BIA consider the victim's age to determine whether a conviction was for a crime of child abuse, even though the victim's age was not an element of the state crime. The BIA rejected the government's argument, holding that it "simply ha[s] no authority to consider such policy matters except as they may bear on the proper interpretation of an otherwise ambiguous statute. Most importantly for present purposes, the [Ninth Circuit] in whose jurisdiction this proceeding arises, has found no such ambiguity and has held in a precedent decision that the 'categorical approach is applicable to [the relevant INA provision] in its entirety.'"[74] Although the BIA did not cite *Brand X,* it applied the *Brand X* methodology.

In contrast, in *Matter of Rodarte,*[75] the Board interpreted a statutory provision that it held was ambiguous. Specifically, the BIA held that to be rendered inadmissible for ten years under INA §212(a)(9)(B)(i)(II), a noncitizen must depart the United States after having been unlawfully present for one year or longer. There was no conflicting federal court interpretation of this provision. Citing *Brand X*, the Board stated that it was "incumbent upon us to resolve the ambiguity and adopt a reasonable construction of Congress's language."[76]

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[69] _ F3d _, 2009 U.S. App. LEXIS 1328 (9th Cir. Jan. 27, 2009).

[70] 478 F.3d 972 (9th Cir. 2007).

[71] *Matter of N-A-M-,* 24 I&N Dec. 336 (BIA 2007).

[72] "Board of Immigration Appeals: Affirmance Without Opinion, Referral for Panel Review, and Publication of Decisions as Precedents," 73 Fed. Reg. 34654, 34661 (June 18, 2008). These regulations were subsequently withdrawn by EOIR.

[73] 24 I&N Dec. 503, 514 (BIA 2008).

[74] *Id.*, quoting *Tokatly v. Ashcroft,* 371 F.3d 613, 624 (9th Cir. 2004).

[75] 23 I&N Dec. 905 (BIA 2006).

[76] *Id.* at 908–08.

In other cases the BIA has interpreted ambiguous statutory provisions differently from courts of appeals. In several published cases the Board declined to decide whether it would continue to follow the circuit law in cases arising within that court's jurisdiction, but it applied a different statutory interpretation outside of the circuit.[77] In *Matter of N–A–M–*,[78] which arose in the Tenth Circuit, the BIA held that to constitute a "particularly serious crime" for purposes of the bar to withholding of removal, an offense need not be an aggravated felony as defined by the INA. In *Alaka v. Attorney General*[79] the Third Circuit U.S. Court of Appeals held the opposite: an offense must be an aggravated felony to constitute a particularly serious crime. But after citing *Brand X*, the BIA declined to decide whether to follow *Alaka* in cases arising in the Third Circuit.

Similarly, in *Matter of Briones*,[80] a case arising in the Fifth Circuit, the BIA held that adjustment of status under INA §245(i) is not available to a person who is inadmissible for reentering or attempting to reenter the United States without being admitted following an aggregate period of more than one year of unlawful presence. The Board discussed conflicting Ninth and Tenth Circuit cases,[81] which held that it would be incompatible with the remedial purpose of §245(i) to make adjustment unavailable to such persons. The Board noted, however, that under *Brand X* it need not currently decide whether to apply its holding to subsequent cases arising in those circuits.

In *Matter of Babaisakov,*[82] the BIA held that when a charge of removability depends on proof of the elements of a crime necessary for a conviction, as well as non-element facts, evidence beyond the record of conviction can be used to determine the non-element facts. This decision conflicted with the categorical and modified categorical approach followed by the courts of appeals to determine the nature of a conviction. The Board recognized that its decision "represents a departure from the precepts that have been presumed to apply in immigration hearings involving aggravated felony charges," but citing *Brand X*, it elected to "leave for another day any questions that may arise with respect to circuit law that may be in tension with this decision, as we ordinarily follow circuit law in cases arising within the particular circuit and the grounds for any departure would need to be developed in the context of specific cases."[83]

In other cases the BIA has applied *Brand X* and declined to follow precedent circuit court decisions in cases that arise both within and outside of the circuit. In *Ramirez-Vargas*,[84] which arose in the Ninth Circuit, the Board held that a parent's period of residence cannot be imputed to a child for purposes of calculating the seven years of continuous residence necessary for cancellation of removal under INA §240A(a)(2). In so holding, the BIA specifically rejected a contrary earlier holding by the Ninth Circuit.[85] The Board defended its action by citing to *Duran Gonzales v. DHS,*[86] in which, under *Brand X,* the Ninth Circuit afforded *Chevron* deference to a BIA interpretation of different statutory provisions that conflicted with its own earlier interpretation.

In *Matter of Armendarez-Mendez,*[87] the BIA declined to follow the Ninth Circuit's decisions in *Lin v. Gonzales*[88] and *Reynoso-Cisneros v. Gonzales*[89] both within and without the Ninth Circuit, even though the case before it arose in the Fifth Circuit U.S. Court of Appeals. The issue in *Matter of Armendarez-Mendez*

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[77] Where this happens, there is a strong argument that the circuit precedent remains binding for cases that arise within that circuit and that both immigration judges and the BIA, in unpublished decisions, must follow it. Arguably, this would remain the case until either the BIA issued a precedent decision that applied its interpretation within the circuit or the court overruled its own precedent under *Brand X* in light of the alternate agency interpretation.

[78] 24 I&N Dec. 336 (BIA 2007).

[79] 456 F.3d 88 (3d Cir. 2006).

[80] 24 I&N Dec. 355 (BIA 2007).

[81] *Acosta v. Gonzales,* 439 F.3d 550, 554 (9th Cir. 2006) and *Padilla-Caldera v. Gonzales*, 453 F.3d 1237, 1244 (10th Cir. 2005).

[82] 24 I&N Dec. 306 (BIA 2007).

[83] *Id.,* 24 I&N Dec. at 322.

[84] 24 I&N Dec. 599 (BIA 2008).

[85] *Cuevas-Gaspar v. Gonzales,* 430 F.3d 1013 (9th Cir. 2007).

[86] 508 F.3d at 1242.

[87] 24 I&N Dec. 646 (BIA 2008).

[88] 473 F.3d 979 (9th Cir. 2007).

[89] 491 F.3d 1001 (9th Cir. 2007).

was whether the BIA had the authority to reopen removal proceedings if the noncitizen had departed the United States after those proceedings were completed. The BIA reaffirmed its longstanding position that it did not have this authority. Additionally, the BIA considered *Lin* and *Reynoso-Cisneros,* in which the Ninth Circuit held the opposite: that the regulation did not apply once removal proceedings were completed due to the individual's removal or voluntary departure. The BIA found that the Ninth Circuit held that the regulation was ambiguous, and relied upon *Brand X* to justify applying its own interpretation, even within the Ninth Circuit. In the same decision the Board also considered the Fourth Circuit's decision in *William v. Gonzales.*[90] In *William* the court held that the regulation barring motions to reopen after a person's departure from the United States was invalid because it violated the statute. Because *William* was a *Chevron* step one case, unlike *Lin* and *Reynoso-Cisneros,* the BIA determined that it was bound to follow it in cases arising within the Fourth Circuit.

Finally, Attorney General Michael Mukasey also relied on *Brand X* and, two months prior to his departure, issued a precedent decision establishing a new framework for courts, the BIA, and immigration judges to determine whether a conviction qualifies as a crime involving moral turpitude. [91] In a striking departure from federal court precedent, the decision essentially overturns the almost uniform categorical and modified categorical approach that the federal courts have taken to determine whether an individual's conviction is for a crime involving moral turpitude. Mukasey alleged that his authority to reach a conflicting interpretation was premised on statutory ambiguity.[92]

Court Remands to the BIA in the Absence of Precedential Decisions

The Second Circuit U.S. Court of Appeals has cited *Brand X* in support of remands in cases that involve an ambiguous statute that neither the court nor the BIA has interpreted. The court justified the remands, in part, as a way to avoid potential future conflicts between circuit court and BIA decisions under *Brand X.* For example, in *Ucelo-Gomez v. Gonzales,*[93] the Second Circuit remanded the case to the Board for a determination of whether affluent Guatemalans constitute a "particular social group" within the meaning of the asylum statute. The Second Circuit noted that the BIA's guidance on what constitutes a "social group" was neither fully developed nor sufficient to meet the purposes of appellate review. The court went on to explain that under *Brand X* a future precedential BIA opinion on the matter would be granted deference "assuming the basic requirements of *Chevron* are met."[94] But the court emphasized that it did not intend to adopt a per se rule, and that if the court "can state with assured confidence (absent agency guidance [ ]) that a group would or would not under any reasonable scenario qualify as a 'particular social group,' it need not remand, and may rule on the issue in the first instance."[95]

Similarly, in *Liu v. DOJ,*[96] the Second Circuit remanded the case to give the BIA the first opportunity to formulate standards for deciding when an asylum application may be deemed frivolous. The court explained that there was little case law on the issue and it could not reasonably ascertain the proper outcome without a set of standards. Citing *Brand X*, the court found that a remand was appropriate because, since there was no circuit court case law on the issue, there was no concern that a remand decision would "create needless conflict between circuit holdings and agency law."[97]

Finally, in *Mirzoyan v. Gonzales,*[98] the Second Circuit remanded the case to the BIA for clarification of the standard governing claims of economic persecution. The court first noted that the INA did not "unambi-

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[90] 499 F.3d 329 (4th Cir. 2007).

[91] *Matter of Silva-Trevino,* 24 I&N Dec. 687 (AG 2008).

[92] *See* Memorandum of *Amici Curiae* in Support of Reconsideration for a full discussion of the many errors in this decision, www.aila.org/Content/default.aspx?docid=27391.

[93] 464 F.3d 163 (2d Cir. 2006).

[94] *Ucelo-Gomez,* 464 F.3d at 170.

[95] *Id.*

[96] 455 F.3d 106 (2d Cir. 2006).

[97] *Id.* at 117.

[98] 457 F.3d 217 (2d Cir. 2006).

guously explain" what "persecution" meant in the context of economic persecution claims, and thus it must defer to a reasonable BIA interpretation under *Chevron.*[99] It then found that there was no clear BIA interpretation to which it could defer and remanded for clarification of a standard. The court also discussed its earlier case that had applied a standard for an economic persecution claim. It concluded that it was unnecessary to determine whether this earlier decision was dicta because, under *Brand X,* "a finding by this Court that a statutory interpretation is permissible does not bind the agency to adopt that interpretation."[100]

A Strategic Approach to *Brand X*

The BIA has invoked *Brand X* more than almost any other federal agency. There are historical reasons for this, the foremost being the Board's disdain for its duties under the guise of streamlining.[101] In 2002, the Board began to issue decisions at a rate of tens of thousands each year without much thought for its delegated role of administering the nation's immigration system. The euphemistic "streamlining" of cases resulted in the transfer of decision-making authority (and the cost of making all those decisions) from the agency to the federal courts.[102] As a result, the circuit courts were confronted with novel statutory interpretation issues without any agency guidance and, out of necessity, developed a body of law over many years of construing the statute—often in ways to which the agency has taken umbrage.[103] Consequently, the BIA has found the *Brand X* decision to be a liberator of sorts that can free it from the circuit court decisions it finds restrictive.

Practitioners dealing with conflicting law must have enormous foresight to find the right way to navigate a client's case through the system and different layers of administrative and judicial review. We must be able to see the end even before we start. But there are some strategies for addressing *Brand X*, the Board's recent reinsertion of itself into the development of the law, and the conflict between circuit law and BIA law. These strategies are only that—strategies. Some circuits have already spoken on the issues, others are still considering them. The law is fluid in many respects, and what is written today may be outdated tomorrow. Practitioners are cautioned to consult the most up-to-date resources. One other caveat: the strategies discussed here apply only to the BIA's law-making powers through adjudication. Other agencies have other law-making powers such as regulations and, perhaps, binding policy guidance. These are not covered here, though they too have *Brand X* implications.

Does *Brand X* Apply?

Brand X adds a layer of complexity to litigation against the U.S. government when there is positive circuit law on your side competing against a contrary BIA opinion. To address *Brand X's* effects, however, the practitioner must first address *Chevron*. The question of whether *Brand X* applies to a particular case is, in essence, to ask if *Chevron* applies. For each case in which a practitioner seeks judicial review, the first question to ask: is *Chevron* implicated? *Chevron* applies only to questions of statutory interpretation, which are questions of law, and not to questions of fact.

Only decisions that are *Chevron*-eligible are subject to a *Brand X* analysis. *Chevron* proffers a mode of statutory analysis requiring deference to an agency interpretation of an ambiguous statute only when the agency itself has invoked *Chevron's* interpretative authority. Following is a three-step process to determine if *Chevron* applies. The lead-up to the *Brand X* analysis is lengthy, because it will almost never be beneficial to the noncitizen for the BIA's precedent to apply if there is positive circuit law.

First, Does Chevron Apply?

Is the Decision Being Appealed Chevron-Eligible?

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[99] *Id.* at 220–21.

[100] *Id.,* 457 F.3d at 223 n.5.

[101] *See* 67 Fed. Reg. 54878 (Aug. 26, 2002).

[102] Dorsey & Whitney LLP, *Board of Immigration Appeals: Procedural Reforms to Improve Case Management*, at 39 (July 22, 2003), http://www.dorsey.com; John R.B. Palmer, "The Nature and Causes of the Immigration Surge in the Federal Courts of Appeals: A Preliminary Analysis," 51 *N.Y.L. Sch. L. Rev.* 13, 18–20 (2006).

[103] *See* 73 Fed. Reg. at 34659, 34661 (June 18, 2008) (claiming that federal courts are usurping the BIA's as the body to initially interpret ambiguous statutory provisions).

Not all BIA decisions are *Chevron*-eligible. Despite more than two decades of its interpretation, the Supreme Court's decision in *Chevron* has not been well understood by many of the courts (or agencies) charged with implementing its multistep analysis. Many judges have relieved themselves of the hard work of statutory interpretation by reflexively invoking *Chevron* when an agency's interpretation or decision is at issue. *Chevron* was not intended by the Supreme Court to displace the primary role of judges to interpret and say what the law is, and *Chevron* applies to far fewer agency actions than it was commonly believed. Both the form of the decision and its contents matter.

As to form, only published BIA decisions are *Chevron*-eligible.[104] This rule limits *Chevron's* power to only those BIA decisions that have the force of law. Unpublished Board decisions do not have a binding effect and do not create a rule of law.[105] The BIA's summary affirmance decisions also are not entitled to *Chevron* deference.[106] Similarly, no immigration judge's decision is *Chevron*-eligible because it lacks the capability of making law.[107]

Although the BIA announces binding law through case-by-case adjudication, EOIR has the authority to issue regulations. Regulations adopted through notice and comment are *Chevron*-eligible.[108] Practitioners should argue that interim rules, even though they have the force of law, have not undergone notice and comment and therefore are not *Chevron*-eligible.[109] Program statements, internal policy guidance, and similar pronouncements are not *Chevron*-eligible. Where the agency's interpretation of the statute is made informally, however, such as by a program statement, the interpretation, while not entitled to *Chevron* deference, will instead be considered only to the extent that it is well reasoned and has "power to persuade."[110]

Is There a Published Board Opinion That Is on-point or Related to the Statutory Interpretation Question in This Case?

A federal court will owe *Chevron*-style deference to any on-point, *Chevron*-eligible BIA opinion—even if it was an opinion in a different case.[111] (This frequently will be true because almost all BIA decisions in individual cases are unpublished.) In *Aguirre-Aguirre,* the Board had issued an unpublished, nonprecedential opinion relying on an earlier published interpretation of what the statutory term "serious nonpolitical crime" meant. The Supreme Court held that the earlier published opinion was entitled to *Chevron* deference because the BIA was entitled to make law through its case-by-case adjudication. Consequently, a published BIA opinion, if related to the issue in the decision being appealed, will have *Chevron* implications at the judicial review stage.

Does the Decision Being Appealed Invoke Chevron *or Otherwise Assert That the Statute Is Ambiguous?*

Practitioners should argue that the BIA can claim deference to *Chevron* only when it invokes *Chevron* power. That is to say, the BIA must actually exercise its administrative discretion to interpret terms or give meaning to any ambiguous terms before *Chevron* is implicated. When the Board finds a statute is clear, it is constrained by the plain language of the statute and must give effect to congressional intent.[112] If the Board

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[104] *See, e.g., Rotimi v. Gonzales*, 473 F.3d 55, 57 (2d Cir. 2007) (rejecting *Chevron* analysis for unpublished single-member BIA opinions); *Perez-Enriquez v. Gonzales*, 463 F.3d 1007, 1012 (9th Cir. 2006) (only published BIA opinions are *Chevron*-eligible).

[105] *Matter of Medrano*, 20 I&N Dec. 216, 220 (BIA 1991) ("Decisions which the Board does not designate as precedents are not binding on the Service or the immigration judges in cases involving the same or similar issues."); *see also Leal-Rodriguez v. INS*, 990 F.2d 939, 946 (7th Cir. 1993) (explaining that unpublished Board decisions "do not serve as authority for later proceedings involving the same issues, nor do they make new law."); *cf. Mead*, 533 U.S. at 233 (holding that because agency decision binds only the parties and "stops short of third parties" it lacks lawmaking power).

[106] *Lin,* 416 F.3d at 191 (reasoning that summary affirmances by BIA do not contain "the sort of authoritative and considered statutory construction that *Chevron* deference was designed to honor.").

[107] *Id.*

[108] *Mead*, 533 U.S. at 230–31.

[109] *Orr v. Hawk*, 156 F.3d 651, 654 (6th Cir. 1998) (rejecting *Chevron* deference to interim rule of Bureau of Prisons).

[110] *Fristoe v. Thompson,* 144 F.3d 627, 631 (10th Cir.1998).

[111] *INS v. Aguirre-Aguirre*, 526 U.S. 415 (1999).

[112] *Chevron*, 467 U.S. at 843.

states that it is simply applying unambiguous statutory language, it is not interpreting the statute, filling statutory gaps, or giving concrete meaning to ambiguous terms through case-by-case adjudication.[113] When the BIA finds that a statute is clear, a reviewing court is precluded from deferring and, instead, must interpret the statutory language de novo.

Courts have recognized this approach and refused to defer to an agency's construction of the statute where the agency had determined that the statute was clear.[114] In *Barraza v. Mukasey,* the Board held that the statute it was administering was clear. Even though the Seventh Circuit said the statute was ambiguous, it did not defer to the Board's construction. The court explained that where the Board asserts that the statue is clear it "forswear[s] any exercise of administrative discretion" and disables its counsel from invoking deference principles under the second step of *Chevron*.[115]

There is much to be made of this argument. The BIA is certainly well-practiced in finding terms to be ambiguous and resolving their meaning. In such cases, the BIA states it is finding the statutory term to be ambiguous and then proffers its own judgment in interpreting the term or provision.[116] In the absence of such a clear statement of an interpretive approach, *Chevron* should not be involved in the judicial resolution.

The opposite is not true. Just because the BIA invokes *Chevron* does not mean that the statute is ambiguous. Article III courts always retain the power to say "what the law is."[117] A federal court is not bound by the BIA's legal determination that an immigration statute is ambiguous. If a practitioner believes that the statutory language is plain, he or she should so argue. The federal court should always interpret the statute de novo.

If the answer to either the first *or* the second questions above is yes, and the answer to the third question is also yes, the case must be analyzed and, most importantly, litigated with *Chevron* and *Brand X* in mind.

Litigating Around *Chevron*

Chevron's two-step inquiry for courts to follow in reviewing agency interpretations of law is well known and discussed in depth above. The first step asks whether Congress has "directly spoken to the precise question at issue," an inquiry that requires an assessment of whether Congress's intent is "clear" and "unambiguously expressed." The second step asks whether the agency's interpretation is "permissible," which means reasonable in light of the underlying law. With few exceptions,[118] immigration litigation fails at *Chevron* step two. Within the scope of what constitutes a "reasonable" interpretation of the law, the latitude for immigration agencies to regulate is vast, particularly BIA. The plenary power doctrine and the (we believe, false) theory that immigration matters are issues of foreign affairs get mixed into the fight, with results that uniformly cut against immigrant rights. Successful case strategies will include a plan for litigating around *Chevron* by winning the statutory claim at *Chevron* step one, for courts rarely will find a BIA decision unreasonable at step two.

At *Chevron* step one, courts are to "employ[] traditional tools of statutory construction." [119] The reviewing court must "give effect to the unambiguously expressed intent of Congress" and is the "final authority on issues of statutory construction." Just what are those traditional tools of statutory construction? *Chevron* does

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[113] *See, e.g., INS v. Cardoza-Fonseca*, 480 U.S. 421, 448 (1987) (describing the Board's role in interpreting the statute).

[114] *See, e.g., Barraza v. Mukasey*, 519 F.3d 388, 391 (7th Cir. 2008); *Peter Pan Bus Lines Inc. v. Federal Motor Carrier Safety Admin.*, 471 F.3d 1350, 1354 (D.C. Cir. 2006) (collecting cases).

[115] *Barraza v. Mukasey,* 519 F.3d 388, 391 (7th Cir. 2008); *see also Arizona v. Thompson*, 281 F.3d 248, 253–54 (D.C. Cir. 2002) ("Deference to an agency's statutory interpretation 'is only appropriate when the agency has exercised its *own* judgment,' not when it believes that interpretation is compelled by Congress.").

[116] *See, e.g., Matter of Fu*, 23 I&N Dec. 985, 988 (BIA 2006) (finding an "ambiguity" within the text of INA §237(a)(1)(H)); *Matter of S-K-*, 23 I&N Dec. 936, 943 (BIA 2006) (stating that a particular statutory term "remains somewhat ambiguous"); *Matter of Cisneros-Gonzalez*, 23 I&N Dec. 668, 671 (BIA 2004) (referring to a statutory provision as "ambiguous").

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

[118] *See, e.g., Akhtar v. Burzynski,* 384 F.3d 1193, 1199–1202 (9th Cir. 2004); *Zheng v. Gonzales,* 422 F.3d 98 (3d Cir. 2005).

[119] *Chevron*, 467 U.S. at 843 n.9.

not say with clarity. The role of commonly used canons of statutory construction has been at the center of academic debate and judicial scrutiny since *Chevron* was decided.[120]

The canons of statutory construction are not rules; rather, they are tools created by judges to aid in the interpretation of statutory language.[121] They are "a set of tools to guide [a judge's] independent judgment on the question of statutory ambiguity."[122] Commentators have assigned different labels to the different canons. Most commentators agree that the canons can be categorized as textual, normative (or substantive), and extrinsic source.[123]

Textual canons "set forth inferences that are usually drawn from the drafter's choice of words, their grammatical placement in sentences, and their relationship to other parts of the 'whole' statute."[124] Common textual tools include reading a text so as not to create surplus language; interpreting different statutory sections consistently with one another; giving effect to each statutory provision;[125] allowing a specific provision to trump a general provision when there is a conflict; giving effect to every word in a statute; and giving the same meaning to identical words within the same act.[126]

Extrinsic source canons are a variety of devices from outside the statutory text that aid in attributing meaning to it. A common extrinsic source canon is reliance on legislative history. The "*Chevron* doctrine" is itself an extrinsic source canon. [127]

Normative canons (also called substantive canons) are "rules of construction that reflect important, often constitutionally inspired principles that there is reason to think Congress, for a variety of reasons will not safeguard adequately, and that are traditionally under enforced by courts."[128] Normative canons include the rule that a court should construe a statute to avoid raising serious constitutional problems and the rule of lenity, among others.

For purposes of *Chevron* step one, it is generally accepted that the textual canons are to be deployed by judges to ascertain the meaning of the statute. The Supreme Court has explained that only "when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent" may a court turn to the second step of *Chevron*.[129] Thus every textual canon should be utilized to support the assertion that the statutory language is clear.

There is less agreement about the use of extrinsic and normative canons at *Chevron* step one. The presumption against retroactivity is a normative canon that is employed at *Chevron* step one. The Supreme Court directly confronted the conflict between the retroactivity canon and *Chevron* deference in *INS v. St. Cyr*, stating:

> We only defer . . . to agency interpretations of statutes that, applying the normal "tools of statutory construction," are ambiguous. Because a statute that is ambiguous with respect to retroactive application is construed under our precedent to be unambiguously prospective there is, for *Chevron* purposes, no ambiguity in such a statute for an agency to resolve.[130]

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[120] *See generally* Orin S. Kerr, "Shedding Light on *Chevron*: An Empirical Study of the *Chevron* Doctrine in the U.S. Courts of Appeals," 15 *Yale J. On Reg.* 1 (1998) (discussing different uses of canons of construction among courts).

[121] Kenneth A. Baumberger, "Normative Canons in the Review of Administrative Policymaking," 118 *Yale L.J.* 64, 70 (2008).

[122] *Id.*

[123] William N. Eskridge, Jr., Philip P. Frickey, & Elizabeth Garrett, *Legislation and Statutory Interpretation* 375–83 (2000); Brian G. Slocum, "The Immigration Rule of Lenity and *Chevron* Deference," 17 Geo. Immigr. L.J. 515, 540 (2003); Baumberger, 118 *Yale L.J.* at 70.

[124] Eskridge, *Legislation And Statutory Interpretation* 375–83.

[125] Baumberger, 118 *Yale L.J.* at 71.

[126] Slocum, 17 *Geo. Immigr. L.J.* at 540.

[127] *Id*.

[128] Baumberger, 118 *Yale L.J.* at 72.

[129] *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581, 600 (2004).

[130] 533 U.S. 289, 320 n.45.

The canon of constitutional avoidance, a normative canon that was the driving force behind the Supreme Court's decisions in *Zadvydas v. Davis*,[131] may not always be appropriately deployed at *Chevron* step one. In *Zadvydas* the Court skipped over the *Chevron* question and proffered an alternative interpretation of the statute to avoid a constitutional question. The Ninth Circuit has explicitly rejected the constitutional avoidance canon at *Chevron* step one. In *Morales-Izquierdo v. Gonzales*, the Ninth Circuit held that "[w]hen Congress has explicitly or implicitly left a gap for the agency to fill, and the agency has filled it, we have no authority to reconstrue the statute, even to avoid potential constitutional problems; we can only decide whether the agency's interpretation reflects a plausible reading of the statutory text."[132]

There are similar questions about the rule of lenity, which for immigration purposes is a presumption about congressional intent. A court will presume that between competing interpretations Congress intended the narrower interpretation unless it clearly stated otherwise.[133] The difficultly with the rule of lenity is that it requires ambiguity.[134] And ambiguity means *Chevron*. For dual-use statutes, such as the aggravated felony definitions used for immigration and criminal statutes, the Supreme Court explained in *Leocal v. Ashcroft* that "if a statute has criminal applications, 'the rule of lenity applies' to the Court's interpretation of the statute even in immigration cases, '[b]ecause we must interpret the statute consistently, whether we encounter its application in a criminal/noncriminal context.'"[135] The law regarding the rule of lenity is murky.[136]

Confronting *Chevron* and *Brand X*

If the text is still ambiguous after deploying all the best statutory tools available, the BIA's interpretation will prevail if it is reasonable. And nearly every agency interpretation will be found reasonable. If there is a conflicting prior court decision on the same issue, the practitioner has entered the world of *Brand X*.

Brand X applies only when there is a prior judicial interpretation of an ambiguous statute. It is the federal court that determines whether the statute is ambiguous. Thus the first question under a *Brand X* analysis is whether the prior judicial decision held that the statute was clear. If so, the judicial interpretation should govern. This would be so even if the BIA declared the statute to be ambiguous.

While *Chevron*'s two-step analysis is doctrinally pristine, all courts reviewing agency decisions employ different words and phrases when addressing the central question of *Chevron*'s first step: Is the statute clear? Given the myriad ways in which judges phrase their decisions, an unresolved issue after *Brand X* is how later court panels should analyze earlier on-point decisions that would otherwise control the issue at hand. In other words, how does a reviewing court decide when an earlier judicial opinion is a decision under step one or step two of *Chevron*? *Brand X* instructs courts to:

> hold judicial interpretations contained in precedents to the same demanding *Chevron* step one standard that applies if the court is reviewing the agency's construction on a blank slate: Only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction.[137]

Application of this rule is fairly straightforward where the initial judicial decision was decided after *Brand X*, because *Brand X* directs courts to state plainly whether its holding is under the first step of *Chevron*.

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[131] 533 U.S. 678.

[132] 486 F.3d 484, 493 (9th Cir. 2007) (en banc).

[133] *Ladner v. United States*, 358 U.S. 169, 177–78 (1958).

[134] *Lewis v. United States*, 445 U.S. 55, 65 (1980).

[135] 543 U.S. 1, 11–12 n.8 (2004)

[136] Several courts have noted that there is tension between the rule of lenity and the *Chevron* doctrine. *Ali v. Reno*, 22 F.3d 442 (2d Cir. 1994); *Valansi v. Ashcroft*, 278 F.3d 203 (3d Cir. 2002); *Khalayleh v. INS*, 287 F.3d 978 (10th Cir. 2002). The Supreme Court has not directly addressed the issue outside of the dual-use statutes at issue in *Leocal*. However, in a recent case a majority of the justices affirmed that the rule of lenity applies only if the statute is ambiguous, which implies that the traditional tools of statutory construction failed to yield a result. *United States v. Hayes*, No. 07-608 (U.S. Feb. 24, 2009).

[137] 545 U.S. at 982–83.

Application of this precept is a thornier issue when faced with the two decades of case law between *Chevron* and *Brand X*. Those judicial opinions were not written with *Brand X*'s future directive in mind and therefore did not always use the exacting language noted by *Brand X*.[138] The Ninth Circuit has recognized that "[o]pinions, unlike statutes, are not usually written with the knowledge or expectation that each and every word may be the subject of searching analysis."[139] Accordingly, practitioners should argue that applying an overly rigorous rule to pre–*Brand X* opinions would not be practical.

Moreover, some decisions that are plainly issued under the first step of *Chevron* nonetheless buttress their arguments with additional reasoning or alternative justifications. For example, in *Riverkeeper, Inc. v. EPA*[140] the Second Circuit court explained that "our primary conclusion in [a pre–*Brand X* decision] was that restoration measures are 'plainly inconsistent' with the statute's text, and our statements regarding the legislative history of a proposed amendment, which we offered as ancillary, but not dispositive, support for our construction of the statute, in no way diminish the force of our conclusion that Congress unambiguously expressed its intent in the statute." As in *Riverkeeper*, a court's discussion of ancillary matters for exposition purposes should not undercut a step one finding.

Similarly, not all courts follow a strict textualist approach in evaluating the first step of *Chevron*, instead relying on various tools of construction, including legislative history. When confronted with a favorable judicial opinion that does not speak with clarity about its step one intentions, the practitioner should argue that for the pre–*Brand X* cases a reasonable approach to parsing the case law should be adopted.[141]

Two other strategic points merit mention. First, Supreme Court decisions may not be subject to a *Brand X* analysis. In the *Brand X* decision itself the necessary concurring opinion of Justice Stevens explains that an interpretation proffered by the Supreme Court on a statute would render the statute clear for all times.[142] That remains an open question.

Second, there are sometimes favorable agency decisions that conflict with unfavorable judicial decisions. Where this occurs, a practitioner may be able to use *Brand X* favorably and argue that the court should defer to the BIA's construction. For example, the administrative interpretation of the inadmissibility ground at INA §212(a)(2)(D)(ii) for procuring a prostitute has long been a narrow holding. The Eighth Circuit, however, conferred (erroneously) *Chevron* deference on an unpublished BIA decision and adopted a very broad reading of this inadmissibility ground in *Amador-Palomares v. Ashcroft*.[143] In *Matter of Gonzales-Zoquiapan,*[144] the BIA issued a published opinion that disapproved of the Eighth Circuit's decision and construed the inadmissibility ground narrowly, as it had done historically. There was no resolution of the conflict between the two decisions, though the BIA made clear that the Eighth Circuit U.S. Court of Appeals had erred. Now that the published BIA decision exists, practitioners in the Eighth Circuit may be able to argue that the court should overturn its prior holding in *Amador-Palomares.*

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[138] *See Brand X*, 545 U.S. at 1018 (Scalia, J., dissenting) (questioning the implications for pre-*Brand X* cases and asking "what of the many cases decided in the past, before this dictum's requirement was established?").

[139] *United States v. Muckleshoot Indian Tribe*, 235 F.3d 429, 433 (9th Cir. 2000).

[140] 475 F.3d 83, 110 (2d Cir. 2007).

[141] The plaintiff class in *Duran Gonzales v. Mukasey*, 508 F.3d 1227 (9th Cir. 2007), argued for just such an interpretation. The plaintiff class characterized the Ninth Circuit's decision in *Perez-Gonzalez* as being clearly issued under step one of *Chevron*. The *Duran* opinion arguably applied a more rigorous analysis to the *Perez-Gonzalez* decision than is warranted for a pre-*Brand X* decision. The Ninth Circuit did not decide the issue explicitly or acknowledge the unresolved question when it denied plaintiffs' claims for an injunction. For more on the *Duran* litigation, refer to the American Immigration Law Foundation's website at www.ailf.org/lac/lac_lit_92806.shtml.

[142] *Brand X,* 545 U.S. at 1002 (Stevens, J., concurring).

[143] 382 F.3d 864 (8th Cir. 2004).

[144] 24 I&N Dec. 549 (BIA 2008).